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State Environmental Quality Review Act

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The continuing impact of environmental problems on the law is commanding the attention of the bar. This article and the one that follows it trace recent developments in New York State in that field.

STATE ENVIRONMENTAL QUALITY REVIEW ACT

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The 1975 Legislature closed a gap in New York's environmental laws when it enacted the State Environmental Quality Review Act or "SEQR".[1] SEQR requires that all state and local agencies follow specified environmental evaluation procedures before carrying out or approving any action which may have a significant effect on the environment. Key provisions require the completion of a final environmental impact statement before agency action, and the making of an explicit factual finding that the agency action will, according to the Act's formula, avoid or minimize adverse environmental effect.

SEQR was to become effective for all levels of government on June 1, 1976. But the Act elicited strenuous criticism between enactment and its effective date. Some local governments claimed that SEQR would be financially burdensome and difficult if not impossible to administer. Spokesmen for industry and labor claimed that SEQR, even with a year's lead time, would delay economic recovery in the construction industry. Some state governmental leaders asserted that the Act's administrative costs would be needlessly high in a time of governmental cutbacks.

Apart from criticisms of SEQR itself, one specific event focused general opposition to regulation on behalf of environmental values.

In August 1975, shortly after passage of SEQR, the New York State Department of Environmental Conservation ("DEC") received evidence that the levels of PCBs in fish far exceeded Federal Food and Drug Administration safety levels, and closed down a portion of commercial fishing on the Hudson River. The DEC then alleged that General Electric had been discharging PCBs, a persistent toxic substance having carcinogenic properties, into the Hudson River at Fort Edward and Hudson Falls in sufficient quantity to contaminate fish populations and endanger human health. The DEC took a position on remedy which, according to General Electric, might cause the shutting down of their two large capacitor manufacturing plants.

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[1] L. 1975, c. 612; N.Y. Env. Con. L. Art. 8.

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Despite the extensive evidence of a public health risk,[2] the General Electric situation was seen by some people in and out of government, as proof that strong protection of the environment was antithetical to economic recovery in the state. Such views, which had been percolating in state government, became public when, in January, 1976, DEC Commissioner Ogden Reid was publicly criticized by Commissioner John Dyson of the Department of Commerce. Commissioner Dyson argued that DEC's strict environmental enforcement policy caused economic consequences in excess of what was necessary to protect public health.[3]

In the context of that open controversy SEQR came in for particular criticism when the legislative session began in January, 1976. Dozens of bills were introduced designed to amend or repeal SEQR. Governor Hugh Carey, however, remained publicly committed to SEQR and submitted as his bill a short amendment which left the Act without change but called instead for a staged implementation. In his message the Governor restated his support for SEQR, but reasoned that the concerns of private industry and local governments place a burden on the state government to demonstrate that the SEQR program is workable and effective at a reasonable cost.[4] The Governor's Bill, which was enacted, staged implementation of the Act as follows:[5]

September 1, 1976—
Actions directly undertaken by the state.

June 1, 1977—
Actions directly undertaken by local agency or actions wholly or partially state funded.

September 1, 1977—
Private actions needing state or local licenses, approval or permits and locally funded actions.

In the midst of such controversy one might easily lose sight of the importance of SEQR as a basic reform in both administrative and environmental law, and of the relevance of recent history which clarified the need for SEQR in the first place. SEQR, it should first be noted, is not novel legislation. The Legislature modeled SEQR on the National Environmental Policy Act of 1969 ("NEPA"), the federal statute which establishes environmental impact procedures for federal agencies, and upon other state environmental evaluation statutes, especially that of California.[6] In passing SEQR, New York joined more than 25 states and more than 60 federal agencies already following environmental review procedures.

In the last five years, the New York Legislature adopted many far-reaching environmental bills designed to protect particular environmental values, such as the Tidal Wetlands Act,[7] the Freshwater Wetlands Act,[8] and the Adirondack Park Agency Act.[9] But New York lagged behind in establishing an across-the-board procedure which would resolve the two missing elements in New York's environmental regulatory scheme: a generally applicable environmental evaluation procedure and a general standard for decision-making which would balance environmental concerns against social and economic concerns.

