

ENVIRONMENTAL LAW

Expert Analysis

## Survey of 2013 Cases Under State Quality Review Act

The courts issued 38 decisions in 2013 under the State Environmental Quality Review Act (SEQRA). This represented the third-lowest number of decisions since this annual survey began in 1990; lower numbers were found only in 2011 (35) and 2010 (37).

It was a miserable year for those bringing SEQRA cases. In only one case that reached a final decision in 2013 did plaintiffs prevail. Plaintiffs also won one motion on attorney fees, and they survived one motion to dismiss. Where an environmental impact statement (EIS) had been prepared, defendants won all six cases. Where there was no EIS, plaintiffs won one and defendants won 23. (The rest of the cases were not classifiable in this fashion.) This is the lowest percentage of plaintiff victories since at least 1990.

The year saw no SEQRA cases from the Court of Appeals, and no others that would be considered landmark decisions. Very notable, however, is that 10 of the decisions—more than one-quarter of the full number—were dismissed because the plaintiffs were found to lack standing to sue. This is the highest percentage since at least 1990.

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### Plaintiffs' Victories

The one case that reached the merits and was decided for plaintiffs was *Town of Blooming Grove v. County of Orange*.<sup>1</sup> Two towns had already determined that an EIS was needed for a mixed-use residential, commercial and retail project on property straddling the towns. The project was to be built by Mountco Construction and Development Corporation. The construction was contingent on, among other things, the extension of a sewer district by Orange County. The county approved the sewer district extension without preparing an EIS about it.

The Appellate Division, Second Department, ruled that "the County improperly segmented the SEQRA review of the [sewer district] extension from the Mountco project," and that "the record establishes that the Mountco project and the [sewer district] extension are part of an integrated and cumulative development plan sharing a common purpose."

In the long-running controversy over the Atlantic Yards project in Brooklyn, plaintiffs, neighbors of the project,

had succeeded in 2012 in obtaining an order requiring Empire State Development Corporation (ESDC) to prepare a supplemental EIS, and in 2013 they sought attorney fees under New York's Equal Access to Justice Act (EAJA). The first question was whether ESDC, a public benefit corporation, was a state agency within the meaning of EAJA. The Supreme Court, New York County, ruled in the affirmative, and then proceeded to consider whether its order requiring the supplemental EIS for the project (in view of the protracted delays in beginning construction) made the plaintiffs a prevailing party and thus entitled to attorney fees.

Though many of plaintiffs' claims had been rejected and some of the project was already being built, the court found that plaintiffs "have succeeded in achieving a substantial part of the relief sought in this litigation." To ESDC's argument "that it had a reasonable basis for, although it did not prevail on, its position that its use of a 10-year build-out in assessing environmental impacts" of the plan was reasonable, and that no supplemental EIS was needed, the court responded that "[t]his claim reflects no small audacity, in light of the court's prior findings." These findings, in the court's words, involved the ESDC's "deplorable lack of transparency" in failing to disclose certain facts to the court. An award of fees was therefore warranted because ESDC's position was not "substantially justified."<sup>2</sup>

Though the merits have not been reached, an important procedural victory was won by one of New York's oldest and least-known governmental bodies, the Trustees of the Freeholders and Commonality of the Town of East Hampton. This body was created by King James II through the Dongan Patent in 1686, and has continuously functioned since then. It once ran the town; now the Town Board does that, but the Trustees still manage many of the publicly owned lands and waterways.

Yet a third body, the Zoning Board of Appeals of the Town of East Hampton, in November 2012 granted variances and a special permit to two private landowners to build a stone armor revetment to protect against coastal erosion. The zoning board issued a negative declaration under SEQRA, meaning that no EIS was needed. The Trustees objected to this construction and sued the board. The board moved to dismiss on the grounds that the Trustees lacked standing to sue because the revetment would not be on property owned by the Trustees.

