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

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(Part one of a two-part article)

I. INTRODUCTION

The efforts of counties, municipalities and private companies throughout New York State to site landfills and other solid waste facilities often spark intense local controversy, which frequently leads to litigation. This article surveys New York State court decisions relating to the siting and permitting of solid waste facilities. The article focuses on judicial rulings, and does not review administrative decisions issued by the New York State Department of Environmental Conservation (DEC). This article concentrates on litigation brought under the State Environmental Quality Review Act (SEQRA), where the majority of solid waste facility siting challenges can be found.

The article begins by describing the three sets of regulations that govern the solid waste facility siting process. It then focuses on particular siting issues brought in a variety of SEQRA cases, ranging from the statute's applicability to more specific issues such as mitigation and the discussion of alternatives. The article concludes that few judicial solid waste facility challenges have been successful, mostly due to a considerable amount of deference given by the courts to DEC technical experts and local solid waste agencies.

II. BACKGROUND

The New York State Solid Waste Management Program is administered regionally through three sets of regulations. First, the Solid Waste Management Facilities Regulations (also known as the "Part 360" regulations)[1] provide the State standards

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and criteria for all solid waste management facilities. Second, regulations under the SEQRA[2] govern the environmental review process for solid waste facility siting and permitting. Finally, the uniform permit application rules describe the procedures used in the processing of applications for solid waste facility permits.[3]

In addition to these rules, the Environmental Conservation Law requires the preparation of a statewide solid waste management plan and local solid waste management plans.[4] Applications for permits to construct solid waste management facilities, made by or on behalf of a municipality, are not complete unless a local plan was in effect.[5] Most local plans are prepared at the county level, and are often accompanied by Generic Environmental Impact Statements (GEISs).

III. Issues in Solid Waste Facility Siting Cases

A. Applicability of SEQRA

The New York State Legislature enacted SEQRA to ensure that impacts on the state's physical environment are carefully considered whenever state and local agencies make decisions on proposed activities. Such activities include those (1) that the agency undertakes directly; or (2) for which it provides some form of funding assistance; or (3) for which the agency issues permits or approvals.[6] Activities subject to SEQRA's provisions are defined broadly as "actions."[7]

The SEQRA statute describes two basic types of "actions."[8] The first type includes "projects or activities."[9] Specifically, the SEQRA regulations state that actions consist of "projects or physical activities, such as construction or other activities that may affect the environment by changing the use, appearance or condition of any natural resource or structure."[10] The second type of activity is comprised of "policy, regulations and procedure-making."[11] The SEQRA rules further define this type of action to include "agency planning and policy making activities that may affect the environment and commit the agency to a definite course of future decisions,"[12] and the "adoption of agency rules, regulations and procedures, including local laws, codes, ordinances, executive orders and resolutions that may affect the environment."[13] Although seemingly straight-forward, defining what kinds of activities qualify as "actions" under SEQRA is not so easy.

For example, *Seymour v. County of Saratoga*[14] concerned the validity of a county resolution which called for the siting of a landfill. The County of Saratoga had contracted with an engineering firm to develop a solid waste management plan. The plan was approved by DEC and called for the establishment of a county landfill at a site to be selected in accordance with a general methodology. The engineering firm commenced the site selection process and issued an interim report, which ultimately selected three primary sites. After performing further tests, the firm recommended that a landfill be constructed at the "Kobor Road" site. Thereafter, the Board of Supervisors adopted a resolution that accepted the recommendation and authorized the firm to prepare an environmental assessment form (EAF) and undertake other investigations to construct the landfill.

Opponents brought suit to annul the resolution, and asserted that its passage constituted an action under SEQRA. The County of Saratoga contended that the resolution labeled the Kobor Road site as the "preferred" site, rather than a "final" site, and therefore did not qualify as an action. The Third Department disagreed and found that the resolution was an action. The court noted that the resolution was a broad-based grant of power to engage in many different activities, all focused on the construction and ultimate operation of a landfill at the Kobor Road site. Among other things, the resolution authorized the County Attorney to initiate eminent domain proceedings to acquire the property.

