

## ENVIRONMENTAL LAW

## Expert Analysis

# Survey of 2014 Cases Under State Environmental Quality Review Act

The courts decided 47 cases in 2014 under the State Environmental Quality Review Act (SEQRA).<sup>1</sup> The issue of whether plaintiffs have standing to sue continued to bedevil the courts. Additionally, in an unusual number of cases, courts overturned governmental rejections of projects, and considered whether changes to unbuilt projects since the environmental review was conducted warranted new review.

In those cases where an environmental impact statement (EIS) had been prepared, the environmental review was overturned in two cases and upheld in nine. Where there had been no EIS, plaintiffs won six cases and lost 25. (The remaining cases cannot be classified in this manner.)

Today's article continues the annual survey of SEQRA cases that this column began in 1990.

### Court of Appeals Cases

The Court of Appeals decided one case under SEQRA in 2014, and it has agreed to review two other cases.

The decided case was *Association for a Better Long Island v. New York State Department of Environmental Conservation* (DEC).<sup>2</sup> It was a challenge to an important set of regulations issued by DEC to protect endangered and threatened species. The rules require applicants for "incidental take" permits allowing them to harm such species to submit

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mitigation plans that result in a net conservation benefit. The Town of Riverhead and its Community Development Agency asserted that the regulations would impede their ability to develop a particular property and cause them to incur substantial costs.

The court found that these petitioners could not sue DEC for not preparing an EIS for the regulations because their alleged injury would be solely economic, and economic injury alone does not confer standing under SEQRA. However, some of petitioners' non-SEQRA challenges to the regulations were allowed to proceed.

The lack of standing for economic injury is well established under SEQRA. Much more disputed is another restriction on standing under SEQRA that is the subject of a case that the Court of Appeals has agreed to hear, *Sierra Club v. Village of Painted Post*.<sup>3</sup> The village authorized the sale of excess water from the municipal water supply and its export to Pennsylvania, where it would be used for hydraulic fracturing of natural gas. The water would be loaded onto trains. One of the plaintiffs, John Marvin, lived near the tracks and complained about the noise that would result from the added train traffic. The train line runs through the entire vil-

lage, and thus, many others would also be affected.

The Appellate Division, Fourth Department, "conclude[d] that Marvin will not suffer noise impacts 'different in kind or degree from the public at large,'" and therefore did not have standing, quoting language from a 1991 decision of the Court of Appeals, *Society of the Plastics Industry, v. County of Suffolk*.<sup>4</sup> In 2014 the Fourth Department used the same rationale to dismiss challenges to an agricultural festival,<sup>5</sup> and also to the construction of a boat storage facility in Niagara Falls State Park.<sup>6</sup> The Supreme Court in New York County used the rationale to determine that some petitioners in a suit against the construction of two health care buildings lacked standing,<sup>7</sup> and the Supreme Court in Suffolk County used it to dismiss an environmental group's suit against the expansion of a sand and gravel mine.<sup>8</sup>

The use of the *Society of the Plastics Industry* case by the lower courts to restrict SEQRA standing has been controversial throughout the nearly quarter century since it was issued. In 2009 the Court of Appeals broadened the SEQRA standing rule by allowing members of the public who occasionally visit a location to sue to protect it.<sup>9</sup> The *Sierra Club* case gives the Court of Appeals the opportunity to revisit the controversial doctrine that a SEQRA plaintiff must show injury different from the public at large in order to maintain standing. The oral argument has been set for Oct. 13.

### More Standing Cases

Hydraulic fracturing was also the subject of two separate lawsuits that chal-

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lenged DEC's delays in issuing the final generic EIS for the practice, and the regulations that were the subject of that EIS. One suit was brought by the bankruptcy trustee of an energy company,<sup>10</sup> and the other by a coalition of owners of land that had been leased for natural gas development.<sup>11</sup> In separate decisions issued the same day by the same judge, both suits were dismissed on the ground that the plaintiffs had not alleged any environmental injury resulting from the delays, and their economic injuries were not a basis for standing under SEQRA.

