New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 262—NO. 52
THURSDAY, SEPTEMBER 12, 2019

Environmental Law

Expert Analysis

Annual Review of Developments Under SEQRA

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The courts decided 46 cases under the State Environmental Quality Review Act (SEQRA) in 2018. However, the most important action under SEQRA was in the Legislature, followed by the state Department of Environmental Conservation (DEC).

Legislative Action

On July 18, 2019, Governor Andrew Cuomo signed into law the Climate Leadership and Community Protection Act, L. 2019 ch. 106. Tucked in the back as Section 7(2), apparently not to be codified in the Environmental Conservation Law (ECL) or elsewhere, is this provision:

> In considering and issuing permits, licenses, and other administrative approvals and decisions, including but not limited to the execution of grants, loans, and contracts, all state agencies, offices, authorities and divisions shall consider whether such decisions are inconsistent with or will interfere with the attainment of the statewide greenhouse gas limits established in article 75 of the [ECL]. Where such decisions are deemed to be inconsistent with or will interfere with the attainment of the statewide greenhouse gas emission limits, each agency, office, authority or division shall provide a detailed statement of justification as to why such limits/criteria may not be met, and identify alternatives or greenhouse gas mitigation measures to be required where such project is located.

Though the new statute does not reference SEQRA, Section 7(2) should function as an amendment to it, since SEQRA is the primary mechanism by which state agencies consider environmental factors.

The referenced Article 75—the Climate Change article of ECL that was added by the same enactment—includes Section 75-0107, "Statewide greenhouse gas limits." It calls for these emissions in 2030 to be 60% of 1990 levels, and in 2050, 15% of 1990 levels. The law's preamble has an aspirational goal of a 100% reduction by 2050. The law also has binding requirements that by 2030, at least 70% of New York's electricity come from renewable sources, and that by 2040 100% come from "zero emissions" sources, which means renewables plus nuclear.

Though the new statute does not reference SEQRA, Section 7(2)

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should function as an amendment to it, since SEQRA is the primary mechanism by which state agencies consider environmental factors. Thus environmental impact statements (EISs) and environmental assessments for state actions should reflect the consideration required by Section 7(2). Moreover, the requirement for "a detailed statement of justification" when the project falls short of the goals would fit well into SEQRA's requirement that a formal statement of findings be issued for all actions that were the subject of an EIS.

Though SEQRA applies to local as well as state entities, Section 7(2) only applies to state entities. Under the CEQR (City Environmental Quality Review) Technical Manual, actions subject to CEQR that are taken or approved by New York City must include consideration of greenhouse gas emissions.

The new climate law is not yet in effect; under its Section 14, it takes effect at the same time as a new law establishing two environmental justice groups. This new law has been passed by the Legislature (S.2385, A.1564). Cuomo is expected to sign it shortly.

Administrative Action

On Jan. 1, 2019, revisions to DEC's regulations under SEQRA—the first major revisions in 20 years—became effective. These revisions make the scoping process mandatory (though it already was in New York City); expand the Type II list (the list of kinds of actions that do not require any SEQRA review); and require EISs to discuss "measures to avoid or reduce both an action's environmental impacts and vulnerability from the effects of climate change such as sea level rise and flooding."

> These short statutes of limitations are lurking throughout the New York statute books, and pose real dangers to litigants who do not find them.

In January 2019, DEC also proposed significant revisions to the SEQR Handbook, a very useful set of pointers and guidelines. The new edition, still in draft, gives more detail about the revised regulations, especially the changes to the Type II list. DEC is also proposing revisions to its 2000 policy document Assessing and Mitigating Visual Impacts, which has been used in implementing SEQRA and for other purposes. The revisions include updating the inventory of aesthetic resources, and providing additional guidance on when a visual assessment is necessary, how to establish a baseline to assess visual impact, and making a determination of significance.

