

ENVIRONMENTAL LAW

Mark A. Chertok & Jonathan Kalmuss-Katz[†]

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INTRODUCTION

This Article will discuss notable developments in the law relating to the New York State Environmental Quality Review Act (SEQRA) for the *Survey* period of 2010-2011.¹ While there have been no major SEQRA decisions from the Court of Appeals since 2009,² a series of regulatory proposals, new legislative enactments, and appellate division and supreme court rulings have updated, clarified, and, in some instances, changed SEQRA practice in the interim.

[†] Mark A. Chertok is a partner, and Jonathan Kalmuss-Katz an associate, at Sive, Paget & Riesel, P.C., in New York, NY (www.sprlaw.com). Both authors practice environmental law at the firm.

1. The *Survey* period covered in this article is July 1, 2010 to June 30, 2011. A prior survey addresses SEQRA developments in the first half of 2010. *See generally* Mark A. Chertok & Ashley S. Miller, *Environmental Law: Developments in the Law of SEQRA, 2009-10 Survey of New York Law*, 61 SYRACUSE L. REV. 721 (2011).

2. *See generally* *Save the Pine Bush, Inc. v. Common Council of Albany*, 13 N.Y.3d 297, 918 N.E.2d 917, 890 N.Y.S.2d 405 (2009); *Anderson v. Town of Chili Planning Bd.*, 12 N.Y.3d 901, 913 N.E.2d 407, 885 N.Y.S.2d 21 (2009).

In 2010, for the first time in two decades, the Department of Environmental Conservation (DEC) proposed revisions to its Full Environmental Assessment Form and Short Environmental Assessment Form, aimed at bringing those documents up to date with current SEQRA practice. Environmental Assessment Forms are widely used in SEQRA practice as they comprise the principal factual predicate upon which a government agency will determine whether a proposed action requires an Environmental Impact Statement (EIS), or whether the agency can issue a negative determination (i.e. that no EIS is required) and terminate the SEQRA process. DEC also published a new edition of its “SEQRA Handbook” in August 2010, providing an updated resource for practitioners and reviewing courts.

In June 2011, the New York State Legislature reauthorized Article X of the Public Service Law, establishing an alternate environmental review process for new and substantially modified power plants. Article X, which was previously in effect from 1992 through 2003, displaces SEQRA for covered projects, though the two regimes share many common elements.

Case law also continued to develop on key issues such as the supplementation of environmental review and the concomitant need for a supplemental EIS (SEIS), the “hard look” standard under which SEQRA challenges are judged, and private party standing to pursue a SEQRA claim. In *Bronx Committee for Toxic Free Schools v. New York City School Construction Authority*, the Appellate Division, First Department, required an SEIS analyzing the maintenance and monitoring requirements within a Site Management Plan (SMP) prepared pursuant to the State Brownfield Cleanup Program (BCP).³ That decision marked a significant change to the SEQRA review for remedial projects and the procedure and standards for requiring an SEIS, and set the stage for the Court of Appeals’ next SEQRA ruling. A series of recent decisions in state and federal court addressed a lead agency’s obligations in determining the environmental significance of proposed actions, or lack thereof, under SEQRA.⁴ Finally, in *Rizzo v. Verizon CCC LLC*, the Supreme Court, Niagara County, upheld a landowner’s standing to challenge the SEQRA review concerning a neighboring parcel of land, despite the petitioner’s lack of residence or

3. 86 A.D.3d 401, 402, 927 N.Y.S.2d 45, 46 (1st Dep’t 2011), *leave to appeal granted*, No. 2011-988, 2011 N.Y. Slip Op. 90176, at 1 (2011). The appeal is likely to be argued and decided in 2012.

4. *See infra* Part IV.B.

physical presence on the property.⁵

I. SUMMARY OVERVIEW OF SEQRA

SEQRA requires governmental agencies to consider the potential environmental impacts of their actions prior to rendering certain defined discretionary decisions, called “actions” under SEQRA.⁶ “The primary purpose of SEQRA is ‘to inject environmental considerations directly into governmental decision making.’”⁷ The law applies to discretionary actions by the State of New York, its subdivisions, or local agencies that have the potential to impact the environment, including direct agency actions, funding determinations, promulgation of regulations, zoning amendments, and permits and similar approvals.⁸ A primary component of SEQRA is the EIS, which—in the event its preparation is required—documents the proposed action, its reasonably anticipated significant adverse impacts on the environment, practicable measures to mitigate such impacts, unavoidable significant adverse impacts, and reasonable alternatives that achieve the same basic objectives as the proposal.⁹

Actions are grouped into three categories in the SEQRA regulations issued by DEC: Type I, Type II, or Unlisted.¹⁰ Type II actions are enumerated specifically and include only those actions that have been determined not to have the potential for a significant impact, and thus are not subject to review under SEQRA.¹¹ Type I actions, also specifically enumerated, “are more likely to require the preparation of an EIS than Unlisted actions.”¹² Unlisted Actions are not enumerated,

5. *See generally* No. 142489, 2011 N.Y. Slip Op. 50505(U), at 7 (Sup. Ct. Niagara Cnty. 2011).

6. SEQRA is codified at Environmental Conservation Law (ECL) sections 8-0101 to 8-0117. N.Y. ENVTL. CONSERV. LAW §§ 8-0101-8-0117 (McKinney 2005 & Supp. 2012); *see also* Mark A. Chertok & Ashley S. Miller, *Environmental Law: Climate Change Impact Analysis in New York Under SEQRA, 2007-08 Survey of New York Law*, 59 SYRACUSE L. REV. 763, 764-65 (2009).

7. *Akpan v. Koch*, 75 N.Y.2d 561, 569, 554 N.E.2d 53, 56, 555 N.Y.S.2d 16, 19 (1990) (quoting *Coca Cola Bottling Co. of N.Y., Inc. v. Bd. of Estimate of N.Y.C.*, 72 N.Y.2d 674, 679, 532 N.E.2d 1261, 1263, 536 N.Y.S.2d 33, 35 (1988)). For a useful overview of the substance and procedure of SEQRA, *see Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 414-16, 494 N.E.2d 429, 434-35, 503 N.Y.S.2d 298, 303-04 (1986).

8. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2 (2000) (defining actions and agencies subject to SEQRA).

9. *Id.* § 617.9(b)(1)-(2), (5).

10. *Id.* § 617.2(ai)-(ak).

11. *Id.* § 617.5(a) (Type II actions).

12. *Id.* § 617.4(a) (Type I actions). This presumption may be overcome, however, if an Environmental Assessment demonstrates the absence of significant, adverse

but rather are a catchall of those actions that are neither Type I nor Type II.¹³ In practice, the vast majority of actions are Unlisted.

