Developments in Federal and State Law

ENVIRONMENTAL LAW IN NEW YORK

ARNOLD & PORTER

MATTHEW BENDER

Volume 10, No. 11 November 1999

Judicial Review of Solid Waste Facility Siting and Permitting in New York

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(Part two of a two-part article)

Editor's Note: Part I of this article appeared in the October 1999 issue and provided background on solid waste facility siting and permitting decisions from courts and administrative tribunals in New York. Part I discussed various siting and permitting issues and challenges brought under SEQRA. Part II continues to focus on particular siting decisions and concludes with comments on the limited success of judicial challenges, and the much greater success of political challeneges, to solid waste facility decisions.

H. Eminent Domain

If necessary, counties and municipalities may use the power of eminent domain to condemn property needed for solid waste facilities. The acquisition of land by a governmental agency, whether through negotiation or the exercise of the power of condemnation, is an action subject to SEQRA.[63] In addition, the Eminent Domain Procedure Law (EDPL) has its own procedural requirements which must be followed.[64]

An interesting attempt to avoid the power of eminent domain arose in *Fulton County v. Village of Canajoharie*,[65] where a village, seeking to avoid the siting of a landfill within its borders, acquired the site for watershed protection purposes. The village then claimed that, since the land was therefore already in use for a public purpose, it could not be taken for a landfill. The court rejected this effort, finding it "an effort to 'short circuit' the appropriate regulatory process and ensure the result desired by the Village." Moreover, the court found that the village had not followed the prescribed procedures in acquiring the land for watershed protection.[66]

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In *Hubbard v. Town of Sand Lake*,[67] petitioner brought a proceeding pursuant to the EDPL to review a determination made by the Town of Sand Lake which condemned a portion of petitioner's property. The Town had leased from petitioner's predecessor-in-interest certain property for use as a sanitary landfill. About a year prior to the lease's expiration date, DEC ordered closure of the landfill and directed the town to monitor and maintain the property for 30 years. In order to comply with that order, the town sought to acquire a long-term interest in petitioner's property. When the parties failed to negotiate such interest, the town attempted to acquire the property by eminent domain.

Following a public hearing, the town concluded it was in the public interest to acquire the property. The Third Department annulled the town's determination, since it was not issued in accordance with SEQRA. Although the record revealed that the town undertook studies to evaluate the impacts to air, ground water, and soil, the record failed to show that the town "took a hard look" at those studies. In addition, the town failed to make a reasoned elaboration for the basis of its negative declaration.

In *Integrated Waste Systems, Inc. v. County of Cattaraugus*,[68] petitioners sought to prohibit the County from proceeding further with acquisition, by condemnation or otherwise, of land where petitioners sought to build a landfill, and its conversion to a county park. The matter was held unripe for review.

In *Broome County v. Havtur*,[69] property owners alleged that the condemnation of their land for a mass burn incinerator violated their equal protection rights. The court ruled that the owners failed to raise their objections on a timely basis, and rejected the challenge.

In *In re Town of Esopus*,[70] the court upheld the actions of a town in condemning the property for the construction of a landfill.

I. Recycling and Transfer Stations

One area where SEQRA suits have been more successful concerns challenges to negative declarations issued for recycling and transfer stations.

For example, a challenge to a resolution granting a special use permit to construct a material recovery facility and solid waste transfer station was successful in *Miller v. City of Lockport*.[71] The City of Lockport Common Council conducted SEQRA review of a proposed facility that would sort and repackage recyclable materials and act as a transfer station for municipal solid waste, including construction and demolition materials. The facility was to be built on land to be acquired from the City. Approximately 1.2 acres of the land to be transferred from the City to the developer was dedicated parkland. As part of the project, the City was to build a sewer line to service the facility and to reconstruct a nearby highway. The Common Council conducted SEQRA review and found in its EAF a number of adverse environmental impacts. Identified impacts included traffic problems, adverse impacts on open space, energy usage, odor, noise, and community character. Despite these findings, the Common Council concluded that all those impacts would be slight to moderate and issued a negative declaration.

