

## ENVIRONMENTAL LAW

## Expert Analysis

# 2010 Developments Under State Environmental Quality Review Act

The courts decided 37 cases under the State Environmental Quality Review Act (SEQRA) in 2010.<sup>1</sup> That is the lowest number since this column began its annual survey of SEQRA cases in 1990. The second lowest number was 45 in 2009. This trough is most likely caused by the economic recession, as SEQRA activity primarily relates to real estate development.

As is usually the case, defendants were much more likely to win in cases where an environmental impact statement (EIS) had been prepared than when there was no EIS. Of the 16 cases with an EIS, defendants won 13 (81 percent); of the 19 cases without an EIS, defendants won 13 (68 percent). (The remaining cases were unclassifiable.) Thus preparing an EIS continues to be generally the safest course from a litigation perspective.

Even in the three cases where an EIS was prepared and plaintiffs prevailed, none involved successful efforts by project opponents to challenge the substance of the documents. As discussed below, two were suits brought by project applicants against municipalities that were found to have treated them unfairly in the SEQRA process, and one involved the need for a supplemental EIS to reflect new post-EIS developments.

Though the courts were less active under SEQRA in 2010 than in prior years, there was a good deal of administrative activity, as will be shown below.

### Suits by Applicants

Though SEQRA litigation has ordinarily been seen as chiefly a tool of project opponents, project applicants scored several notable successes in 2010. There were no Court of Appeals decisions under SEQRA, but the most striking decision of the year came from the U.S. District Court for the Southern District of New York in a challenge to a town's refusal to allow the construction of a new church. (The case was in federal court due to claims under the Religious Land Use and Institutionalized Persons Act.)

MICHAEL B. GERRARD is Andrew Sabin Professor of Professional Practice and director of the Center for Climate Change Law at Columbia Law School, and senior counsel to Arnold & Porter LLP. He is co-author of the treatise "Environmental Impact Review in New York" published by LexisNexis.

By  
**Michael B.  
Gerrard**



The case was *Fortress Bible Church v. Feiner*.<sup>2</sup> The court delivered a scorching assessment of actions of the Town of Greenburgh, in Westchester County. It found "that the Town used the SEQRA process...punitively because of the Church's refusal to make a significant donation of value or monetary payment to the Town and because of certain Town Board members' desire to delay the project and increase the expense of the SEQRA process for the Church." The court found that "[t]he majority of Town employees and consultants called to testify at trial had significant credibility issues. Such witnesses changed their testimony

The most striking decision of the year came from the Southern District of New York in a challenge to a town's refusal to allow the construction of a new church.

from prior testimony given at depositions, suddenly 'remembered' facts not recalled during depositions, and/or gave explanations to the court that were not believable."

The court concluded that "the Town's traffic concerns were exaggerated—if not completely fabricated," and that "Defendants' concerns regarding traffic safety were manufactured to justify denying Plaintiffs' SEQRA application." Moreover, "Defendants' blatant disregard for its discovery obligations...compels this Court to hereby sanction Defendants in the amount of \$190,000 for their spoliation of evidence and failure to comply with their discovery obligations."

The court directed the issuance of the requested land use approvals. Construction of the church remains on hold, however, pending the outcome of an appeal to the U.S. Court of Appeals for the Second Circuit.

The Village of Mamaroneck, also in Westchester County, was likewise rebuked for misuse of the SEQRA process in a long-running dispute over construction of seasonal residences at a beach and yacht club. The Village Planning Board issued an SEQRA findings statement that rejected these proposed residences, though the zoning in effect at the time of the application would have allowed them. The court found this to be "poorly veiled efforts to circuitously apply the subsequently-enacted zoning amendment," and that it was arbitrary and capricious for the Planning Board to "use their environmental review power to effectively re-zone the club."<sup>3</sup>

A mining company was not as successful in a challenge to a town's rezoning action that inhibited an expansion of its mining operations. The trial court had found that the town had satisfied the requirements of SEQRA, but that the rezoning action was overbroad and that the town could have used "less restrictive means" to achieve its objective. The Appellate Division, Second Department, reversed and found that "[t]his is a judgment as to the substance of the Town's action rather than the quality of the Town's review of the potential environmental impacts of the local law," which was inappropriate.<sup>4</sup>

