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### Judicial Review Under SEQRA: A Statistical Study

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## ARTICLES

### JUDICIAL REVIEW UNDER SEQRA: A STATISTICAL STUDY

*Michael B. Gerrard\**

#### INTRODUCTION

Nearly 2000 judicial opinions were issued under the State Environmental Quality Review Act ("SEQRA")<sup>1</sup> between its enactment in 1975 and the end of 2000.<sup>2</sup> Almost 700 were issued from 1990 (when the author began undertaking an annual review of SEQRA cases for the *New York Law Journal*) through 2000.<sup>3</sup> These numbers are large enough to serve as a basis for a statistically valid review of case outcomes.

This article is divided into five parts. Part I presents statistics on the SEQRA cases. Part II reviews the history of how the Court of Appeals has decided SEQRA cases. Part III lists some of the issues that have been litigated over the years and breaks them down into the resolved issues, the open issues yet to be resolved, and the

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\* For biographical information on Mr. Gerrard, see Michael B. Gerrard, *Reflections on Environmental Justice*, 65 ALB. L. REV. 357, 357 n.\* (2001).

<sup>1</sup> N.Y. ENVTL. CONSERV. LAW §§ 8-0101–8-0117 (McKinney 1997).

<sup>2</sup> See 2 MICHAEL B. GERRARD, DANIEL A. RUZOW & PHILIP WEINBERG, ENVIRONMENTAL IMPACT REVIEW IN NEW YORK, TC-1 to TC-40 (Tables of Cases) (1990 & 2001 Supp.).

<sup>3</sup> *Id.* See also Michael B. Gerrard, *Ten Years of SEQRA Litigation: A Statistical Analysis*, N.Y. L.J., Mar. 24, 2000, at 3; see generally Michael B. Gerrard, *A Review of 2000 SEQRA Cases*, N.Y. L.J., Mar. 23, 2001, at 3; Michael B. Gerrard, *How SEQRA Cases Fared in 1998*, N.Y. L.J., Jan. 22, 1999, at 3; Michael B. Gerrard, *A Review of 1997 SEQRA Cases*, N.Y. L.J., May 22, 1998, at 3; Michael B. Gerrard & Deborah Goldberg, *Update on SEQRA Lawsuits for 1996*, N.Y. L.J., Mar. 28, 1997, at 3; Michael B. Gerrard & Deborah Goldberg, *An Update on SEQRA Lawsuits for 1995*, N.Y. L.J., Mar. 22, 1996, at 3; Michael B. Gerrard & Deborah Goldberg, *Update on SEQRA Lawsuits for 1994*, N.Y. L.J., Mar. 24, 1995, at 3; Stephen L. Kass & Michael B. Gerrard, *Update on SEQRA Lawsuits for 1993*, N.Y. L.J., Apr. 22, 1994, at 3; Stephen L. Kass & Michael B. Gerrard, *Update on SEQRA Lawsuits for 1992*, N.Y. L.J., Mar. 26, 1993, at 3; Stephen L. Kass & Michael B. Gerrard, *SEQRA Update for 1991*, N.Y. L.J., Mar. 27, 1992, at 3; and Stephen L. Kass & Michael B. Gerrard, *SEQRA Update—1990*, N.Y. L.J., Mar. 29, 1991, at 3.

persistently gnawing issues that are not likely to be resolved. Part IV identifies the legal nemeses of the various participants in the SEQRA process. Part V attempts to distill the caselaw under SEQRA into one sentence.

## I. STATISTICS ON SEQRA CASES

Table I herein presents an analysis of the court decisions issued under SEQRA from January 1990 through December 2000—a period of eleven years. There were 697 decisions during this period.<sup>4</sup> These are all the cases known to the author; they include all reported decisions, and many unreported decisions. There may well be other unreported decisions not included in this enumeration.

Several conclusions are apparent from these numbers. The number of decisions per year is remarkably constant. The average is sixty-three decisions per year, and it has never varied by more than plus or minus thirteen decisions.<sup>5</sup>

The number of final environmental impact statements (“EISs”) dropped after 1993,<sup>6</sup> while the number of cases challenging EISs did not.<sup>7</sup> This means that the percentage of EISs that led to court decisions increased significantly, from about 7% during the first half of the 1990s to about 15% during the second half of that decade.

Unfortunately the New York State Department of Environmental Conservation (NYSDEC) stopped counting the number of negative declarations (i.e., decisions that no EIS is required for a particular action) in 1994.<sup>8</sup> During the first half of the 1990s, however, roughly 2.4% of negative declarations led to court decisions.<sup>9</sup>

The single best indicator of whether the plaintiff (usually, but not always, a project opponent) or the defendant (always at least one

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<sup>4</sup> See *infra* Table I.

<sup>5</sup> With a total of seventy-six judicial decisions concerning State Environmental Quality Review Act (SEQRA), N.Y. Env'tl. Law § 8-0101 to 8-0117 (McKinney 1997), cases in that year, 1990 represents the “high water mark” over the past eleven years. 1997 represents the “low water mark,” with a total of just fifty-one SEQRA cases decided that year. *Id.*

<sup>6</sup> In 1993, a total of 170 final EISs were submitted to the NYSDEC. By 1994 that number had declined to 113, and has hovered around 100 per year ever since. *Id.*

<sup>7</sup> Twelve EISs were challenged in 1993. From then to present, the total number of EISs submitted in a given year has risen to as high as eighteen (in 1995 and 1997). *Id.*

<sup>8</sup> See Michael B. Gerrard, *A Review of 2000 SEQRA Cases*, N.Y. L.J., Mar. 23, 2001, at 3 (citing a personal communication with Jack Nasca of the New York State Department of Environmental Conservation (NYSDEC) on March 7, 2001, in which Mr. Nasca informed the author that “[t]he DEC no longer compiles statistics on negative declarations”).

<sup>9</sup> See 1 GERRARD, RUZOW & WEINBERG, *supra* note 2, §§ 1.03[1], 7.04[5] (tabulating, respectively, the number of negative declarations, and the number of court decisions on projects without EISs for the period of time noted above).

government agency, and often one or more project applicants) was more likely to win a particular SEQRA case was whether an EIS had been prepared in that case. Plaintiffs won 11% of the cases in which an EIS had been prepared, whereas plaintiffs won 28% of the cases in which no EIS had been prepared.<sup>10</sup> In other words, plaintiffs in SEQRA cases wherein an EIS *had not* been prepared won almost three times more often than plaintiffs in SEQRA cases wherein an EIS *had* been prepared.<sup>11</sup> There was no great change in these percentages over the decade, nor were there any obvious trends.

This last observation may be useful in predicting the outcome of future SEQRA cases. If an EIS has been prepared, plaintiffs apparently start out with about a one-in-ten chance of winning. On the other hand, if there has been no EIS, plaintiffs tend to have closer to a one-in-three chance of winning. Taking these odds into account, one can then look at the specific facts of a particular case to form a judgment about whether that case is going to have a significantly greater or smaller chance of success than these average percentages would indicate.