The owner of a hotel was able to challenge the construction of another hotel on an adjacent property. Though the plaintiff may have been motivated to avoid business competition, the alleged traffic and parking impact from an adjacent facility was enough to confer standing.<sup>12</sup>

The Second Department found that the owners of buildings in an historic district in Poughkeepsie had standing to challenge a proposed condominium project nearby "as their properties are adjacent to the proposed project site and they have alleged potential structural harm from construction-related blasting, as well as visual harm."<sup>13</sup>

### Project Changes

In three cases, the plaintiffs prevailed in claims that the subject projects or their settings had changed so much since their original environmental review that a new review was needed. A planning board had issued a negative declaration (a decision that no EIS was needed) in 2009 for a 36-unit residential facility. In 2014, the board approved for the same site a 50-room lodging unit plus a wine bistro and meeting rooms. This was too much of a change, the court ruled, and a new determination about the need for an EIS was required.<sup>14</sup> Similarly, an EIS prepared in 2009 was found inadequate for a considerably larger project that included a gasoline station on the same site in 2012, and a supplemental EIS was needed.<sup>15</sup>

Though SEQRA does not specify an expiration date for environmental reviews, a 2006 environmental assessment was found insufficient to support a negative declaration issued in 2013.<sup>16</sup>

In stark contrast to those three cases, in 1993 an EIS had been prepared for the redevelopment of the Harlem River Yards in the Bronx. Twenty years later, Fresh Direct proposed to build a new warehouse and distribution facility there. The First Department upheld the conclusion that no supplemental EIS was needed because the project was materially similar to the uses proposed in the original land use plan, it would generate less vehicular traffic, and it did not have the potential to have new, additional, or increased significant adverse environmental impacts.<sup>17</sup>

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### Segmentation

A frequent subject of litigation is whether an environmental review improperly failed to consider actions that are closely related to the one under review. All four attempts in 2014 to assert such segmentation claims failed.

The most notable of these was *Gabrielli v. Town of New Paltz*.<sup>18</sup> The town had adopted a local wetlands law based on a negative declaration. The Supreme Court annulled the local law because it found the SEQRA review had been inadequate. The Third Department reversed, finding that the town's review of the law had been thorough and lengthy. The Third Department also rejected the claim that the town had segmented the review by including in the law a "catch-all" provision that allowed town officials to regulate a broad array of activities that they find will substantially alter or impair the natural functions or benefits of a regulated area.

The other segmentation cases concerned the installation of a bike share station near the Plaza Hotel in Manhattan, and the upgrading of a nearby traffic signal, which were found to be unrelated actions;<sup>19</sup> the review of a comprehensive town plan and corresponding zoning amendments, which were found to

have been considered together;<sup>20</sup> and the review of two health care buildings, which the court held did not also require simultaneous review of the construction of a garage 50 blocks away to replace a sanitation garage displaced by the health care project.<sup>21</sup>

### Flood Control

Three cases concerned measures to control or anticipate flooding. Two of them arose in East Hampton. In one, the town had approved the construction of a 166-foot-long rock revetment along the shoreline. The Supreme Court, Suffolk County, found that this required environmental review; it was not exempt as mere maintenance of existing landscaping, or as minor temporary use of land.<sup>22</sup> In the other, East Hampton's Zoning Board of Appeals had denied a property owner's application to build a 90-foot erosion control structure. The owner sued, and the court upheld the town's denial, finding it had a rational basis and was supported by substantial evidence.<sup>23</sup>

The third case—and the only 2014 SEQRA case from a federal court—involved the longstanding controversy over New York City's attempts to build a marine transfer station for solid waste at East 91st Street in Manhattan. The city had issued an EIS in 2005 for its Solid Waste Management Plan, including an extensive discussion of the proposed 91st Street facility. Neighbors claimed that a new environmental review was needed to reflect the flooding caused by Superstorm Sandy of 2012, and to address whether the marine transfer station could withstand such a storm in the future. The Southern District of New York found that the city had taken a hard look at these issues, and it refused to order further review.<sup>24</sup>

### Project Rejection

One of the most striking aspects of the 2014 cases is the number where a court overturned a town's rejection of a project.