Before undertaking an action (except for a Type II action), an agency must determine whether the proposed action may have one or more significant adverse environmental impacts, called a “determination of significance.”¹⁴ Where multiple decision-making agencies are involved, there is usually a “coordinated review” pursuant to which a designated lead agency makes the determination of significance.¹⁵ If the lead agency “determine[s] either that there will be no adverse environmental impacts or that the . . . impacts will not be significant,” no EIS is required, and instead the lead agency issues a negative declaration.¹⁶ If the answer is affirmative, the lead agency may in certain cases impose conditions on the proposed action to sufficiently mitigate the potentially significant adverse impacts or, more commonly, the lead agency issues a positive declaration requiring the preparation of an EIS.¹⁷

If an EIS is prepared, typically the first step is the scoping of the contents of the Draft EIS. Although scoping is not actually required under SEQRA or DEC’s implementing regulations, it is recommended by DEC and commonly undertaken when an EIS is required.¹⁸ Scoping involves focusing the EIS on relevant areas of environmental concern, with the goal (not often achieved) of eliminating inconsequential subject

environmental impacts. 6 N.Y.C.R.R. 617.4(a)(1); *see, e.g.*, *Hells Kitchen Neighborhood Ass’n v. N.Y.C.*, 81 A.D.3d 460, 461-62, 915 N.Y.S.2d 565, 567 (1st Dep’t 2011) (“[W]hile Type I projects are presumed to require an EIS, an EIS is not required when, as here, following the preparation of a comprehensive Environmental Assessment Statement (EAS), the lead agency establishes that the project is not likely to result in significant environmental impacts or that any adverse environmental impacts will not be significant.”).

13. 6 N.Y.C.R.R. 617.2(ak).

14. *Id.* §§ 617.6(a)(1)(i), 617.7.

15. *Id.* § 617.6(b)(2)(i), (3)(ii).

16. *Id.* § 617.7(a)(2), (d).

17. *Id.* §§ 617.2(h), 617.7(d). This is known as a conditioned negative declaration (CND). For a CND, the lead agency must issue public notice of its proposed CND and, if public comment identifies potentially significant adverse environmental impacts that were not previously addressed or were inadequately addressed, or indicates the mitigation measures imposed are substantively deficient, an EIS must be prepared. 6 N.Y.C.R.R. 617.7(d)(1)(iv), (2), (3). CNDs cannot be issued for Type I actions or where there is no applicant (i.e. the project sponsor is a government agency). *Id.* § 617.7(d)(1). In practice, CNDs are not favored and not frequently employed.

18. DIV. OF ENVTL. PERMITS, N.Y. STATE DEP’T OF ENVTL. CONSERVATION, THE SEQRA HANDBOOK 103 (3rd ed. 2010), *available at* http://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf. Scoping, when it occurs, is governed by 6 NYCRR 617.8. SEQRA is an alternate acronym for SEQRA.

matters.¹⁹ The Draft EIS, once prepared and accepted as adequate and complete by the lead agency, is then circulated for public and other agency review and comment.²⁰ Although not required, under DEC's implementing regulations, the lead agency typically holds a legislative hearing with respect to the Draft EIS.²¹ That hearing is typically combined with other hearings required for the proposed action.²²

A Draft EIS must include an alternatives analysis comparing the proposed action to a "range of reasonable alternatives . . . that are feasible, considering the objectives and capabilities of the project sponsor."²³ This analysis includes a "no action alternative," which evaluates the changes that are likely to occur in the absence of the proposed action.²⁴

In addition to "analyz[ing] the significant adverse impacts and evaluat[ing] all reasonable alternatives,"²⁵ the Draft EIS should include:

[W]here applicable and significant:

- (a) reasonably related short-term and long-term impacts, cumulative impacts and other associated environmental impacts;
- (b) those adverse environmental impacts that cannot be avoided or adequately mitigated if the proposed action is implemented;
- (c) any irreversible and irretrievable commitments of environmental resources that would be associated with the proposed action should it be implemented;
- (d) any growth-inducing aspects of the proposed action;
- (e) impacts of the proposed action on the use and conservation of energy . . . ; [and]
- (f) impacts of the proposed action on solid waste management and its consistency with the state or locally adopted solid waste management plan²⁶

The next step is the preparation of a Final EIS, which addresses any project changes, new information and/or changes in circumstances,

19. 6 N.Y.C.R.R. 617.8(a).

20. *Id.* § 617.8(b), (d), (e).

21. *Id.* § 617.9(a)(4).

22. *See id.* § 617.3(h).

23. *Id.* § 617.9(b)(5)(v).

24. 6 N.Y.C.R.R. 617.9(b)(5)(v). The "no action alternative" does not necessarily reflect current conditions, but rather the of-right development and other changes that could be anticipated in the absence of the proposed action. *See Uptown Holdings, L.L.C. v. N.Y.C.*, 77 A.D.3d 434, 436, 908 N.Y.S.2d 657, 660 (1st Dep't 2010).

25. 6 N.Y.C.R.R. 617.9(b)(1).

26. *Id.* § 617.9(b)(5)(iii)(a)-(f).

and responds to all substantive comments on the Draft EIS. After preparation of the Final EIS, and prior to undertaking or approving an action, each acting agency must issue findings that the provisions of SEQRA and the DEC implementing regulations have been met and, “consider[ing] the relevant environmental impacts, facts and conclusions disclosed in the final EIS,” must “weigh and balance relevant environmental impacts with social, economic and other considerations”²⁷ The agency must then:

[C]ertify that consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable.²⁸

The substantive mitigation requirement of SEQRA is an important feature of the statute—a requirement notably absent from SEQRA’s parent federal statute, the National Environmental Policy Act (NEPA).²⁹

II. REGULATORY DEVELOPMENTS

A. *Proposed Environmental Assessment Form Revisions*

While SEQRA litigation and commentary often focus on the requirements for an EIS,³⁰ in practice SEQRA review begins, and frequently ends, well before the preparation of an EIS. Most proposed actions without significant adverse environmental impacts are instead approved following a negative declaration (or, on occasion, a conditional negative declaration (CND)).

To guide determinations of environmental significance, DEC has issued Environmental Assessment Forms (EAF) that solicit information about a proposed action’s anticipated impacts.³¹ There are two versions of this form: a Full EAF for Type I actions³² and a Short EAF for

27. *Id.* §§ 617.11(a), (d)(1)-(2).

28. *Id.* § 617.11(d)(5).

29. 42 U.S.C. §§ 4321-4370f (2006); *see also* Jackson v. N.Y. State Urban Dev. Corp., 67 N.Y.2d 400, 415, 494 N.E.2d 429, 434, 503 N.Y.S.2d 298, 303 (1986).

30. *See, e.g.,* Jackson, 67 N.Y.2d at 415, 494 N.E.2d at 435, 503 N.Y.S.2d at 304 (“The heart of SEQRA is the Environmental Impact Statement (EIS) process.”); Neil Orloff, *SEQRA: New York’s Reformation of NEPA*, 46 ALB. L. REV. 1128, 1133 (1982) (“The environmental impact statement process is the primary vehicle for achieving the policy set forth in SEQRA.”).

31. 6 N.Y.C.R.R. 617.2(m).

32. *Id.* § 617.6(a)(2).