Integrated Waste Systems, Inc. v. County of Cattaraugus[15] involved a challenge by two waste companies to prohibit the County of Cattaraugus from condemning, for a proposed county park, land where they intended to site a landfill. By resolution, the Cattaraugus County Legislature had adopted a Final Generic Environmental Impact Statement (FGEIS) regarding the proposed action and issued a positive finding with respect to it. In paragraph four of the resolution, it stated, 'these SEQRA Findings are the basis for decisions on the proposed action, but do not by themselves constitute a decision, and do not commit the lead agency to making those decisions.' The Supreme Court, Erie County, found that the challenge was unripe for review. The court held that the resolution did not constitute a final and binding determination by the Cattaraugus County Legislature, and therefore could not be challenged in court.

In *Concerned Citizens of Cattaraugus County, Inc. v. Town Board of the Town of Farmersville*,[16] an earlier decision regarding the same proposed landfill, a citizens group sought to annul a contract made between the Town Board of the Town of Farmersville and the landfill developer. The court found that the contract, under which the town agreed to allow the landfill under certain circumstances, did not constitute an action subject to review under SEQRA and dismissed the petition. Accordingly, the town board and the corporation were entitled to proceed in implementation of their respective rights and obligations as set forth in the landfill contract. One reason that the contract may not have qualified as an "action" in this case might be that DEC had already undertaken SEQRA review for the landfill in issue. Thus the court found there was no need to duplicate DEC's review for purposes of the contract itself.

Another issue concerning the applicability of SEQRA arose in *Marbletown Residents Association v. Tocco*,[17] where a town board passed a resolution approving the purchase of land for a landfill, and conducted a permissive referendum authorizing the purchase. The court annulled the purchase because the town board vote and the referendum were subject to SEQRA, since each "constituted significant authorization for a specific proposal and committed the Town 'to a definite course of future decisions' . . . and thus are actions within the meaning of SEQRA and its implementing regulations."[18]

In *Modern Landfill, Inc. v. Jorling*,[19] DEC had renewed a permit for a sanitary landfill to allow an increase in height from 37 to 180 feet. DEC then concluded that it had erroneously circumvented SEQRA, and it annulled the renewal. The Fourth Department upheld DEC's action, finding that DEC had the authority to rescind its prior determination when it discovered the error.

In *Nassau/Suffolk Neighborhood Network v. Town of Oyster Bay*,[20] the court refused to require completion of an EIS prior to the issuance of requests for proposals to firms to design, build and operate a resource recovery plant. However, the court stated that an EIS might be needed before any proposal is accepted or any contracts are signed, to ensure that the range of alternatives is not prematurely limited.

Although facility siting or expansion is usually subject to SEQRA review, a significant exception to this rule should be noted. That is, administrative enforcement proceedings and judicial decrees are exempt from SEQRA.[21] In *New York Public Interest Research Group v. Town of Islip*,[22] DEC had entered into a consent order requiring the Town of Islip to expand vertically its Blydenburg landfill, in a way designed to reduce the threat that hazardous wastes would be released from the landfill. Since the expansion was so mandated, the Court of Appeals agreed that it was not subject to SEQRA.

Similarly, in *Town of Brunswick v. Jorling*,[23] DEC ordered closure of an unlicensed landfill and fined the operator. The operator sued, charging that DEC had to undergo SEQRA procedures before taking this action. The court dismissed the petition since DEC's actions fit within the enforcement exemption.

However, in *Hubbard v. Town of Sand Lake*,[24] the court rejected the town of Sand Lake's contention that SEQRA review is unnecessary where the project is simply the taking of the subject property and is not the closure of a landfill. The court noted, "if that postulate were accepted, no condemnation proceeding would ever require environmental review except a taking involving more than 100 acres."[25] Eminent domain proceedings are discussed further in the second part of this article.

