

## Environmental Law

## Expert Analysis

# Review of Developments Under State Environmental Quality Review Act

The courts issued 41 decisions in 2017 under the State Environmental Quality Review Act (SEQRA). This annual review will summarize the most important of these, and the patterns they represent.

### Revised Regulations

However, the most important SEQRA development in several years occurred on June 28, 2018, when the Department of Environmental Conservation (DEC) adopted the first major revisions to its SEQRA regulations in 20 years. The revisions, which have been in the works since at least 2012, do not amount to the comprehensive streamlining that some had hoped for or the gutting that some had feared. They make

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the scoping process mandatory (though it already is in New York City). They also expand the Type II list—the list of kinds of actions that never require an environmental impact statement (EIS). Among the new items on the list:

- Green infrastructure upgrades or retrofits;
- Installation of solar arrays on closed landfills, cleaned-up brownfield sites, wastewater treatment facilities, and sites zoned for industrial use, or solar canopies on residential and commercial parking facilities;
- Installation of solar arrays on an existing structure not listed on the National or State Register of Historic Places;

- Reuse of a residential or commercial structure, or structure containing mixed residential and commercial uses;

- Acquisition and dedication of parkland;

Land transfers in connection with one, two or three family housing; and

- Construction and operation of certain anaerobic digesters at operating publicly owned landfills.

The revised regulations, which take effect on Jan. 1, 2019, also require EIS's to discuss "measures to avoid or reduce both an action's environmental impacts and vulnerability from the effects of climate change such as sea level rise and flooding." This would seem to require discussion of the official sea level rise projections that DEC issued in February 2017 (and codified as Part 490 of DEC's regulations) for projects in the affected areas.

As a related matter, on June 20, DEC issued two draft documents growing

out of the Community Risk and Resilience Act of 2014, and designed to help guide consideration of sea level rise, storm surge and flooding—State Flood Risk Management Guidance, and Guidance for Smart Growth Public Infrastructure Assessment. DEC is holding public information and comment meetings, and accepting written comments through August 20.

Governor Andrew Cuomo's State of the State address in January spoke of these efforts, and proposed to develop a comprehensive program

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to adapt to and prepare for extreme weather associated with climate change. He said that DEC will update and improve its maps of wetlands and coastal risk areas. He indicated the Department of State will recommend changes to the State Fire Prevention and Building Code that will increase climate resiliency. He said that State agencies will also lead by example with the implementation of individual adaptation plans based on the risks identified by the State Vulnerability Assessment. Finally, the governor announced that the State will provide financial support for state-of-the-art local resiliency plans to create a pipeline of projects to increase the flood resiliency of communities by pro-

tecting streams, coasts and critical infrastructure—such as hospitals, transit systems, bridges, water and wastewater infrastructure, dams, culverts and levees—as well as homes and small businesses. Interagency response teams will also conduct at least 40 emergency flood response trainings in communities across New York annually, he indicated.

### Cases

Of last year's SEQRA decisions from the courts, 19 upheld negative declarations (agency decisions not to require an EIS) and five annulled negative declarations. Eight upheld EIS's and two struck down EIS's.

The Court of Appeals issued one decision under SEQRA in 2017, *Friends of P.S. 163 v. Jewish Home Lifecare, Manhattan*, 30 N.Y.3d 416 (2017). It concerned a proposed high-rise nursing home on a vacant lot on West 97th Street in Manhattan. Parents of students in an elementary school next door, and tenants in nearby apartment buildings, brought Article 78 proceedings against the State Health Department for approving the project. The State Supreme Court, New York County, annulled the approval on the grounds that the Health Department's EIS had not given enough consideration to two proposed mitigation measures: erecting a tent over the construction site to make sure that soil that might be contaminated with lead would not

be blown into the neighborhood; and installing central air conditioning in the elementary school so that the windows could stay closed and construction noise would not disrupt student learning. The Appellate Division reversed, and the Court of Appeals agreed with the Appellate Division. The appellate courts both found that the Department of Health had taken a hard look at the possibility of airborne lead levels, and at the best methods to mitigate construction noise. This is in keeping with a long line of cases where the courts defer to the judgments of administrative agencies in matters within their expertise.

As is the case every year, the great majority of the year's SEQRA decisions upheld the challenged actions. We will just highlight some of the few that did not:

The Appellate Division, Second Department ordered the preparation of a supplemental EIS to assess the presence of wetlands on the site of a housing development in the Town of Ramapo, where the town planning board had relied on a 2007 letter from the Corps of Engineers about a smaller project rather than requiring a new jurisdictional determination from the Corps. *Shapiro v. Planning Board of the Town of Ramapo*, 155 A.D.3d 741 (2d Dept. 2017). A separate decision required a supplemental EIS for that project concerning the

impacts of placing the homes in close proximity to a natural gas pipeline. *Youngewirth v. Town of Ramapo Town Board*, 155 A.D.3d 755 (2d Dept. 2017).

Ramapo was keeping the Second Department busy, and the court affirmed the nullification of the approval of a commercial development straddling the Towns of Ramapo and Haverstraw because there had not been consideration of whether a supplemental EIS was needed in view of the addition of a 16-pump gasoline station to the project. *Green Earth Farms Rockland v. Town of Haverstraw Planning Board*, 153 A.D.3d 823 (2d Dept. 2017).

The Fourth Department annulled a negative declaration for a supermarket in Rochester, where the presence of soil contamination on the site had been ignored. *Rochester Eastside Residents for Appropriate Development v. City of Rochester*, 150 A.D.3d 1678 (4th Dept 2017).

The Supreme Court for Seneca County required the preparation of an EIS for a local law adopted by the Town of Seneca Falls that would allow an existing solid waste landfill to stay open, despite an earlier law requiring its closure. *Waterloo Contractors v. Town of Seneca Falls Town Board*, 2017 NY Misc. Lexis 3540 (Sup. Ct. Seneca Co. Sept. 13, 2017).

The Supreme Court for Broome

County vacated the site plan approval and negative declaration for a natural gas compressor facility in the Town of Fenton near a public park and near an intersection needed for access to a school. *Chenango Valley Central School District v. Town of Fenton Planning Board*, 2017 NY Misc. Lexis 3243 (Sup. Ct. Broome Co. Aug. 28, 2017). The Supreme Court in Suffolk County required the preparation of a supplemental EIS for a town-home development in Southampton to consider whether there was

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adequate water supply. *Shinnecock Neighbors v. Town of Southampton*, 55 Misc. 3d 1224(A), 61 N.Y.S.3d 193 (Sup. Ct. Suffolk Co. 2017).

In every one of these cases where the plaintiffs prevailed, the flaw found by the courts was the failure to prepare an EIS or a supplemental EIS.

A different sort of flaw was found in *Mutual Aid Association of the Paid Fire Department of the City of Yonkers v. City of Yonkers*, 55 Misc. 3d 1218(A) (Sup. Ct. Westchester Co. 2017). An EIS had been prepared for a mixed use residential and commercial development. The EIS spoke of

the need for additional firefighting staffing and equipment, and the City Council's findings statement approving the project indicated that the project sponsor had agreed to build a new firehouse. The development opened in 2011, but no firehouse was built. A labor union representing Yonkers firefighters sued, alleging that the safety of their members and of the public at large was imperiled by the lack of firefighting facilities. The court rejected the City's motion to dismiss the claims that its failure to build the new firehouse violated the SEQRA findings statement. However, the court declined to issue an injunction requiring the City to build the firehouse; it merely allowed the litigation to proceed.