Unlisted actions.³³ Type II actions, which are exempt from further SEQRA review, do not require an EAF.³⁴

The Full EAF has been unchanged for more than thirty years; the Short EAF for more than twenty.³⁵ According to DEC, “[t]he existing forms fail to address environmental issues that have emerged since [their] promulgation”³⁶ Thus, DEC recently adopted long-awaited changes to both the Full and Short EAFs.³⁷

The most substantial revisions are to the Short EAF, which in its current form is just two pages long.³⁸ Given its lack of detailed information, local governments often elect to require a Full EAF for Unlisted actions, viewing the Short EAF as “too short or cursory to be useful.”³⁹ The revised Short EAF is twice that length, adding more specific questions for the project sponsor about traffic, use of energy efficient designs, environmental justice, and other relevant areas.⁴⁰ These changes are designed to “allow users of the EAF to make more use of the short-form for Unlisted actions, which can be expected to be a [significant] savings in paperwork and data gathering efforts.”⁴¹

DEC also proposed revisions to the Full EAF, which would be expanded to include new or more specific information about carbon dioxide emissions, vehicle trips, and other data relevant to modern SEQRA analysis.⁴² Under the existing regulations, DEC has a separate

33. *Id.* § 617.6(a)(3). Even where a Short Form EAF is authorized, however, it is common to utilize the Full EAF for actions of potential consequence or controversy, as the Short Form EAF does not provide sufficient information for decision-making on such proposals.

34. DIV. OF ENVIRONMENTAL PERMITS, *supra* note 18, at 29.

35. XXXII N.Y. Reg. 8 (Nov. 24, 2010), *available at* <http://docs.dos.ny.gov/info/register/2010/nov24/pdfs/rules.pdf>. The revised forms were finalized in January 2012, but will not become effective until October 1, 2012. *State Environmental Quality Review Act—Revised Model Environmental Assessment Forms, Effective October 1, 2012*, N.Y. ST. DEP’T OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/permits/70293.html> (last visited Mar. 23, 2012).

36. N.Y. Reg. at 8.

37. *Certificate of Adoption*, N.Y. STATE DEP’T OF ENVTL. CONSERVATION (Jan. 25, 2012), *available at* http://www.dec.ny.gov/docs/permits_ej_operations_pdf/certifadopt.pdf.

38. 6 N.Y.C.R.R. 617.20, app. C.

39. N.Y. Reg. at 9.

40. *Compare* 6 N.Y.C.R.R. 617.20, app. C (existing Short EAF) *with Appendix B Short Environmental Assessment Form*, N.Y. STATE DEP’T OF ENVTL. CONSERVATION, *available at* http://www.dec.ny.gov/docs/permits_ej_operations_pdf/seafmay10.pdf (last visited Mar. 7, 2012) (revisions to Short EAF in proposed 6 N.Y.C.R.R. 617, Appendix B).

41. N.Y. Reg. at 9.

42. *617.20 Appendix A State Environmental Quality Review Full Environmental Assessment Form*, DEP’T OF ENVTL. CONSERVATION 8, *available at* http://www.dec.ny.gov/docs/permits_ej_operations_pdf/feafcvr10.pdf (last visited Mar. 7,

“Visual EAF Addendum” intended solely to assess a proposed action’s impacts on visual resources (e.g., visibility from parks and roads).⁴³ That information has been merged into the full EAF in DEC’s proposed revisions, in order to “reduce the multiplicity of forms.”⁴⁴

Before they take effect in October 2012, DEC plans to incorporate new electronic features into the revised EAFs and issue “detailed guidance instructions for completing the forms.”⁴⁵

B. Revised SEQR Handbook

In August 2010, DEC also released a new edition of its “SEQR Handbook.”⁴⁶ The Handbook, first issued in 1982 and previously revised in 1992, “provides agencies, project sponsors, and the public with a practical reference guide to the procedures prescribed by the State Environmental Quality Review Act”⁴⁷ The Handbook does not create binding rights or obligations, but it is widely used and has been cited in judicial interpretations of SEQRA’s requirements.⁴⁸

Since the last update of the SEQR Handbook, DEC has amended its SEQRA regulations and courts have issued scores of decisions addressing the justiciability, procedure, and substantive review of SEQRA claims. Maintaining its traditional question-and-answer format, the revised Handbook incorporates those subsequent developments, such as the 2009 DEC Guidance requiring consideration of greenhouse gas emissions (“GHGs”) under SEQRA.⁴⁹ The Handbook also contains an updated chapter on “Notable Court Decisions under SEQRA.”⁵⁰

Perhaps most significantly, the latest edition of the SEQR Handbook was published exclusively online, providing easier access to SEQRA practitioners and the courts.⁵¹ The latest edition of New York City’s revised City Environmental Quality Review (CEQR) Technical Manual, which covers the City Environmental Quality Review process,

2012) (proposed 6 N.Y.C.R.R. 617, Appendix A).

43. 6 N.Y.C.R.R. 617.20, app. B.

44. N.Y. Reg. at 9.

45. *State Environmental Quality Review Act*, *supra* note 35.

46. DIV. OF ENVIRONMENTAL PERMITS, *supra* note 18, at 1.

47. *Id.*

48. *See, e.g., Inc. Vill. of Atlantic Beach v. Gavalas*, 81 N.Y.2d 322, 326, 615 N.E.2d 608, 609-10, 599 N.Y.S.2d 218, 219-20 (1993); *Merson v. McNally*, 227 A.D.2d 487, 490, 643 N.Y.S.2d 129, 131 (2d Dep’t 1996), *rev’d*, 90 N.Y.2d 742, 688 N.E.2d 479, 665 N.Y.S.2d 605 (1997).

49. DIV. OF ENVIRONMENTAL PERMITS, *supra* note 18, at 127.

50. *Id.* at 202-11.

51. *Id.* at 1.

was also published exclusively online, to facilitate broader public access and more timely updates.⁵²

III. LEGISLATIVE DEVELOPMENTS

The New York legislature did not amend SEQRA's procedural or substantive requirements during the *Survey* period. It did, however, re-establish an old SEQRA exemption by reauthorizing a comprehensive power plant siting regime that provides an alternative to SEQRA review.

The previous version of that power plant siting law, commonly known as "Article X" based on its location within the New York Public Service Law, had expired due to legislative inaction on January 1, 2003.⁵³ Since then, the siting of power plants has been reviewed under SEQRA and subject to municipal zoning and land use ordinances.

On June 22, 2011, however, the State Senate and Assembly voted to reauthorize Article X through the Power NY Act of 2011.⁵⁴ The new Article X covers power plants with a nameplate generating capacity of at least twenty-five megawatts (mW), compared to the prior threshold of eighty mW permitted generating capacity.⁵⁵ This change is anticipated to bring more wind and solar projects, which typically have lower generating capacity than fossil fuel-fired plants, within the scope of the new siting law.

Under Article X, new power plants must receive and operate in accordance with a Certificate of Environmental Compatibility and Public Need ("Certificate") from a new State Board on Electric Generation Siting and the Environment (the "Board").⁵⁶ The review process for Certificate applications overlaps with many established SEQRA procedures. For instance, applicants must file a "scoping statement" that describes "potential environmental and health impacts . . . from . . . construction and operation,"⁵⁷ and then prepare "[a]n evaluation of the expected environmental health impacts and safety implications of the facility"

52. *CEQR: City Environmental Quality Review Technical Manual*, N.Y.C. MAYOR'S OFF. OF ENVTL. COORDINATION 2 (Jan. 2012), http://www.nyc.gov/html/oec/downloads/pdf/2012_ceqr_tm/2012_ceqr_tm_introduction.pdf. For more information on the revised CEQR Manual, see Chertok & Miller, *supra* note 1, at 738-41.