An increase in the fees charged private carters to use a city landfill has been held to be a routine or continuing agency administrative function and this not subject to SEQRA.[26]

The post-SEQRA issuance of Part 360 permits to landfills that had been in operation before the effective date of SEQRA has been deemed to be "grandfathered," where there was no accompanying change in design or operations.[27]

B. Lead Agency

Under SEQRA, the lead agency has primary authority for determining whether a specific action requires an Environmental Impact Statement (EIS) and for complying with the various procedural steps mandated by the statute. The procedures for the designation of a lead agency are set forth in the regulations,[28] with the governing principle that the lead agency should be the agency principally responsible for carrying out or approving the action. If only one agency is proposing to undertake an action or fund or approve the action, then it automatically becomes the lead agency.[29] However, frequently more than one agency will be involved in undertaking, funding or approving the action. SEQRA defines each such agency as an "involved agency."[30] Involved agencies have several responsibilities, although they do play a much more passive role in the SEQRA process. For example, involved agencies have a responsibility to provide the lead agency with information in order to aid in the determination of environmental significance, to identify issues, to comment on the EIS, and to express concerns and to participate in any public hearings.[31]

Where an action is undertaken directly by a governmental agency (often found in the siting and construction of a landfill), the most likely lead agency will be the governmental authority sponsoring the action. The lead agency can have a profound effect on the outcome of the future action, since it holds a great deal of authority in the decision-making process. Opponents of solid waste facility projects are often critical of the designation of the governmental sponsor as the lead agency, in part out of a fear that the project sponsor will not be motivated to consider environmental impacts objectively.

Although a number of decisions have annulled project approvals because the lead agency did not have implementation,[32] approval or funding responsibility, this has not occurred in the solid waste area. In *Town of Coeymans v. City of Albany*,[33] the Town of Coeymans challenged the propriety of DEC's designation of its Region 4 office as the lead agency for the siting, construction and operation of a municipal solid waste landfill within its borders. In 1989, resolutions were adopted by several municipalities, including the Town of Coeymans and the City of Albany, which authorized the creation of the Albany New York Solid Waste Energy Recovery Waste Shed Planning Unit (Planning Unit). The Planning Unit's responsibilities included the coordination and preparation of a solid waste management plan for the region, since the available disposal capacity in the city's existing landfill was running out. After an evaluation process, the City of Albany submitted a permit application to DEC for the siting, construction and operation of the landfill within the Town of Coeymans. When DEC's Region 4 office was named as lead agency, the town challenged the designation and sought a declaration that the City of Albany would be subject to its local laws in the event that a permit was granted. The town's laws limited the disposal of waste and operation of

landfills within its boundaries and prohibited the importation of solid waste generated elsewhere in the state.

The Third Department dismissed the proceeding on ripeness grounds. The court held that the lead agency designation is not a final determination, but rather is a preliminary step in the decision-making process. The court noted that the town failed to demonstrate any actual, concrete injury flowing from the lead agency designation. Even though the lead agency coordinates all of the steps in the environmental review process, the court found that the town was not precluded from either participating in the SEQRA review, or submitting information addressing its concerns. Finally, the court held that a declaratory judgment is not available when the existence of a controversy is contingent upon the happening of a future event, such as the purchase of a parcel to serve as the landfill facility.

The Court of Appeals affirmed the Fourth Department's determination that a village lacked jurisdiction to serve as lead agency in *Young v. Board of Trustees of the Village of Blasdell*.[34] After the Village of Blasdell enacted a resolution that authorized the lease of village property for the construction and operation of a solid waste transfer facility, opponents of the project sought to annul the resolution and lease for noncompliance with SEQRA. Although the court dismissed the proceeding as time-barred, it noted that in the interests of judicial economy, the Appellate Division had concluded that the village could not serve as lead agency for the SEQRA review. The review was related to the development group's application to DEC for a permit to operate the waste transfer facility. In response to the Fourth Department's decision, DEC reestablished itself as lead agency.