## II. NEW YORK COURT OF APPEALS DECISIONS

Table II herein lists all the decisions issued by the Court of Appeals under SEQRA from 1981 (the year of the first such decision<sup>12</sup>) through 2000.<sup>13</sup> There are a total of forty-four cases listed below.<sup>14</sup> Pro-environmental plaintiffs won eight of these cases; these victories were almost entirely in the 1980s.<sup>15</sup> There was one plaintiffs' victory in 1997—*Kahn v. Pasnik*,<sup>16</sup> affirming an appellate division decision that a negative declaration was wrongly issued under some fairly egregious facts.<sup>17</sup> Other than that,

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<sup>10</sup> *Infra* Table I.

<sup>11</sup> Based on the historical data, plaintiffs unquestionably have a much better chance of winning a SEQRA challenge if no EIS has been prepared. The lowest annual percentage of plaintiff-wins in cases *without* an EIS was 18%, in 1997 and 1998; whereas the percentage of plaintiff-wins in cases *with* an EIS only rose this high twice—28% in 1995 and 23% in 2000. *Id.*

<sup>12</sup> Harlem Valley United Coalition v. Hall, 430 N.E.2d 909 (N.Y. 1981).

<sup>13</sup> Soho Alliance v. N.Y. City Bd. of Standards and Appeals, 741 N.E.2d 106 (N.Y. 2000).

<sup>14</sup> *Infra* Table II.

<sup>15</sup> *Id.*

<sup>16</sup> 687 N.E.2d 402 (N.Y. 1997).

<sup>17</sup> See *id.* at 403-04 (affirming the decision below, finding that the defendant—a village board—had utterly failed to take the requisite hard look at the pertinent areas of environmental concern).

plaintiffs have not won a SEQRA case in the Court of Appeals since *Village of Westbury v. Department of Transportation*<sup>18</sup> in 1989.

The plaintiffs' victories in the 1980s included four of the iconic pro-plaintiff SEQRA cases: *Chinese Staff and Workers Ass'n v. City of New York*,<sup>19</sup> concerning socioeconomic effects;<sup>20</sup> *Save the Pine Bush, Inc. v. City of Albany*,<sup>21</sup> on cumulative impacts;<sup>22</sup> *Coca-Cola Bottling Co. of New York v. Board of Estimate*,<sup>23</sup> on eligibility for lead agency status;<sup>24</sup> and *Village of Westbury v. Department of Transportation*,<sup>25</sup> on segmentation.<sup>26</sup>

All of the most important Court of Appeals SEQRA decisions since 1989 have been victories for governmental defendants: *The Society of the Plastics Industry, Inc. v. County of Suffolk*,<sup>27</sup> on standing;<sup>28</sup> *Long Island Pine Barrens Society v. Planning Board*,<sup>29</sup> on cumulative impacts;<sup>30</sup> and *Merson v. McNally*,<sup>31</sup> on relaxed standards of procedural compliance.<sup>32</sup>

Few of these cases were even close; of the forty-four Court of Appeals SEQRA decisions since 1981, all but six were unanimous.<sup>33</sup> It is not immediately apparent why environmental plaintiffs have had such a drought in the Court of Appeals since 1989. The

<sup>18</sup> 549 N.E.2d 1175 (N.Y. 1989).

<sup>19</sup> 502 N.E.2d 176 (N.Y. 1986).

<sup>20</sup> See *id.* at 181 (holding that, under SEQRA, an agency must consider socioeconomic impacts, including the potential displacement of residents and business, as well as any anticipated change in the "character" of the community).

<sup>21</sup> 512 N.E.2d 526 (N.Y. 1987).

<sup>22</sup> See *id.* at 527 (stating that the "cumulative impact of other proposed or pending projects must be considered" under SEQRA).

<sup>23</sup> 532 N.E.2d 1261 (N.Y. 1988).

<sup>24</sup> See *id.* at 1265 (noting that SEQRA is violated when the determination of a project's environmental impact is not made by an agency with authority over the project).

<sup>25</sup> 549 N.E.2d 1175 (N.Y. 1989).

<sup>26</sup> See *id.* at 1178 (holding that it was improper to consider separately the effects of various segments of the same overall project).

<sup>27</sup> 573 N.E.2d 1034 (N.Y. 1991).

<sup>28</sup> See *id.* at 1043-44 (requiring plaintiffs attempting to show standing to plead a "special injury"—i.e., an injury different from the injury, if any, to the public-at-large). *Society of Plastics* was a sweeping decision, one which redefined the requirements for standing under SEQRA. See generally Joan Leary Matthews, *Unlocking the Courthouse Doors: Removal of the "Special Harm" Requirement Under SEQRA*, 65 ALB. L. REV. 421, 453-457 (2001) (arguing that the heightened standing requirements after *Society of Plastics* are draconian, and should be modified).

<sup>29</sup> 606 N.E.2d 1373 (N.Y. 1992).

<sup>30</sup> See *id.* at 1379 (holding that the impacts of 224 contemporaneously planned projects in the Long Island Pine Barrens need *not* be considered cumulatively, since the projects were not part of a "cohesive framework").

<sup>31</sup> 688 N.E.2d 479 (N.Y. 1997).

<sup>32</sup> See *id.* at 483-84, 486 (allowing a conditional negative declaration to be issued for a Type I project, despite regulations seemingly to the contrary).

<sup>33</sup> *Infra* Table II.

impression one gets from these decisions is of a court that is enormously deferential to administrative decisions, at least when regulatory—as opposed to constitutional—questions are at stake.

### III. LITIGATED ISSUES

A number of issues have appeared frequently in SEQRA litigation. Some of these issues have been conclusively decided; other issues are still open, while still others are likely never to be resolved. These issues are categorized below, together with citations to leading decisions that embody any prevailing rule.

#### A. Resolved Issues

##### 1. Standard of Review

The New York courts grant considerable deference to the technical decisions of administrative agencies. One prominent example is the 1990 Court of Appeals decision *Akpan v. Koch*,<sup>34</sup> a challenge to an urban renewal project in Brooklyn.<sup>35</sup> Opponents presented voluminous expert reports urging that the EIS analysis was deeply flawed.<sup>36</sup> The court would have none of it; the defendant City of New York had studied the issues and reached a reasoned conclusion.<sup>37</sup> It was not for the courts to second-guess the City's judgments.<sup>38</sup> This deference is the major reason why, as just noted, plaintiffs seldom win cases in which EISs have been prepared.

##### 2. Procedural Compliance

Over the years, several cases had declared that strict procedural compliance was required under SEQRA, and that even minor procedural errors would lead to nullification of a decision.<sup>39</sup> This

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<sup>34</sup> 554 N.E.2d 53 (N.Y. 1990).

<sup>35</sup> See *id.* at 54 (detailing the goals of the renewal plan; specifically, to replace structurally impaired buildings with new housing, as well as with parks and other facilities).

<sup>36</sup> See *id.* at 58-59 (presenting plaintiffs' various criticisms of the defendant City of New York's housing study and EIS).