53. *A08510 Votes*, N.Y. STATE ASSEMBLY, http://assembly.state.ny.us/leg/?default_fld=&bn=A08510&term=2011&Summary=Y&Votes=Y (last visited Mar. 7, 2012).

54. *Id.*

55. *Id.*

56. N.Y. PUB. SERV. LAW §§ 160(4), (5), 162(1) (McKinney Supp. 2012).

57. *Id.* § 163(1)(b).

along with its application.⁵⁸ SEQRA is incorporated by reference into the reauthorized Article X, which requires an alternative analysis that is “no more extensive than required under article eight of the environmental conservation law”⁵⁹ While the Article X statute replicates many of the subjects of SEQRA review, it also includes greater detail about the scope of certain study topics.

For instance, as part of a detailed environmental justice analysis, the applicant must prepare:

A comprehensive demographic, economic and physical description of the community [in which the facility is [to be] located . . . with the county . . . and . . . adjacent communities within such county, including reasonably available data on population, racial and ethnic characteristics, income levels, open space, and public health data, including available department of public health data on incidents of asthma and cancer⁶⁰

The review must also include “[a] cumulative impact analysis of air quality within a half-mile of the facility,”⁶¹ and “an evaluation of significant and adverse disproportionate environmental impacts of the proposed facility”⁶² This type of analysis may be performed under SEQRA as well, but is not statutorily mandated with similar levels of specificity.

As under SEQRA, Board decisions are reviewed under a deferential “[a]rbitrary” and “capricious” standard.⁶³ The revised Article X will not take effect until DEC issues implementing regulations, which must be finalized by August 2012.⁶⁴ At that point, all applications covered by the new siting law will be exempt from review under SEQRA.⁶⁵

58. *Id.* § 164(1)(b).

59. *Id.* § 164(1)(i).

60. *Id.* § 164(1)(h).

61. N.Y. PUB. SERV. LAW § 164(1)(g).

62. *Id.* § 164(1)(f).

63. *Id.* § 170(2)(e).

64. Power NY Act of 2011, ch. 388, 2011 N.Y. Laws 1171 (McKinney 2011) (requiring regulations to be issued within one year of enactment). Governor Cuomo signed the Power NY Act of 2011 into law on August 4, 2011. *Id.* at 1146. Regulations implementing certain parts of Article X, including the environmental justice analysis, were proposed by the DEC in January 2012; *see also Environmental Justice Proposed Regulations*, N.Y. ST. DEP’T OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/regulations/79626.html> (last visited Mar. 7, 2012).

65. Power NY Act of 2011, at 1168.

IV. CASE LAW DEVELOPMENTS

A. *Bronx Committee for Toxic Free Schools and SEQRA Review of Brownfield Site Cleanups and Requirement for SEIS*

While the New York Court of Appeals did not issue any SEQRA decisions during the *Survey* period, the Court recently accepted an appeal from the First Department's July 7, 2011 opinion in *Bronx Committee for Toxic Free Schools v. New York City School Construction Authority*.⁶⁶ In upholding a challenge to a Brownfield Cleanup Program (BCP) governed cleanup for a proposed school complex, *Bronx Committee* raised new questions concerning the timing, contents, and supplementation of an SEQRA review for the remediation and redevelopment of contaminated properties.⁶⁷

The BCP was enacted in 2003 "to encourage persons to voluntarily remediate brownfield sites for reuse and redevelopment," through a combination of tax credits and liability protections.⁶⁸ Site remediation, including but not limited to BCP projects, typically begins with a remedial investigation that identifies and characterizes the nature of contamination.⁶⁹ The findings of this investigation are summarized in a remedial investigation report (RIR), and a remedial action work plan (RAWP) sets the parameters of the proposed cleanup.⁷⁰

The BCP establishes four cleanup "tracks" based in part upon the intended future use of the site.⁷¹ Track One cleanups allow unrestricted future use of the site and do not rely on any long-term engineering controls (ECs) or institutional controls (ICs) to protect human health or the environment.⁷² Track Four cleanups, the most common category, are site-specific and utilize long-term ECs and/or ICs to prevent exposure to any residual contamination remaining on or around the site.⁷³ Such controls can include: physical barriers to prevent the migration of contamination, limitations on the future use of the property, and/or ground water use restrictions.⁷⁴

Upon completion of remediation, but before a certificate of

66. 86 A.D.3d 401, 927 N.Y.S.2d 45 (1st Dep't 2011), *leave to appeal granted*, No. 2011-988, 2011 N.Y. Slip Op. 90176, at 1 (2011).

67. *See generally Bronx Comm. for Toxic Free Sch.*, 86 A.D.3d 401, 927 N.Y.S.2d 45.

68. N.Y. ENVTL. CONSERV. LAW § 27-1403 (McKinney 2007).

69. N.Y. COMP. CODES R. & REGS. tit. 6, § 375-3.8(b)(1) (2006).

70. *See id.* § 375-3.8(b)(3).

71. *Id.* § 375-3.8(e).

72. N.Y. ENVTL. CONSERV. LAW § 27-1415(4).

73. *Id.*

74. *See id.* § 27-1415(5).

completion (COC) can be issued under the BCP, an applicant must submit a final engineering report (FER) documenting the remedial activities.⁷⁵ If ECs or ICs are required, the FER includes a site management plan (SMP) detailing, inter alia, the maintenance and monitoring obligations related to the continuing controls.⁷⁶ The SMP is made enforceable by the filing of an environmental easement.⁷⁷

Bronx Committee arose as a challenge to the New York School Construction Authority's (SCA) remediation of a 6.6 acre site for use as public schools, athletic fields, and open space.⁷⁸ The site had previously been used as a railroad yard, laundry facility, and manufactured gas plant resulting in soil and groundwater contamination.⁷⁹ The northwestern part of the site was accepted into the BCP, and DEC approved a RAWP entailing a Track Four cleanup which, in addition to the removal of contaminated soil, provided for a cap to prevent contact with any residual contamination, a hydraulic barrier to prevent contaminated groundwater from entering the site, and a vapor barrier and sub-slab depressurization system (SSDS) to prevent infiltration of contaminated soil vapor into the overlying buildings.⁸⁰ These ECs (and several standard ICs) required the SCA to prepare an SMP.⁸¹

Following approval of a RAWP, but before the completion of remediation or preparation of an SMP, the SCA began review of its cleanup and redevelopment plans under SEQRA.⁸² This involved the preparation of an EIS; the Draft EIS was published in August 2006 and the Final EIS in October 2006.⁸³ The EIS described the remedial measures to be undertaken at the site and contained a description of the anticipated ECs and ICs.⁸⁴

Bronx Committee for Toxic Free Schools and other petitioners challenged the SCA's SEQRA review alleging that EIS was inadequate without a complete description of "a long-term maintenance and

75. 6 N.Y.C.R.R. 375-1.6(c)(1), (6).