*Pittsford Canalside Properties v. Village of Pittsford*<sup>25</sup> concerned a proposed apartment complex and restaurant abutting the Erie Canal. The village issued a negative declaration and approved the project. But it then became controversial, and three people opposed to the project

were elected to the Village Board. The board then rescinded the negative declaration and required an EIS. The applicant sued. It turned out that the mayor had not disclosed his membership on the board of a group that was fighting the project, and another trustee was a participating member of a different group

and extended the prior approvals.<sup>26</sup>

One other decision was favorable to applicants in overturning project denials.<sup>27</sup> But the Appellate Division, Second Department, rejected an applicant's suit, finding (as had most prior courts that have looked at the issue) that a challenge to a positive declaration (a deci-

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litigating against it.

The Supreme Court, Monroe County, found that the board had impermissibly acted based on community pressure. It declared that "being an advocate on a particular issue before a board or being a litigant against the board or a party and then serving on that board and adjudicating to the detriment of the opposition is not a question of free speech, but one of fundamental fairness, arbitrariness and caprice." The court went on to say that "the ardent expression of preferential opposition to the project to the extent of running for political office to defeat the project, and then sitting in judgment of the project, is within the definition of arbitrary." The court annulled the board's actions and directed the planning board to process and decide the application "post haste."

The Putnam Community Foundation sought to build 120 units of affordable senior-citizen housing. The foundation prepared an EIS, and in 2008 the planning board adopted a SEQRA findings statement that was favorable to the project. In 2009 the planning board approved the site plan. However, in 2012, when the foundation sought to extend the approval, the planning board took action that in effect denied the application without notice to the applicant. The foundation sued, and the Supreme Court, Putnam County, found the planning board's action to be arbitrary and capricious, and it reinstated

sion that a project requires an EIS) is not ripe for judicial review because there is not yet any final agency action on the application.<sup>28</sup> Interestingly, the Court of Appeals has granted leave to appeal in this case. Also dismissed as unripe was a challenge to a village's SEQRA findings statement, where the village had not yet acted on the underlying applications.<sup>29</sup>

### Alternatives

Two cases concerned whether a sufficient range of alternatives had been considered. In one, concerning the security plan at the redeveloped World Trade Center site, the Supreme Court, New York County, found that enough alternatives had been studied in the EIS, and it rejected the petition.<sup>30</sup> The other involved a complex and protracted land use dispute concerning the Village of Kiryas Joel in Orange County. The Supreme Court, Orange County, found that various high-density alternatives should have been considered, and it annulled certain zoning amendments.<sup>31</sup>

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1. N.Y. ENVTL. CONSERV. LAW Art. 8.
2. 23 N.Y.3d 1 (2014).
3. 115 A.D.3d 1310 (4th Dept.), reargument and leave to appeal denied, 118 A.D.3d 1369 (4th Dept.), leave to appeal granted, 24 N.Y.3d 908 (2014).
4. 77 N.Y.2d 761 (1991).
5. *Kindred v. Monroe Cnty.*, 119 A.D.3d 1347 (4th Dept. 2014).
6. *Niagara Preservation Coal. v. N.Y. Power Auth.*, 121 A.D.3d 1507 (4th Dept. 2014), leave to appeal denied, 124 A.D.3d 1419 (4th Dept.), leave to appeal denied, 25 N.Y.3d 902 (2015).
7. *Residents for Reasonable Development v. City of N.Y.*, 2014 N.Y. Misc. LEXIS 3416 (Sup. Ct. New York County July 28, 2014), *aff'd*, 2015 N.Y. App. Div. LEXIS 4486 (1st Dept. May 28, 2015).

8. *Long Island Pine Barrens Soc'y v. Central Pine Barrens Joint Planning & Policy Comm'n*, 2014 N.Y. Misc. LEXIS 988 (Sup. Ct. Suffolk Co. Feb. 27, 2014).