The Fourth Department held that the City violated SEQRA in issuing the negative declaration. The court found that after identifying numerous adverse impacts in the EAF, the City could not impose conditions on the applicant to minimize those impacts. The City's declaration was effectively a conditional negative declaration, which is not permitted in a Type I action. Consequently, the court annulled the negative declaration and directed the City to prepare an EIS.

A negative declaration issued by DEC for a solid waste transfer station in Brooklyn was annulled because DEC had failed to look at the facility's impacts on traffic, zoning, community character, and cumulative impacts.[72] A recycling center in Greenwich Village, in Manhattan, was found to have such environmental significance that the preparation of an EIS was required before it could be permitted.[73] Similarly, a negative declaration was annulled for a solid waste transfer station, and an EIS ordered to be prepared.[74]

Another court found that the establishment of a municipal trash disposal system, including the closing of an existing landfill and the creation of a transfer station to collect waste for a more distant landfill, was an "action" subject to SEQRA. However, the court found it premature to determine whether an EIS was needed.[75]

In *Young v. Board of Trustees of the Village of Blasdell*,[76] the Village of Blasdell adopted a resolution approving lease of property to the Blasdell Development Group for the purpose of constructing and operating a garbage transfer facility. The Village and the Blasdell Development Group executed the lease and Blasdell Development submitted a solid waste permit application to DEC. The Village was designated as lead agency and conducted a SEQRA review, which resulted in the issuance of a negative declaration. Petitioners sought to annul the resolution and challenged the municipality's compliance with SEQRA. The Court of Appeals dismissed the action as time-barred.

However, in *Proemm v. St. Lawrence County Solid Waste Disposal Authority*,[77] petitioners claimed that the county agency had failed to consider the effects of recycling programs on the necessity for certain components of the solid waste management system, and on their size. The court ruled that the agency had taken a hard look at the issue, and dismissed the petition.

In *New York City Environmental Justice Alliance v. New York City Department of Sanitation*,[78] the court upheld the New York City Department of Sanitation's (DOS's) issuance of a negative declaration for an interim contract awarded to a waste management company for the receipt, processing, and transporting of residential waste. Due to the mandated closure of Staten Island's Fresh Kills Landfill, DOS solicited bids for vendors to receive,

process, and transport out-of-City approximately 2,500 tons per day of Brooklyn-generated residential waste. Petitioners, various individuals and community groups, challenged the implementation of an interim contract for the export of this waste and claimed that DOS failed to comply with SEQRA when awarding this contract. In addition, petitioners alleged that DEC failed to comply with SEQRA by the issuance of permits and/or permit modifications for certain waste transfer facilities. The court found that DOS properly studied traffic and traffic-related air and noise impacts that could reasonably be anticipated following implementation of the interim contract. Further, the court found that DEC was not required to treat permit modifications for the transfer facilities as new permits or substantial modifications, and thus upheld the issuance of a negative declaration for the modifications. The court noted that DEC reviewed and evaluated DOS's study for the interim contract, and that the agency agreed with DOS's conclusions.

On a related note, in *Neighbors Against Garbage v. Doherty*,[79] the First Department held that New York City failed to comply with Local Law 40's directive that it adopt rules "establishing requirements concerning siting of dumps [and] transfer stations in relation to other such facilities, residential premises and/or other premises." A lower court had ordered the New York City Department of Sanitation (DOS) to adopt such siting rules. The adoption of regulations for siting transfer stations in New York City was mandated by Local Law 40, which was enacted by the City Council in 1990. The case was brought by residents and elected representatives of communities that contain large clusters of transfer stations. The First Department found that rules adopted by DOS addressing permitting, design, operation and maintenance of transfer stations, but not their proximity and clustering, did not satisfy the law's requirements.

J. Segmentation

The SEQRA regulations define "segmentation" as "the division of the environmental review of an action such that various activities or stages are addressed under this Part [i.e., the SEQRA regulations] as though they were independent, unrelated activities, needing individual determinations of significance."[80] Segmentation can occur in two contexts. In the first context, the lead agency must decide whether a particular action requires an EIS. If a project that does require an EIS because it will have a significant effect on the environment is split into two or more smaller projects, each falling below the threshold for finding a significant effect, the entire project might evade environmental review.