<sup>37</sup> See *id.* at 57-60 (noting that the issue of "secondary displacement," the plaintiff's main concern, had been raised at every level of the SEQRA process).

<sup>38</sup> See *id.* at 57 (defining the proper scope of judicial review of an agency's substantive compliance with SEQRA as a "meaningful" inquiry, yet not so searching a review that the court is merely substituting its judgment for that of the agency).

<sup>39</sup> See *King v. Saratoga County Bd. of Supervisors*, 675 N.E.2d 1185, 1188, (N.Y. 1996) (citing *E.F.S. Ventures Corp. v. Foster*, 520 N.E.2d 1345 (N.Y. 1988); *Chinese Staff*, 502 N.E.2d 176; and *Tri-County Taxpayers Ass'n v. Town Bd.*, 432 N.E.2d 592 (N.Y. 1982) to

doctrine, however, was never firmly established in practice, and it was largely cast aside in 1997 in *Merson v. McNally*,<sup>40</sup> in which the Court of Appeals authorized, under some circumstances, a conditioned negative declaration for a Type I action<sup>41</sup> (an action more likely than others to require an EIS) despite an EIS regulation that seems to prohibit such a declaration.<sup>42</sup> This decision signaled that minor procedural irregularities will be forgiven, especially if the public has been given full opportunity to participate in the discussions. Absolutely strict procedural compliance continues to be the domain of the Election Law.<sup>43</sup>

### 3. Role of SEQRA in Decision-Making

When SEQRA review establishes the presence or absence of an impact, that decision is binding, at least on the lead agency. For example, in *WEOK Broadcasting Corp. v. Planning Board*,<sup>44</sup> an EIS had concluded that a proposed radio broadcasting tower would not have a negative aesthetic impact.<sup>45</sup> The lead agency—a town planning board—then disapproved the tower on grounds of its potential aesthetic impact.<sup>46</sup> The Court of Appeals found this inconsistency between the EIS and the agency's decision to be impermissible and upheld WEOK's application.<sup>47</sup>

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illustrate the "strict compliance" principle); see also *Williamsburg Around the Bridge Block Ass'n v. Giuliani*, 644 N.Y.S.2d 252, 259 (App. Div. 1996) (explaining that stringent compliance with SEQRA's requirements is essential, as merely "substantial" compliance would allow government agencies to bypass SEQRA's essential mandates); *Rye Town/King Civic Ass'n v. Town of Rye*, 442 N.Y.S.2d 67, 71 (App. Div. 1981) (noting that the legislature, when enacting SEQRA, expressly stated that SEQRA should be interpreted and administered to "the fullest extent possible" (citing N.Y. ENVTL. CONSERV. LAW § 8-0103 (McKinney 1997))).

<sup>40</sup> 688 N.E.2d 479 (N.Y. 1997)

<sup>41</sup> See *id.* at 484-86 (allowing modifications despite the fact that the modification might, in form, appear identical to an impermissible conditioned negative declaration).

<sup>42</sup> See N.Y. COMP. CODES. R. & REGS. tit. 6, § 617.7(d)(1) (2000) (prohibiting—by omission—the use of conditioned negative declarations in Type I projects).

<sup>43</sup> See *Pierce v. Breen*, 657 N.E.2d 1304, 1305 (N.Y. 1995) (stating that to relax strict compliance with election procedures would "dilute the integrity of the election process"); *Staber v. Parrilla*, 482 N.E.2d 1204, 1205-06 (N.Y. 1985) (explaining, with perhaps unwarranted optimism, how strict compliance with election laws insures that candidates will be prevented from manipulating the election process).

<sup>44</sup> 592 N.E.2d 778 (N.Y. 1992).

<sup>45</sup> See *id.* at 779 (noting that the environmental impact statement (EIS) had addressed the potential visual impacts of the tower at nine separate locations, and found no significant impact at any of these locations).

<sup>46</sup> See *id.* at 780.

<sup>47</sup> See *id.* at 783 (annulling the board's determination "because it [was] not supported by substantial evidence," but, rather, by statements from members of the community disputing the findings of the EIS).

#### 4. Lead Agency Selection

Until the late 1980s, there was considerable uncertainty over which agencies were eligible to serve as lead agencies in the SEQRA process.<sup>48</sup> The lead agency has a crucial role; it decides whether an EIS is necessary, and, if so, what the EIS must contain, whether a draft EIS is adequate, and what the final EIS should say.<sup>49</sup> The City of New York designated two permanent co-lead agencies for all of its SEQRA matters, but in 1988 in *Coca-Cola Bottling Co. of New York v. Board of Estimate*<sup>50</sup> the Court of Appeals annulled this practice and declared that only “involved agencies”—that is, agencies that have an actual decision-making role, as opposed to an advisory role—may be the lead agency.<sup>51</sup>

#### 5. Role of Expert v. Amateur Opinion

SEQRA controversies frequently become battles of experts, but two rules have clearly emerged: one expert followed by the lead agency beats any number of experts by opponents,<sup>52</sup> and non-expert views expressing general opposition count for nothing.<sup>53</sup>

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<sup>48</sup> See, e.g., *Save the Pine Bush, Inc. v. Planning Bd.*, 466 N.Y.S.2d 828, 831 (App. Div. 1983) (holding impermissible the designation of an Environmental Quality Review Board as lead agency on city projects, because the Board lacked jurisdiction to approve the project in the first instance); *Congdon v. Washington County*, 512 N.Y.S.2d 970, 975 (Sup. Ct. 1986) (holding that, though harmless in this case, the government's designation of two lead agencies was erroneous).

<sup>49</sup> See ENVTL. CONSERV. LAW § 8-0111(6) (McKinney 1997) (corresponds to current version (McKinney 2001)).

<sup>50</sup> 532 N.E.2d 1261 (N.Y. 1988).

<sup>51</sup> See *id.* at 1265 (noting that SEQRA's purpose and policy are subverted when two separate agencies, only one of which is the lead agency, divide their responsibilities under SEQRA); see also 1 GERRARD, RUZOW & WEINBERG, *supra* note 2, § 3.03[3][a] (defining “involved agencies”).

<sup>52</sup> See *Sprint Spectrum v. Willoth*, 176 F.3d 630, 646 (2d. Cir. 1999) (allowing a planning board to disregard the opinion of the applicant's expert where the board's own expert had advanced a different opinion); *Chem. Mfrs. Ass'n v. Jorling*, 649 N.E.2d 1145, 1154 (N.Y. 1995) (stating that the NYSDEC was not required to accept assertions by chemical industry experts unsupported by scientific data, and, further, that the NYSDEC had no burden to demonstrate the invalidity of the unsupported data); *Village of Harriman v. Town Bd. of Monroe*, 544 N.Y.S.2d 860, 862 (App. Div. 1989) (noting that petitioners had failed to produce tests of their own to refute the agency's conclusions).

<sup>53</sup> See *WEOK Broad. Corp. v. Planning Bd.*, 592 N.E.2d 778, 783-84 (N.Y. 1992) (stating that “generalized community objections” alone do not rise to the level of substantial evidence upon which to make SEQRA decisions).