### Alternatives

The most consistently losing argument for plaintiffs in 2010 was that an EIS had looked at too few alternatives. In every one of the five cases where this argument was raised, it was rejected. In a case concerning a proposed shopping center, the Second Department declared that "[t]he Planning Board was not required to consider the petitioners' proposed alternatives. Consideration of a smaller scale alternative is permissive, not mandatory, and alternatives are to be considered in light of the developer's objectives."<sup>5</sup>

Likewise, the Supreme Court, New York County, found that the city of New York was not required to consider a parkland proposal that a community group had put forward as an alternative for the rezoning of Coney Island.<sup>6</sup>

The other courts also agreed that not every conceivable alternative need be examined.<sup>7</sup>

### Standing

Five cases were dismissed because the plaintiffs were found to lack standing to sue.

In two of these, the activity that plaintiffs said would injure them, though facilitated by

the challenged governmental decision, was not actually approved or ordained by it, and therefore the injury remained speculative.<sup>8</sup> In one, a village that challenged an adjoining town's rezoning action was not allowed to assert the collective individual rights of its residents, and was unable to show with enough specificity that the governmental unit itself would be injured.<sup>9</sup> A business that would suffer economic injury was unable to establish environmental standing,<sup>10</sup> and tenants in a building who objected to revisions to the ground lease were unable to show that they were third-party beneficiaries of the lease.<sup>11</sup>

### Ripeness

Two cases were dismissed because they were not yet ripe. *Guido v. Town of Ulster Town Board* concerned a residential development. The EIS was challenged, but the Town Planning Board had not yet granted any of the fundamental approvals necessary to render the SEQRA decision final. The Appellate Division, Third Department, found that "[b]ecause the Planning Board's SEQRA determination continues to be subject to its own corrective action, there remains a possibility that the perceived injury to petitioners will be prevented or significantly ameliorated by such action and that the dispute will be rendered moot or academic."<sup>12</sup>

In *Historic Albany Foundation Inc. v. Joyce*, the planning board had given site plan approval for a project that would involve demolition of an historic building. The alleged harm would arise from the demolition itself, but no demolition permit had been issued, and thus the case was found to be unripe.<sup>13</sup>

### Supplemental EIS

In the protracted fight over the Atlantic Yards project in Brooklyn, the EIS had analyzed impacts assuming a build-out period of 10 years. After much litigation, the EIS was upheld. However, the state agency that was acting as lead on the project, the Empire State Development Corporation (ESDC), changed that period to 25 years. The Supreme Court in Brooklyn found that ESDC had not provided a reasoned elaboration for its determination not to require a supplemental EIS, but should have. However, the court did not stay the construction of the project based on this finding.<sup>14</sup> Various proceedings are ongoing with respect to these issues.

### Environmental Assessment

An Environmental Assessment (EA) is a document that summarizes a proposed action's likely environmental impacts and is used in determining whether a full EIS is needed. The standard EA form is an appendix to the SEQRA regulations of the New York State Department of Environmental Conservation (DEC), and has not changed in 30 years. But DEC has now circulated a proposed revised form, and the public comment period closed last month.

A notable feature of the proposed revision is that it requires quantification or other specifics on many items that had previously been noted more generally in the form EA:

- Expected air pollution emissions, including greenhouse gases;

- Hours of operation, during construction and during operation;
- Vehicle trips (not only maximum per hour, but also average per hour and total yearly);
- Details about pesticide application;
- Details about hazardous wastes or constituents to be generated;
- Details about streams, lakes, ponds, wetlands to be affected;
- Details concerning demand for community services created by project, such as schools, police, fire, libraries, and parks.

### Smart Growth

Chapter 433 of the New York Laws of 2010 is the State Smart Growth Public Infrastructure Policy Act. It prohibits New York's seven infrastructure agencies from approving, financing, or undertaking a "public infrastructure project" unless it meets the 10 smart growth criteria specified in the law "to the extent practical." Every such agency must issue a "written smart growth impact statement that the project, to the extent practicable, meets the relevant criteria set forth" in the law.

