

Pace University

DigitalCommons@Pace

Pace Law Faculty Publications

School of Law

2-18-2004

SEQRA Challenges: Court Creates New Rule on Statute of Limitations

John R. Nolon

Elisabeth Haub School of Law at Pace University

Jessica A. Bacher

Elisabeth Haub School of Law at Pace University

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Land Use Law Commons](#)

Recommended Citation

John R. Nolon & Jessica A. Bacher, SEQRA Challenges: Court Creates New Rule on Statute of Limitations, N.Y. L.J., Feb. 18, 2004, at 5, <http://digitalcommons.pace.edu/lawfaculty/692/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

SEQRA Challenges: Court Creates New Rule on Statute of Limitations

Written for Publication in the New York Law Journal
February 18, 2004

John R. Nolon and Jessica A. Bacher

[John Nolon is a Professor at Pace University School of Law, the Director of its Joint Center for Land Use Studies, and Visiting Professor at Yale's School of Forestry and Environmental Studies. Ms. Bacher is a Staff Attorney for the Land Use Law Center at Pace Law School.]

Abstract: The New York State Environmental Quality Review Act, known around the New York legal community as SEQRA, triggers any time a public action may have an adverse impact on the environment. The determinations of this process, intertwined with public actions such as, site plan approvals, variance requests, or any other land use or public action, are often challenged by those parties who are unsatisfied with the result. This article discusses the extensive case history regarding when SEQRA actions are ripe for legal challenge.

The issuance of land use and environmental permits by administrative agencies in New York, at both the state and local levels, typically involves two distinct determinations. The first is whether the activity meets the substantive standards of the law and regulations enforced by the agency. The second is whether the activity may have an adverse impact on the environment. Where there may be such an impact, the agency makes a "positive declaration" of environmental impact and requires that an Environmental Impact Statement (EIS) be completed. The contents of the EIS are considered by the agency in approving, conditioning its approval of, or denying the permit. The environmental review requirement is imposed by the State Environmental Quality Review Act, known as SEQRA.

The dual nature of this process has led to some confusion in recent years as to when the statute of limitations is triggered for those who wish to challenge agency decisions subject to SEQRA. For years, the courts seemed to hold that parties with standing to challenge agency actions had to wait until the substantive decision was made to litigate agency determinations. "The general rule under SEQRA, as established by the case law, is that the moment of ripeness occurs only when an agency takes its final action approving or disapproving the underlying proposal." Michael B. Gerrard, Daniel Ruzow, Philip Weinberg, *Env'tl. Impact Rev. in N.Y.*, § 7.02 (1) (Mathew Bender 2003). That rule appeared to be changing in recent years and this change has just been confirmed by the Court of

Appeals. See *Stop-the-Barge v. Cahill*, 2003 N.Y. Lexis 4004 (Court of Appeals December 2, 2003).

An example of the rule requiring the substantive decision to be “final” before a SEQRA determination may be litigated is seen in *Town of Coeymans v. City of Albany*, 655 N.Y.S.2d 172 (3d Dep’t 1997). Here, the petitioners sought judicial review of the determination that designated the Department of Environmental Conservation’s regional office as the lead agency for the review of a proposed solid waste management facility. The court held that the lead agency designation was not a “final” determination. Rather, it was, like some other SEQRA determinations, a preliminary step in the decision making process and, therefore, not ripe for judicial review. The court stated that to hold otherwise would subject the entire SEQRA process to unrestrained review that would delay the process indefinitely. As a corollary, the period of limitations applicable to a challenge to the lead agency determination does not begin to run until the environmental review process is complete.

In *Stop-the-Barge v. Cahill*, 2003 N.Y. Lexis 4004 (Court of Appeals December 2, 2003), the Court of Appeals held that the issuance of the Conditional Negative Declaration (CND) was the “final” agency action under SEQRA and, therefore, triggered the statute of limitations. For agency actions that are not listed in the SEQRA regulations as Type I actions (which presumptively may have an adverse impacts on the environment) the agency can issue a CND. This can be done where possible adverse impacts disclosed on an Environmental Assessment Form can be sufficiently mitigated by imposing conditions on the project in the early stage of project review. The conditions imposed must be practicable and reasonably related to impacts identified in the record. When a CND is issued, a full EIS is not required and no further environmental review is necessary. In other words, for SEQRA purposes, the matter is “final”.

In *Stop-the-Barge*, New York City Energy (NYCE) submitted a request to the New York City Department of Environmental Protection (DEP) for a permit to install a power generator on a floating barge on the west side of the Wallabout Channel at the Brooklyn Navy Yard. DEP became the lead agency under SEQRA and conducted an environmental review of the project. DEP was the lead agency under the regulations because it had the primary responsibility for the underlying approval of the power generator project under New York City law. DEP issued a CND, concluding that the project posed no significant impact to the environment and no environmental impact statement was required. On February 18, 2000, the CND became final and the SEQRA review was concluded.

As often happens in land use and environmental approvals, another agency was involved. NYCE had to obtain an air permit under Article 19 of the Environmental Conservation Law from the State Department of Environmental Conservation (DEC). It was at this stage that *Stop-the-Barge*, an opposition

group, got actively involved. Opposition to the project led to a DEC hearing and the petitioners and others submitted extensive written objections to the proposal on the grounds of inadequate environmental review. Following the hearing, DEC approved NYCE's permit application.

The steps in this process relevant to the petitioner's action challenging the environmental review included 1. the issuance of a final CND by DEP on February 18, 2000; 2. DEC's issuance of the air permit on December 18, 2000; and 3. the commencement of petitioner's action challenging the environmental review process on February 20, 2001. Under C.P.L.R. § 217(1) a cause of action of this type must be initiated within four months of the action challenged. The question is which of the actions involved triggered the running of the statute?