## 6. Aesthetics Counts

Aesthetics have firmly been established as a valid basis for municipal regulation, and a project subject to discretionary review can, under the right circumstances, be rejected because it is ugly.<sup>54</sup>

### *B. Open Issues*

#### 1. Standing for Shared Exposure

In 1991, in *The Society of the Plastics Industry, Inc. v. County of Suffolk*,<sup>55</sup> the Court of Appeals created the doctrine that, in order to have standing to bring a SEQRA case, a plaintiff must not only be affected by the challenged action; she must also be affected differently than the public-at-large.<sup>56</sup> This doctrine has the potential to shield from review many “classic” environmental impacts—such as air and water pollution—that equally affect everyone nearby. New York’s doctrine of standing in environmental cases has no parallel in either federal standing law or the laws of most other states,<sup>57</sup> and thus makes New York one of the most restrictive jurisdictions for environmental plaintiffs. Some lower courts have found ways around this rule,<sup>58</sup> and a number of commentators are critical of it.<sup>59</sup> This rule can fairly be characterized as unstable, and certainly will generate great interest should it reach the Court of Appeals again.

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<sup>54</sup> See *Sprint Spectrum*, 176 F.3d at 645, 647-48 (upholding denial of site plan approval for three communication towers because of their potential for negative aesthetic impact); *Holmes v. Brookhaven Town Planning Bd.*, 524 N.Y.S.2d 492, 494 (App. Div. 1988) (nullifying a negative declaration for failure to consider the aesthetic impacts of a shopping center).

<sup>55</sup> 573 N.E.2d 1034 (N.Y. 1991).

<sup>56</sup> *Id.* at 1043-44.

<sup>57</sup> See *Matthews*, *supra* note 28, at 450-53 (discussing the “special harm” requirement set forth by the Court of Appeals in the *Society of Plastics* case, and comparing New York’s SEQRA standing requirements after this case to that of several other states).

<sup>58</sup> See, e.g., *Comm. to Preserve Brighton Beach & Manhattan Beach, Inc. v. Planning Comm’n of New York*, 695 N.Y.S.2d 7, 12 (App. Div. 1999) (stating that the neighboring landowners’ (petitioners’) injuries, which were related to aesthetics and quality-of-life issues, nonetheless satisfied the requirements for standing); *Long Island Pine Barrens*, 690 N.Y.S.2d at 97 (finding that petitioners who alleged they had experienced rust in their drinking water, and whose wells had been tested as possible replacement water, had standing to challenge the sale of nearby land).

<sup>59</sup> See generally *Matthews*, *supra* note 28, at 453.

## 2. Statute of Limitations Accrual

The general rule is that when a lead agency has issued a negative declaration under SEQRA and subsequently approves the project, the statute of limitations accrues upon approval.<sup>60</sup> However, a few decisions, especially from the Appellate Division, Third Department, have held that accrual begins upon issuance of the negative declaration.<sup>61</sup> This has led to a good deal of confusion, as well as to the “protective” early filing of lawsuits by plaintiffs not wishing to run afoul of this rule.

## 3. Cumulative Impacts/Segmentation

Two related continuing areas of uncertainty are when there has been a failure to consider cumulative impacts, and when there has been impermissible segmentation.<sup>62</sup> The leading case on cumulative impacts is *Long Island Pine Barrens Society v. Planning Board*,<sup>63</sup> which allowed more than 200 different projects in an ecologically sensitive area of Suffolk County to be considered separately under SEQRA, despite their concededly common effect on groundwater supplies.<sup>64</sup> Shortly after *Long Island Pine Barrens* was decided, NYSDEC created a task force to study potential amendments to the SEQRA regulations on cumulative impacts.<sup>65</sup> The task force issued a report in 1999, but no action has been taken on it thus far.<sup>66</sup>

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<sup>60</sup> See *Hickey v. Planning Bd.*, 571 N.Y.S.2d 105, 106 (App. Div. 1991).

<sup>61</sup> See, e.g., *J.B. Realty Enter. Corp. v. City of Saratoga Springs*, 704 N.Y.S.2d 742, 745 (App. Div. 3d Dep't 2000) (holding that the statute of limitations began to run when the City's Design Review Commission issued a negative declaration); *Wing v. Coyne*, 517 N.Y.S.2d 576, 578 (App. Div. 3d Dep't 1987) (holding that the statute of limitations begins to run when a decision is “final and binding”).

<sup>62</sup> The former question arises when impacts from different projects may combine to degrade a common resource, such as an aquifer; the latter arises when there is debate over whether the project under consideration is actually part of a larger undertaking. The two doctrines, however, often blur into each other. See, e.g., *City of Buffalo v. N.Y. State Dep't of Env'tl. Conserv.*, 707 N.Y.S.2d 606 (Sup. Ct. 2000) (in case concerning relationship between a proposed bridge and toll plaza, segmentation and cumulative impact language interspersed).

<sup>63</sup> 606 N.E.2d 1373 (N.Y. 1992).

<sup>64</sup> See *id.* at 1378 (stating that the government's policy with regard to the Pine Barrens, as opposed to a government plan, was not a “sufficiently unifying ground for tying otherwise unrelated projects together”); see also *supra* note 30 and accompanying text.

<sup>65</sup> John M. Armentano, *Environmental Action Committee: Group Report Requests Guidelines for Cumulative-Impact Assessments*, N.Y. L.J., July 28, 1999, at 5.

<sup>66</sup> *Id.*

### *C. Persistently Gnawing Issues*

#### 1. Cross-Agency Jurisdiction

In some municipalities there are specialized boards and commissions that deal with such matters as local wetlands permits and architectural review. Controversies occasionally arise when one of these specialized bodies, acting as an involved agency, reaches conclusions at odds with those of the lead agency (often a planning board) as to the impacts of a project.<sup>67</sup> If an EIS supervised by a planning board concludes that a project will not have a negative effect on wetlands, but the wetlands commission reaches the opposite conclusion, it is easy to envision litigation, but it is somewhat more difficult to predict the outcome.

#### 2. Self-Serving Lead Agencies

When the Legislature enacted SEQRA in 1975 it chose to allow agencies that were project proponents to serve as lead agencies.<sup>68</sup> For example, if the State Department of Transportation wishes to build a new highway, it can be the lead agency for that project. The theory behind this approach is that environmental considerations will be taken most seriously if the entity that is planning the project must also handle the SEQRA compliance.<sup>69</sup> However, citizen groups frequently complain that this eliminates objective review and leads to biased environmental reviews.<sup>70</sup> This complaint has had no traction, however, in the courts.<sup>71</sup>

#### 3. Inconsistency Among Lead Agencies

There is no mechanism under SEQRA to ensure that different lead agencies reach consistent results. Some municipalities tend to

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<sup>67</sup> See 1 GERRARD, RUZOW & WEINBERG, *supra* note 2, § 3.03[3][a] (describing the procedure for dealing with one such scenario—specifically, in the instance where the lead agency has prepared an EIS which an involved agency finds “inadequate for purposes of its own decision-making”).

