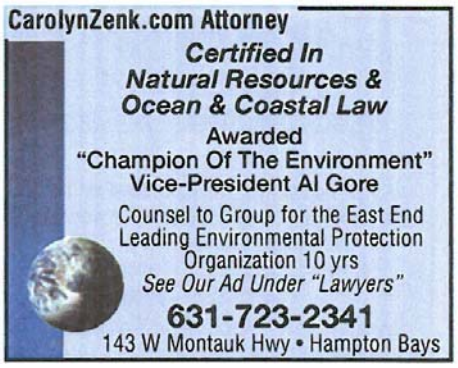
THE NEW YORK STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA)-AN OVERVIEW.

By Carolyn Zenk, Attorney at Law/Activist, Certified in Environmental Law and Natural Resources Law, and Ocean and Coastal Law. Former Councilwoman Southampton Town. Law Office: Call for a free consultation. 631-723-2341



INTRODUCTION. The State Environmental Quality Review Act, known as SEQRA, is one of New York State's most important environmental statutes. It was partially based upon the National Environmental Policy Review Act, which required that environmental considerations be part of officials' decision-making process for federal decisions.

FUNDAMENTALS OF SEQRA: At the heart of SEQRA is the requirement that government officials must prepare an environmental impact statement (EIS) for any action that "*may* have a significant effect on the environment." An environmental impact statement is a scientific study, which analyzes the environmental impact of a project and attempts to minimize or avoid its' harm and which presents "reasonable alternatives" to the project to be considered.

DISTINGUISHED FROM THE NATIONAL POLICY REVIEW ACT: Authors of SEQRA hoped to make the statute stronger than the National Environmental Policy Review Act (NEPA), which turned out to be primarily a disclosure statute. The SEQRA statute and its implementing regulations require that government "take a hard look" (do a through analysis) at the "areas of environmental concern", "minimize or avoid" harm to those areas of concern, and set forth "mitigation measures" and a "range of reasonable alternatives" to the project in the environmental impact statement. More specifically, the entity leading the environmental analysis must, "consistent with social, economic, and other essential considerations to the maximum extent practicable, minimize or avoid adverse environmental effects, including effects revealed in the environmental impact statement process." ECL 8-0109. Unfortunately, these provisions have proven to be somewhat of a "Paper Tiger"-a lot of teeth showing, but weak in the bite department.

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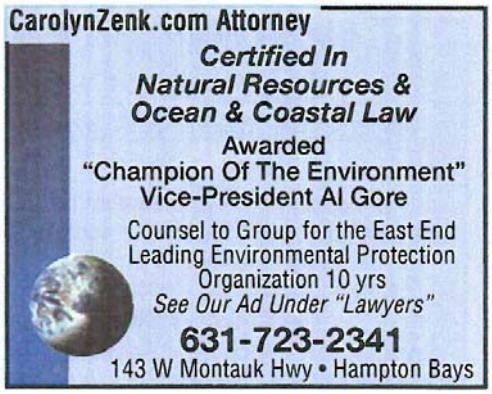

CONTENTS OF AN ENVIRONMENTAL IMPACT STATEMENT: The SEQRA requires that environmental impact statements contain specific sections. Most notably, these include: an explanation of the project, the environmental impact of the project, mitigation measures that can be implemented to reduce the environmental harm from the project, and reasonable alternatives to the project. ECL 8-0109(2).

LITERAL COMPLIANCE IS REQUIRED: Thousands of cases have grown up around the statute. Most require that the statute and the implementing regulations contained at 6 New York Code of Rules and Regulations, Section 617 be literally followed. Thus, any civic group looking to challenge an EIS would do well to determine whether the procedural aspects of the statute were followed.

WHO PREPARES THE ENVIRONMENTAL IMPACT STATEMENT (EIS) AND WHO OVERSEES THE EIS PROCESS?