The second situation concerns the scoping of an EIS: the decision about what activities will be considered part of the project for purposes of description, impact analysis, alternatives, and the other components of the EIS. Impermissible segmentation can arise when certain activities are wrongly excluded from the definition of the project. This may happen when there are different activities occurring at different times and in different places. By segmenting the project, a developer could minimize the project's apparent impact, and thereby make it more palatable to the agencies involved, as well as to community groups.

Challenges based on impermissible segmentation of solid waste facilities have been consistently unsuccessful. DEC's segmented review for a proposed solid waste transfer station was upheld in *Concerned Citizens for the Environment v. Zagata*.[81] A citizens group and local residents sought to annul DEC's approval of a proposed integrated solid waste management facility in the Village of Green Island. The proposed facility consisted of an incinerator, a materials recovery facility, and a solid waste transfer station. Phase One of the plan called for construction of the materials recovery facility and the transfer station, both of which were to become operational prior to the completion of the incinerator. The developer submitted an EIS for the construction and operation of only the transfer station. DEC granted the developer's request for a segmented review and issued the permit for the transfer station. Subsequently, petitioners sought a declaration that DEC improperly segmented the environmental review of the transfer station from that of the integrated facility.

The Third Department held that DEC properly conducted a segmented review of the project and dismissed the petition. In making its decision, the court noted the reasons for disfavoring segmentation. First is the danger that in considering related actions separately, a decision involving review of an earlier action may be "practically determinative" of a subsequent action. The second danger occurs when a project that would have a significant effect on the environment is broken up into two or more component parts that, individually, would not have as significant an environmental impact as the entire project. Similarly, this concern may arise where one or more aspects of the project might fall below the threshold requiring any review.

The court found that those concerns were not present in the project in issue. With regard to the first danger, the court held that the record supported DEC's determination that the transfer station was wholly independent of the materials recovery facility and the incinerator. Further, the court noted that the former had utility regardless of whether the balance of the project is ever approved and constructed. As for the second concern, DEC required the developer to submit to a full environmental review of the transfer station, and the related actions were clearly identified and discussed in a DEIS submitted for the integrated facility.

In *Atlantic States Legal Foundation v. County of Onondaga*,[82] an EIS for a resource recovery plant did not specifically discuss the landfill to receive the ash residue. Opponents claimed that this constituted impermissible segmentation. The court disagreed, and found that the EIS discussed what was then known about the landfill, and that the landfill itself would be subject to its own full environmental review at the appropriate time.

In *New York City Environmental Justice Alliance v. New York City Department of Sanitation*,[83] as discussed above, a number of individuals and community groups alleged that the DOS impermissibly segmented the environmental review process of

various components of DOS's plan to manage the City's solid waste. Specifically, petitioners contended that the Draft Solid Waste Management Plan embodied DOS' solid waste export plan and that the agency had taken the first two of five total steps in implementing the plan by awarding an interim contract for the processing and export of certain residential waste. However, the court disagreed and held that there were no concrete plans at present. The court noted that DOS merely articulated "vague policy statements" regarding plans for managing solid waste until the closure of Fresh Kills landfill, and that the interim contract had a geographically distinct scope, with potential impacts limited to that borough. In addition, the court held that reduced reliance on the landfill in the next few years does not mean that the interim contract will be the *de facto* long-term plan for the disposal of solid waste.

Another decision concerned a final EIS that had not considered transfer stations that would be included in a solid waste plan, though a subsequent supplemental EIS did consider them. The court ruled that the statute of limitations for challenging the final EIS had expired, so that the segmentation challenge concerning the final EIS could no longer be brought.[84] In *Ithaca v. Tompkins County Board of Representatives*,[85] a court found it permissible to separate consideration of a landfill site and volume reduction techniques, since the two were not dependent on each other. Similarly, in *Residents for a More Beautiful Port Washington v. Town of North Hempstead*,[86] deferral of detailed environmental assessments of possible plans for composting, cover-material mining and other solid waste management activities on the remainder of a site selected for a resource recovery plant was allowed. The court found that a Generic EIS looked at these projects, and the town was not yet committed to any of these activities.

K. Mitigation

Many times, mitigation measures are incorporated in a permit. Such measures attempt to minimize or avoid one or more environmental impacts identified in the SEQRA scoping process. For example, impacts to groundwater may be mitigated by maintaining permeable areas on the site or by instituting a program for monitoring water quality in adjacent wells.