A village was found to have been a permissible lead agency, though its only role would have been its decision whether or not to convey land it owned to the county for construction of a resource recovery plant.[35] In another resource recovery plant case, a county was found to be a proper lead agency, even though certain other involved agencies had not been given notice of this selection on a timely basis.[36]

C. Soil Testing

To prevent leachate migration and the ultimate contamination of groundwater, soil testing is a critical component of landfill siting. Two SEQRA cases have invalidated a solid waste facility siting process where the court found inadequate soil testing was conducted.

A permit to construct and operate a landfill was invalidated in *Town of Northumberland v. Sterman*[37] in part because the town was denied access to the site to conduct soil tests. After Saratoga County filed a permit application, an issues conference was held at which the Town of Northumberland requested permission to access the proposed landfill site to conduct soil permeability testing. An Administrative Law Judge (ALJ) found that the town had demonstrated the existence of an adjudicable issue with respect to whether the county's permeability test results were reliable and hence whether the county had adequately proven entitlement to a variance from the groundwater separation requirement. Accordingly, the ALJ granted the town's request for access. However, on appeal, DEC modified this decision and found that further testing was unwarranted, although the Commissioner agreed that an issue had been raised regarding the safety of groundwater.

The Third Department annulled DEC's decision not to grant access to the site, as well as its decision to grant the groundwater separation variance (and the permit, which depended thereon). The court noted that although the Commissioner had found an adjudicable issue existed with respect to the county's permeability findings, he nevertheless concluded that a re-evaluation of existing data would be sufficient to resolve the issue. However, if the county's data was not accurate or reliable, repeated evaluation of that data would not be sufficient to find any flaws in the design of the system. The court held that the Commissioner provided no reasonable basis for denying the Town access to perform testing.

In *Town of Red Hook v. Dutchess County Resource Recovery Agency*,[38] the county prepared a final EIS designating a particular site for an ash residue landfill. The EIS acknowledged that a complete program of soil testing had not been completed, but said that this work would be conducted as part of the Part 360 permit application process. The court ruled that the county, by approving the final EIS and the accompanying SEQRA findings, had committed itself to this site. This commitment, the court found, was premature, for the testing had not been completed. The court declared that the county "has purported to adopt a *Final* EIS concerning the siting of a landfill without studying the environmental impact of that landfill on groundwater. One must ask what is 'final' about that? Can the Agency have taken a 'hard look' at the environmental impact of a landfill without a hydrogeological study? Such an EIS cannot be defined as 'final' when it defers such an obvious study."[39]

However, a limited testing program was upheld in *Town of Dryden v. Tompkins County Board of Representatives*,[40] where 23 potential landfill sites were identified but only nine were field tested, because the owners of the remaining 14 refused access. Though the county could have used its eminent domain powers to gain access to the remaining sites for testing, the court ruled that this was unnecessary, for the county was not obligated to study every conceivable site.

D. EIS Contents

The contents required in both a Final EIS and a Draft EIS are set forth in the SEQRA regulations.[41] In reviewing the contents of EISs and thus determinations of significance, New York courts have uniformly come to apply a three part test in which the lead agency must show: (1) it identified the relevant areas of environmental concern; (2) it took a "hard look" at those areas; and (3) the agency made a "reasoned elaboration" of the basis for its determination.[42] Many SEQRA cases have challenged the contents of EISs prepared for solid waste facilities. With only a few exceptions, these challenges have been unsuccessful.

The main reason for the lack of successful challenges to EIS

contents is that courts grant considerable deference to the expertise of lead agencies. For example, in *Aldrich v. Pattison*,[43] a challenge to the Poughkeepsie resource recovery facility, the Second Department systematically rejected each of the opponents' objections to the contents of the EIS. Similarly, in *Schiff v. Board of Estimate*,[44] the Second Department rejected a challenge to the contents of an EIS prepared for the proposed Brooklyn resource recovery plant. The court ruled in *Schiff*:

