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How SEQRA Cases Fared in 1998

Michael B. Gerrard
Columbia Law School, michael.gerrard@law.columbia.edu

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By Michael B. Gerrard

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In the annals of the State Environmental Quality Review Act (SEQRA), 1998 should be remembered as the year when developers throughout New York State became frustrated with what they perceived as irrational requirements or excessive delays in the SEQRA process, went to court for redress, and almost uniformly lost. There were 18 attempts at such relief and one highly mixed success.

In all, the courts decided 62 cases under SEQRA in 1998 -- close to the average of 64 since this column began an annual survey in 1991. For the first time since then there were no decisions from the Court of Appeals, but there was an unprecedented number of SEQRA cases brought in the federal courts in conjunction with federal claims (though this approach was also very unsuccessful).

The central requirement of SEQRA is the preparation of an environmental impact statement (EIS) for discretionary state or local governmental actions that may significantly affect the environment. As usual, plaintiffs were more likely to win in 1998 if no EIS had been prepared. Plaintiffs won seven of the 40 cases (17.5%) where there had been no EIS, and one of the 18 cases (5.5%) where there had been an EIS. (A few of the decisions did not indicate whether or not there had been an EIS.)

In 1998 there were 203 positive declarations (rulings that an EIS is necessary), 183 draft EISs, and 100 final EISs.

Frustrated Applicants

To begin the discussion of 1998's most notable SEQRA development -- the flood of suits by frustrated applicants -- I will start with the only such case where the plaintiffs won at all.

In Ernalex Construction Realty Corp. v. Bellissimo , the applicant sought to build two apartment buildings in Glen Cove. It started with a proposal for 88 units, but after the city adopted a "Hillside Protection Ordinance" that restricted use of the site, the applicant scaled back to 28 units. As required by the city, the applicant prepared a draft EIS; then a supplemental draft EIS; and then a final EIS. At the end of the process, the city's Planning Board denied site-plan approval, and the developer sued. Supreme Court

dismissed the case but the Appellate Division, Second Department, reversed.

The Second Department found that the "Planning Board's denial of site-plan approval was largely based on six speculative comments that ... raised various unsubstantiated environmental issues... Since the comments submitted to the Planning Board were uncorroborated by empirical evidence or expert opinion, they were insufficient to counter the compelling evidence submitted by the petitioner's experts."

Even this victory had something of a Pyrrhic quality to it, however. Not only had the applicant been forced to reduce its project from 88 units to 28, it also suffered through an extraordinarily long process. It bought the property in 1986, received a positive declaration in 1988, underwent a scoping session (a meeting to determine the scope of the EIS) in 1993, was denied its permit in 1996, and won at the Second Department in 1998. Moreover, the decision remanded the case to the Planning Board for further proceedings on certain outstanding environmental issues, so the saga is not yet over.

In all of the other 17 cases where applicants sued, they went down to unalloyed defeat. In three of these cases the courts expressed considerable sympathy for the applicant's plight but said they could do nothing to help. In Honess 52 Corp. v. Town of Fishkill , an applicant for a residential subdivision went to federal court alleging that the prolonged and convoluted approval process amounted to a violation of substantive due process. The court noted that the town had subjected the applicant to a "prolonged runaround" but found that the applicant had no property interest in receiving discretionary permits, and thus federal relief was unavailable. Instead, the court said the applicant should seek relief in state court. However, the applicant had sought such relief, and -- a month before the federal ruling -- had lost there as well.

Likewise, in DLC Management Corp. v. Town of Hyde Park , the Second Circuit found that "plaintiffs were treated shabbily and unfairly" by the town but had no "legitimate claim of entitlement" to the zoning reclassification that they sought. The case was dismissed after the plaintiffs had spent more than $1 million on the proposed shopping center project, even though the chair of the planning board was married to the owner of a competitor of the project, and other irregularities were found.

The New York State Department of Environmental Conservation (DEC) required an applicant for a mining permit, who had already prepared an EIS, to undertake a supplemental EIS on whether the project would adversely affect the timber rattlesnake. The applicant asked the court to require DEC to decide first whether the project would have unacceptable noise and visual impacts, so that he would know if it was worthwhile to spend the several years and

several hundred thousand dollars required for a rattlesnake study. The court said, given the irrelevance of the rattlesnakes to the noise and visual issues, DEC's "refusal to issue an interim determination is arbitrary and capricious and an abuse of discretion." However, in the court's view, the refusal to issue an interim decision is not a final determination and thus not subject to judicial review, and the case was dismissed.

Several other matters presented less sympathetic facts. In four cases, the applicant failed or refused to submit information requested by the agencies, but instead insisted on litigating; unsurprisingly, in all four cases the agencies prevailed.

Courts in several other cases upheld permit denials, or severe permit conditions, whether issued after the preparation of EISs or without EISs. A town's insistence on further environmental review before rendering a final decision on an application was also upheld.

Telecommunications Towers

Three decisions concerned new telecommunications towers. Those wishing to site such towers won one of the three.