SEQR attempts to fill these gaps. It establishes a procedural framework in which to resolve environmental controversies with finality through an environmental impact statement process, and sets out a standard by which an agency is to make its decision. SEQR then is more than an environmental protection measure; it is an administrative reform of first importance.

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[2] *In re General Electric Co.*, 6 ERC 30007, Feb. 9, 1976.

[3] New York Times, January 16, 1976, at 33, col. 5.

[4] 1976 McKinney's Session Laws A–263, 264.

[5] 1976 Session Laws, Ch. 228.

[6] 1975 Legis. Ann. pp. 217–18, 438–39.

[7] N.Y. Env. Cons. L. Art. 25.

[8] L. 1975, c. 614; N.Y. Env. Cons. L. Art. 24.

[9] N.Y. Executive L. Art. 27.

Preludes to SEQR

In 1972, the DEC took a first step towards the SEQR concept when it required by regulation an environmental impact assessment whenever a private applicant sought any one of six major DEC permits or approvals: air contamination source construction, public water supply approval, installation of wells of a certain size on Long Island, stream protection, municipal waste disposal system construction, and industrial waste disposal system construction.[10] The DEC Commissioner under the regulation had the option of requiring or not requiring an applicant seeking such a permit to submit a detailed analysis of the environmental effects of the proposed project or development. If the Commissioner opted to follow the procedure a public notice was required and a public hearing might be held as well. At the public hearing the issue was whether and to what extent the project or development would cause irreparable and irretrievable damage to the environment and the natural resources of the State of New York.

The DEC's "environmental impact assessment" procedure was a first step towards a full environmental impact assessment, but it was an inadequate one. It was discretionary with the Commissioner and without clear guidelines as to applicability. Not all state permits were included. It had no applicability to state or public corporation projects. The standard for decision was not set forth with clarity.

The inadequacies of the DEC's regulatory procedures were quickly pointed out in *Ton-Da-Lay, Ltd. v. Diamond*.[11] *Ton-Da-Lay* involved a plan to develop 18,000 acres of forest land in Franklin County into a second home community. The DEC Commissioner followed the "environmental impact assessment" procedure and denied the developer's application for public water supply and sewage disposal permits. While the Appellate Division, Third Department affirmed the Commissioner's denial on appeal, it severely circumscribed the "environmental impact assessment" procedure. The Court ruled that the regulation did not reach the required definitive standards necessary to inform the applicant of exactly what was required for compliance. The court ruled the regulation inadequate, citing the optional nature of the procedure, the Commissioner's unfettered discretion to establish guidelines outside the regulations and the absence of standards as to what would cause irreparable and irretrievable damage to the environment and natural resources. The court held in addition that the Commissioner was without authority to deny the application on the grounds of aesthetic and ecological undesirability of the entire project. The court reasoned that damage to the environment must be relegated to its proper place of importance within the statutory framework, and that the absence of clearly defined standards opened the door for purely subjective decisions.[12]

The court's opinion pointed to major deficiencies in New York's laws. Although permit programs protective of environmental values and health had proliferated, each had separated standards, and not one set forth general standards on which to balance overall environmental and ecological values against other important state concerns. The procedures were equally unclear. An optional procedure following optional and unpublished guidelines satisfied no one.

The absence of settled procedures and standards for evaluating environmental concerns regularly appeared in other court decisions, sometimes favorable to the environmental values, sometimes unfavorable, but always unpredictable. In *Walsh v. Spadaccia*,[13] a court overturned the Town of Yorktown's site plan approval granting a builder the right to build 168 apartments on the shore of Lake Mohegan in Westchester County. The court held that the local site

[10] 6 NYCRR Part 615.

[11] 44 A.D. 2d 430, 355 N.Y.S. 2d 820 (3rd Dep't 1974).

[12] 44 A.D. 2d at 438; 355 N.Y.S. 2d at 828.