In *Town of Northumberland v. Sterman*,[87] the Third Department rejected a challenge to a mitigation plan for the protection of the Northern Harrier, a threatened wildlife species. Opponents of a proposed landfill project sought to annul a permit to construct and operate the landfill. They contended that the DEC Commissioner was required to consider whether the lands in question qualified as "critical habitat" of the species. The Third Department disagreed and found that an ALJ held that the implementation of a mitigation plan would promote conservation of the species and ensure that the landfill project would not have an adverse impact. Having adopted the ALJ's position that the mitigation efforts would avoid the "taking" of the species, the court upheld the Commissioner's conclusion that it was unnecessary to consider whether the lands in issue constituted critical habitat.

Similarly, an attack on measures to mitigate adverse environmental impacts failed in *Aldrich v. Pattison*.[88] Plaintiffs contended that the final EIS for a resource recovery plant did not provide adequate measures to screen hazardous waste from entering the facility. The court found that the potential for adverse environmental impacts was so slight that the screening of incoming truckloads, and visual inspection of refuse being dumped, constituted sufficient mitigation. The measures proposed in the final EIS to control contaminated leachate were also found to be adequate.

A permit condition that a landfill operator be required to pay a portion of the costs of an onsite DEC environmental monitor was upheld as "rational and based on the nondiscriminatory application of established criteria."[89]

Miller v. City of Lockport[90] held that a lead agency may not issue a negative declaration for a Type I action and then mitigate several adverse impacts identified in an EAF by imposing conditions on the applicant. Such an attempt amounts to a conditional negative declaration and is not permitted under SEQRA for Type I actions.

L. Alternatives

SEQRA requires that each EIS include a discussion of alternatives to the proposed action.[91] In addition, under the SEQRA regulations, an EIS must "evaluate all reasonable alternatives."[92] The First Department has provided the leading statement on what this means:

> SEQRA does not require that every conceivable alternative must be considered before an EIS will be considered acceptable. Rather, the rule is one of reasonableness and balance. We do not believe that respondents must consider every possible alternative. What must be required is that information be considered which would permit a reasoned conclusion.[93]

Challenges to alternative site analysis for solid waste facilities have been routinely dismissed. In *Town of Charleston v. Montgomery, Otsego, Schoharie Solid Waste Management Authority*,[94] the Third Department upheld the selection of a landfill site, despite the fact that state-regulated wetlands were located within the site's boundaries. The solid waste management authority had prepared a "landfill siting schedule," which provided for a multi-phased site selection and identification process. An interim siting report identified 14 potential sites and, following preliminary site evaluations, three areas with the highest scores were marked. A final site selection report chose Site G, located within the Town of Charleston, as the primary site. Thereafter, the solid waste management authority prepared a Draft EIS and held a public hearing. In response to comments on the Draft EIS, the management authority arranged for a field investigation of the site by DEC to determine whether a certain wetland located within the site's boundaries was in fact state-regulated. Although DEC concluded that a state-regulated wetland was indeed located on the site, the management authority nevertheless maintained Site G as it primary site and prepared a Final EIS. Following a SEQRA Findings statement, the

management authority applied to DEC for a permit to construct and operate the proposed landfill.

The Town of Charleston challenged the site selection, and claimed that Site G should have lost its status as the primary site after the discovery of state-regulated wetlands. The court denied the petition and upheld the site selection process. The court noted that the management authority contemplated that each site would possess different attributes and that a careful weighing of those attributes would lead to selection of the most appropriate site. The court rejected petitioner's argument that the management authority ignored its own siting criteria, or that the selection criteria were so rigid as to require the process to begin from scratch once Site G was found to posses characteristics that were not wholly consistent with those criteria. Finally, the court upheld the SEQRA review and stated, "it is not the role of this court to. . .choose among alternatives."[95]

Aldrich v. Pattison[96] also upheld the alternatives analysis in the final EIS for a resource recovery plant. The county had reasonably found that the capacity of the major existing landfills would be exhausted within 15 years and that it would become increasingly expensive and impractical to bring existing landfills into compliance with new regulations, to develop new landfills, and to transport solid waste to more distant locations. Similarly, the consideration of alternative resource recovery technologies was upheld in *Residents for a More Beautiful Port Washington v. Town of North Hempstead.*[97]