76. *Id.* § 375-1.2(at).

77. *Id.* § 375-1.8(h)(2)(i).

78. Bronx Comm. for Toxic Free Sch. v. N.Y.C. Sch. Constr. Auth., No. 13800/07, at 2 (Sup. Ct. Bronx Cnty. Nov. 7, 2008) (on file with authors).

79. *Id.* at 2, 4.

80. *Id.* at 4-5, 7, 9.

81. Bronx Comm. for Toxic Free Sch. v. N.Y.C. Sch. Constr. Auth., 86 A.D.3d 401, 402, 927 N.Y.S.2d 45, 46 (1st Dep't 2011).

82. Bronx Comm. for Toxic Free Sch. v. N.Y.C. Sch. Constr. Auth., No. 13800/07, at 8-9 (Sup. Ct. Bronx Cnty. Nov. 7, 2008) (on file with authors)..

83. *Id.* at 10.

84. *Id.* at 10.

monitoring plan and/or objectives for the Site.”⁸⁵ While their petition was pending, the SCA distributed, for eventual public comment under the BCP, a proposed SMP which outlined the monitoring and maintenance requirements for the ECs and ICs described in the EIS.⁸⁶ This SMP contained no new remedial requirements, ECs, or ICs.⁸⁷

Despite the proposed SMP, the petitioners argued that the SCA was required to analyze these monitoring and maintenance obligations under SEQRA as well.⁸⁸ Thus, they demanded that the SCA prepare a SEIS to consider the impacts of the SMP.⁸⁹

While characterizing the project’s environmental review as “extensive,” the supreme court upheld the petitioner’s challenge with respect to the need for further assessment under SEQRA of the long-term maintenance and monitoring provisions of the SMP.⁹⁰ Specifically, the court held: “[c]ontrary to the SCA’s assertion, the implementation of a long term maintenance plan may involve modifications and/or changes to the project which would pose additional environmental concerns.”⁹¹ It thus ordered the SCA to “prepare an SEIS based upon any changes to the final [e]nvironmental [i]mpact [s]tatement as a result of the SCA’s completed, detailed long term maintenance and monitoring plan.”⁹²

On appeal, the First Department affirmed the lower court’s decision.⁹³ Relying primarily upon *Penfield Panorama Area Community v. Town of Penfield Planning Board*,⁹⁴ the court held that the failure to analyze long-term monitoring plans in the context of an EIS “frustrated the purpose of SEQRA, which is to subject agency actions with environmental impact to public scrutiny.”⁹⁵ In *Penfield*, however, the Planning Board had conditionally approved a subdivision application subject to DEC’s subsequent approval of a forthcoming remedial plan, so there was no SEQRA review of the remedial plans whatsoever; the lead agency had delegated its SEQRA responsibility to DEC.⁹⁶ In contrast, the SCA’s EIS analyzed its remedial plans in detail and described the monitoring and

85. *Id.* at 13.

86. *Id.* at 14.

87. *Id.* at 9.

88. *Bronx Comm. for Toxic Free Sch.*, at 13-14.

89. *Id.* at 13.

90. *Id.* at 17.

91. *Id.* at 15.

92. *Id.* at 17.

93. *Bronx Comm. for Toxic Free Sch. v. N.Y.C. Sch. Constr. Auth.*, 86 A.D.3d 401, 402, 927 N.Y.S.2d 45, 46 (1st Dep’t 2011).

94. 253 A.D.2d 342, 688 N.Y.S.2d 848 (4th Dep’t 1999).

95. *Bronx Comm. for Toxic Free Sch.*, 86 A.D.3d at 402, 927 N.Y.S. 2d at 46-47.

96. *Penfield Panorama Area Cmty.*, 253 A.D.2d at 349, 688 N.Y.S.2d at 853.

maintenance provisions that were provided in greater detail in the SMP.⁹⁷

These decisions are troubling in several respects. First, the supreme court ordered, and the First Department affirmed, the mandatory preparation of a SEIS, despite the supreme court's acknowledgment that the long term maintenance and monitoring controls "may not alter the information currently contained in the [final EIS (FEIS)]."⁹⁸ Under SEQRA regulations, however, an SEIS may only be required if new information, changed circumstances, or project revisions give rise to "significant adverse environmental impacts not addressed or inadequately addressed in the EIS . . ."⁹⁹ In *Bronx Committee*, the ECs and ICs addressed in the SMP were referenced in the EIS, and neither the trial nor appellate court identified any new or different significant, adverse impacts from the SMP that would require supplementation under SEQRA.¹⁰⁰

Moreover, the New York Court of Appeals has previously afforded lead agencies with broad discretion to determine whether a SEIS should be prepared.¹⁰¹ This determination is inherently "fact-intensive," with the agency, not the courts, responsible for assessing the environmental significance of changed circumstances or project revisions.¹⁰² Thus, even if the long-term monitoring constituted "changes proposed for the project," as the First Department held in *Bronx Committee*,¹⁰³ the court should have remanded the matter to the SCA for a determination of the significance of those changes, instead of ordering an SEIS prior to the identification of any significant, adverse impacts.

Moreover, by holding that the EIS was deficient because it was issued before the SMP, and thus could not analyze the long-term maintenance and monitoring obligations contained therein, the supreme court effectively mandated the completion of remediation prior to completion of SEQRA

97. *Bronx Comm. for Toxic Free Sch.*, 86 A.D.3d at 401-02, 927 N.Y.S.2d at 46.

98. *Bronx Comm. for Toxic Free Sch. v. N.Y.C. Sch. Constr. Auth.*, No. 13800/07, at 16 (Sup. Ct. Bronx Cnty. Nov. 7, 2008) (on file with authors) (emphasis added), *aff'd*, 86 A.D.3d 401, 927 N.Y.S.2d 45 (1st Dep't 2011).

99. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(a)(7) (1995).

100. *Bronx Comm. for Toxic Free Sch.*, 86 A.D.3d at 403, 927 N.Y.S.2d at 47.

101. *Riverkeeper, Inc. v. Planning Bd. of Southeast*, 9 N.Y.3d 219, 231, 881 N.E.2d 172, 176, 851 N.Y.S.2d 76, 80 (2007) ("A lead agency's determination whether to require a SEIS . . . is discretionary.").

102. *Id.* at 231-32, 881 N.E.2d at 177, 851 N.Y.S.2d at 81 ("The lead agency, after all, has the responsibility to comb through reports, analyses and other documents before making a determination; it is not for a reviewing court to duplicate these efforts."); *see also C/S 12th Ave. LLC v. N.Y.C.*, 32 A.D.3d 1, 7, 815 N.Y.S.2d 516, 522-23 (1st Dep't 2006) ("[W]hether or not a modification is 'significant' is for the agency to decide . . .").