> The "hard look" standard does not authorize a court to conduct a de novo analysis of every environmental impact of, or alternative to, a proposed project which was included in, or omitted from, an environmental impact statement An agency's substantive obligations under SEQRA must be viewed in light of a rule of reason the environmental impact statement is to be analytical, not encyclopedic, and the degree of detail with which each factor must be discussed will vary with the circumstances and nature of the proposal So long as the agency honors its mandate regarding environmental protection by complying strictly with prescribed procedures and giving reasoned process, the court is not permitted to second-guess the agency's choice.[45]

Similar reasoning has been applied by numerous courts in rejecting challenges to several other resource recovery plants[46] and landfills.[47] One successful challenge to the contents of an EIS was the *Town of Red Hook* case mentioned above in the section on soil testing.

Golten Marine Co., Inc. v. New York State Department of Environmental Conservation[48] was a case that annulled DEC's issuance of a negative declaration approving the issuance of permits to construct a solid waste transfer station. Neighboring businesses sought to review DEC's issuance of a negative declaration, as well as the permits issued pursuant to the agency's SEQRA findings. The Second Department annulled the negative declaration and permits where DEC failed to review identified areas of environmental concern. Specifically, DEC declined to review traffic, zoning, community character, and cumulative impacts of the proposed facility, noting that these were primarily local issues under the jurisdiction of various city agencies. A "revised negative declaration" purported to consider the environmental areas of concern; however, the court found that DEC was required to conduct a de novo review of the issues. The court held that DEC had an independent obligation to analyze the listed areas of environmental concern.

It should also be noted that in 1990 the State Legislature amended the text of SEQRA to require that EISs for all types of projects contain a discussion of the project's impacts on solid waste, where 'applicable and significant.'[49]

E. Public and Agency Participation

Under SEQRA, the public must be given an opportunity to comment on the contents of every DEIS.[50] Once the lead agency accepts a DEIS, SEQRA requires that it issue a notice of completion informing other involved agencies and the public that the DEIS is available for review and public comment.[51] If a technical objection to a DEIS is not raised during this comment period, it has been held that this objection cannot later be raised in litigation challenging the final EIS; the objector will be deemed to have failed to exhaust his administrative remedies.[52]

As mentioned, SEQRA also requires lead agencies to consult with all involved agencies.[53] Delayed consultation with the State Office of Parks, Recreation and Historic Preservation (OPRHP) was excused when the lead agency did not realize until fairly late in the process that location of a resource recovery plant in a particular site could affect property within OPRHP's jurisdiction.[54]

F. Supplemental EIS

Under SEQRA, a supplemental EIS may be required if changes are proposed for the project which may result in a significant environmental effect; newly discovered information arises about significant adverse effects which was not previously addressed; or a change in circumstances arises which may result in a significant adverse effect.[55] Several lawsuits have sought to require supplemental EIS for solid waste facilities. None has been successful.

In *Village of Hudson Falls v. DEC*,[56] DEC granted the Adirondack Resource Recovery Agency permits in 1986 to build a plant. Nearly two years later, one of the three counties generating waste to be processed at the facility, as well as the county whose landfill was to receive the ash and bypass wastes, withdrew from the project. The village where the resource recovery plant would have gone demanded a supplemental EIS, but DEC refused and renewed the permit. The court upheld DEC's decision, finding that permit renewals are not subject to the same rigorous review requirements as original permit applications.[57]

Another decision ruled that it was premature to require a supplemental EIS where the permit application was still pending before DEC, which could consider the necessity of new analysis.[58]

In *Atlantic States Legal Foundation v. County of Onondaga*,[59] a supplemental EIS was prepared and challenged. DEC had prepared an EIS for a resource recovery plant in the early 1980s. The project was dormant for several years. Then the county assumed lead agency status and prepared a supplemental EIS, but it did not start the process over. The court found that the county sufficiently updated a 1981 evaluation of alternative technologies. No new sites were evaluated since 1981, even though one of the reasons the selected site was chosen in 1981 was because of its proximity to steam markets, which later ceased to be a factor. The county reevaluated this selection in 1987 and found it adequate. The court refused to disturb this finding.[60]

In *Hallenbeck v. Onondaga County Resource Recovery Agency*,[61] the Town of Van Buren sought to compel the Onondaga County Resource Recovery Agency to prepare a supplemental

EIS in development of a county landfill site. Without going into much detail, the Fourth Department deferred to the agency's determination and found that it took the requisite "hard look" at the possible and probable environmental effects of the proposed landfill. The court upheld the agency's finding that the town failed to present new information to compel the preparation of an SEIS and dismissed the proceeding.