In *Chenango, Inc. v. County of Chenango,*[98] the County was required by DEC to close its existing landfill and construct a new "state of the art" municipal landfill. The county undertook a study of 20 potential sites and prepared an EIS. When a site was selected, DEC granted the necessary permits for construction and operation. An adjoining landowner sued the County and alleged that the construction and operation of the landfill were negligent and constituted a nuisance. The property owner contended that odors, noise, and vibrations adversely affected the use and enjoyment of its own property. Regular monitoring and testing conducted by DEC revealed no regulatory violations or adverse affects upon water quality or the environment. The Third Department found that the complaint was based, not upon the landfill's negligent operation, but rather from its siting and its inherent attributes. The court held that the siting and operation of the landfill complied with regulatory requirements and dismissed the action.

The discussions above of *Town of Red Hook v. Dutchess County Resource Recovery Agency*[99] and *Town of Dryden v. Tompkins County Board of Representatives*[100] illuminate the degree of soil testing required in identifying and limiting alternative landfill sites.

M. Landfill Expansions

Several cases have upheld the procedures followed in expanding existing landfills.

For example, *New York Public Interest Research Group v. Town of Islip,*[101] upheld a landfill expansion without an EIS where the project was undertaken pursuant to a DEC consent decree. Similarly, the renewal of a landfill permit without issuance of a supplemental EIS was upheld where the renewal would allow expansion only in accordance with rigorous landfill technology standards.[102] DEC's rescission of permission for vertical expansion of a landfill was upheld where DEC concluded that it should have conducted SEQRA review before granting permit renewal.[103]

N. Landfill Closures

At the same time it is requiring that new, modern landfills be opened, DEC has mandated the closure of older, antiquated landfills. In *Town of Brunswick v. Jorling,*[104] DEC fined a town for operating an unpermitted landfill, and the town said DEC had not complied with SEQRA in ordering the landfill to be closed. The court held that DEC was taking enforcement action and was thus exempt from SEQRA. DEC was also upheld in its claims that certain towns on Oneida County were responsible for closure of an abandoned landfill that had been operated by a corporation in which the towns participated.[105]

The New York Court of Appeals upheld the issuance of an injunction requiring the closure of an illegal landfill, where the landfill operator had repeatedly ignored DEC warnings.[106]

In *Riverso v. Town of Clarkstown,*[107] the town had owned and operated a landfill since the 1950s. In 1990, pursuant to a consent order between the town and DEC, the landfill was officially closed. The consent order mandated that the town clean up the landfill. While the landfill was functioning, a portion of an adjoining landowner's property was subject to its operation. As part of the remediation plan adopted pursuant to the consent order, the town was required to clean up the adjoining landowner's property. By resolution, the town concluded that the public interest would be served by the acquisition of permanent and temporary easements on 2.5 acres of the adjoining land. The property owner brought suit to challenge this determination. The New York Court of Appeals dismissed the challenge and found that the consent order permitted the town to "obtain whatever easements, right-of-way. . .or authorizations that are necessary to perform the town's obligations."

The closure of a landfill has had far-reaching implications for Westchester County. In 1972 the federal government filed a lawsuit seeking to force the county to close its Croton Point Landfill because of water pollution caused by the landfill's leachate. The county then told the court that it had assumed full responsibility for the disposition of all solid waste generated within the county. The landfill was finally closed in 1986, but the county had not developed sufficient capacity to dispose of all its waste. In 1990, the U.S. District Court held the county in contempt of court for not having carried out its self-assumed obligation to devise and implement a plan to dispose of all the county's solid waste. The court ordered the county to devise such a plan or face a fine of $1,000,000 plus $10,000 a day.[108] However, on appeal the U.S. Court of Appeals for the Second Circuit reversed the order of contempt.[109] The court held that "no clear and convincing proof of noncompliance with a clear

and unambiguous order" had been provided in the case. The court found that the consent decree's provision requiring the County to develop long-range plans for solid waste disposal could not be interpreted to require the County to implement construction of a facility, without regard to commitments from municipal and private carters for delivery of solid waste to the facility.