103. *Bronx Comm. for Toxic Free Sch.*, 86 A.D.3d at 402, 927 N.Y.S.2d at 45 (quoting 6 N.Y.C.R.R. 617.9(a)(7)(i)(a)).

review.¹⁰⁴ This creates tension with SEQRA's fundamental requirement that lead agencies take environmental concerns into account as early in the decision-making process as possible.¹⁰⁵ SMPs, on the other hand, are typically issued after, and informed by, the cleanup process.

This *Bronx Committee* decision thus creates a catch-22 for developers, threatening to undermine the goals of the BCP and other site remediation programs. Under SEQRA, project approvals cannot be granted until the environmental review process is complete.¹⁰⁶ If the SEQRA process could not be completed until the preparation of an SMP, then developers would be required to conduct expensive and time-consuming remediation without ever knowing if the development for which the remediation is being conducted will be approved. Moreover, this sequencing is inefficient, as remedial activities (e.g., excavation of contaminated soil) and ECs (e.g., vapor barriers applied to a building's foundation) often overlap with proposed construction activities. Separating remedial and construction activities, or requiring a separate round of environmental review for the latter, could create a disincentive for the redevelopment of contaminated properties, contrary to the express objectives of the BCP.¹⁰⁷

B. Judicial Review of SEQRA Determinations of Significance

The standard of judicial review is narrowly circumscribed under SEQRA. While ensuring that lead and involved agencies comply with the statute's procedures and take a "hard look" at the significant adverse impacts of their actions, determinations of significance and the analysis contained within an EIS are upheld unless "arbitrary and capricious or an abuse of discretion."¹⁰⁸ Several cases issued during the *Survey* period, however, provide a reminder that the courts will police the outer limits of agencies' discretion under SEQRA.

In *Troy Sand & Gravel Co. v. Town of Nassau*, the petitioner challenged amendments to local zoning laws and a comprehensive plan that banned commercial mining on petitioner's land.¹⁰⁹ The adoption of zoning regulations and a comprehensive land use plan are Type I

104. *Id.* at 403, 927 N.Y.S.2d at 47.

105. 6 N.Y.C.R.R. 617.1(c).

106. *Id.* 617.3(a) ("No agency involved in an action may undertake, fund or approve the action until it has complied with the provisions of SEQR.").

107. N.Y. ENVTL. CONSERV. LAW § 27-1403 (McKinney 2007).

108. *Akpan v. Koch*, 75 N.Y.2d 561, 570, 554 N.E.2d 53, 57, 555 N.Y.S.2d 16, 20 (1990) (citations omitted) (internal quotation marks omitted); *see also* *Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 417, 494 N.E.2d 429, 436, 503 N.Y.S.2d 298, 305 (1986).

109. 82 A.D.3d 1377, 1377, 918 N.Y.S.2d 667, 668-69 (3rd Dep't 2011).

actions that presumptively require an EIS under SEQRA regulations.¹¹⁰ Despite that presumption, the Town issued a negative declaration, indicating on the EAF that: “[t]he project will not result in any large and important impact(s) and, therefore, is one which will not have a significant impact on the environment”¹¹¹

The supreme court reversed the Town’s determination as arbitrary and capricious, finding that the conclusory statement from the EAF did not provide the “reasoned elaboration” required to support the negative declaration.¹¹² It thus annulled both the comprehensive plan and the zoning change, pending additional SEQRA review.¹¹³

On appeal, the Town argued that the environmental impacts of its decisions were considered during “a long and deliberative legislative process,” and characterized the lower court decision as “elevat[ing] form over substance.”¹¹⁴ The Third Department rejected this line of argument holding that “[a] record evincing an extensive legislative process . . . is neither a substitute for strict compliance with SEQRA’s reasoned elaboration requirement nor sufficient to prevent annulment.”¹¹⁵ Citing the lack of any “formal” reasoned elaboration aside from a checked box on the Town’s EAF, the court affirmed the decision below.¹¹⁶ Pro forma completion of an EAF does not provide the “reasoned elaboration” required to support a negative declaration under SEQRA.¹¹⁷

Fortress Bible Church v. Feiner presents the opposite—and less common—scenario, in which a reviewing court reversed an agency’s finding of environmental significance.¹¹⁸ That litigation, filed in federal court because it also involved claims under the Religious Land Use and Institutionalized Persons Act (RLUIPA), involved the Town of Greenburgh’s denial of the approvals, waivers, and variances needed to

110. 6 N.Y.C.R.R. 617.4(a)(1), (b)(1).

111. *Troy Sand & Gravel Co.*, 82 A.D.3d at 1379, 918 N.Y.S.2d at 669-70.

112. *Id.*, 918 N.Y.S.2d at 670.

113. *Id.*

114. *Id.*

115. *Id.* In order to effectuate SEQRA’s environmental goals, courts regularly require “strict compliance” with the statute’s procedural mandates. *See King v. Saratoga Cnty. Bd. of Supervisors*, 89 N.Y.2d 341, 348, 675 N.E.2d 1185, 1187-88, 653 N.Y.S.2d 233, 235-36 (1996) (“Anything less than strict compliance . . . offers an incentive to cut corners and then cure defects only after protracted litigation, all at the ultimate expense of the environment.”).

116. *Troy Sand & Gravel Co.*, 82 A.D.3d at 1379, 918 N.Y.S.2d at 669-70.

117. *See Baker v. Vill. of Elmsford*, 70 A.D.3d 181, 190, 891 N.Y.S.2d 133, 140 (2d Dep’t 2009) (overturning negative declaration based upon “conclusory” EAF).

118. 734 F. Supp. 2d 409, 433-34 (S.D.N.Y. 2010).

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build a church.¹¹⁹

In January 2000, Fortress Bible Church (the “Church”) submitted a full EAF to the Town Board, which “provided the Town with more information and analysis than is typically provided at the EAF stage of SEQRA.”¹²⁰ The Church also proposed measures as part of its project, including new turn lanes and traffic lights, to ameliorate potentially significant traffic impacts.¹²¹

Despite the Town Planning Commissioner’s recommendation that a conditioned negative declaration would be appropriate, the Town Board issued a positive declaration and ordered the Church to complete an EIS.¹²² The Town proceeded to assume control over the preparation of an EIS after it was substantially completed by the applicants, inserting what the court found to be “errors, gratuitous comments and revisions intended to cast the project in the worst light possible.”¹²³ Based upon this FEIS, the Town adopted a Findings Statement denying the application due to its purported steep slopes, fire safety, and traffic impacts.¹²⁴

In a 111-page opinion, the court meticulously addressed each of those justifications and found all of them to be arbitrary and capricious.¹²⁵ The court also compared the Church to prior applicants for similar land use approvals and found that none of them had faced the level of scrutiny or burdens imposed in this case.¹²⁶ As a threshold matter, however, the court held that an EIS should have never been prepared, since at the EAF stage “Fortress Bible Church had mitigated all identified potential adverse impacts.”¹²⁷ Thus, the court ordered the Town to adopt a resolution approving the Church’s EAF site plan with “no further SEQRA review by the Town or its Boards (including, but not limited to, the Town Board and the Zoning Board of Appeals).”¹²⁸ Since an EIS had already been prepared and the Town’s decision had been separately overturned as arbitrary and capricious, the court need not have determined the propriety of the positive declaration. In fact, challenges to positive declarations standing alone are often rejected as

119. *See generally id.*

120. *Id.* at 423, 428.