What is known as the *draft* environmental impact statement is usually prepared by the project sponsor. So, for example, if the action is a subdivision development, the developer would prepare the statement. A government entity with the primary approval powers over the project usually serves as what is known as the "lead agency." The lead agency is responsible for the content of the EIS and the process of circulating the EIS to other "involved agencies" (those having approval authority, but not the lead agency), holding hearings, answering the public's comments, and producing what is known as "the *final* environmental impact statement" which is merely the draft, combined with the public comments on the draft, and responses to the draft.

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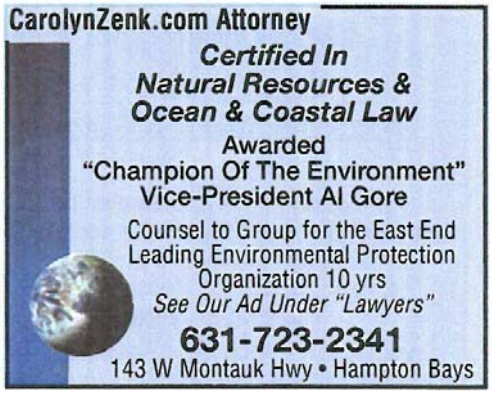

WHAT ENVIRONMENTAL IMPACTS MUST BE CONSIDERED BY AN EIS? The statute and regulations broadly define the term "environment" to include impacts to air, land, and water, animals, plants, noise, objects of historic or aesthetic significance, neighborhood character, and population distribution. ECL 8-0105(6).

WHEN IS AN ENVIRONMENTAL IMPACT STATEMENT REQUIRED? There are several considerations to determine when an environmental impact statement is required. As a matter of law, certain actions are simply excluded. These are called "Type II" actions. No impact statement is required as a matter of law. Other actions carry a *presumption* that they will have a significant impact on the environment. These are called "Type I" actions. If an action is neither Type I or Type II, it is called an "Unlisted Action" and an independent determination of significance can be made. This means the lead agency can depend upon itself rather than the SEQRA statute and its regulations. The SEQRA regulations set forth a list of environmental criteria that one should consider before making a determination of significance. Since the statute requires EISs for projects that "*may*" have a significant impact on the environment, it is best to err on the side of caution and prepare the EIS when you are in doubt. Environmental and civic groups often sue government when it fails to require the preparation of an EIS, when an action will clearly have an impact on the environment.

WHAT OPPORTUNITIES DO OTHER AGENCIES AND THE PUBLIC HAVE TO GET INVOLVED IN THE SEQRA PROCESS? The SEQRA and its implementing regulations give the public, civic groups, and the community at large several opportunities to be involved in the SEQRA process. "Involved agencies" must often be included in what is known as a "coordinated review" as a matter of law. This means that they must receive a copy of the draft environmental impact statement. They

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have an opportunity to comment on it. More importantly, they can include their own conditions on the project, which are binding.

The public has several opportunities to participate in SEQRA. These include: a written period to comment on draft environmental impact statements, hearings before the lead agency to make their thoughts known, and a period to submit written comments on the final environmental impact statement. SEQRA hearings are usually coordinated with other required hearings to avoid redundancy.

SEQRA AND THE LEGAL PROCESS: If the public does not like the fact that an environmental impact statement has not been required, they can challenge a lead agency's "negative declaration," i.e. its decision not to require an EIS, in a court of law. However, the statute of limitations is very short in New York-sometimes as short as thirty days- and an Article 78 SEQRA challenge must be made within a matter of days or months or the lawsuit will fail. When an entity is unhappy with such a decision, they should immediately ascertain the statute of limitations for the particular board and action involved and make sure they have ample time to sue. Many a practitioner has missed the statute of limitations.