[13] 72 Misc. 2d 866, 343 N.Y.S. 2d 45 (Sup. Ct. West. Cty. 1973).

approval was not in conformity with the Development Plan of the Town because no prior consideration had been given to the pollution of Lake Mohegan due to increased septic tank runoff. In *Nattin Realty, Inc. v. Ladewig*,[14] a developer found his land lawfully down zoned from garden apartments to single family homes when it emerged that his plans for water supply and sewage disposal inadequately dealt with the anticipated population permissible under the zoning. In *Gottfried v. New York City Convention and Exhibition Center Corporation*,[15] a court affirmed New York City's final approval of the construction plans for a new convention center on the promise of future environmental review, not existing review. And in *Hamilton v. Diamond*,[16] a court approved a DEC permit to enclose and fill less than an acre of Hudson River shallows at Grand View-on-Hudson holding that it was unnecessary to consider the cumulative environmental effects of many such small landfills.

But the uncertain situation was most evident in *Lloyd Harbor Study Group, Inc. v. Diamond*.[17] In that case the court held that the DEC Commissioner could "disregard in total" his hearing examiner's report and the public hearing on which it was based. The public hearing concerned water quality certification with respect to a nuclear generating station at Shoreham, Long Island. The court characterized the public hearings as futile, unnecessary and unfair to the public, but nevertheless upheld the procedure because there were neither statutory nor constitutional requirements that the environmental issues be resolved through the hearing process. The court concluded that "until legislation fills the void, the public hearings are nothing more than a *pro forma* ritual and a hollow exercise by a concerned public in respect to environmental issues."[18]

In response to such decisions, and to a nationwide consensus supporting environmental impact statement procedures, the 1975 legislature took two decisive steps designed to rationalize environmental decision-making. The first was directed specifically at the problems examined in the *Ton-Da-Lay* opinion. The second was the enactment of SEQR.

The legislature dealt with *Ton-Day-Lay* by amending § 3–0301 of the Environmental Conservation Law specifically to authorize the Commissioner, when issuing a permit or license of any kind, to take into account the cumulative impact of the proposal on the water, land, fish, wildlife and air resources of the state.[19] The amendment did not solve the major procedural problems, however, including the absence of an explicit standard or systematic procedures. That was to come later in the legislative session with the enactment of SEQR.

SEQR SETS THE PROCEDURAL FRAMEWORK FOR RATIONAL DECISION-MAKING

SEQR begins by stating lengthy Legislative Findings and Declarations announcing specific goals, which are reflected in the Act's substantive provisions. These Legislative Declarations affirm that maintenance of a "quality environment," both healthful and pleasing to the senses, is a "statewide concern" to which every citizen has a responsibility, and that enhancement of human and community resources depends upon the existence of a quality physical environment.[20]

Equally important, the Legislative Declarations call for the state government to take immediate steps to identify critical thresholds

[14] 67 Misc. 2d 828, 324 N.Y.S. 2d 668 (Sup. Ct. Dutchess Cty. 1971), *aff'd*, 40 A.D. 2d 535, 334 N.Y.S. 2d 483 (2d Dep't 1972), *aff'd*, 32 N.Y. 2d 681, 343 N.Y.S. 2d 360 (1973).

[15] 172 N.Y.L.J. 17, col. 1 (Sup. Ct. N.Y. Cty. Aug. 30, 1974).

[16] 42 A.D. 2d 465, 349 N.Y.S. 2d 146 (3rd Dep't 1973).

[17] 78 Misc. 2d 135, 355 N.Y.S. 2d 693 (Sup. Ct. Albany Cty. (1973).

[18] 78 Misc. 2d at 139–40, 355 N.Y.S. ed at 698.

[19] L. 1975, c. 532; N.Y. Env. Con. L. § 3–0301(1)(b).

[20] N.Y. Env. Con. L. § 8–0103(1)–(4).

for public health and safety and to take "all coordinated actions necessary to prevent such thresholds from being reached."[21] It is the Legislature's goal that "to the fullest extent possible" the state's policies, statutes, regulations and ordinances should be interpreted and administered in accordance with SEQR, and to that end, environmental preservation and protection must be part of each agency's mandate. When agencies regulate activities, such values must be given "major consideration" to prevent environmental damage.[22]

Following these broad, general directions, SEQR establishes procedures by which the agencies can enforce and implement their environmental mandate.