G. Organization of Responsibility

Another issue arising in challenges to solid waste facilities concerns organization of responsibility. For example, the Town of North Hempstead, in Nassau County, transferred operation of a landfill to a solid waste management authority. Opponents claimed that the Town Law required a permissive referendum before this transfer could take place. The court disagreed, and found that no referendum was necessary.[62]

This article will be concluded in the November issue of Environmental Law in New York.

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[1] 6 N.Y.C.R.R. Part 360. In 1993, the Part 360 regulations were substantially revised to address 40 C.F.R. Part 258, federal criteria for municipal solid waste landfills, and to address legal, technological, and policy developments that occurred after 1988. The Part 360 regulations also include a section that allows certain materials to exit the solid waste stream when beneficially used. The Beneficial Use Determination (BUD) regulations identify certain solid wastes that, when used in a specific manner, are no longer subject to regulation under Part 360.

[2] 6 N.Y.C.R.R. Part 617, implementing the SEQRA statute, E.C.L. Art. 8. For a comprehensive review of the SEQRA statute and accompanying issues, *see* Gerrard, Ruzow and Weinberg, *Environmental Impact Review in New York*, (Matthew Bender Publishers).

[3] 6 N.Y.C.R.R. Part 621. When permit applications reach the hearing stage, DEC's permit hearing procedures govern. 6 N.Y.C.R.R. Part 624.

[4] E.C.L. 27-0103, 0107

[5] E.C.L. 27-0707(2)(b).

[6] E.C.L. § 8-0105(4).

[7] E.C.L. § 8-0109(1), 8-0109(2).

[8] E.C.L. § 8-0105(4).

[9] E.C.L. § 8-0105(4)(i).

[10] 6 N.Y.C.R.R. § 617.2(b)(1).

[11] E.C.L. § 8-0105(4)(ii).

[12] 6 N.Y.C.R.R. § 617.2(b)(2).

[13] 6 N.Y.C.R.R. § 617.2(b)(3).

[14] Seymour v. County of Saratoga, 190 A.D.2d 276, 598 N.Y.S.2d 93 (3d Dept. 1993).

[15] Integrated Waste Systems, Inc. v. County of Cattaraugus, No. 1998/3206 (Sup. Ct. Erie Co. Sept. 11, 1998).

[16] Concerned Citizens of Cattaraugus County, Inc. v. Town Board of the Town of Farmersville, 221 A.D.2d 1010, 634 N.Y.S.2d 280 (4th Dept. 1995).

[17] Marbletown Residents Association v. Tocco, Index. No. 2975-83 (Sup. Ct. Albany Co., Feb. 8, 1983).

[18] Marbletown Residents Association v. Tocco, Index. No. 2975-83 at 6.

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

[20] Nassau/Suffolk Neighborhood Network v. Town of Oyster Bay, 134 Misc. 2d 979, 513 N.Y.S.2d 921 (Sup. Ct. Nassau Co. 1987).

[21] 6 N.Y.C.R.R. § 617.5(c)(29).

[22] New York Public Interest Research Group v. Town of Islip, 71 N.Y.2d 292, 525 N.Y.S.2d 798 (1998).

[23] Town of Brunswick v. Jorling, 149 A.D.2d 832, 540 N.Y.S.2d 351 (3d Dept. 1989).

[24] Hubbard v. Town of Sand Lake, 211 A.D.2d 1005, 622 N.Y.S.2d 126 (3d Dept. 1995)

[25] Hubbard v. Town of Sand Lake, 211 A.D.2d at 1006, 622 N.Y.S.2d at 127.