PITFALLS OF SEQRA CASES: SEQRA cases are extremely technical. Thousands of cases fail each year because technical mistakes have been made by counsel. Most frequently, these mistakes include: a failure to make sure the entity suing has "standing"- i.e. the ability to be in court at all; a failure to include all of the "necessary parties" as defendants in the lawsuit; a failure to sue within the applicable statute of limitations timeframe, which varies from agency to agency and varies from action to action; a failure to "exhaust administrative remedies" before bringing the suit, for example, perhaps you failed to appeal to another administrative agency first as provided by law; a failure to make sure the action is "ripe for review;" a failure to correctly serve various

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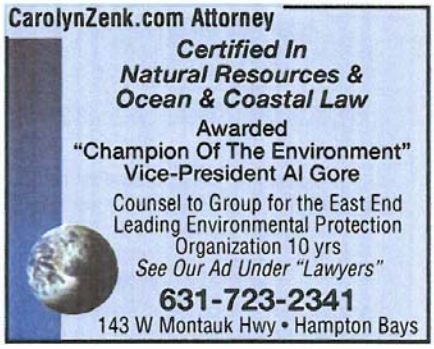

governmental agencies; a failure to get all one's evidence in at the administrative level (often, it can't come in later); a failure to use a notice of petition along with your Article 78 petition; and many other technical glitches. It is critical that any citizen's group bringing their case immediately consult with a knowledgeable practitioner.

REVISIONS TO THE STATE ENVIRONMENTAL QUALITY REVIEW ACT STATUTE AND REGULATIONS ARE NEEDED: SEQRA has serious problems. It is not living up to its stated purpose to protect the environment. I know because I have worked with the statute for over three decades. Here's a few of the problems I have identified.

PROBLEM I: THOSE WITH VESTED INTERESTS SHOULD NOT PREPARE THE DRAFT ENVIRONMENTAL IMPACT STATEMENT. A basic rule of law in any courtroom is to identify vested interests and/or bias and minimize them. Project sponsors know the most about their projects. Some argue that it follows that they should be allowed to prepare environmental impact statements. However, project sponsors often stand to make millions of dollars from their projects. Can they really be objective about the environmental impacts? Unlikely. If the goal of the statute is to truly minimize impacts to the environment, developers should simply pay a fee to government and government should hire independent experts to conduct the environmental review. Basic information needed from the developer could simply be provided by the developer in its application.

These independent professionals would more fairly evaluate the comments offered by other government entities and the public if they knew that municipalities, not developers, were directing their efforts. Sadly, those environmental experts most likely to support development projects, even where they are clearly bad for the environment and the public, are the most likely to be hired by developers.

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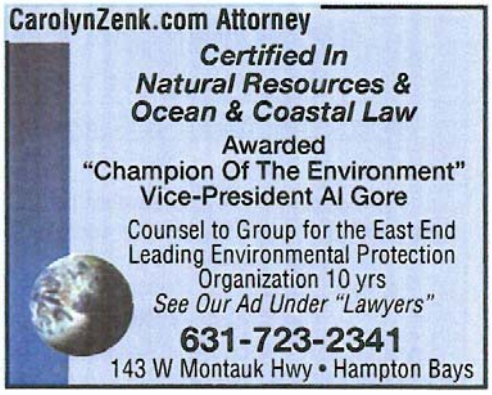

PROBLEM II: THE STATUTE OF LIMITATIONS FOR ARTICLE 78S SHOULD BE LENGTHENED: A second problem with SEQRA is the statute of limitations. State law requires that government decisions be challenged by what is known as an Article 78 proceeding. This name is used because the relevant law is contained at Article 78 of New York's Civil Practice Law and Rules. The statute is as short as thirty days in some instances. In other instances, it is only four months long. When one considers that the statute of limitations for contracts in New York is several years, this deadline is ridiculous. The statute of limitations varies according to agency and sometimes by the natural resource at issue. This makes no sense. Why does one board get a four month statute of limitations and another thirty days? The public policy argument in favor of a shorter statute is that agencies must move quickly to get business done. A standardized six month statute would accomplish this goal nicely, while allowing citizens a reasonable amount of time to challenge decisions.

