

## STATE ENVIRONMENTAL REGULATION

## Expert Analysis

# Is State Poised to Take SEQRA Decisions Away From Local Governments?

Under the State Environmental Quality Review Act (SEQRA),<sup>1</sup> which became law in 1975, a “lead agency” coordinates the environmental review of a proposed project by taking a wide variety of steps that range from completing an environmental assessment form and determining whether any aspect of the overall project may have or will not have a significant adverse impact on the environment to deciding the adequacy of a submitted draft environmental impact statement (EIS),<sup>2</sup> deciding whether or not to hold a SEQRA public hearing concerning a draft EIS, and preparing or causing a final EIS to be prepared.

A lead agency typically is the involved agency that is principally responsible for carrying out, funding, or approving a proposed development.<sup>3</sup> In the vast majority of instances, a lead agency is a local planning board or other local governmental agency.

Recently, however, the Long Island Regional Economic Development Council<sup>4</sup> advocated a striking change to this longstanding rule in a report<sup>5</sup> to Governor Andrew Cuomo. The proposed change, which was tucked into one paragraph on page 27 of the 90-page document, and repeated on the first page of the appendix, suggested that the state “assert itself” as lead agency for “regionally significant projects.” The report’s rationale: “Such a declaration could fast-track projects that have been identified as transformative, without posing any threats to the environment that the law was designed to protect.”<sup>6</sup> The report opined that “[n]o changes in state law or regulation would be required as long as a state agency is either undertaking, approving or funding a part of the project.”

There has been a great deal of reaction to this idea. For example, Peter Cavallaro, the mayor of the Long Island Village of Westbury and the first vice president of the Nassau County Village Officials Association (NCVOA), observed in the

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association’s newsletter that the proposed change was “yet one more attempt to weaken local control so that the politicians in Albany can have the state mirror their way of thinking, and feed their need to raise more and more revenue.” Cavallaro added that was “wrong, and the antithesis of what our governmental system should be all about. Let the proponents of project[s] go to the localities, plead their case, make concessions and do what needs to be done to mitigate impacts. Who knows better what these impacts are than the local citizenry? No one.”<sup>7</sup>

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A somewhat different view was provided by Long Island’s business newspaper, *Long Island Business News*, which editorialized that discussion of the proposal was worthy of debate because “[l]ocal officials routinely use [SEQRA] reviews to squash projects opposed by the vocal minority or to demand changes that will keep the civics happy, at least until the next election. That forces developers to head to court, where they can spend years, and millions, getting a fair hearing. Or, more likely, they give up.”<sup>8</sup>

### Legislation

Long Island legislators were quick to jump into the fray. For example, Assemblyman Michael Montesano (R,I,C—Glen Head) urged the council to reconsider its recommendation to have the state assume lead agency status on regionally significant economic development projects. He stated that

the recommendation “to turn our local projects over to Albany is irresponsible and flouts over 30 years of successful and effective SEQRA experience at the local level.” Montesano added that lead agency status for the state “implies that our local input is inadequate or that local officials are unfit to perform a review of a project’s potential environmental impact.”<sup>9</sup>

Apparently in response to the council’s proposal, legislation has been introduced in both the Senate<sup>10</sup> and Assembly<sup>11</sup> that would maintain “local control” under SEQRA. Both bills would add a provision to subdivision 6 of ECL Section 8-0111 that would state that “in determining the lead agency [under SEQRA], the lead agency shall be a local agency when the anticipated impacts of an action are primarily of regional or local significance.”

The Senate sponsors’ stated justification for their bill is that in cases when projects are undertaken that are primarily of regional or local significance, the lead agency conducting the SEQRA review should be a local agency because “[m]ajor projects have the greatest impact on the host municipality. It stands to reason that the most qualified entity to be the lead agency for environmental review would be at the local level.” The proposed legislation “recognizes and seeks to insure that lead agency status remains at the local level and should not be taken over at a higher level of government for SEQRA review of projects that are deemed of regional or local significance.”<sup>12</sup>

At first blush, it might appear that the bills, if they were to become law, effectively would leave the law where it is today. But they actually may alter existing law, at least when one considers what typically happens in cases where a dispute arises over whether a lead agency should be a local agency or a state agency such as the New York State Department of Environmental Conservation (DEC).

