

2009

## Court of Appeals Expands SEQRA Standing After an 18-Year Detour

Michael B. Gerrard

*Columbia Law School*, [michael.gerrard@law.columbia.edu](mailto:michael.gerrard@law.columbia.edu)

Follow this and additional works at: [https://scholarship.law.columbia.edu/faculty\\_scholarship](https://scholarship.law.columbia.edu/faculty_scholarship)



Part of the [Environmental Law Commons](#)

---

### Recommended Citation

Michael B. Gerrard, *Court of Appeals Expands SEQRA Standing After an 18-Year Detour*, 242(103) N.Y.L.J., NOVEMBER 27, 2009 (2009).

Available at: [https://scholarship.law.columbia.edu/faculty\\_scholarship/3094](https://scholarship.law.columbia.edu/faculty_scholarship/3094)

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact [scholarshiparchive@law.columbia.edu](mailto:scholarshiparchive@law.columbia.edu).

## ENVIRONMENTAL LAW

## Expert Analysis

# Court of Appeals Expands SEQRA Standing After an 18-Year Detour

The most controversial decision in New York environmental jurisprudence is almost certainly *Society of the Plastics Industry v. County of Suffolk (Plastics)*,<sup>1</sup> in which the Court of Appeals ruled in 1991 that plaintiffs in suits under the State Environmental Quality Review Act (SEQRA) must show that they are affected differently than the public at large. In the 18 years since that decision, the New York Attorney General, the State Department of Environmental Conservation, the New York State and New York City bar associations, and numerous environmental groups all filed amicus briefs or issued reports calling for the reversal of the decision. Albany Law School held an all-day conference in 2002 on the subject. The State Legislature came close to amending SEQRA to effect a reversal. Yet the Court of Appeals rejected all entreaties to revisit the decision.

At last, a 3-2 decision by the Appellate Division, Third Department, in 2008 meant an as-of-right appeal, so the issue could no longer be avoided.<sup>2</sup> On Oct. 27, 2009, the Court of Appeals ruled in *Save the Pine Bush Inc. v. Common Council of the City of Albany*.<sup>3</sup> While not explicitly overruling *Plastics*, five of the seven members of the high court made clear that the lower courts had taken an 18-year detour from what their predecessors had intended back in 1991. In so doing, the Court explicitly addressed one of the two major scenarios in which the old ruling was seen to have created an obstacle, and it showed the path to pleading around the obstacle in the other scenario.

### Predecessors and Progeny

Prior to 1991, standing was not much of an issue in SEQRA litigation, except when the plaintiff was pursuing purely economic and not environmental interests. But then came *Plastics*. Suffolk County had banned the use of certain plastic products by restaurants.

By  
**Michael B.  
Gerrard**



The ban was challenged on SEQRA grounds by the plastics industry trade association and one of its members, Lawrence Wittman & Co., which happened to be located in Suffolk County.

The Court of Appeals found the association had no standing because it itself would not be affected by the ban. Wittman was local but had made only a “tenuous assertion of harm it would suffer.” The plaintiffs alleged the plastics law would cause environmental

---

Standing under SEQRA is still far from automatic, but it is now easier than it has been for 18 years.

harm at landfills by increasing truck traffic there, and by leading to harmful disposal of more paper waste. By a 4-3 vote, the Court found that, “having failed to allege any threat of cognizable injury it would suffer, different in kind or degree from the public at large,” Wittman lacked standing under SEQRA.

It may have made sense to prevent a plastics manufacturer from getting into court by posing as an environmentalist. However, the decision’s reference to injury “different in kind or degree from the public at large” led some lower courts astray. Injury that is different from the public’s is a familiar concept in the law of public nuisance, where it allows only those with special harm to assert claims that are ordinarily brought by the government.<sup>4</sup> But special harm—as opposed to harm—had not

previously been needed under SEQRA, and has not been required in order to establish standing in cases under SEQRA’s federal counterpart, the National Environmental Policy Act, or under the similar laws of 15 other states.<sup>5</sup>

Within six months after *Plastics*, appellate courts began citing it in denying standing to environmental groups. Some of these cases involved plaintiffs who did not allege they would be adversely affected by the challenged action, and thus would have been denied standing even before *Plastics*.<sup>6</sup> However, 1994 saw the first appellate decision denying standing to a plaintiff who alleged actual injury, but the same as the public at large—in that case, pollution of a lake from which many people draw water.<sup>7</sup>