SEQR establishes three affirmative duties:

1. a general, across-the-board requirement for all state agencies to act and choose alternatives which, to the maximum extent practicable, and consistent with social, economic and other essential considerations on state policy, "minimize or avoid adverse environmental effects";[23]
2. a mandatory requirement to prepare an environmental impact statement for any action "which may have a significant effect on the environment";[24]
3. a mandatory requirement that for any action which the agency approves, the agency must make "an explicit finding" that it has selected the alternative which, consistent with other essential considerations of state policy, minimizes or avoids adverse environmental effects.[25]

Under SEQR, therefore, all agencies have an environmental mandate. No agency can claim that its organic statute prevents consideration of environmental concerns.

With respect to actual preparation of the environmental impact statement SEQR lists nine specific areas which must be covered. These include a requirement to analyze such matters as adverse environmental effects of the project, alternatives to the proposed action, mitigation measures, growth inducing aspects of the proposal and the effect on energy conservation.[26] To insure smooth functioning, the Act specifically provides for coordination with federal environmental procedures, encourages a "lead agency" concept when more than one state agency is involved, allows for public hearings when justified and authorizes a private applicant to prepare the environmental impact statement for the agency or to subsidize the agency's costs for preparation of the statement.[27]

The initial issue with respect to environmental impact statement preparation is, of course, the threshold test for requiring preparation of an environmental impact statement, i.e. what actions "may have a significant effect on the environment?" The DEC regulations include both a criteria for determining what actions meet the Act's threshold test as well as listing specific examples as guidelines.[28] The criteria and examples are useful, but are of necessity somewhat general in nature and look largely towards quantitative impact. The word "significance", however, means of consequence, a quality which need not be judged in quantitative terms.

The California Supreme Court has recently interpreted the identical phrase in the California environmental assessment statute.[29] The California Supreme Court noted that the California statute, like the New York statute, sought to offer the fullest possible protection to the environment, and that the principal method by which environmental data would be brought to the attention of the agency and the public is through preparation of an impact statement. The court, in rejecting a high threshold, concluded that an agency should

[21] N.Y. Env. Con. L. § 8-0103(5).
[22] N.Y. Env. Con. L. § 8-0103(6)-(9).
[23] N.Y. Env. Con. L. § 8-0109(1).
[24] N.Y. Env. Con. L. § 8-0109(2).
[25] N.Y. Env. Con. L. § 8-0109(8).
[26] N.Y. Env. Con. L. § 8-0109(2).
[27] N.Y. Env. Con. L. §§ 8-0109(3)-(6); 8-0111(2) and (6).
[28] 6 NYCRR §§ 617.9 and 617.12.
[29] Calif. Pub. R-s. C. §§ 21100 et seq.; *No Oil, Inc. v. City of Los Angeles*, 529 P. 2d 66 (1975).

prepare an environmental impact statement whenever it perceives some substantial evidence that a project may have a significant effect environmentally. In support of its holding, the California Supreme Court cited approvingly the Second Circuit's reasoning that one of the important purposes of NEPA's impact statement process is to ensure that the relevant environmental data are before the agency and considered by it prior to the decision, and that the statute must not be construed so as to allow the agency to make its decision in a doubtful case without the relevant data or a detailed study of it.[30]

On completion of an environmental impact statement, and if the action is approved, the agency must make an explicit finding of fact that the goals of the Act have been met and that all practicable means will be taken to minimize or avoid adverse environmental effects.[31] The substantive fact finding requirement is a major addition to the law because it compels the agency to select among the alternatives the alternative which, consistent with social and economic concerns, will minimize or avoid adverse environmental effects. New York was, in this respect, ahead of California. Following New York's lead, this past summer, California adopted its own formulation of a substantive requirement to minimize the environmental harms disclosed in the statement.[32]

A key issue with respect to the statutory finding will be the standard for review in the event a decision and finding are challenged. In reviewing other state's statutes at least two other state's Supreme Courts have tentatively suggested in dictum that the courts will review agency decisions. The California Supreme Court, speaking generally about review, stated that "obviously if the adverse consequences to the environment can be mitigated, or if feasible alternatives are available, the proposed activity, such as the issuance of a permit, should not be approved."[33] The Washington Supreme Court declared that approval of a project may reveal an abuse of discretion where mitigation or avoidance of damage was possible.[34]

Claims in New York that feasible, less damaging actions were available may, however, run against New York's rules prohibiting a court from substituting its judgment for that of the agency. In a recent New York case involving a somewhat similar environmental provision the Court of Appeals reversed the Appellate Division's decision that the Public Service Commission acted unreasonably and in abuse of its discretion when the Public Service Commission did not order transmission lines placed underground.[35] The case arose under the Transmission Facilities Siting Act which contains a requirement that any approved project represent "minimum adverse impact."[36] Although the particular Act in question limits the scope of review and is more restrictive in purpose than SEQR, the Court of Appeals' refusal to look beyond the traditional standards of review will no doubt be seen as precedent under the similar minimization requirement in SEQR.