121. *Id.* at 430.

122. *Id.* at 430, 432.

123. *Fortress Bible Church*, 734 F. Supp. 2d at 451.

124. *Id.* at 453, 454.

125. *See generally id.* at 409.

126. *Id.* at 475-88, 517.

127. *Id.* at 433.

128. *Fortress Bible Church*, 734 F. Supp. 2d at 520.

unripe.¹²⁹ Here, however, the court believed that the Town had misused the SEQRA process, and thus was unwilling to remand or allow for any further SEQRA review.¹³⁰

In *East Hampton Library v. Zoning Board of Appeals of East Hampton*, the Supreme Court, Suffolk County, also overturned a lead agency's determination of significance.¹³¹ In that case, the East Hampton Library—a non-profit institution chartered by the Board of Regents of the University of the State of New York—applied for variances and special permits to build a 10,300 square foot expansion of a public library.¹³² After its initial application, but before any SEQRA documentation was prepared, the Library reduced the scope of its proposed expansion to 6802 square feet.¹³³

SEQRA regulations define “routine activities of educational institutions, including expansion of existing facilities by less than 10,000 square feet of gross floor area” as Type II actions, which are “not subject to review” under SEQRA.¹³⁴ Despite a letter from DEC expressing its opinion that the proposed expansion was a Type II action, the Zoning Board of Appeals (ZBA) determined that the library was not an “educational institution” and adopted a positive declaration requiring a full EIS.¹³⁵ On the basis of traffic and open space impacts identified in that EIS, the ZBA denied the applications.¹³⁶

The supreme court found the library was an “educational institution” for the purposes of SEQRA, citing its SUNY charter and its “numerous instructional programs, classes, lectures and lessons, all of which are, unequivocally, educational in nature.”¹³⁷ It therefore annulled the positive declaration, EIS, and SEQRA Findings Statement, in addition to reversing the corresponding permit denials as irrational,

129. See *Rochester Tel. Mobile Commc'ns v. Ober*, 251 A.D.2d 1053, 1054, 674 N.Y.S.2d 189, 190 (4th Dep't 1998) (“[T]he positive declaration requiring the preparation of a DEIS is, ‘like other SEQRA determinations, a preliminary step in the decision-making process and, therefore, not ripe for judicial review.’” (quoting *Town of Coeymans v. City of Albany*, 237 A.D.2d 856, 857, 655 N.Y.S.2d 172, 173 (3d Dep't 1997))).

130. *Fortress Bible Church*, 734 F. Supp. 2d at 520. In this respect, the case resembles *Gordon v. Rush*, where the Court of Appeals upheld a challenge to the Town of Southampton Coastal Erosion Hazard Board of Review's positive declaration after DEC had already issued a negative declaration for the same project. 100 N.Y.2d 236, 241, 792 N.E.2d 168, 171, 762 N.Y.S.2d 18, 21, 23 (2003).

131. No. 31117-10, 2011 N.Y. Slip Op. 50921(U), at 9 (Sup. Ct. Suffolk Cnty. 2011).

132. *Id.* at 1-2, 5.

133. *Id.* at 2.

134. N.Y. COMP. CODES R. & REGS. tit. 6, §§ 617.5(a), (c)(8) (1995).

135. *E. Hampton Library*, 2011 N.Y. Slip Op. 50921(U), at 2, 5, 7.

136. *Id.* at 12.

137. *Id.* at 6.

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arbitrary, and capricious.¹³⁸

The preceding decisions are an exception to the deference afforded to a lead agency's determination of environmental significance, which is generally upheld if the agency took a "hard look" at the relevant areas of concern and provided a "reasoned elaboration" for its decision.¹³⁹ Such deference is not unlimited, however, particularly where SEQRA regulations dictate a contrary result or environmental impacts are perceived as pretext for discrimination or non-environmental goals.

V. OTHER NOTABLE SEQRA DECISIONS

A. Develop Don't Destroy (Brooklyn), Inc. v. Empire State Development Corp.

The longstanding litigation over the proposed Atlantic Yards project, a twenty-two acre mixed-use development in Brooklyn, including a basketball arena and sixteen high-rise buildings for commercial and residential uses, continued during the latest *Survey* period. As detailed in last year's SEQRA update, in 2010, Develop Don't Destroy (Brooklyn), Inc. (DDDB) challenged the Empire State Development Corp.'s (ESDC) reliance upon a ten-year build-out period in the project's EIS, contending that the terms of a development agreement between ESDC and the project developer included an outside construction deadline of 2035, fifteen years beyond the initial ten-year projection.¹⁴⁰ Presented with that agreement for the first time upon re-argument, the supreme court reversed its prior determination that no SEIS was required and remanded the matter to ESDC for findings on the impact of the Development Agreement and the need for an SEIS.¹⁴¹

In response to the supreme court's order, ESDC's environmental consultants prepared a "Technical Analysis of an Extended Build-Out," and ESDC issued a resolution finding that: "[a] delay in the [ten]-year construction schedule, through and including a [twenty five]-year final completion date, would not result in any new significant adverse environmental impacts not previously identified and considered in the

138. *Id.* at 9, 11.

139. *See, e.g.*, *Aldrich v. Pattison*, 107 A.D.2d 258, 265, 486 N.Y.S.2d 23, 29 (2d Dep't 1985).

140. Chertok & Miller, *supra* note 1, at 734 (citing *Develop Don't Destroy (Brooklyn), Inc. v. Empire State Dev. Corp.*, No. 114631/09, 2010 N.Y. Slip Op. 20479, at 6 (Sup. Ct. N.Y. Cnty. 2010)).

141. *Develop Don't Destroy (Brooklyn), Inc.*, 2010 N.Y. Slip Op. 20479, at 13.

FEIS . . . and would not require or warrant an SEIS”¹⁴² ESDC further argued that it was reasonable to rely upon existing SEQRA documentation, despite the possibility that the project may not be completed within the projected build-out period, since the Development Agreement compelled the developer “to use commercially reasonable effort to meet the [ten]-year deadline.”¹⁴³ The supreme court rejected these arguments, finding that the continued reliance upon a ten-year build-out lacked a rational basis in light of the acknowledged prospect of significant delays.¹⁴⁴ The court also rejected ESDC’s reasonable efforts arguments, holding that “ESDC’s invocation of the commercially reasonable effort provision rings hollow in the face of the specific deadlines in the Development Agreement,” which allow for and anticipate a longer build-out period.¹⁴⁵

For a remedy, the court took the unusual step of ordering the preparation of an SEIS analyzing the potential environmental impacts of the extended build-out.¹⁴⁶ ESDC’s Technical Analysis had indicated there would be no significant adverse impacts beyond those disclosed in the 2006 FEIS, because the relevant impacts were driven by construction intensity as opposed to duration.¹⁴⁷ The court held that, “[e]ven assuming arguendo that ESDC’s common sense assumption is correct, under established standards for environmental impact analysis, the duration of construction activities is a factor that is required to be taken into account in assessing the impacts” of the proposed development.¹⁴⁸ Citing the CEQR Technical Manual, the court found that duration of construction must be considered in assessing impacts upon traffic, air quality, noise, neighborhood character, open space, and socio-economic conditions.¹⁴⁹ It also rejected ESDC’s claim that pre-existing mitigation requirements would render any such impacts non-significant, as such measures were adopted to mitigate the impacts of a ten-year build-out and “[the] Technical Analysis does not consider the adequacy of these mitigation measures for a significantly prolonged construction period.”¹⁵⁰

142. *Develop Don’t Destroy (Brooklyn), Inc. v. Empire State Dev. Corp.*, No. 114631/09, 2011 N.Y. Slip Op. 21239, at 3 (Sup. Ct. N.Y. Cnty. 2011).