<sup>68</sup> See N.Y. ENVTL. CONSERV. LAW § 8-0111(6) (defining lead agency); *see also* 1 GERRARD, RUZOW & WEINBERG, *supra* note 2, § 3.03[1] (discussing the pros and cons of allowing the project sponsor to act as lead agency).

<sup>69</sup> 1 GERRARD, RUZOW & WEINBERG, *supra* note 2, § 3.03[1].

<sup>70</sup> See *id.* (noting that project opponents generally fear that if a lead agency already supports a project *before* assessing its environmental impacts, the agency is likely to proceed with bias).

<sup>71</sup> *Id.*

be pro-development and will issue negative declarations for relatively large projects; other municipalities are anti-development and will require EISs for much smaller projects. At the federal level, the President's Council on Environmental Quality<sup>72</sup> strives for agencies to behave in a more or less consistent fashion under the National Environmental Policy Act.<sup>73</sup> SEQRA gives no comparable role to NYSDEC or to any other entity. The inevitably inconsistent results frequently lead to dissatisfaction by parties that are unhappy with the results of the SEQRA process on a project that concerns them.

#### 4. Consent Orders as SEQRA Exemptions

In *New York Public Interest Research Group v. Town of Islip*,<sup>74</sup> the Court of Appeals ruled that an action taken pursuant to a consent order with DEC (in that case, the vertical expansion of a landfill) fell within SEQRA's exemption for enforcement proceedings.<sup>75</sup> As a result, a number of substantial projects have been built without any SEQRA review at all, leading to great frustration for project opponents.

#### 5. Preliminary Injunction Bonds

New York Civil Procedure Law and Rules (C.P.L.R.) section 6312(b)<sup>76</sup> requires that no preliminary injunction may be granted without the posting of a bond by the plaintiff. There is no SEQRA exemption to this rule. Some courts in issuing preliminary injunctions have required only nominal bonds, but others have required bonds that are so large that the plaintiffs were unable to post them, the injunction never went into effect, and the project was built.<sup>77</sup>

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<sup>72</sup> See Exec. Order No. 11,514, 35 Fed. Reg. 4247 (Mar. 7, 1970), *reprinted as amended in* 42 U.S.C. § 4321 (1994) (establishing and defining the responsibilities of the Council of Environmental Quality).

<sup>73</sup> National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 to 4370 (1994).

<sup>74</sup> 520 N.E.2d 517 (N.Y. 1988).

<sup>75</sup> *Id.* at 524.

<sup>76</sup> N.Y. C.P.L.R. 6312(b) (McKinney 1980 & Supp. 2001).

<sup>77</sup> 2 GERRARD, RUZOW & WEINBERG, *supra* note 2, § 7.16[1][b][iv].

#### IV. THE NEMESSES

In SEQRA litigation, each of the classes of parties listed below (citizen plaintiffs, applicants, and governmental agencies) have confronted difficulties that are pervasive and specific to that class.<sup>78</sup>

##### A. Citizen Plaintiffs' Nemeses

###### 1. Statute of Limitations

The great majority of all SEQRA cases are brought under Article 78 of the CPLR.<sup>79</sup> The statute of limitations for Article 78 cases is four months,<sup>80</sup> but numerous laws in the environmental and planning area have thirty-day statutes of limitations.<sup>81</sup> If project opponents have not organized, raised money, and retained counsel by the time a project is approved, it will be very difficult for them to file suit within four months, and often impracticable—if not impossible—to do so within thirty days.

###### 2. Exhaustion of Administrative Remedies

An environmental objection to a project normally cannot be raised in court for the first time; if the plaintiff did not raise the objection during the administrative process, especially during the comment period on the DEIS, she may be held to have waived her administrative remedies.<sup>82</sup> Of course, this does not apply if the plaintiff had no opportunity to participate in the administrative

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<sup>78</sup> Two of plaintiffs' primary nemeses, standing and standard of review, have been discussed in detail above. See *supra* Part III. A. 1. (presenting *Akpan v. Koch*, 554 N.E.2d 53, 54 (N.Y. 1990), as an example of how courts typically review lead agency determinations deferentially when an EIS has been prepared); see also *supra* Part III. B. 1. (contending that, ever since the Court of Appeals in its *Society of Plastics* decision, heightened the requirements for standing under SEQRA, countless cases have been dismissed because plaintiffs were found to lack standing).

<sup>79</sup> See 2 GERRARD, RUZOW & WEINBERG, *supra* note 2, § 7.03[1] (explaining that, because SEQRA has no explicit provision for judicial review, Article 78 proceedings—designed for challenges to the actions of administrative agencies—are the appropriate vehicle for plaintiffs seeking to challenge specific SEQRA outcomes).

<sup>80</sup> N.Y. C.P.L.R. 217(1) (McKinney 1990 & Supp. 2001).

<sup>81</sup> See 2 GERRARD, RUZOW & WEINBERG, *supra* note 2, § 7.02[4][b] (listing the statutes of limitations periods for various types of environmental challenges). The statutes—aptly described by the authors of the treatise as “difficult to find”—are scattered throughout New York's statutory compilations, including the Environmental Conservation Law, Village Law, Local Finance Law, Executive Law, General City Law, and Town Law. *Id.*

<sup>82</sup> See *Aldrich v. Pattison*, 486 N.Y.S.2d 23, 31 (App. Div. 1985).

process.<sup>83</sup> For example, there is no established procedure for the public to comment on negative declarations before they are issued.

### 3. FOIL Delays

The principal mechanism for citizens to obtain information about a project they are opposing is the New York State Freedom of Information Law (FOIL).<sup>84</sup> FOIL requires that requests be acknowledged within five days of receipt,<sup>85</sup> but FOIL contains no quantitative time limitations for supplying the requested information. It is not uncommon for the comment deadline on a DEIS, or other opportunities for public participation, to come and go before a project's opponents ever receive the information they are seeking under FOIL.

## B. Applicants' Nemeses

### 1. Ripeness

Applicants who believe they are being unfairly treated by lead agencies have little judicial recourse. Agency actions are not ripe for review until they are final—i.e., interim actions by lead agencies are not ripe for review<sup>86</sup>—and a positive declaration (a decision to require an EIS) has been held *not* to be a final action.<sup>87</sup> Once in a great while, an applicant will succeed in a suit against an agency that the applicant believes is unduly delaying the application.<sup>88</sup>

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<sup>83</sup> See *Malkin v. Tully*, 412 N.Y.S.2d 186, 187-88 (App. Div. 1978) (noting that what is of primary importance is that petitioners raise these issues "at the first opportunity").

<sup>84</sup> N.Y. PUB. OFF. LAW §§ 84-90 (McKinney 2001).

<sup>85</sup> *Id.* at § 89(3).