The Supreme Court, Suffolk County, found that the Trustees' petition asserted that the town's planning department had found in an environmental assessment form for a prior application "that the construction of the proposed revetment had a high potential of accelerating the erosion...and had the potential to cause significant adverse impacts to the primary dune system, the beach and the wetlands adjoining the subject property." The court concluded that "[t]he Trustees by alleging potentially significant adverse impacts to the beaches that are under their control as part of 'the Commonlands' [near] the proposed revetment" had claimed sufficient distinct injury as to give them standing to pursue their suit. Thus the court denied the zoning board's motion to dismiss.<sup>3</sup>

### Standing

Ten decisions dismissed cases because the plaintiffs were found to

lack standing to sue. Plaintiffs alleging only economic injury included neighboring businesses that would suffer a competitive injury,<sup>4</sup> nearby property owners whose complaint was found to be about economic impact,<sup>5</sup> a business that would be harmed by a challenged regulation,<sup>6</sup> and labor unions that were unhappy about wages.<sup>7</sup> In seven of these decisions, the plaintiffs had only an economic injury. Since economic concerns do not fall within SEQRA's zone of interests, they are not sufficient to confer standing.

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In three other cases, neighbors of the challenged projects sued but did not live close enough to establish a presumption of standing, and did not allege that they would suffer adverse environmental impacts different than those that would be suffered by the public at large.<sup>8</sup>

### Segmentation

The theory of segmentation—improperly considering linked projects separately—succeeded in the Town of Blooming Grove case discussed above. It failed in two other cases. In *Campaign for Buffalo History, Architecture and Culture v. Buffalo and Fort Erie Public Bridge Authority*,<sup>9</sup> the demolition of several buildings was challenged. The demolition was associated with a number of potential projects related to a bridge.

The defendant agency acknowledged that there was a connection but argued that considering them separately was warranted, in part because the other projects were at much earlier stages and might never happen. The U.S. District Court for the Western District of New York was satisfied with this explanation and found the segmentation to be per-

missible. The decision was also significant because it found an international agency to be subject to SEQRA.

Demolition—this time of an historic house—was also at issue in *Saratoga Springs Preservation Foundation v. Boff*.<sup>10</sup> The structure was unsafe, and upon its demolition the site would merely be cleaned up and fenced. Any redevelopment of the site would require further governmental review. Separate consideration of the demolition and the redevelopment was found acceptable by the Appellate Division, Third Department.

### Supplemental EIS

Three suits sought supplemental EIS statements on the grounds that the prior statements had become outdated and obsolete in view of new developments. All three suits failed.

*South Bronx Unite! v. New York City Industrial Development Agency*<sup>11</sup> involved the proposed construction of a corporate headquarters and distribution center for Fresh Direct. It would be located in the Harlem River Yards. An EIS had been prepared back in 1993 for development of the Yards. The Supreme Court, Bronx County, declared that "[t]he mere passage of time rarely warrants an order to update the information considered by an agency, since the [EIS] process necessarily ages data. A requirement of constant updating and further review would render the administrative process perpetual, and subvert its legitimate objectives." (In 2014, the Appellate Division, First Department, affirmed the court's conclusion that no supplemental EIS was required.<sup>12</sup>)

The other two suits, with similar results, involved the 91st Street Marine Transfer Station, a controversial solid waste facility on the East River,<sup>13</sup> and the redevelopment of downtown Brooklyn.<sup>14</sup>

All three of these cases involved actions undertaken or approved by the City of New York. The city was also victorious in SEQRA challenges to three of its other undertakings: a pilot program to allow medallion cabs to

arrange passenger pickups via smartphone applications;<sup>15</sup> the installation of bike share stations;<sup>16</sup> and the phase-out of No. 4 and No. 6 fuel oil in favor of cleaner-burning alternatives.<sup>17</sup>

### Speculative Impacts

Another high-profile project was at issue in *Entergy Nuclear Indian Point 2 v. Perales*.<sup>18</sup> The New York Department of State had designated a stretch of the Hudson River adjacent to the Indian Point nuclear power plant as a “significant coastal fish and wildlife habitat.” The Supreme Court, Albany County, upheld the negative declaration for this designation. The court said that the designation was not a predetermination of whether the relicensing of the plant was consistent with federal and state coastal laws and policies and that the potential environmental consequences of impacts to Indian Point operations identified by petitioners, the owner of the power plant, therefore were speculative.