A county, municipality or private landfill operator may be liable under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) for the cleanup of any hazardous substances released from a closed landfill, even if they operated the landfill in what appeared at the time to have been a sound manner.[110]

On a related note, as noted above, in 1996, the Governor and Mayor of New York City jointly announced an agreement to stop taking solid waste as of December 31, 2001 to the Fresh Kills Landfill, located on Staten Island. Fresh Kills is the largest landfill in the state. Soon after this agreement, the Governor signed a law mandating the cessation of waste acceptance at Fresh Kills by January 1, 2002.[111] Creation of disposal capacity for New York City's waste, and transfer stations to allow the waste to reach the point of ultimate disposal, are dominating current solid waste siting activity in New York State. A key issue in this regard, but one that is beyond the scope of this article, is "flow control"—the issue of whether a state, county or municipality may regulate the flow of solid waste across its borders.[112]

IV. CONCLUSION

The most striking fact that emerges from this review is how few judicial challenges have been successful. Only a small handful of cases have invalidated siting decisions, mainly because the courts have given considerable deference to the technical expertise of DEC and local solid waste agencies. Courts have been very reluctant to substitute their own views of the merits of solid waste facility siting decisions for those of the agencies.

However, the poor success rate of lawsuits challenging solid waste facility siting decisions must be viewed in light of two important realities. First, DEC exerts a very active role in the technical review of solid waste applications. Although the agency tends not to second-guess siting decisions, it frequently refuses to issue construction permits until it is fully satisfied that all technical requirements have been met. This process often takes years to complete.

Second, many attempts at facility siting have been derailed not because of court decisions, but because of local opposition. Such opposition usually concerns a particular site and is often grounded in sound technical objections. Local opposition may become so intense that the agency attempting to site the facility either reopens the siting process, or abandons it altogether.

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[63] 6 N.Y.C.R.R. § 617.4(b)(4).

[64] *See generally* EDPL arts. 2, 3, and 4.

[65] 136 A.D.2d 115, 525 N.Y.S.2d 948 (3d Dept. 1988).

[66] *See also* Dutchess Resource Recovery Agency v. Town Board of Washington, 145 Misc.2d 933, 548 N.Y.S.2d 414 (Sup. Ct. Dutchess Co. 1989) (upholding resource recovery agency's standing to challenge town's condemnation attempt, but not reaching merits).

[67] 211 A.D.2d 1005, 622 N.Y.S.2d 126 (3d Dept. 1995).

[68] No. 1998/3206 (Sup. Ct. Erie Co. Sept. 11, 1998).

[69] 159 A.D.2d 790, 551 N.Y.S.2d 1007 (3d Dept. 1990), *app. den'd*, 76 N.Y.2d 709, 561 N.Y.S.2d 913 (1990).

[70] 162 A.D.2d 829, 557 N.Y.S.2d 732 (3d Dept. 1990), *app. den'd*, 77 N.Y.2d 801, 566 N.Y.S.2d 586 (1991).

[71] 210 A.D.2d 955, 620 N.Y.S.2d 680 (4th Dept. 1994), *app. den'd*, 85 N.Y.2d 807, 628 N.Y.S.2d 50 (1995).

[72] Golten Marine Co. v. DEC, No. 16010/90 Sup. Ct. Queens Co., Jan. 3, 1991, *aff'd*, 193 A.D.2d 742, 598 N.Y.S.2d 59 (2d Dept. 1993).

[73] DiLucia v. Davis, N.Y.L.J., Nov. 16, 1982, at 11:1 (Sup. Ct. N.Y. Co. 1982).

[74] Meschi v. DEC, 114 Misc.2d 877, 452 N.Y.S.2d 553 (Sup. Ct. Albany Co. 1982). *See also* City of Ithaca v. Tompkins County Board of Representatives, No. 90-1617 (Sup. Ct. Chemung Co., Aug. 10, 1990) (EIS prepared, and upheld, for transfer/baling and recycling facility); A & M Brothers, Inc. v. Waller, 150 A.D.2d 563, 541 N.Y.S.2d 237 (2d Dept. 1989), *app. den'd*, 74 N.Y.2d 615, 549 N.Y.S.2d 960 (1989) (allegation that municipal regulations concerning transfer stations were not enacted in compliance with SEQRA; petition dismissed because of statute of limitations); Douglaston and Little Neck Coalition v. Sexton, 145 A.D.2d 480, 535 N.Y.S.2d 634 (2d Dept. 1988) (conditioned negative declaration issued for sanitation garage; challenge barred by statute of limitations).