The petitioners, Stop-the-Barge, commenced the present action one year after the CND became final. They claimed that the DEP's issuance of the CND was arbitrary and capricious and violated SEQRA. The DEP, in turn, moved to dismiss the petition as time barred. The Court of Appeals agreed with DEP relying on *Essex County v. Zagata* and *Gordon v. Rush* to reach its decision.

In *Essex County v. Zagata*, 91 N.Y.2d 447 (1998), the Court found that several factors must be considered to determine whether an agency action is "final". The first is whether the action imposes an obligation, denies a right or fixes some legal relationship as a consummation of the administrative process. *Essex*, 91 N.Y.2d at 453. In other words, the agency action is "final" when the decision maker arrives at a "definitive position on the issue that inflicts an actual, concrete injury." *Id.* "There must additionally be a finding that the injury purportedly inflicted by the agency may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party. If further agency proceedings might render the disputed issue moot or academic, then the agency position cannot be considered definitive or the injury actual or concrete." *Id.* at 453-54.

In *Gordon v. Rush*, 100 N.Y.2d 236 (2003) the court relied on the *Essex* factors to determine whether the issuance of a positive declaration under SEQRA was "final" and thus ripe for review. A positive declaration of environmental impact requires the preparation of an Environmental Impact Statement: a costly and time-consuming enterprise. The Town of Southampton Coastal Erosion Hazard Board issued its own positive declaration for the project after the DEC had previously conducted a coordinated review resulting in a negative declaration, in which the Board had an opportunity but failed to participate.

The court found that the issuance of a positive declaration imposed an obligation on the applicant, submission of the DEIS, which is an actual injury because the process requires considerable time and expense. In addition, further proceedings would not lessen the injury. The court held that the issuance of the positive declaration and not the assertion of jurisdiction by the Board alone

was a “final” administrative action ripe for judicial review. In disposing of the matter, the court determined that the Southampton Board should have brought an Article 78 action challenging the DEC’s issuance of the tidal wetlands permit upon completion of the coordinated SEQRA review and the issuance of DEC’s negative declaration. How broadly this case will be applied to the issuance of positive declarations by lead agencies under SEQRA remains to be seen. *Gordon* is some authority for that proposition and *Essex* and *Stop-the-Barge* provide the factors and analysis that must be used to determine finality for the adjudication of SEQRA determinations such as positive declarations.

In *Stop-the-Barge*, the court held that the DEP had reached a definitive position on February 18, 2000, when the public comment period ended because, at that point, its SEQRA review ended. “[T]he issuance of the CND resulted in actual concrete injury to petitioners because the declaration essentially gave the developer the ability to proceed with the project without the need to prepare an environmental impact statement.” *Stop-the-Barge*, 2003 N.Y. Lexis 4004 at *7. “Thus, to the extent that petitioners challenge the conclusions reached by DEP from its SEQRA review, the period of limitations must be measured at the latest from the time that the CND became final, on February 18, 2000.” *Id.*

The CND completed the SEQRA process and waiting ten months to challenge the process until the issuance of the air permit would be particularly unreasonable, said the court. The court found that running the period of limitations from the issuance of the CND is consistent with the policy of resolving environmental issues and determining whether an environmental impact statement will be required at the early stages of project planning. The court concluded that “[u]nder the circumstances presented [in the case], the CND was a final agency action for purposes of judicial review of petitioners’ SEQRA claim.” *Id.* at *8.

Prior to the Court of Appeals decisions in *Gordon v. Rush* and *Stop-the-Barge*, the interpretation regarding the statute of limitation for SEQRA challenges appeared to be well settled: the running of the period of limitations commenced on the date of the agency’s underlying substantive decision, not completion of the SEQRA review. In *Long Island Pine Barrens Soc. Inc. v. Planning Bd. of the Town Brookhaven*, 78 N.Y.2d 608 (1991), the court held that the statute of limitation period began to run upon the approval of the preliminary plat and not from the earlier act that was the last step in the SEQRA process. Two Third Department cases began to cloud this old rule. In *McNeill v. Town Bd.*, 260 A.D.2d 829 (3d Dept. 1999), the court held that the statute of limitations for SEQRA challenges began to run from the issuance of the negative declaration. In *City of Saratoga Springs v. Zoning Bd. of Appeals of the Town of Wilton*, 279 A.D.2d 756 (3d Dept. 2001), the court again held that the statute of limitation period began to run from the filing of the SEQRA determination, a negative declaration. Neither of these cases reached the court of appeals for a final determination on the issue.

The new rule created in *Gordon v. Rush* and *Stop-the-Barge* initiates the running of the period of limitations when the SEQRA determination is “final”. This requires those who challenge SEQRA determinations involved in underlying land use and environmental permits to become involved early and to be diligent in spotting when the environmental process ends. In *Stop-the-Barge*, the petitioners offered no comments regarding the DEP’s issuance of the CND. Since the project required two permits, one can understand why an opposition group might conclude that its right to litigate survives until the second permit is issued. Not so in these circumstances. If the objection is to the adequacy of the required environmental review, then the matter is “final” and the period of limitations begins when the CND is finally issued. By analogy, where an agency issues a negative declaration (its finding that the activity will not have an adverse impact on the environment), the issuance of the negative declaration will trigger the statute.

While imposing due diligence burdens on opposition groups, these rules provide definition for permit applicants and administrative agencies. In these cases, they now know that SEQRA declarations are immune from attack after the period of limitations has run following the “final” SEQRA determination.