### Applicability of SEQRA

In six cases, plaintiffs argued that certain actions were subject to SEQRA. Plaintiffs lost all six. SEQRA was found not to apply to a town’s one-year moratorium on hydraulic fracturing (since land use moratoria of limited duration are generally found not to require environmental review);<sup>19</sup> a zoning board of appeals’ interpretation of the local zoning code;<sup>20</sup> the release of covenants on property that restricted their development (two related cases);<sup>21</sup> a county’s comprehensive plan that called for the development of a pedestrian and bicycle trail network (since this was merely a policy document and not a binding plan);<sup>22</sup> and a minor amendment to a previously granted variance.<sup>23</sup>

### Procedural Issues

A town’s approval of a wind energy farm had been annulled by the lower court because of violations of the Open Meetings Law, even though the court had found that

the SEQRA negative declaration was valid. The Appellate Division, Third Department, found no Open Meetings Law violation; the location of a public hearing was permissibly moved because so many people showed up that a larger room was needed. However, the Appellate Division found that the county planning department had not been given adequate advance notice of the hearing. Moreover, the town had not provided adequate explanations of the project’s compliance with various conditions of the local ordinance, so the special permit was annulled.<sup>24</sup>

Three suits sought supplemental environmental impact statements on the grounds that the prior statements had become outdated and obsolete in view of new developments. All three suits failed.

A challenge was brought to the approval of a recreational complex in the Catskills—a casino, a horse racing track, a golf course, a hotel, a convention center and a condominium development. The parties submitted dueling expert reports about the project’s environmental impacts. The Supreme Court, Sullivan County, declared, “Where expert testimony conflicts and differing analyses are presented under SEQRA, the agency has the discretion to make a choice[,] and as long as the decision is rationally and reasonably related to the evidence in the record, courts will not disturb the decision.”<sup>25</sup>

Discovery is available in Article 78 proceedings (the procedural mechanism under which most SEQRA suits are brought) only upon motion to the court, and in practice discovery in these cases is rare. In two cases,

discovery was sought; in both it was denied, in part because those seeking it had already obtained ample documents via the Freedom of Information Law and other methods.<sup>26</sup>

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1. 103 A.D.3d 655, 959 N.Y.S.2d 265 (2d Dept.), leave to appeal denied, 21 N.Y.3d 857, 991 N.E.2d 217, 969 N.Y.S.2d 443 (N.Y. 2013).

2. *Develop Don’t Destroy (Brooklyn) v. Empire State Development Corp.*, 41 Misc.3d 779, 971 N.Y.S.2d 682 (Sup.Ct. N.Y. Co. 2013).

3. *Trustees of the Freeholders of the Commonality of the Town of East Hampton v. Zoning Bd. of Appeals of the Town of East Hampton*, 2013 N.Y. Misc. Lexis 4648 (Sup.Ct. Suffolk Co., Oct. 2, 2013).

4. *Concerned Citizens of Armonk v. Town Bd. of Town of North Castle*, Index No. 4207/12 (Sup. Ct. Westchester Co. Apr. 4, 2014); *Gasoline Heaven at Commack v. Town of Smithtown Town Bd.*, 2013 N.Y. Misc. Lexis 5748 (Sup. Ct. Suffolk Co. Nov. 26, 2013); *Oyster Bay Assocs v. Town of Oyster Bay*, 2013 N.Y. Misc. Lexis 4888 (Sup. Ct. Suffolk Co. Oct. 9, 2013).

5. *Kampa v. Vill. of Saltaire*, 2013 N.Y. Misc. Lexis 1510 (Sup. Ct. Suffolk Co. April 1, 2013); *Rappaport v. Vill. of Saltaire*, 2013 N.Y. Misc. Lexis 1511 (Sup. Ct. Suffolk Co. April 1, 2013).

6. *County Oil Co. v. N.Y.C. Dept. of Envtl. Prot.*, 111 A.D.3d 718, 975 N.Y.S.2d 114 (2d Dept. 2013).

7. *Families United for Racial and Econ. Equality v. Bloomberg*, 980 N.Y.S.2d 275 (Sup. Ct. N.Y. Co. 2013).

