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STATE ENVIRONMENTAL REGULATION

Expert Analysis

Ruling Expanding SEQRA Standing Begins to Show Impact

Several months ago, the New York State Court of Appeals issued a decision in *Matter of Save the Pine Bush Inc. v. Common Council of the City of Albany,*[1] which significantly widened the category of who has standing to challenge environmental regulatory decisions made by administrative agencies under the New York State Environmental Quality Review Act (SEQRA). For nearly two decades, SEQRA cases involving standing issues had been decided under rules set down by the Court of Appeals in *Society of Plastics Industry Inc. v. County of Suffolk*.[2] Now, under *Pine Bush*, a person who can prove that he or she uses and enjoys a natural resource more than most other members of the public, or an organization with members who do so, has SEQRA standing to challenge government actions that threaten that resource.

The *Pine Bush* ruling is likely to result in more individuals and organizations challenging agency conclusions under SEQRA in court than has happened in the past. Whether it will result in more successful challenges of SEQRA determinations is, of course, open for debate; indeed, in *Pine Bush*, after finding standing, the Court rejected the petitioners' challenge to the SEQRA ruling at issue in that case. Certainly, however, *Pine Bush* is a setback to respondents who oftentimes rely upon the technical defense of "lack of standing" to successfully defend their SEQRA decisions, as can be seen from the recent decision by the Supreme Court, Suffolk County, in *Matter of Peconic Baykeeper Inc. v. Board of Trustees of Freeholders & Commonalty of Tn. of Southhampton*, discussed below.[3]

By **Charlotte A. Biblow**

The Karner Blues

The *Pine Bush* case arose in September 2003, when Tharaldson Development Company, the owner of a 3.6-acre parcel of land located on Washington Avenue Extension in Albany, applied for a rezoning of the parcel to allow for construction of a hotel. The property was not part of the area protected by the Albany Pine Bush Preserve Commission, but it was near protected areas, including Butterfly Hill, a habitat of the endangered Karner Blue butterfly. The effect of the hotel construction, if any, on Karner Blues was recognized from the outset as the principal environmental issue raised by the proposal.

The recent 'Peconic Baykeeper' case illustrates the way that courts are likely to apply the 'Pine Bush' ruling.

The city of Albany and Tharaldson completed a draft environmental impact statement that identified two "Significant Items": the proximity of the project to the Karner Blue butterfly habitat and an increase in traffic. Thereafter, the city accepted a final environmental impact statement and approved the zoning change. Within a few months, an organization known as Save the Pine Bush Inc., and nine of its members went to court to challenge the city's action under SEQRA. The individual petitioners alleged that they lived "near the site of the hotel project" and that they used the Pine Bush "for recreation and to study and enjoy the unique habitat found there."

The Supreme Court, Albany County, denied a motion to dismiss the proceeding for lack of standing, and, in a later opinion, vacated the city's SEQRA determination and annulled the rezoning. The Appellate Division, Third Department, affirmed, with two justices dissenting.[4] While concluding that none of the individual petitioners resided close enough to the proposed project so as to presumptively demonstrate that they had sustained demonstrable injury different from the public at large, the majority held that evidence that they regularly used the preserve and that at least one of them resided in sufficient proximity to the preserve to facilitate that use was enough to establish standing.[5]

The city appealed to the Court of Appeals, arguing that the petitioners lacked standing because none of the individual petitioners, and no member of Save the Pine Bush Inc., was a near neighbor of the site of the proposed hotel development, with the closest living approximately one-half mile away.

The 'Pine Bush' Ruling

In a decision by Judge Robert S. Smith, the Court explained that although it had stated in *Society of Plastics* that residents "close to" the landfills and paper manufacturing plants at issue there "would directly suffer the alleged harms," that decision did "not hold, or suggest, that residence close to a challenged project is an indispensable element of standing in every environmental case." The Court then pointed out that the petitioners in this case alleged that they used the Pine Bush "for recreation and to study and enjoy the unique habitat found there."

Moreover, the Court declared, it was "clear" in context that they alleged repeated, not rare or isolated, use. In the Court's view, this showed that the threatened harm of which petitioners complained would affect them differently from

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"the public at large." Indeed, the Court noted, people who visited the Pine Bush, although they came from some distance away, seemed "much more likely to suffer adverse impact from a threat to wildlife in the Pine Bush than the actual neighbors of the proposed hotel development," who were the owners and occupants of the nearby office buildings and shopping malls.

The Court pointed out that the neighbors might care little or nothing about whether butterflies or anything else would continue to exist on or near the site. It then rejected the city's argument that environmental harm could be alleged only by those who owned or inhabited property adjacent to, or across the street from, a project site, declaring that such a rule "would be arbitrary, and would mean in many cases that there would be no plaintiff with standing to sue, while there might be many who suffered real injury."