### Lead Agency Disputes

Currently, when a lead agency dispute occurs and the involved agencies fail to agree on which one should conduct the SEQRA review, any of the involved agencies (or the party seeking approvals) may request that the DEC commissioner designate

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a lead agency.<sup>13</sup> Indeed, over the past eight years, the commissioner has been asked to resolve about a dozen lead agency disputes between the DEC or another state agency, on the one hand, and a local agency, on the other. In most instances, the commissioner has ruled in favor of the state.

Consider the lead agency dispute between the Town Board of the Town of Brighton, as commissioners of the Town of Brighton Consolidated Sewer District, and the State University Construction Fund (SUCF)<sup>14</sup> in connection with the SUCF's proposal to finance and construct the Empire State College Rochester Regional Center on an 11.92-acre parcel owned by the SUCF in the Town of Brighton, in Monroe County.

In his decision resolving the dispute, the commissioner explained that he had to analyze the following three factors:<sup>15</sup>

- a. whether the anticipated impacts of the action being considered are primarily of statewide, regional, or local significance (and, the commissioner noted, if the impacts are of primarily local significance, all other considerations being equal, the local agency involved will be lead agency);
- b. which agency has the broadest governmental powers for investigation of the impacts of the proposed action; and
- c. which agency has the greatest capability for providing the most thorough environmental assessment of the proposed action.

In the Brighton-SUCF dispute, with respect to the first factor, the commissioner found that expected impacts from the proposed regional center were predominantly local in nature, with very limited regional or statewide impacts anticipated. The commissioner explained that the proposed facility was located entirely within the Town of Brighton; as such, there was an anticipated increase in demand on local community services. In addition, he noted that the impacts from construction activities (including construction machinery noise, dust, clearing, grading, paving, landscaping, and traffic from machines and workers) also were primarily local. Thus, the commissioner acknowledged that this factor favored the Town of Brighton as lead agency.

The commissioner began his analysis of the second factor by pointing out that SUCF, as the sponsor of the proposed project and the party responsible for obtaining all necessary permits or approvals, had control and authority to design, modify, alter, or rearrange proposed activities at the site as well as to investigate all of the impacts associated with the project identified through the SEQRA analysis and review. SUCF also asserted, based on New York State Education Law §375.3, that the Town of Brighton had very restricted powers to effect change or alteration of the primary components of the project.<sup>16</sup>

The Town of Brighton argued that, notwithstanding any limits placed on its authority by vir-

tue of §375.3, it had (acting in the town board's capacity as commissioners of the sewer district) jurisdiction and authority pursuant to Town Law §194 over approvals for extending the sewer district and sewer main extensions and connections. It added that in making these approvals under Town Law §194, the town board had to consider the benefit to the property and owners in the proposed district; whether all benefited property and owners were in the proposed district; and whether it was in the public interest to approve the extension.

The commissioner stated that although this authority appeared to be "discretionary and significant," it was more limited than the SUCF's authority as the project sponsor and financier. He then found that the second factor favored the SUCF.

The commissioner next declared that, with respect to the third factor, both agencies had "demonstrated the capability to review projects under their jurisdiction." Therefore, he decided that this factor favored neither agency.

Based on this analysis—even though the expected impacts were primarily of local significance—the commissioner decided that the SUCF should serve as lead agency because the SUCF had broader governmental powers to investigate the impacts of the project as well as to avoid or mitigate such impacts.<sup>17</sup>

The proposed legislation "recognizes and seeks to insure that lead agency status remains at the local level and should not be taken over at a higher level of government for SEQRA review of projects that are deemed of regional or local significance."

The commissioner's decision in this matter, as noted, was not unusual. The commissioner reached the same result in most other lead agency disputes of this type,<sup>18</sup> involving projects seemingly as local as the construction and operation of an electric generating facility,<sup>19</sup> the construction and operation of a liquid petroleum gas underground storage and distribution facility system,<sup>20</sup> and the creation of a 9½-acre bluestone mine with the reclamation goal of preparing the parcel for development of a single family residence,<sup>21</sup> among other things.<sup>22</sup>

Given these decisions in lead agency dispute matters, and given the ability of the DEC (or another state agency) to assert itself under existing law in specific circumstances, one might conclude that the council's proposal to further empower the DEC or other state agencies in SEQRA cases is, at the least, not needed.