8. *deZafra v. Town of Brookhaven*, 2013 N.Y. Misc. Lexis 3293 (Sup. Ct. N.Y. Co. July 3, 2013); *O’Brien v. N.Y. State Comm’r of Educ.*, 112 A.D.3d 188; 975 N.Y.S.2d 205 (3d Dept. 2013), appeal dismissed, 22 N.Y.3d 1125, 6 N.E.3d 603, 983 N.Y.S.2d 485 (2014), leave to appeal denied, 2014 N.Y. Lexis 1082 (N.Y. May 13, 2014); *Tuxedo Land Trust v. Town Board of Town of Tuxedo*, 112 A.D.3d 726, 977 N.Y.S.2d 272 (2d Dept. 2013).

9. 2013 U.S. Dist. Lexis 25390 (W.D.N.Y. Feb. 22, 2013).

10. 110 A.D.3d 1326, 973 N.Y.S.2d 835 (3d Dept. 2013).

11. Index No. 260462/2012 (Sup. Ct. Bronx Co. May 24, 2013).

12. 115 A.D.3d 607, 983 N.Y.S.2d 8 (1st Dept. 2014).

13. *Kellner v. City of N.Y. Dept. of Sanitation*, 107 A.D.3d 529, 967 N.Y.S.2d 356 (1st Dept. 2013).

14. *Families United for Racial and Economic Equality v. Bloomberg*, 980 N.Y.S.2d 275 (Sup. Ct. N.Y. Co. 2013).

15. *Black Car Assistance Corp. v. City of N.Y.*, 2013 N.Y. Misc. Lexis 1692 (Sup. Ct. N.Y. Co. April 23, 2013), aff’d, 110 A.D.3d 618, 973 N.Y.S.2d 627 (1st Dept. 2013).

16. *Cambridge Owners Corp. v. N.Y.C. Dept. of Transp.*, 2013 N.Y. Misc. Lexis 4998 (Sup. Ct. N.Y. Co. Oct. 28, 2013).

17. *County Oil Co. v. N.Y.C. Dept. of Envtl. Prot.*, 111 A.D.3d 718, 975 N.Y.S.2d 114 (2d Dept. 2013).

18. 41 Misc.3d 1237(A), 983 N.Y.S.2d 202 (Sup. Ct. Albany Co. 2013).

19. *Lenape Resources v. Town of Avon*, Index No. 1060-2012 (Sup. Ct. Livingston Co. Mar. 15, 2013).

20. *Chestnut Ridge v. 30 Sephar Lane*, Index No. 14674/10, NYLJ 1202610643586 (Sup. Ct. Rockland Co. June 17, 2013).

21. *Kampa v. Vill. of Saltaire*, 2013 N.Y. Misc. Lexis 1510 (Sup. Ct. Suffolk Co. Apr. 1, 2013); *Rappaport v. Vill. of Saltaire*, 2013 N.Y. Misc. Lexis 1511 (Sup. Ct. Suffolk Co. April 1, 2013).

22. *Schaefer v. Legislature of Rockland Cnty.*, 112 A.D.3d 642, 976 N.Y.S.2d 178 (2d Dept. 2013).

23. *Westwater v. N.Y.C. Bd. of Standards & Appeals*, 2013 N.Y. Misc. Lexis 4707 (Sup. Ct. N.Y. Co. Oct. 15, 2013).

24. *Frigault v. Town of Richfield Planning Bd.*, 107 A.D.3d 1347, 968 N.Y.S.2d 673 (3d Dept. 2013).

25. *Concord Assocs. v. Town of Thompson*, 41 Misc.3d 1208(A), 980 N.Y.S.2d 275 (Sup. Ct. Sullivan Co. 2013) (citations omitted).

26. *Weinstein v. Harvey*, 2013 N.Y. Misc. Lexis 1365 (Sup. Ct. N.Y. Co. April 2, 2013); *Entergy Nuclear Point 2 v. N.Y. State Dept. of State*, 39 Misc.3d 1223(A), 971 N.Y.S.2d 70 (Sup. Ct. Albany Co. May 6, 2013).