143. *Id.* at 17-18.

144. *Id.* at 20, 21.

145. *Id.* at 20.

146. *Id.* at 39.

147. *Develop Don’t Destroy (Brooklyn), Inc.*, 2011 N.Y. Slip Op. 21239, at 21-22.

148. *Id.* at 23-24.

149. *Id.* at 24.

150. *Id.* at 29-30.

The court, however, declined to stay construction of the project pending completion of the SEIS.¹⁵¹ The initial phase of construction was already underway, following extensive SEQRA review, the adequacy of which was affirmed by the First Department.¹⁵² The second phase of construction was not slated to begin for several years, rendering the requested stay of that work premature.¹⁵³ The court thus allowed construction to proceed during the preparation of the SEIS.¹⁵⁴

B. *Rizzo v. Verizon CCC LLC*

Standing under SEQRA has historically been constrained by *Society of the Plastics Industry, Inc. v. County of Suffolk*, a 1991 Court of Appeals decision requiring petitioners to establish special harm “that is in some way different from that of the public at large.”¹⁵⁵ The Court of Appeals expanded standing in 2009’s *Save the Pine Bush, Inc. v. Common Council of Albany*, holding that “repeated” use of a natural resource conferred standing to challenge a government action that threatened that resource.¹⁵⁶ In recent years, lower courts have often been called upon to define the boundaries of standing under SEQRA, post *Pine Bush*.¹⁵⁷

During the *Survey* period, one such case arose involving a neighboring landowner’s challenge to the negative declaration for a proposed Verizon data center in the Town of Sommerset.¹⁵⁸ The data center would convert approximately one hundred acres of agricultural land into a complex of three main buildings, two electric substations, and parking for two hundred employees.¹⁵⁹

While standing is often presumed for petitioners who live in close proximity to a proposed project,¹⁶⁰ in this case the petitioner owned but did not reside on the neighboring parcel, which contained only “a

151. *Id.* at 35-36.

152. *Develop Don’t Destroy (Brooklyn), Inc.*, 2011 N.Y. Slip Op. 21239, at 36-37 (citing *Develop Don’t Destroy (Brooklyn) v. Urban Dev. Corp.*, 59 A.D.3d 312, 874 N.Y.S.2d 414 (1st Dep’t 2009)).

153. *Develop Don’t Destroy (Brooklyn), Inc.*, 2011 NY Slip Op. 21239, at 39.

154. *Id.* at 35-36.

155. 77 N.Y.2d 761, 774, 573 N.E.2d 1034, 1041, 570 N.Y.S.2d 778, 785 (1991).

156. 13 N.Y.3d 297, 305, 918 N.E.2d 917, 921, 890 N.Y.S.2d 405, 409 (2009).

157. *See, e.g.*, Chertok & Miller, *supra* note 1, at 725-32 (analyzing standing cases).

158. *Rizzo v. Verizon CCC LLC*, No. 142489, 2011 N.Y. Slip Op. 50505(U), at 2, 3 (Sup. Ct. Niagara Cnty. 2011).

159. *Id.* at 3.

160. *See, e.g.*, *McGrath v. Town Bd. of N. Greenbush*, 254 A.D.2d 614, 616, 678 N.Y.S.2d 834, 836 (3d Dep’t 1998); *Sopchak v. Guernsey*, 176 A.D.2d 403, 403, 574 N.Y.S.2d 110, 111 (3d Dep’t 1991).

dilapidated shack . . . and . . . a garage type structure in the interior that is used to store farm equipment.”¹⁶¹ Instead, she lived in a separate town twenty-five miles away and leased the parcel to a local farmer to grow crops.¹⁶² The tenant was not a party to the litigation.¹⁶³

The court thus described the challenge to petitioner’s standing as “a serious one.”¹⁶⁴ It found that “[petitioner’s] actual physical presence on that property is quite negligible,” and “[t]here is no claim, let alone credible evidence, in this record of any diminution of property value that might be anticipated should the Verizon computer data center be constructed across the street.”¹⁶⁵ Those factual burdens notwithstanding, the court ultimately concluded that: “Petitioner here has demonstrated barely sufficient legal standing and has minimally sustained her burden so as to challenge these SEQRA violations.”¹⁶⁶ In so holding, the court relied upon a series of Fourth Department cases suggesting that standing was to be liberally applied under SEQRA.¹⁶⁷

CONCLUSION

The prior year witnessed the continued development of SEQRA in a variety of forums, and also set the stage for additional changes over the year ahead. In 2012, DEC is expected to finalize the pending changes to its EAF forms and issue new regulations defining the environmental review process under the reauthorized Article X power plant siting law. SEQRA practitioners and prospective developers of contaminated parcels are also awaiting the Court of Appeals’ consideration of *Bronx Committee for Toxic Free Schools*.

Finally, in 2012 DEC is likely to issue a Final Supplemental Generic Environmental Impact Statement for high-volume hydraulic fracturing, completing the latest round of SEQRA review for “hydrofracking” in the Marcellus Shale natural gas deposits underlying the Southern Tier of New York State.¹⁶⁸ The latest draft of the supplemental generic EIS (SGEIS) engendered substantial debate and more than 30,000 public comments, which DEC must review and

161. *Rizzo*, 2011 N.Y. Slip Op. 50505(U), at 3.

162. *Id.* at 3-4.

163. *Id.* at 4.

164. *Id.* at 7.

165. *Id.*

166. *Rizzo*, 2011 N.Y. Slip Op. 50505(U), at 7.

167. *Id.*

168. See Revised Draft SGEIS on the Oil, Gas and Solution Mining Regulatory Program, N.Y. ST. DEP’T OF ENVTL. CONSERVATION (Sept. 2011), <http://www.dec.ny.gov/energy/75370.html>.

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respond to in a final SGEIS.¹⁶⁹ Moreover, given the number of stakeholders involved and the volume of comment submitted, protracted litigation is likely to follow the completion of DEC's pending SEQRA review.

169. Mary Esch, *EPA: NY Should Map Gas Wells, Set Radiation Limits*, ASSOCIATED PRESS (Jan. 12, 2012), available at http://www.newsvine.com/_news/2012/01/12/10142274-epa-ny-should-map-gas-wells-set-radiation-limits ("DEC spokeswoman Emily DeSantis said Thursday that 32,100 comments have been tallied so far and the number is expected to exceed 40,000 when they are all counted.").