<sup>86</sup> See 2 GERRARD, RUZOW & WEINBERG, *supra* note 2, § 7.02[1] n.7 (citing several SEQRA cases that illustrate the ripeness doctrine, including *Zagata v. Freshwater Wetlands Appeals Bd.*, 663 N.Y.S.2d 881 (App. Div. 1997); *Ogden Citizens for Responsible Land Use, Ltd. v. Planning Bd.*, 637 N.Y.S.2d 582 (App. Div. 1996); and *Young v. Bd. of Trs.*, 634 N.Y.S.2d 605 (App. Div. 1996)).

<sup>87</sup> See *Sour Mountain Realty v. N.Y. State Dep't of Envtl. Conserv.*, 688 N.Y.S.2d 842, 845 (App. Div. 1999) (holding that the issuance of a positive declaration is not a final determination; it is simply a preliminary step in the overall process, and is not ripe for review until the decision-making process is complete); see also *Pilot Corp. v. Planning Bd. of Newburgh*, Index No. 5399/00, at 11 (Sup. Ct. Orange County June 2001).

<sup>88</sup> See 2 GERRARD, RUZOW & WEINBERG, *supra* note 2, § 7.16[5] (citing a few of these rare instances, including 383 *Madison Assoc. v. N.Y. City Planning Comm'n*, N.Y. L.J., June 20, 1988, at 25 (Sup. Ct. N.Y. Co. 1988); and *Pospisil v. Anderson*, 518 N.Y.S.2d 306 (Sup. Ct. 1987)).

This, though, is a rare event; and the litigation itself is likely to antagonize the agency and delay matters even further.<sup>89</sup>

## 2. Unenforceability of Time Limits

Related to the ripeness issue is the fact that while SEQRA contains various time limitations for the processing of applications,<sup>90</sup> these limitations essentially are unenforceable.<sup>91</sup> Thus, applicants have little remedy—outside of the political process—for dealing with many, if not most, project delays.

## 3. SLAPP-Suit Laws & Noerr-Pennington

Applicants would often like to sue project opponents whom the applicants believe are defaming or otherwise impeding their projects; such actions have been called “SLAPP suits” (Strategic Lawsuits Against Public Participation).<sup>92</sup> Since the New York Legislature’s 1992 enactment of a statute discouraging SLAPP suits,<sup>93</sup> most suits of this sort have been dismissed.<sup>94</sup> As a related matter, a federal antitrust rule known as the *Noerr-Pennington* doctrine has blocked applicants from suing competitors who are fomenting opposition to their projects.<sup>95</sup>

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<sup>89</sup> See *id.* at § 3.12[3] n.45-47 (citing an Appellate Division, Second Department decision in which the court stated that “protection of ‘the environment’ . . . far overshadows the rights of developers to obtain prompt action on their proposals” (quoting *Sun Beach Real Estate Dev. Corp. v. Anderson*, 469 N.Y.S.2d 964, 970-71 (App. Div. 1983)); see also, e.g., *Sour Mountain Realty*, 688 N.Y.S.2d at 846-47 (rejecting a claimed due process violation attributable to agency’s request for a supplemental draft environmental impact statement (DEIS)).

<sup>90</sup> See 1 GERRARD, RUZOW & WEINBERG, *supra* note 2, § 3.12[3].

<sup>91</sup> See *id.* (reporting that, in practice, “the [published regulatory] time frames may be extended by agreement between an applicant and the lead agency”) (citations omitted). Further, “most applicants do not withhold their agreement to a time extension for fear of alienating the very agency that possesses broad discretionary approval authority over their pending projects.” *Id.*

<sup>92</sup> See 660 W. 115th St. Corp. v. Van Gutfeld, 603 N.E.2d 930, 933 n.1 (N.Y. 1992) (describing SLAPP suits generally, as well as how they often are used to burden, delay, and intimidate project opponents).

<sup>93</sup> N.Y. CIVIL RIGHTS L. § 76-a (McKinney Supp. 2001); 1992 N.Y. Laws 767.

<sup>94</sup> See, e.g., *Street Beat Sportswear v. Nat’l Mobilization Against Sweatshops*, 698 N.Y.S.2d 820, 826 (Sup. Ct. 1999) (dismissing a tortious interference lawsuit on the grounds that it was a SLAPP suit under the statute).

<sup>95</sup> See *Alfred Weissman Real Estate, Inc. v. Big V Supermarkets, Inc.*, 707 N.Y.S.2d 647, 652 (App. Div. 2000) (noting that the *Noerr-Pennington* doctrine, originally intended to protect petitioners from prosecution even if their petitions were motivated by anti-competitive intent, has been expanded to protect the First Amendment rights generally of all those who petition the government).

### *C. Agencies' Nemesis*

The principal legal nemeses of lead agencies are lower court judges who annul project approvals on grounds that are later reversed on appeal. There is a long list of decisions, particularly in New York City, that have followed this pattern. Examples include cases concerning the Times Square redevelopment,<sup>96</sup> the Hudson River Park,<sup>97</sup> the Harlem River Yards project,<sup>98</sup> a zoning amendment authorizing General Large Scale Developments,<sup>99</sup> and the rezoning of the block between Eleventh and Twelfth Avenues and 41st and 42nd Streets.<sup>100</sup> These decisions, though ultimately reversed, often lead to long—sometimes fatal—delays in project construction. This almost “lottery-like” quality to decisions discourages applicants from confining EISs to relevant subject matters, for fear that the project may ultimately end up before a lower court judge who would issue an unduly restrictive opinion.

### V. CONCLUSION

The essence of the holdings of the nearly 2000 SEQRA decisions can be boiled down to one sentence:

If an agency identifies the relevant areas of concern, writes them up in moderate detail, takes action consistent with the write-up, and follows the procedures reasonably closely, the agency is highly likely to eventually win any SEQRA lawsuit brought against it.

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<sup>96</sup> See *Jackson v. N.Y. State Urban Dev. Corp.*, 494 N.Y.S.2d 700, 706 (App. Div. 1985), *aff'd*, 494 N.E.2d 429 (N.Y. 1986) (overruling the lower court's decision to the extent that it had enjoined the project and directed further environmental study).

<sup>97</sup> See *Hudson River Sloop Clearwater Inc. v. Cuomo*, 635 N.Y.S.2d 637, 638 (App. Div. 1995) (reversing the lower court's finding of various violations of SEQRA on the part of project proponents New York State and New York City).

<sup>98</sup> See *South Bronx Clean Air Coalition v. N.Y. State Dep't of Transp.*, 630 N.Y.S.2d 73, 75 (App. Div. 1995) (finding that the lower court had impermissibly “substituted its analysis for the expertise of the lead agency”).

<sup>99</sup> See *People for Westpride, Inc. v. Bd. of Estimate*, 568 N.Y.S.2d 732, 733-35 (App. Div. 1991) (reversing the lower court's ruling that the Board of Estimate had failed to take the requisite “hard look” at significant impacts when it approved a zoning revision that, in effect, facilitated several massive redevelopment projects without any review of the environmental impacts of these projects).

<sup>100</sup> See *Neville v. Koch*, 575 N.Y.S.2d 463, 464-65 (App. Div. 1991) (overturning the lower court's ruling, on the basis that SEQRA decisions must be governed by the “rule of reason”; and stating that “the lead agency is not required to identify every conceivable eventuality”).