[26] Presidents Council of Trade Waste Ass'ns v. City of New York, 142 Misc.2d 135, 536 N.Y.S.2d 656 (Sup. Ct. N.Y. Co. 1988).

[27] Salmon v. Flacke, 91 A.D.2d 867, 458 N.Y.S.2d 755 (4th Dept. 1982), *aff'd*, 61 N.Y.2d 946 (1984); Northeast Solite Corp. v. Flacke, 91 A.D.2d 57, 458 N.Y.S.2d 291 (3d Dept. 1983).

[28] 6 N.Y.C.R.R. § 617.6.

[29] 6 N.Y.C.R.R. § 617.6(b)(1).

[30] 6 N.Y.C.R.R. § 617.2(s).

[31] 6 N.Y.C.R.R. § 617.3(e).

[32] *See e.g.*, Coca-Cola Bottling Co. v. Board of Estimate, 72 N.Y.2d 674, 536 N.Y.S.2d 33 (1988); Glen Head-Glenwood Landing Civic Council v Oyster Bay, 88 A.D.2d 484, 453 N.Y.S.2d 732 (1982).

[33] Town of Coeymans v. City of Albany, 237 A.D.2d 856, 655 N.Y.S.2d 172 (3d Dept.), *app. denied*, 90 N.Y.2d 803, 661 N.Y.S.2d 79 (1997).

[34] Young v. Board of Trustees of the Village of Blasdell, 89 N.Y.2d 846, 652 N.Y.S.2d 729 (1996).

[35] Congdon v. Washington County, 134 Misc.2d 765, 512 N.Y.S.2d 970 (Sup. Ct. Washington Co. 1986), *aff'd*, 130 A.D.2d 27, 518 N.Y.S.2d 224 (3d Dept. 1987), *app. denied*, 70 N.Y.2d 610, 522 N.Y.S.2d 110 (1987).

[36] Residents of Bergen Believe in the Environment and Democracy, Inc. v. County of Monroe, 159 A.D.2d 81, 558 N.Y.S.2d 422 (4th Dept), *app. denied*, 77 N.Y.2d 803, 568 N.Y.S.2d 15 (1990). *See also* Residents for a More Beautiful Port Washington v. DEC, 153 A.D.2d 746, 545 N.Y.S.2d 306 (2d Dept. 1989).

[37] Town of Northumberland v. Sterman, 246 A.D.2d 729, 667 N.Y.S.2d 505 (3d Dept.), *app. denied*, 92 N.Y.2d 801, 677 N.Y.S.2d 71 (1998).

[38] Town of Red Hook v. Dutchess County Resource Recovery Agency, 146 Misc.2d 723, 552 N.Y.S.2d 191 (Sup. Ct. Dutchess Co. 1990).

[39] *Emphasis in original.*

[40] Town of Dryden v. Tompkins County Board of Representatives, 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).

[41] 6 N.Y.C.R.R. § 617.9.

[42] *See* H.O.M.E.S. v. New York State Urban Development Corp., 69 A.D.2d 222, 418 N.Y.S.2d 827 (4th Dept. 1979). *See also* Gerrard, Ruzow and Weinberg, *Environmental Impact Review in New York*, at § 7.04[3].

[43] Aldrich v. Pattison, 107 A.D.2d 258, 486 N.Y.S.2d 23 (2d Dept. 1985).

[44] Schiff v. Board of Estimate, 122 A.D.2d 57, 504 N.Y.S.2d 215 (2d Dept. 1986).

[45] Schiff v. Board of Estimate, 122 A.D.2d at 59.

[46] Residents for a More Beautiful Port Washington v. Town of North Heampstead, 149 A.D.2d 266, 545 N.Y.S.2d 297 (2d Dept. 1989); Congdon v. Washington Co., 134 Misc.2d 765, 512 N.Y.S.2d 970 (Sup. Ct. Washington Co. 1986), *aff'd*, 130 A.D.2d 27, 518 N.Y.S.2d 224 (3d Dept. 1987), *app. denied*, 70 N.Y.2d 610, 522 N.Y.S.2d 110 (1987).