PROBLEM III: THE STANDING DOCTRINE IS IN NEED OF SERIOUS REVISION: The standing doctrine is also in need of serious revision. The purpose of SEQRA, which is to protect the environment, is laudable, regardless of who brings an Article 78 proceeding. If the statute has been violated, who cares who has brought the action? Does it really have to be a neighbor who is immediately on top of the project? Why shouldn't a not-for-profit environmental or civic group be able to enforce the statute? After all, these groups have often been given a tax-exempt status from government itself, due to the public services they provide. We are lucky to have these watch dogs looking out for the pubic interest. Why should these small groups be penalized by the standing doctrine when they are working on behalf of everybody? They should not.

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PROBLEM IV: THE FINALITY DOCTRINE IS IN NEED OF REVISION. The shifting finality doctrine is also in need of serious revisions. A shell game is currently played with approvals and Article 78s. There are a series of decisions that are often made, culminating in a final decision. According to the finality doctrine, one must sue from the *final decision* or lose. But when is a decision really final? Ironically, the case law sometimes requires a lawsuit when it comes to subdivisions after the preliminary, not the final map is approved. This adds uncertainty to the finality doctrine. Obviously, one does not want to see the government hampered decision after decision by lawsuits. However, should the penalty for a failure to sue after a final decision be as draconian as permanent dismissal? This is not wise.

PROBLEM V: ENFORCEMENT OF ENVIRONMENTAL LAWS; SOLUTION A CITIZEN SUIT PROVISION IS NEEDED: It is sad to believe that some lawmakers and judges want to appear to protect the environment, but not actually do it, but I fear this is the case when it comes to the Article 78. It looks good on paper. But, civic groups must run the most technical of gauntlets to get a stab at the merits of their cause and have their day in court.

Why not add a citizen suit provision to the statute that reimburses citizens for their attorney fees, when they bring successful SEQRA suits and help protect New York's environment? In this way, the statue could provide a built-in policing mechanism for enforcing the statute. In turn, the environmental would be better protected. I look forward to reading about the brave politician who ultimately takes the bull, known as SEQRA revision, by the horns.

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WHAT IS A CITIZEN'S GROUP TO DO? HIRE A LAWYER WELL-VERSED IN SEQRA. In the meantime, a citizen group's best bet is to hire a lawyer well-versed in the many pitfalls that SEQRA suits present. They should make a strenuous case at the administrative level *before* resorting to the courts to have the best chance of success. (See my article entitled, "Effective Advocacy Before Municipal Boards; how to be an Effective Activist." on this website) In this way, their money is well spent by getting to the merits of their lawsuits rather than getting pushed aside based upon some strained technicality. I have handled over two dozen Article 78s successfully, getting to the merits of the case.

Carolyn Zenk, the author, is an Environmental Attorney, with Certificates in Environmental and Natural Resources Law, and Ocean and Coastal Law, who worked as the General Counsel with the East End of Long Island's leading environmental protection organization-Group for the East End for ten years. (99 to 2009)

She has successfully spearheaded numerous environmental causes at the administrative level. Her victories have included: stopping incinerators on the East End of Long Island, saving 1400 acres at "Hampton Hills" and Wildwood Lake in Flanders, New York by bringing an Article 78 and convincing Suffolk County to buy it, preserving Wehrmann Pond in Red Creek Ridge by lobbying Southampton Town to purchase the parcel using community preservation fund dollars, saving the Long Pond Greenbelt in Bridgehampton/Sag Harbor, bringing a United Artist Theatre to downtown Hampton Bays, researching and writing a Harbor Protection Overlay District for East Hampton Town, helping to stop bulkheads on the beautiful beaches of Montauk, East Hampton, and Southampton by both lobbying locally and litigating.

Ms. Zenk has brought numerous successful SEQRA and Article 78 challenges and enabled citizen groups to have their day in court.

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