[75] Rauscher v. Village of Boonville, 131 Misc.2d 264, 499 N.Y.S.2d 832 (Sup. Ct. Oneida Co. 1986).

[76] 89 N.Y.2d 846, 652 N.Y.S.2d 729 (1996).

[77] (Sup. Ct. St. Lawrence Co., March 23, 1989).

[78] No. 42723/98 (Sup. Ct. Kings Co. June 25, 1999).

[79] 245 A.D.2d 81, 665 N.Y.S.2d 649 (1st Dept. 1997).

[80] 6 N.Y.C.R.R. § 617.2(ag).

[81] 243 A.D.2d 20, 672 N.Y.S.2d 956 (3d Dept. 1998), *app. den'd*, 92 N.Y.2d 808, 678 N.Y.S.2d 594 (1998).

[82] Sup. Ct. Onondaga Co., Feb. 28, 1990.

[83] No. 42723/98 (Sup. Ct. Kings Co. June 25, 1999).

[84] Proemm v. St. Lawrence County Solid Waste Disposal Authority, (Sup. Ct. St. Lawrence Co., March 23, 1989).

[85] No. 90-1617 (Sup. Ct. Chemung Co., Aug. 10, 1990).

[86] 149 A.D.2d 266, 545 N.Y.S.2d 297 (2d Dept. 1989).

[87] 246 A.D.2d 729, 667 N.Y.S.2d 505 (3d Dept. 1998), *app. den'd*, 92 N.Y.2d 801, 677 N.Y.S.2d 71 (1998).

[88] 107 A.D.2d 258, 486 N.Y.S.2d 23 (2d Dept. 1985).

[89] C.I.D. Landfill, Inc. v. DEC, 167A.D.2d 827, 561 N.Y.S.2d 936 (4th Dept. 1990), *app. den'd*, 77 N.Y.2d 809, 571 N.Y.S.2d 912 (1991).

[90] 210 A.D.2d 955, 620 N.Y.S.2d 680 (4th Dept. 1994), *app. den'd*, 85 N.Y.2d 807, 628 N.Y.S.2d 50 (1995). *But see* Merson v. McNally, 90 N.Y.2d 742, 665 N.Y.S.2d 605 (1997) (holding that, if there has been sufficient public participation, a conditional negative declaration might be allowed for some Type I actions, despite DEC regulations seemingly to the contrary).

[91] E.C.L. §§ 8-0109(4); 8-0109(2)(d); 8-0109(2).

[92] 6 N.Y.C.R.R. § 617.9(b)(1).

[93] Coalition Against Lincoln West v. City of New York, 94 A.D.2d 483, 491, 465 N.Y.S.2d 170 (1st Dept.), *aff'd*, 60 N.Y.2d 805, 469 N.Y.S.2d 689 (1983).

[94] 235 A.D.2d 608, 651 N.Y.S.2d 708 (3d Dept. 1997), *app. den'd*, 89 N.Y.2d 812, 657 N.Y.S.2d 405 (1997).

[95] 235 A.D.2d at 611, 235 A.D.2d at 711.

[96] 107 A.D.2d 258, 486 N.Y.S.2d 23 (2d Dept. 1985).

[97] 149 A.D.2d 266, 545 N.Y.S.2d 297 (2d Dept. 1989). Similarly *see* Citizens for Responsible Waste Management v. Western Finger Lakes Solid Waste Management Authority, No. 2046/88 (Sup. Ct. Monroe Co., Sept. 15, 1988).

[98] 256 A.D.2d 793, 681 N.Y.S.2d 640 (3d Dept. 1998).

[99] 146 Misc.2d 723, 552 N.Y.S.2d 191 (Sup. Ct. Dutchess Co. 1990).

[100] 144 Misc.2d 873, 545 N.Y.S.2d 236 (Sup. Ct. Tompkins Co. 1989), *aff'd*. 157 A.D.2d 316, 557 N.Y.S.2d 638 (3d Dept. 1990), *aff'd*, 78 N.Y.2d 331, 574 N.Y.S.2d 930 (1991).