The Court concluded by noting that, in recognizing that injury of the kind the petitioners alleged could confer standing, it was adopting a rule similar to one long established in the federal courts. In *Sierra Club v. Morton*,[6] the U.S. Supreme Court held that a generalized "interest" in the environment could not confer standing to challenge environmental injury, but that injury to a particular plaintiff's "[a]esthetic and environmental well-being" would be enough. Indeed, the Court added, the Supreme Court in *Sierra Club* noted that the plaintiff there "failed to allege that it or its members would be affected in any of their activities or pastimes" by the development it challenged.[7] The Court then observed that the petitioners in *Pine Bush* made the allegation that "was missing" in *Sierra Club*.[8]

The 'Peconic Baykeeper' Case

The recent *Peconic Baykeeper* case illustrates the way that courts are likely to apply the *Pine Bush* ruling. That case arose when Peconic Baykeeper Inc., commenced an article 78 proceeding seeking to vacate a permit issued by the Town of Southampton for the development of 16 boat slips along with the construction or reconstruction of bulkheads, catwalks, associated ramps, floating docks, and pilings in Shinnecock Bay, thereby expanding an existing marina with a restaurant, allegedly without appropriate SEQRA review. The respondents contended, among other things, that the petitioner lacked standing to maintain its challenge.

As the court explained, according to its president, Peconic Baykeeper was a not-for-profit organization with the mission "to protect and improve the aquatic ecosystems of the Peconic and South Shore estuary systems of Long Island by, inter alia, acting to safeguard and enhance sustainable commercial, recreational and subsistence uses of these estuary systems and their watersheds, in furtherance of the interests of its members and supporters." Its supporters and members included persons who lived in Southampton and used the waters, beaches, and wetlands for a variety of purposes, including commercial and recreational fishing, shellfishing, boating, bird watching, hiking, sailing, kayaking, swimming, sun bathing, picnicking, and nature study.

Peconic Baykeeper maintained an on-water presence through regular patrolling of the open bays and tributaries by boat, as well as active advocacy for the preservation, protection, and improvement of the waters in and about Shinnecock Bay. In addition, the court continued, Peconic Baykeeper owned 289 acres of submerged lands in the Great Peconic Bay for the purpose of shellfish propagation and study. The president of Peconic Baykeeper also asserted that he was a person who enjoyed fishing, kayaking, sailing, swimming, snorkeling, and studying nature in the immediate vicinity of the property at issue and the adjacent bay area, and that the proposed construction would "diminish my recreational and scenic and other enjoyment of the bay."

Plaintiffs must not only allege, but, if the issue is disputed, must prove that their injury is real and different from the injury most members of the public face. The bar has been lowered, however.

The court observed that the petitioners in *Save the Pine Bush* had alleged that they enjoyed repeated use of the area in issue, not just rare or isolated use, and that the threatened harm to the environment was real and would affect them differently from members of the general public. Finding that the petitioner in this case had alleged the same things, it simply decided that Peconic Baykeeper had standing to bring its article 78 proceeding.

Conclusion

Neither the *Pine Bush* decision nor the *Peconic Baykeeper* ruling should be taken to suggest that standing in environmental cases will be automatic, or that parties can meet the test by perfunctory allegations of harm. Plaintiffs must not only allege, but, if the issue is disputed, must prove that their injury is real and different from the injury most members of the public face. The bar has been lowered, however, and rulings similar to the ruling in *Peconic Baykeeper* may very well become commonplace.

1. 13 N.Y.3d 297 (2009).

2. 77 N.Y.2d 761, 772-73 (1991) (to have standing, party must demonstrate injury in fact within the zone of interests, or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted; standing of organization can be established by proof that agency action will directly harm association members in their use and enjoyment of the affected natural resources).

3. 2010 N.Y. Slip Op. 30182(U) (Sup. Ct. Suffolk Co. Jan. 22, 2010).

4. *Save the Pine Bush Inc. v. Common Council of the City of Albany*, 56 A.D.3d 32 (3d Dept. 2008).

5. Id. at 37. On the merits, the Third Department agreed with the Supreme Court.

6. 405 U.S. 727 (1972).

7. Id. at 735.

8. As noted, the Court also concluded that the petitioners' challenge failed on the merits, and that the city did not violate SEQRA. In addition, Judge Eugene F. Pigott, Jr., concurred in the result, in an opinion in which Judge Susan Phillips Read concurred, declaring that he would hold that because petitioners had asserted only generalized claims of harm, no different than the public at large, they lacked standing to challenge the city's determination.