## TABLES

TABLE I: OUTCOMES OF SEQRA CASES<sup>101</sup>

Year	Final EISs	Total Judicial Decisions	Challenges with Completed EIS		Challenges Without EIS	
			Total	% Plaintiffs Win	Total	% Plaintiffs Win
1990	229	76	31	13	24	29
1991	214	70	13	0	49	24
1992	171	73	16	4	44	27
1993	170	53	12	17	33	45
1994	113	57	12	8	32	28
1995	131	62	18	28	37	30
1996	103	70	14	7	44	34
1997	98	51	18	11	28	18
1998	100	62	18	6	40	18
1999	84	61	13	8	33	27
2000	108	62	13	23	41	29
Average	138	63	16	11	37	28

<sup>101</sup> 2 GERRARD, RUZOW & WEINBERG, *supra* note 2, § 7.04[5]; *see also* Letter from Michael B. Gerrard, to Joseph LaValley, Editor-in-Chief, *Albany Law Review* 1 (Oct. 22, 2001) (detailing how the author, over the past decade, has compiled the "raw data" from each year's crop of SEQRA decisions, from 1990 to 2000, for his annual New York Law Journal column on SEQRA trends) (on file with Albany Law Review).

TABLE II: NEW YORK COURT OF APPEALS SEQRA DECISIONS

Year	Name of Case	Primary Issue	Winner			Split Panel?
			Envtl. $\pi$	Applicant $\pi$	Gov't $\Delta$	
1981	Harlem Valley United Coalition, Inc. v. Hall, 430 N.E.2d 909 (N.Y. 1981).	Negative declaration upheld: Agency must, and did, "consider substantial disadvantages peculiar to a particular location."			X	No
1982	Niagara Recycling, Inc. v. Town Bd., 443 N.Y.S.2d 961, aff'd, 438 N.E.2d 1142 (N.Y. 1982).	No EIS needed for "general legislation . . . which neither implements nor authorizes any project or program."			X	No
	Tri-County Taxpayers Ass'n v. Town Bd., 432 N.E.2d 592 (N.Y. 1982).	EIS needed on a referendum to establish and finance a proposed sewer district.	X			Yes: 4/3
1983	Bd. of Visitors-Marcy Psychiatric Ctr. v. Coughlin, 453 N.E.2d 1085 (N.Y. 1983).	Emergency action exempt from EIS requirement.			X	No

Year	Name of Case	Primary Issue	Winner			Split Panel?
			Envtl. $\pi$	Applicant $\pi$	Gov't $\Delta$	
	Webster Assocs. v. Town of Webster, 451 N.E.2d 189 (N.Y. 1983).	Alternatives to a proposed project need not be included in an EIS when the agency and the affected public are very familiar with them.			X <sup>a</sup>	No
	Devitt v. Heimbach, 447 N.E.2d 59 (N.Y. 1983).	An agency is required to have an EIS or a negative declaration before deciding on a project.	X			No
1984	Sun Beach Real Estate Dev. Corp. v. Anderson, 469 N.Y.S.2d 964, aff'd, 468 N.E.2d 296 (N.Y. 1984).	N.Y. Town Law's 45-day time limit for planning board to approve a project application was tolled while planning board waited for DEIS.			X	No
	Programming & Sys. v. N.Y. State Urban Dev. Corp., 460 N.E.2d 1347 (N.Y. 1984).	Timing of SEQRA review: EIS must be prepared and available to the public before any significant authorization is granted for a specific proposal.			X	No

<sup>a</sup> The government defendants won the battle but lost the war. The Town of Webster was victorious on the SEQRA issues but lost the appeal on other grounds. See *Town of Webster*, 451 N.E.2d at 189, 193.

Year	Name of Case	Primary Issue	Winner			Split Panel?
			Envtl. $\pi$	Applicant $\pi$	Gov't $\Delta$	
1985	Filmways Communi- cations of Syracuse, Inc. v. Douglas, 484 N.Y.S.2d 738, aff'd, 482 N.E.2d 1225 (N.Y. 1985).	Building permits exempt: Ministerial acts involving no discretion are not "actions" subject to SEQRA review.			X	No
	Inland Vale Farm Co. v. Stergianopoulos 481 N.E.2d 547 (N.Y. 1985).	EIS required where planning board determined that a proposed project could adversely affect nearby water supply.	X			No
1986	Jackson v. N.Y. State Urban Dev. Corp., 494 N.E.2d 429 (N.Y. 1986).	Standard of review for SEQRA will be either "arbitrary and capricious" or "abuse of discretion."			X	No
	Chinese Staff & Workers Ass'n. v. City of N.Y., 502 N.E.2d 176 (N.Y. 1986).	Socio-economic impacts are covered by SEQRA and, if present, must be included in an EIS.	X			Yes: 5/2

Year	Name of Case	Primary Issue	Winner			Split Panel?
			Envtl. $\pi$	Applicant $\pi$	Gov't $\Delta$	
	Pizzuti v. Metro. Transit Auth., 494 N.E.2d 1385 (N.Y. 1986).	SEQRA and EDPL <sup>c</sup> : Compliance with SEQRA is not subject to judicial review in a condemnation proceeding under the EDPL. <sup>d</sup>			X	No
1987	Save the Pine Bush, Inc. v. City of Albany, 512 N.E.2d 526 (N.Y. 1987).	Cumulative impacts of other pending projects must be considered under SEQRA review.	X			No
	Pius v. Bletsch, 519 N.E.2d 306 (N.Y. 1987).	Building permits not always exempt: Where officials w/approval power have discretionary authority, those actions are not ministerial and are subject to SEQRA.			X	No
1988	Coca-Cola Bottling Co. of N.Y., Inc. v. Bd. of Estimate, 532 N.E.2d 1261 (N.Y. 1988).	Lead agency status: The agency responsible for the final project decision must be the entity that performs the SEQRA analysis.	X			No

<sup>c</sup> N.Y. Em. Dom. Proc. Law § 201 (1979).

<sup>d</sup> This decision was reversed by 1991 legislation. See E. Thirteenth St. Cmty. Ass'n v. N.Y. State Urban Dev. Corp., 641 N.E.2d 1368, 1372 (N.Y. 1994).

Year	Name of Case	Primary Issue	Winner			Split Panel?
			Envl. $\pi$	Applicant $\pi$	Gov't $\Delta$	
	NYPIRG v. Town of Islip, 520 N.E.2d 517 (N.Y. 1988).	Consent decrees are exempt from SEQRA compliance when they are an exercise of department's prosecutorial discretion.			X	Yes: 4/2/1
	E.F.S. Ventures Corp. v. Foster, 520 N.E.2d 1345 (N.Y. 1988).	Agencies are not estopped from reviewing an entire development even though construction according to an approved plan occurred prior to a finding of SEQRA violations.			X <sup>e</sup>	No
	Indus. Liaison Comm. v. Williams, 527 N.E.2d 274 (N.Y. 1988).	The lead agency must only address those non-speculative impacts that can reasonably be anticipated as a consequence of the proposed action.			X	No
1989	Vill. of Westbury v. Dep't of Transp., 549 N.E.2d 1175 (N.Y. 1989).	Segmentation: Two projects that are dependent on each other, complementary, or otherwise unified must be considered together and their cumulative impacts assessed.	X			No

<sup>e</sup> The agency won on the SEQRA issue but lost the appeal; as the agency's actions were otherwise held to be arbitrary and capricious. See *E.F.S. Ventures*, 520 N.E.2d at 1353.