[101] 71 N.Y.2d 292, 525 N.Y.S.2d 798 (1988).

[102] Orange Environment v. Jorling, 161 A.D.2d 1069, 558 N.Y.S.2d 205 (3d Dept. 1990). For more on the Orange County landfill controversy, *see* S. Thornton and M. Edelstein, "Citizen Enforcers or Bothersome Meddlers? A Plaintiff's Perspective on the Orange County Landfill Case," 10 Envtl. L. in N.Y. 6, at 81 (June 1999). *See also* BPS Associates v. Town of Smithtown, No. 89-10849 (Sup. Ct. Suffolk Co., Oct. 5, 1989) (upholding findings statement concerning proposed lateral expansion of sanitary landfill, largely on the basis of the voluminous studies undertaken by the town); Heimbach v. Williams, 136 Misc.2d 1, 517 N.Y.S.2d 393 (Sup. Ct. Albany Co. 1987) (DEC's failure to mail written notice of determination of whether application for landfill expansion was complete within 15 days of receipt of Draft EIS meant that the application was deemed complete); Town of Goshen v. Al Turi Landfill, No. 4489/83 (Sup. Ct. Orange Co., Sept. 29, 1983) (concerning town's compliance with SEQRA in enacting local law barring landfill expansion).

[103] Modern Landfill v. Jorling, 161 A.D.2d 1112, 555 N.Y.S.2d 937 (4th Dept. 1990), *app. den'd*, 76 N.Y.2d 715, 565 N.Y.S.2d 766 (1990).

[104] 149 A.D.2d 832, 540 N.Y.S.2d 351 (3d Dept. 1989).

[105] Towns of Augusta, et al. v. Jorling, 158 A.D.2d 984, 551 N.Y.S.2d 137 (4th Dept. 1990), *app. den'd*, 75 N.Y.2d 711, 557 N.Y.S.2d 309 (1990).

[106] State of New York v. Barone, 74 N.Y.2d 332, 547 N.Y.S.2d 269 (1989), *stay granted*, 74 N.Y.2d 702, 543 N.Y.S.2d 390 (1989), *aff'd*, 74 N.Y.2d 332, 547 N.Y.S.2d 269 (1989).

[107] 244 A.D.2d 494, 664 N.Y.S.2d 337 (2d Dept. 1997), *app. den'd*, 92 N.Y.2d 808, 678 N.Y.S.2d 593 (1998).

[108] United States v. O'Rourke, 740 F. Supp. 969 (S.D.N.Y. 1990).

[109] United States v. O'Rourke, 943 F.2d 180 (2d Cir 1991).

[110] Shapiro v. Alexanderson, 741 F. Supp. 472 (S.D.N.Y. 1990), *reargument den'd*, 743 F. Supp. 268 (S.D.N.Y. 1990).

[111] L. 1996, ch. 107.

[112] *See generally* C & A Carbone, Inc. v. Town of Clarkstown, 114 S.Ct. 1677 (1994); SSC Corp. v. Smithtown, 66 F.3d 502 (2d Cir. 1995), *cert. den'd*, 116 S.Ct. 1419 (1996); USA Recycling v. Town of Babylon, 66 F.3d 1272 (2d Cir. 1995), *cert. den'd*, 116 S.Ct.1452 (1996); Harvey & Harvey, Inc. v. County of Chester, 68 F.3d 788 (3d Cir. 1995), *cert. den'd*, 116 S.Ct. 1265 (1996); Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County, 48 F.3d 701 (3d Cir. 1995). *See also* G. Oberhaus, "The Dormant Commerce Clause Dumps New Jersey's Solid Waste 'Flow Control' Regulations? Now What? Possible Constitutional Alternatives to the Current 'Flow Control' System." 29 Rutgers L.J. 439 (Winter 1998); M. Suhrhoff, "Solid Waste Flow Control and the Commerce Clause: Circumventing Carbone," 7 Alb. L.J. Sci & Tech. 185 (1996); R. Roddewig & G. Sechen, "The Second Circuit Defines the Limits of Carbone," 28 Urb. Law. 847 (Fall 1996).