Similarly, the legislation introduced in apparent response to the council's proposal would

seem to alter the standard for resolving these lead agency disputes, to focus exclusively on "the anticipated impacts" of a proposed project to the exclusion of the other factors. Clearly, the implications of both the council's proposal and the proposed legislation must be carefully considered by all parties before either is enacted into law.



1. New York Environmental Conservation Law Art. 8; 6 N.Y.C.R.R. Part 617.

2. See 6 N.Y.C.R.R. Part 617.11(a).

3. See <http://www.dec.ny.gov/permits/6451.html>.

4. The council's chair is Lieutenant Governor Robert J. Duffy; its co-vice chairs, and the co-authors of the report, are Hofstra University President Stuart Rabinowitz and Long Island Association President Kevin S. Law.

5. "A Strategic Economic Development Plan for the Long Island Region," available at <http://regionalcouncils.ny.gov/themes/nyopenrc/rc-files/longisland/LongIslandsFutureEconomy.pdf>.

6. One might reasonably wonder whether the New York State Department of Environmental Conservation (DEC), the state agency that most likely would be named lead agency in the vast majority of cases that would be affected by the council's proposal, would be able to conclude SEQRA reviews any more quickly than local agencies.

7. May 2012 NCOVA newsletter.

8. Editorial: "Good Fight," *Long Island Business News*, April 27, 2012.

9. See press release, available at <http://assembly.state.ny.us/mem/Michael-Montesano/story/47625/>.

10. See Senate Bill 6525.

11. See Assembly Bill A09541.

12. See <http://open.nysenate.gov/legislation/bill/S6525-2011>.

13. See 6 NYCRR Part 617.6(b)(5).

14. The SUCF provides design and construction services for the State University of New York pursuant to Article 8-A of the Education Law.

15. See 6 NYCRR §617.6(b)(S)(v).

16. Under §375.3, "no county, city, town or village shall have power to modify or change the plans or specifications for facilities...nor to require that any such person, firm or corporation obtain any other or additional authority or permit from such county, city, town or village as a condition of doing such work."

17. Lead Agency Dispute: Town of Brighton Consolidated Sewer District v. State University Construction Fund (July 7, 2011), available at <http://www.dec.ny.gov/permits/80850.html>.

18. Town of Forestburgh and New York State Department of Environmental Conservation Region 3 (Feb. 9, 2009), available at <http://www.dec.ny.gov/permits/51800.html>; and Lead Agency Dispute: *Steuben County IDA v. DEC* (Jan. 17, 2006), available at <http://www.dec.ny.gov/permits/6661.html>.

19. Lead Agency Dispute: Town Board of the Town of Dover and the NYS DEC, through its Central Office (April 12, 2010), available at <http://www.dec.ny.gov/permits/65820.html>.

20. Lead Agency Dispute: Town of Reading Planning Board and the NYS DEC, through its Region 8 office (Feb. 2, 2010), available at <http://www.dec.ny.gov/permits/65814.html>.

21. Town of Rochester and the New York State Department of Environmental Conservation Region 3 (March 11, 2009), available at <http://www.dec.ny.gov/permits/52936.html>.

22. NYS DEC and Town of Riverhead Planning Board (Dec. 13, 2007), available at <http://www.dec.ny.gov/permits/40909.html>; Lead Agency Dispute: *NY Division of Lottery v. City of Saratoga Springs Planning Board* New York State Department of Environmental Conservation Commissioner's Determination of Lead Agency Under Article 8 of the Environmental Conservation Law (June 14, 2006), available at <http://www.dec.ny.gov/permits/37515.html>; *Village of East Nassau v. DEC Lead Agency Dispute* (March 17, 2005), available at <http://www.dec.ny.gov/permits/25054.html>; *Town of Smithtown v. DEC Lead Agency Dispute* (Aug. 25, 2004), available at <http://www.dec.ny.gov/permits/25072.html>; *Lead Agency Dispute: Division of Lottery v. City of Yonkers* (June 15, 2004), available at <http://www.dec.ny.gov/permits/6642.html>; and *Town of Nassau v. DEC Lead Agency Dispute* (April 4, 2004), available at <http://www.dec.ny.gov/permits/25078.html>.