A more likely task for courts will be to review the nature of the record and the rationality of the decision made. Thus, in another California case, where the agency ignored adverse environmental effects disclosed in the environmental impact statement, and did not explain why practicable and feasible alternatives were rejected, the court overturned the decision.[37]

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[30] 529 P. 2d at 76–77; *Hanly v. Kleindienst*, 471 F.2d 823, 837–38 (2d Cir. 1972) (dissent).

[31] N.Y. Env. Con. L. § 8–0109(8).

[32] California Public Resources Law §§ 21002, 21002.1 and 21081.

[33] *Friends of Mammoth v. Board of Super Mono County*, 502 P. 2d 1049, 1059 n. 8 (Calif. 1972) (In Banc).

[34] *Eastlake Community Council v. Roanoke Associates*, 513 P. 2d 36, 49 n.6 (Wash. 1973).

[35] *County of Orange v. Public Service Comm.*, 37 N.Y.2d 762, 374 N.Y.S.2d 633 (1975), *reversing*, 44 A.D. 2d 103, 353 N.Y.S. 2d 633 (3rd Dep't 1974).

[36] N.Y. Pub. Serv. L. § 126(b).

[37] *Burger v. County of Mendocino*, 45 Cal. App. 3rd 322, 119 Ca. Rptr. 568 (1975).

Equally relevant are the federal cases which require that the agency must consider environmental impacts when final decisions are made and that there be objective and good faith consideration of environmental factors, the so-called "hard look."[38]

The true battleground for SEQR will be in the agencies. Under SEQR the agency must balance SEQR's admonition to minimize or avoid adverse environmental effects against need to act consistent with social, economic and other essential considerations of state policy. But the Act does not explain how the decision is to be arrived at and the DEC regulations do not go much farther than the Act itself. SEQR, however, is action-forcing in the same manner as NEPA in that it forces out into the open the environmental trade-offs, risks, options and benefits. As one federal case stated, "at the very least, NEPA is an environmental full disclosure."[39] SEQR opens the political processes by which many if not most environmentally important decisions are made. The Legislature reflected that intent in its recitation of findings, referring repeatedly to the need to create an awareness of and system to give effective weight to important environmental values disclosed in the SEQR process.[40]

[38] *Kleppe v. Sierra Club*, 98 S. Ct. 2718, 2731 n. 21 (1976); *Calvert Cliffs' Coord. Comm. v. AEC*, 449 F.2d 1109, 1112–13 n. 5, 1115 (D.C. Cir. 1971).

[39] *EDF v. Corps. of Engineers*, 325 F. Supp. 749, 759 (E.D. Ark. 1971).

[40] N.Y. Env. Con. L. § 8–0101.

It is wrong, SEQR says, to pursue social and economic goals in ignorance and in disregard to the environmental effects and risks of that pursuit.

For environmental concerns, SEQR comes not a moment too soon. The PCB case against General Electric illuminated just how important the SEQR type analysis is, even in the context of specific discharge standards. In that case the PCB discharge was in small quantities, about 30 pounds per day. Yet the chemical and biological characteristics of PCBs caused the chemical to accumulate in fish at levels far exceeding health standards. Through the enforcement proceeding the DEC was able to halt discharge of PCBs, but the questions left unanswered at the conclusion of the initial hearing read like an outline for the environmental assessment that should have occurred before the discharge began: Are there any safe or effective means to remove PCBs from the river bottom once they get there? Should the user be required to remove PCB contaminated earth from around its plants? Are there any safe substitutes for PCBs less harmful to the environment? Can the manufacturer of equipment containing PCBs be required to insure that the end user of the product properly disposes of equipment containing PCBs?

Questions such as these should not be asked only after catastrophy has struck. They should be asked in time to avoid or minimize risks. SEQR provides the procedures for such analysis.