Such denials became a trend. In late 2002, I conducted a statistical survey of SEQRA standing cases. I found that prior to *Plastics*, in those cases where standing was raised, 68 percent were allowed to go forward; but between *Plastics* and the time of the survey, only 48 percent were allowed to proceed. The courts fell into a pattern of looking mostly at a plaintiff’s proximity to the challenged project as a way of testing whether the injury was different from the public at large. With only one outlier, at the time of the survey, in the appellate cases every plaintiff who was more than 500 feet from the subject project was denied standing, and every plaintiff whose distance was 500 feet or less was granted standing.<sup>8</sup>

This tendency has continued. So far in 2009 there have been at least three appellate decisions denying standing in SEQRA cases because the plaintiff did not allege injury different than the public at large.<sup>9</sup>

Such was the unhappiness with the restrictive standing doctrine that had emerged that every year since 2004 the New York Assembly had passed a bill, sponsored by Assemblyman Adam Bradley, that would eliminate special harm as a requirement for standing under SEQRA. After the Democrats took over control of the Senate in January 2009, the bill appeared to be on its way to passage there too, but (like much of the rest of the state’s business) progress was

---

MICHAEL B. GERRARD is professor of professional practice and director of the Center for Climate Change Law at Columbia Law School, and special counsel to Arnold & Porter LLP. He is co-author of “Environmental Impact Review in New York.”

derailed when the Senate suffered a political meltdown in June 2009.<sup>10</sup>

### 'Save the Pine Bush'

The world of SEQRA standing changed suddenly in October 2009 in the latest of many disputes over the development of the Albany Pine Bush, an ecologically precious area. Save the Pine Bush Inc. challenged a rezoning that would allow construction of a hotel. The environmental impact statement (EIS) that had been prepared under SEQRA addressed the project's impact on the endangered Karner Blue butterfly, but not other rare species that were alleged to reside in the area. Save the Pine Bush and nine of its members sued on the grounds the EIS should have evaluated possible threats to the other species.

The defendant City of Albany said the plaintiffs lacked standing. In a 3-2 decision, the Appellate Division found they had standing. Because of the split, the city had an as-of-right appeal under CPLR 5601(a). Thus the case went up.

In a decision written by Judge Robert S. Smith, a 5-2 majority of the Court of Appeals found plaintiffs have standing. Though the closest lives about half a mile away, the Court stated that *Plastics* "does not hold, or suggest, that residence close to a challenged project is an indispensable element of standing in every environmental case." The Court declared its adherence to the rule of *Plastics* that "[i]n land use matters... the plaintiff, for standing purposes, must show that it would suffer direct harm, injury that is in some way different from that of the public at large." However, plaintiffs alleged that they "use the Pine Bush for recreation and to study and enjoy the unique habitat found there." The Court found, "It is clear in context that they allege repeated, not rare or isolated use. This meets the *Society of Plastics* test by showing that the threatened harm of which petitioners complain will affect them differently from 'the public at large.'"

The Court was careful to note that "we do not suggest that standing in environmental cases is automatic, or can be met by perfunctory allegations of harm. Plaintiffs must not only allege, but if the issue is disputed must prove, that their injury is real and different from the injury most members of the public face."

Concluding its discussion of standing, the Court stated, "Thus, while we decline to erect standing barriers that will often be insuperable, we are also conscious of the danger of making these barriers too low," in view of the long delays that can attend SEQRA litigation. "Striking the right balance in these cases will often be difficult, but we believe that our rule—requiring a demonstration that a plaintiff's use of a resource is more than that of the general

public—will accomplish that task better than the alternatives."

Turning to the merits, the Court found that plaintiffs had failed to establish that further investigations should have been conducted of various species. Thus, the Court ordered that the petition be dismissed.

Judge Eugene F. Pigott Jr. wrote a concurring opinion, joined by Judge Susan Phillips Read. They agreed with the dismissal of the suit on the merits, but they stated that the majority's holding "reinterprets much too broadly the special harm requirement that has been the cornerstone of our standing jurisprudence in land use cases." They would reaffirm the use of the 500-foot guideline, and disputed that frequent visits to a site are enough to establish standing. The majority's holding, they said, "results in Save the Pine Bush and its members having standing to sue whenever a project site, no matter where its location, may have a potential impact on animals and plants that happen to live on the Pine Bush."