DEC also issued drafts of two other important documents in 2018 that are relevant to environmental review—the Flood Risk Management Guidance for Implementation of the Community Risk and Resiliency Act, and the Guidance for Smart Growth Public Infrastructure Assessment.

Judicial Action

Of the 46 SEQRA decisions issued in 2018, 23 upheld—or at least did not disturb—negative declarations (decisions not to prepare an EIS). Five overturned negative declarations. Ten cases involved projects where full EISs had been prepared; the plaintiffs challenging these EISs or the underlying actions lost all ten. The remaining nine cases cannot be classified in this manner. All 46 cases will be covered in the next update to *Environmental Impact Review in New York* (Gerrard, Ruzow & Weinberg, eds.) (LexisNexis).

The five cases where plaintiffs prevailed are of particular interest.

In *Adirondack Historical Association v. Village of Lake Placid*, 161 A.D.3d 1256 (3d Dept. 2018), the Village condemned two vacant parcels owned by petitioner to build a public parking garage. According to the court, "During both the public hearing and the written comment period, concerns regarding increased traffic congestion and other potential traffic impacts associated with the proposed condemnation were

repeatedly voiced." However, "the record is bereft of any evidence that the Village Board took the requisite hard look at these potential traffic implications." Thus the court vacated the findings and determinations made in connection with the condemnation.

A similar fate befell a town's approval of a two-story cultural center next to a church. As the court recounted, the town's board of appeals, as the lead agency, identified two concerns—"that the proposed action may result in a change in the use or intensity of the land (it unquestionably would); and the proposed action may impair the character or quality of the existing neighborhood." But the board's decision approving the project simply stated that the center and accompanying use and area variances "will not have a significant effect on the environment," with no further explanation or rationale. The court found this fell far short of the "reasoned elaboration" that SEQRA requires, and it annulled the approvals. *Healy v. Town of Hempstead Board of Appeals*, 61 Misc. 3d 408 (Sup.Ct. Nassau Co. 2018).

Likewise, the negative declaration for a proposed condominium complex next to an historic district contained merely conclusory statements disclaiming potential adverse impacts, leading the court to direct the preparation of a full EIS. *Peterson v. Planning Bd. of the City of Poughkeepsie*, 163 A.D.3d 577 (2d Dep't 2018).

The two remaining cases involved misclassification of actions as Type II—i.e., so minor or nondiscretionary that no environmental review is required. One concerned the clear cutting of trees on 155 acres of land adjacent to the Erie Canal. The court found this to be far beyond the simple "maintenance" activities that qualify as Type II actions. *Town of Pittsford v. Power Authority of the State of New York*, 2018 Misc. LEXIS 766 (Sup. Ct. Wayne Co. 2018). The other involved DEC's issuance of a permit to a power plant in Queens to withdraw large amounts of water from the East River for its cooling system. Though the relevant statute said DEC "shall issue" the permit, it gave DEC discretion to impose terms and conditions on the withdrawal, and thus SEQRA applied. *Sierra Club v. Martens*, 158 A.D.3d 169 (2d Dept. 2018).

Statutes of Limitations

The four-month statute of limitations that applies to most Article 78 proceedings (the procedural vehicle for most SEQRA cases) has long been the graveyard of many such lawsuits. Five of the 2018 cases were dismissed because they were brought too late. One of them, however, illustrates a particular peril. *Beer v. Village of New Paltz*, 163 A.D.3d 1215 (3d Dept. 2018), involved a challenge to the creation of a water district for the residents of a town while its primary water source, the Catskill Aqueduct, was being shut down for maintenance. Certain property owners were unhappy, and they sued within four months. However, an obscure provision of the Town Law sets a 30-day limitation period for certain kinds of suits involving water districts. So the petitioners sued too late.

These short statutes of limitations are lurking throughout the New York statute books, and pose real dangers to litigants who do not find them.

Three cases were dismissed on ripeness grounds—that is, they were brought too early, before there was final agency action. Such a dismissal of course is not so bad, because the suit can be brought later, once the final agency action is taken.