9. See Michael B. Gerrard, "Court of Appeals Expands SEQRA Standing After an 18-Year Detour," NYLJ, Nov. 27, 2009.

10. *Wallach v. DEC*, Index No. 6773-2013 (Sup. Ct. Albany County July 11, 2014).

11. *Joint Landowners Coalition of New York v. Cuomo*, Index No. 843-2014 (Sup. Ct. Albany County July 11, 2014).

12. *Beekman Delameter Props. v. Vill. of Rhinebeck Zoning Bd. of Appeals*, 998 N.Y.S.2d 305 (Sup. Ct. Dutchess County 2014).

13. *Schlemme v. Planning Bd. of City of Poughkeepsie*, 118 A.D.3d 893 (2d Dept. 2014).

14. *Beekman Delameter Props. v. Vill. of Rhinebeck Zoning Bd. of Appeals*, 998 N.Y.S.2d 305 (Sup. Ct. Dutchess County 2014).

15. *Green Earth Farms Rockland v. Town of Haverstraw Planning Bd.*, 2014 N.Y. Misc. LEXIS 4569 (Sup. Ct. Rockland County Oct. 15, 2014).

16. *Coeymans Heritage Soc'y v. Town Bd. of the Town of Coeymans*, Index No. 4415-13 (Sup. Ct. Albany County March 3, 2014).

17. *South Bronx Unite! v. N.Y.C. Indus. Dev. Agency*, 115 A.D.3d 607 (1st Dept.), leave to appeal denied, 24 N.Y.3d 908 (2014).

18. 116 A.D.3d 1315 (3d Dept.), leave to appeal denied, 24 N.Y.3d 901 (2014).

19. *Bd. of Managers of the Plaza Condominium v. N.Y.C. Dept. of Transp.*, 992 N.Y.S.2d 157 (Sup. Ct. New York County 2014).

20. *Calverton Manor v. Town of Riverhead*, 2014 N.Y. Misc. LEXIS 3232 (Sup. Ct. Suffolk County July 15, 2014).

21. *Residents for Reasonable Development v. City of N.Y.*, 2014 N.Y. Misc. LEXIS 3416 (Sup. Ct. New York County July 28, 2014), *aff'd*, 2015 N.Y. App. Div. LEXIS 4486 (1st Dept. May 28, 2015).

22. *Trustees of the Freeholders & Commonalty of the Town of East Hampton v. Zueig*, 2014 N.Y. Misc. LEXIS 4714 (Sup. Ct. Suffolk County Nov. 3, 2014).

23. *Wagner v. Zoning Bd. of Appeals of the Town of East Hampton*, 2014 N.Y. Misc. LEXIS 5609 (Sup. Ct. Suffolk County Dec. 15, 2014).

24. *Residents for Sane Trash Solutions v. U.S. Army Corps of Eng'rs*, 31 F.Supp.3d 571 (S.D.N.Y. 2014).

25. 2014 N.Y. Misc. LEXIS 4854 (Sup. Ct. Monroe County Oct. 23, 2014).

26. *Putnam Cmty. Found. v. Planning Bd. of the Town of Carmel*, 2014 N.Y. Misc. LEXIS 5218 (Sup. Ct. Putnam County Aug. 6, 2014).

27. *24 Franklin Ave. R.E. Corp. v. Heanship*, 990 N.Y.S.2d 440 (Sup. Ct. Westchester County March 24, 2014).

28. *Ranco Sand & Stone Corp. v. Vecchio*, 124 A.D.3d 73 (2d Dept. 2014), leave to appeal granted, 25 N.Y.3d 902 (2015).

29. *Patel v. Bd. of Trustees of Inc. Vill. of Muttontown*, 115 A.D.3d 862 (2d Dept. 2014).

30. *WTC Neighborhood Alliance v. Kelly*, 992 N.Y.S.2d 161 (Sup. Ct. New York County 2014).

31. *Vill. of Kiryas Joel v. Vill. of Woodbury*, Index No. 9655/11 (Sup. Ct. Orange County March 19, 2014).