### Consequences

The decision is a clear victory for environmental plaintiffs who seek to protect places that they care about, and repeatedly visit, but do not reside near. The logic that the Court applied to an endangered species habitat would presumably apply as well to a remote corner of the Adirondacks and a historic building in the middle of a city.

That is one of the two major scenarios in which *Plastics* has arisen—a precious place far from home. The other involves threats at home to resources that many people use equally—most prominently, the air and the water. The Court reaffirmed that SEQRA plaintiffs must "suffer direct harm, injury that is in some way different from that of the public at large." Thousands or millions of people may breathe the same air and drink the same water. Therefore can no one sue? However, some people may be especially susceptible to the pollution in a way that differs from the public at large, such as those with respiratory diseases like asthma, and those with impaired immune systems. Thus, going forward, counsel undertaking pollution cases under SEQRA may seek out prospective plaintiffs with special physical vulnerabilities.

A potential difficulty arises from the Court's new rule "requiring a demonstration that a plaintiff's use of a resource is more than that of the general public." This rule is directly aimed at the first scenario, not the second. It remains to be seen how narrowly or broadly this rule will be interpreted in future decisions.

Pollution plaintiffs may be encouraged by the Court's statement that "we adopt a rule similar to one long established in the federal courts." The Court cited *Sierra*

*Club v. Morton*,<sup>11</sup> a classic 1972 decision in which the U.S. Supreme Court declared that "[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." The Court also cited *Friends of the Earth Inc. v. Laidlaw Environmental Services (TOC) Inc.*<sup>12</sup> a water pollution suit, in which the Supreme Court granted standing to plaintiffs who had used the affected river for fishing and wading, but were inhibited by the fear of the defendant's effluent.

Finally, the Court of Appeals gave special standing deference to Save the Pine Bush Inc., a long-established, indisputably legitimate group with a particular interest in the area at issue in the case. But it declared that "in other cases, including those brought by organizations devoted to less specific environmental interests—the plaintiff in *Sierra Club*, for example—plaintiffs may be put to their proof on the issue of injury, and if they cannot prove injury their cases will fail." Thus, standing under SEQRA is still far from automatic, but it is now easier than it has been for 18 years. The decision is unlikely to lead to more lawsuits being filed (the law of standing in New York after *Plastics* had been so confusing that probably few plaintiffs were deterred from suing, since they still had a shot at prevailing), but it will allow more suits to stay in court, especially if they are carefully pled.

.....●●●.....

1. 77 NY2d 761, 570 NYS2d 778 (1991).

2. 56 AD3d 32, 865 NYS2d 365 (3d Dept. 2008).

3. 2009 WL 3425317 (N.Y. Oct. 27, 2009).

4. See *Copart Industries Inc. v. Consolidated Edison Co.*, 41 NY2d 564, 394 NYS2d 169 (1977).

5. Joan Leary Matthews, "Unlocking the Courthouse Doors: Removal of the 'Special Harm' Standing Requirement Under SEQRA," 65 Albany L. Rev. 421 (2001).

6. E.g., *Otsego 2000 Inc. v. Planning Bd. of the Town of Otsego*, 171 AD2d 258, 575 NYS2d 584 (3d Dept. 1991), leave to appeal denied, 79 NY2d 753, 581 NYS2d 281 (1992).

7. *Schulz v. Warren County Board of Supervisors*, 206 AD2d 672, 614 NYS2d 809 (3d Dept. 1994), leave to appeal denied, 85 NY2d 805, 626 NYS2d 756 (1995) (Table 109).

8. Michael B. Gerrard, "Standing Under SEQRA: Progeny of 'Society of the Plastics Industry,'" NYLJ, Nov. 22, 2002, 3:1.

9. *Village of Canajoharie v. Planning Board of the Town of Florida*, 63 AD3d 1498, 882 NYS2d 526 (3d Dept. 2009); *Sutherland v. New York City Housing Development Corp.*, 61 AD3d 479, 877 NYS2d 43 (1st Dept. 2009); *Bloodgood v. Town of Huntington*, 58 AD3d 619, 871 NYS2d 644 (2d Dept. 2009).

10. A.3423/S.1635 (2009).

11. 405 US 727 (1972).

12. 528 US 167 (2001).