The case won by cellular telephone companies was Lucas v. Planning Board of the Town of LaGrange . Bell Atlantic Mobile and Cellular One had each applied to build separate towers. After negotiations with the town, they agreed to co-locate on a single tower. The town then, however, issued a positive declaration under SEQRA (requiring an EIS) and imposed a moratorium on new towers. The companies sued the town in federal court on the grounds that the moratorium and other town actions violated the Federal Telecommunications Act of 1996, which restricts local authority over such facilities. The court agreed, and a consent decree was worked out under which the town revoked its positive declaration and issued permits to the towers. With that, neighbors of the tower sued the town in state court for (among other things) violating SEQRA by revoking the positive declaration. The town removed the suit to federal court. Judge Brieant dismissed the suit, holding that the consent decree -- which, upon his approval, had become an action of a court -- was exempt from SEQRA, and that in any event the procedural requirements of SEQRA had been preempted by the Telecommunications Act. Judge Brieant went on to issue a permanent injunction "enjoining plaintiffs, their successors and assigns and all persons with actual knowledge of the injunction from challenging in any forum, except on direct appeal in this case, the validity of the Permits" issued to the tower.

Two other decisions took a different view of the effect of the Telecommunications Act on SEQRA. In Sprint Spectrum L.P. v. Willoth , the Town of Ontario required an EIS for three new cellular towers, and then denied the applications because it felt that one

tower would be sufficient. The federal district court rejected Sprint Spectrum's argument that the federal statute precluded such a denial. The statute reserved zoning authority to local governments, and the Town of Ontario had acted within that authority in denying the application, the court held.

In Rochester Telephone Mobile Communications v. Ober , the Appellate Division, Fourth Department, rejected a challenge to a positive declaration on the grounds that it was not a final determination that could be challenged in an Article 78 proceeding.

It should also be noted that 1998 saw a rash of SEQRA cases brought in federal court -- nine decisions in all -- but, with the sole exception of Lucas, every one of them was dismissed. The seven brought by project applicants have already been discussed. The two brought by project opponents fared no better; the federal causes of action were found to lack merit, and the pendent state claims were then dismissed for lack of jurisdiction.

Standing

As in some prior years, the defense that petitioners lacked standing to sue succeeded in several cases. A number of courts found that plaintiffs, especially environmental groups or their individual members, would not be adversely affected by an action in a way that differed from the public at large, and therefore they could not sue, or (in the case of businesses) that the only real adverse effect would be economic, which does not fall within SEQRA's zone of interests. Even a city was held to be without standing to challenge approval of a hot mix asphalt plant in an adjoining municipality.

On the other hand, decisions from three of the appellate divisions reversed lower court decisions that had held that very close neighbors of proposed facilities lacked standing to sue under SEQRA.

Type II Exemptions

SEQRA and its regulations contain several exemptions and "Type II" actions -- actions that have been determined never to have sufficient environmental impact to require an EIS. Invocation of these provisions succeeded in five of the six cases where it was tried last year. The Type II categories for maintenance or repair of existing structures and replacement, rehabilitation or reconstruction of an existing structure shielded from SEQRA review the renovation of a playground, replacement of sewer lines, and widening of an airport runway. Other exemptions removed from SEQRA review the issuance of a Landmarks Preservation Commission approval for alterations to a building in an historic district, the restructuring of the Long Island Lighting Company,

and an advisory opinion of the State Commissioner of Agriculture and Markets.

The only case where this argument failed was Metropolitan Taxicab Board of Trade v. City of New York , which concerned a new City regulation that allowed certain vans and other non-medallion vehicles to accept street hails in Manhattan and to pick up and discharge passengers at Kennedy and LaGuardia airports. The court rejected the City's argument that this new rule was necessary to address an emergency (which would have put it within another exemption); instead, the court declared, the rule should have been reviewed under SEQRA before its adoption.

Plaintiffs' Victories

Environmental and community groups won three victories in 1998 -- all because no EIS had been prepared, or it was prepared too late. Riverhead Business Improvement District v. Stark concerned a zoning amendment that would have allowed large commercial development; Riverkeeper, Inc. v. General Electric concerned a hangar for private jets at the Westchester County Airport.

An EIS was prepared, but too late, in Vitiello v. City of Yonkers . The City had changed the zoning of a site to allow the construction of a cement plant. Two months later the City adopted a negative declaration under SEQRA. The SEQRA action should have come before the rezoning; the Appellate Division found that the "City Council's attempted after-the-fact compliance was thus an empty exercise, which in effect rubber-stamped a decision that had already been made." The cement plant had already been completed by the time the appellate decision was issued, but since the plaintiffs had moved for a preliminary injunction when they first filed the suit, "the plaintiffs did all they could do to timely safeguard their interests, and [the cement company] was put on notice that if it proceeded with construction, it would be at its own risk." Therefore, the court ruled, the case was not considered moot, and the case was remitted to the trial court for determination of appropriate relief.

Defendants' Victories

Two decisions (in addition to those already discussed) where defendants won merit mention. Both involved reversals by the Appellate Division, Third Department, of decisions below. In West Village Committee Inc. v. Zagata , the Appellate Division reversed a lower court decision that had struck down certain amendments to DEC's regulations under SEQRA. The lower court had found it impermissible to exempt the Governor from SEQRA, and to add to the Type II list certain non-residential projects and the construction of one-, two- and three-family residences. The Appellate Division found the revised regulations to be entirely valid.

Finally, in Concerned Citizens for the Environment v. Zagata , the Appellate Division found that no impermissible segmentation had occurred when DEC had approved a solid waste transfer station without analyzing as well the impacts of a materials recovery facility and incinerator that had been proposed for the same site, where the transfer station had undergone a full EIS and had independent utility from the other proposed facilities.

Michael B. Gerrard is a partner in the New York office of Arnold & Porter. He is General Editor of the eight-volume Environmental Law Practice Guide (Matthew Bender & Co.).

People

Michael B. Gerrard
Senior Counsel
New York
+1 212.715.1190
michael.gerrard@aporter.com
VCard