There has not yet been much public implementation of this requirement, but it has the potential to be significant. However, the statute specifies that there is no private right of action to enforce its implementation.

The most consistently losing argument for plaintiffs in 2010 was that the Environmental Impact Statement had looked at too few alternatives. In every one of the five cases where this argument was raised, it was rejected.

### Sea Level Rise Task Force

In 2007 the New York State Legislature created the Sea Level Rise Task Force (SLRTF) and gave it the task of assessing impacts to the state's coastlines from rising seas and recommending protective and adaptive measures. (The author was a member of the SLRTF.) It issued its final report to the Legislature on Dec. 31, 2010.

Among these recommendations was that DEC should identify areas that are vulnerable to sea level rise. For proposed projects in those areas, the report recommended either that unlisted actions in those areas would become Type I actions under SEQRA (meaning that they are more likely than others to require an EIS), or that presence in such an area would be added to the criteria utilized in determining whether preparation of an EIS is required.

To date, in the midst of a state fiscal crisis, there has been little discernible action on these recommendations.

.....●●.....

1. All these cases will be discussed in the forthcoming annual update to Michael B. Gerrard, Daniel A. Ruzow and Philip Weinberg, "Environmental Impact Review in New York" (LexisNexis).

2. 734 F.Supp.2d 409 (SDNY 2010).

3. *Mamaroneck Beach & Yacht Club Inc. v. Galvin*, Index No.

24348/07 (Sup. Ct. Westchester Co., June 18, 2010).

4. *Red Wing Properties Inc. v. Town of Milan*, 71 AD3d 1109, 898 NYS2d 593 (2d Dept.), lv. app. den., 15 NY3d 703, 906 NYS2d 817 (2010).

5. *Save Open Space v. Planning Board of the Town of Newburgh*, 74 AD3d 1350, 904 NYS2d 188 (2d Dept.), lv. app. den., 15 NY3d 36, 910 NYS2d 36 (2010).

6. *Save Coney Island Inc. v. City of New York*, 27 Misc.3d 1221(A), 910 NYS2d 765 (Sup. Ct. NY Co. 2010).

7. *Uptown Holdings, LLC v. City of New York*, 77 AD3d 434, 908 NYS2d 657 (1st Dept. 2010), appeal dismissed, 2011 WL 537041 (Feb. 16, 2011); *Alfred Condominium v. City of New York*, 2010 NY Slip Op 32178(U) (Sup. Ct. NY Co. 2010); *Save the Pine Bush v. NY Dept. Environmental Conservation*, Index No. 8897-09 (Sup. Ct. Albany Co., Feb. 5, 2010).

8. *Town of Henderson Town Board v. Town of Hounsfield Planning Board*, Index No. 10-0336 (Sup. Ct. Jefferson Co., July 26, 2010) (approval of wind turbines does not determine siting of transmission lines that carry the electricity they will generate); *Tribeca Comm. Assn. v. New York City Dept. of Sanitation*, 2010 NY Slip Op 30037 (U) (Sup. Ct. NY Co. 2010), aff'd, 2011 WL 1405414 (1st Dept. April 14, 2011) (settlement agreement requiring relocation of sanitation facilities did not dictate where they would go).

9. *Village of Pomona v. Town of Ramapo*, 30 Misc.3d 263, 914 NYS2d 566 (Sup. Ct. Rockland Co. 2010).

10. *C&A Carbone Inc. v. County of Rockland*, 2010 WL 3825740 (SDNY Sept. 30, 2010).

11. *Branch v. Riverside Park Community LLC*, 74 AD3d 634, 903 NYS2d 390 (1st Dept.), lv. app. den., 15 NY3d 70, 910 NYS2d 36 (2010).

12. 74 AD3d 1536, 902 NYS2d 710 (3d Dept. 2010).

13. 26 Misc.3d 1221(A), 907 NYS2d 100 (Sup. Ct. Albany Co. 2010).

14. *Develop Don't Destroy v. ESDC*, 29 Misc.3d 1220(A) (Sup. Ct. NY Co. 2010).