[47] Town of Charleston v. Montgomery, Otsego, Schoharie Solid Waste Management Authority, 235 A.D.2d 608, 651 N.Y.S.2d 708 (3d Dept.), *app. denied*, 89 N.Y.2d 812, 657 N.Y.S.2d 405 (1997); Hallenbeck v. Onondaga County Resource Recovery Agency, 225 A.D.2d 1036, 639 N.Y.S.2d 627 (4th Dept. 1996); Town of Candor v. Flacke, 82 A.D.2d 951, 440 N.Y.S.2d 769 (3d Dept. 1981); Mohawk Environmental Services, Inc. v. Town of Root, No. 97-1113 (Sup. Ct. Schenectady Co., Oct. 16, 1997); BPS Associates v. Town of Smithtown, No. 89-10849 (Sup. Ct. Suffolk Co., Oct. 5, 1989); Rainbow Alliance for a Clean Environment v. Fulton County, (Sup. Ct. Fulton Co., Sept. 17, 1985).

[48] Golten Marine Co., Inc. v. New York State Department of Environmental Conservation, 193 A.D.2d 742, 598 N.Y.S.2d 59 (2d Dept. 1993).

[49] L. 1990 Ch. 182, amending E.C.L. § 8-0109(2)(i).

[50] 6 N.Y.C.R.R. § 617.11.

[51] 6 N.Y.C.R.R. § 617.9(a)(3).

[52] Aldrich v. Pattison, 107 A.D.2d 258, 486 N.Y.S.2d 23 (2d Dept. 1985).

[53] 6 N.Y.C.R.R. 617.11(a).

[54] Citizens for Clean Air v. DEC, 135 A.D.2d 256, 524 N.Y.S.2d 585 (3d Dept.), *app. dismissed*, 72 N.Y.2d 853, 532 N.Y.S.2d 363 (1988). *See also* Town of Coeymans v. City of Albany, 237 A.D.2d 856, 655 N.Y.S.2d 172 (3d Dept.), *app. denied*, 90 N.Y.2d 803, 661 N.Y.S.2d 179 (1997) (noting that involved agency was not precluded from participating in the SEQRA process or submitting information addressing its concerns).

[55] 6 N.Y.C.R.R. § 617.9(a)(7).

[56] Village of Hudson Falls v. DEC, 158 A.D.2d 24, 557 N.Y.S.2d 702 (3d Dept. 1990), *aff'd*, 77 N.Y.2d 983, 571 N.Y.S.2d 908 (1991).

[57] The decision of the participant counties not to prepare a supplemental EIS was upheld in Greenwich Citizens Committee v. Counties of Warren and Washington Industrial Development Agency, 164 A.D.2d 469; 565 N.Y.S.2d 239 (3d Dept. 1990), *app. denied*, 77 N.Y.2d 810, 571 N.Y.S.2d 912 (1991).

[58] Recycle v. Lacatena, 163 A.D.2d 693, 558 N.Y.S.2d 299 (3d Dept. 1990).

[59] Atlantic States Legal Foundation v. County of Onondaga, (Sup. Ct. Onondaga Co. Feb. 28, 1990), *aff'd*, 174 A.D.2d 1053, 573 N.Y.S.2d 14 (4th Dept. 1991).

[60] A supplemental EIS for a resource recovery plant was also upheld in Proemm v. St. Lawrence County Solid Waste Disposal Authority (Sup. Ct. St. Lawrence Co. March. 23, 1989).

[61] Hallenbeck v. Onondaga County Resource Recovery Agency, 225 A.D.2d 1036, 639 N.Y.S.2d 627 (4th Dept. 1996).

[62] New York Public Interest Research Group, Inc. v. Town of North Hempstead, 153 A.D.2d 743, 545 N.Y.S.2d 308 (2d Dept. 1989).

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