Year	Name of Case	Primary Issue	Winner			Split Panel?
			Envtl. $\pi$	Applicant $\pi$	Gov't $\Delta$	
	Har Enters. v. Town of Brookhaven, 548 N.E.2d 1289 (N.Y. 1989).	Standing: Owner of property subject to a zoning change is presumptively adversely affected by violation of SEQRA. <sup>1</sup>			X	No
1990	Mobil Oil Corp. v. Syracuse Indus. Dev. Agency, 559 N.E.2d 641 (N.Y. 1990).	Standing: Owner with no close relationship with subject property must plead special damages for standing to challenge a SEQRA decision.			X	No
	Akpan v. Koch, 554 N.E.2d 53 (N.Y. 1990).	Standard of Review: Great deference given to agency conclusions.			X	No
1991	Soc'y of the Plastics Indus., Inc. v. County of Suffolk, 573 N.E.2d 1034 (N.Y. 1991).	Standing: Challenger must establish different injury than that suffered by public-at-large.			X	Yes: 4/3
	Sutton Area Cmty. v. Bd. of Estimate, 578 N.E.2d 436 (N.Y. 1991).	"Hard Look": Board was informed of all pertinent environmental issues and considered them, thus constituting a "hard look."			X	No

<sup>1</sup> The presumption may, however, be rebutted by a showing that owner has no close nexus with the property. See Mobil Oil Corp. v. Syracuse Indus. Dev. Agency, 559 N.E.2d 641, 645 (N.Y. 1990).



Year	Name of Case	Primary Issue	Winner			Split Panel?
			Envl. $\pi$	Applicant $\pi$	Gov't $\Delta$	
	Citizens for an Orderly Energy Policy, Inc. v. Cuomo, 582 N.E.2d 568 (N.Y. 1991).	Legislative exemption: An agency complying with a "legislative mandate" that leaves no room for discretion is performing a ministerial function and is exempt from SEQRA.			X	Yes: 4/3
	Long Island Pine Barrens Soc'y, Inc. v. Planning Bd., 585 N.E.2d 778 (N.Y. 1991).	When SEQRA review has been completed at a preliminary approval stage, a SEQRA challenge that waits for final project approval is not timely.			X	No
	Town of Dryden v. Tompkins County Bd. of Representatives, 580 N.E.2d 402 (N.Y. 1991).	Alternatives: Agency must only consider a reasonable range of alternatives; the "rule of reason" must apply.			X	No
	Village of Hudson Falls v. NYSDEC, 557 N.Y.S.2d 702, aff'd, 575 N.E.2d 394 (N.Y. 1991).	Permit renewal: Absent any change in conditions or violations of a permit, its renewal may not be challenged on SEQRA grounds.			X	No
	Haggerty v. Planning Bd., 587 N.E.2d 287 (N.Y. 1991).	Statute of limitations: For a SEQRA challenge, under certain circumstances this may be as short as thirty (30) days.			X	No

Year	Name of Case	Primary Issue	Winner			Split Panel?
			Envtl. $\pi$	Applicant $\pi$	Gov't $\Delta$	
1992	Long Island Pine Barrens Soc'y, Inc. v. Planning Bd., 606 N.E.2d 1373 (N.Y. 1992).	Cumulative impacts: A mere "policy" that affects a certain region, as opposed to a "project" in an insufficiently unifying ground to trigger cumulative review.			X	No
	WEOK Broad. Corp. v. Planning Bd., 592 N.E.2d 778 (N.Y. 1992).	"Negative aesthetic impact considerations . . . unsupported by substantial evidence may not serve as a basis for denying approval."		X		No
	Neville v. Koch, 593 N.E.2d 256 (N.Y. 1992).	Satisfies "hard look" for an agency to examine hypothetical "worst case scenarios."			X	No
1993	Inc. Vill. of Atlantic Beach v. Gavalas, 615 N.E.2d 608 (N.Y. 1993).	A building inspector's decision to grant or deny an application may be ministerial and thus exempt from SEQRA.			X	No
	Niagara Mohawk Power Corp. v. NYSDEC, 624 N.E.2d 146 (N.Y. 1993).	Federal preemption: State water quality programs not in compliance with Federal Clean Water Act are preempted.		X		No

Year	Name of Case	Primary Issue	Winner			Split Panel?
			Envtl. $\pi$	Applicant $\pi$	Gov't $\Delta$	
1994	E. Thirteenth St. Cmty. Ass'n v. N.Y. State Urban Dev. Corp., 641 N.E.2d 1368 (N.Y. 1994).	EDPL standing: Condemnation proceeding under EDPL may not be challenged under SEQRA.			X	U
1995	Chem. Specialties Mfrs. Ass'n v. Jorling 649 N.E.2d 1145 (N.Y. 1995).	Court's role in reviewing agency action is not to substitute its judgment for the agency, but merely to see if the agency's actions were reasonable.			X	Yes: 5/2
1996	Gernatt Asphalt Prods., Inc. v. Town of Sardinia 664 N.E.2d 1226 (N.Y. 1996).	Negative declaration upheld, even where Town Board prepared EIS forms with the intent of adopting the proposed project.			X	No
	King v. Saratoga Co. Bd. of Supervisors, 675 N.E.2d 1185 (N.Y. 1996).	Despite a SEQRA violation by and agency's undertaking an action prior to filing an EIS, no de novo environmental review was required.			X	No
	Young v. Bd. of Trs., 675 N.E.2d 464 (N.Y. 1996).	Statute of limitations begins to run on an action by an agency when it commits itself to "a definite course of future decision."			X	No

Year	Name of Case	Primary Issue	Winner			Split Panel?
			Envtl. $\pi$	Applicant $\pi$	Gov't $\Delta$	
1997	Merson v. McNally, 688 N.E.2d 479 (N.Y. 1997).	Changes made to a project proposal during the EAF process are not impermissible conditional negative declarations.			X	No
	Kahn v. Pasknik, 687 N.E.2d 402 (N.Y. 1997).	Negative declaration annulled when the planning board did not take the requisite "hard look."	X			U
1998	None					U
1999	Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck, 721 N.E.2d 971 (N.Y. 1999).	Information in an EIS may be used to show a "close causal nexus" between an action and a legitimate objective, thus annulling a takings claim.			X	U
2000	Soho Alliance v. N.Y. City Bd. of Standards and App., 741 N.E.2d 106 (N.Y. 2000).	Agency was found to have taken the requisite "hard look" when it "sought input from several interested agencies" and performed environmental soil and water tests.			X	U