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Expert Analysis

Coordinating Brownfields and SEQRA Review: Clarification Is Needed

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When a construction project may have a "significant effect on the environment,"[1] the State Environmental Quality Review Act (SEQRA)[2] requires the preparation of an environmental impact statement (EIS). The contents of an EIS frequently are subject to discussion, negotiation, and, of course, litigation, which can make the whole process burdensome and costly, and which in some cases means that a project never gets off the drawing board.

The Department of Environmental Conservation (DEC) has proposed significant revisions[3] to the SEQRA rules[4] in what it has said was an effort to streamline the SEQRA process "without sacrificing meaningful review."[5] The recent decision by the New York Court of Appeals in *Matter of Bronx Comm. for Toxic Free Schools v. New York City School Constr. Auth.*[6] strongly suggests, however, that the revisions the DEC should make to the SEQRA rules should include clarifying the rules governing the intersection of SEQRA with the Brownfields Cleanup Program (BCP), through which the state offers inducements for the cleanup of contaminated sites.[7]

Background

The dispute in the case arose over the construction of a campus in the Mott Haven area of the Bronx on a site, chosen by the New York City School Construction Authority, that had been a railroad yard where the soil and groundwater were significantly contaminated. The Authority applied to participate in the BCP, and the DEC accepted the most contaminated section of the site into the program.

As required by the BCP, the Authority submitted a number of documents to the DEC describing how it proposed to remedy the contamination. In a Remedial Action Work Plan (RAWP), it proposed, among other things, to make use of so-called "engineering controls" to prevent contaminants from entering the school and to prevent recontamination of the site by groundwater. Although a site owner is required to describe the means it will use to be sure that its engineering controls continue to work as intended,[8] the Authority's RAWP did not describe its plans for long-term maintenance and monitoring—which can include such things as the inspection of vapor control equipment or asphalt caps to be sure they are in good condition and the periodic testing of groundwater for contaminants—because the Authority believed that it was better to choose maintenance and monitoring methods for the site after the cleanup was finished and it could assess the post-cleanup soil and groundwater conditions.

The DEC approved the RAWP without the long-term maintenance and monitoring being specified, stating as a condition that the Authority had to "develop a site management plan for [DEC] approval to…provide for the operation and maintenance of the components of the remedy."[9]

After getting the DEC's conditional approval of the RAWP, but before it prepared the site management plan that the DEC required, the Authority went through the SEQRA process. The Authority prepared a draft EIS, made it available for public comment, and revised it. Neither the draft nor the final version of the EIS described the long-term maintenance and monitoring procedures to be used by the Authority.

The Bronx Committee for Toxic Free Schools filed an Article 78 proceeding challenging the Authority's SEQRA compliance and alleging that the EIS was flawed because of "its failure to propose a long term maintenance and monitoring protocol."[10] The petitioner submitted an expert's affidavit as support for the petition that said that the strategy outlined in the RAWP by the Authority could "be effective mitigation only if a robust long term management program is implemented."[11]

In response, the Authority submitted an expert affidavit in which it was argued that a detailed site management plan had to "be governed by post-remediation soil and groundwater conditions, something that cannot be measured until after cleanup is completed."[12] Rejecting that position, the Supreme Court, Bronx County, ordered the Authority to prepare a supplemental EIS detailing the long-term maintenance and monitoring plan.

The Authority moved for reargument and renewal, asserting in substance that its submission of the site management plan, and DEC's approval of it, removed the need for any further SEQRA filing. The Supreme Court adhered to its prior ruling, and the Appellate Division, First Department, affirmed. The dispute reached the Court of Appeals.

Court of Appeals Decision

In an opinion by Judge Robert S. Smith, the court acknowledged that in reviewing the sufficiency of an EIS, an agency had "broad discretion" in deciding what to include and

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what to omit. The court also stated that if this were a case involving a dispute over how much detail had to be included in the EIS, or over whether events occurring after the EIS had been filed were significant enough to call for a supplement, it would have deferred to any reasonable judgment made by the Authority.[13] In this case, however, the court found that the Authority had to supplement its EIS to describe the maintenance and monitoring of the engineering controls it indicated it would use to prevent or mitigate environmental harm.

In essence, the court observed, the community group's position, with which the Supreme Court and First Department had agreed, was that the methods chosen by the Authority for long-term maintenance and monitoring of its engineering controls were too important not to be described in the EIS. The court noted that the Authority had not asserted that the maintenance and monitoring measures were relatively minor details that the public did not need to know about. Moreover, the court declared, the Authority had not disputed the community group's showing that these measures were "essential" to protecting the site's occupants from dangerous contaminants or that a description of these measures was "essential to an understanding of the environmental impact of the Authority's project." Simply put, the court found, the community group's showing as to the importance of these measures stood "unrebutted on this record."[14]

Significantly, at the end of its opinion, the court examined—and dismissed—the Authority's arguments that it: (1) reasonably chose not to decide on those measures before its EIS had been filed, and (2) adequately described them in the site management plan approved by the DEC as part of the BCP.

Because the court determined that the mitigation measures were of "undisputed importance" they could not "escape the SEQRA process," noting that DEC regulations provided for the filing of a supplemental EIS to address subjects "not addressed or inadequately addressed in the EIS," arising from "changes proposed for the project," from "newly discovered information" or from changed circumstances.[15] Whether the court would have reached the same conclusion had the Authority challenged the petitioner's contention about the essential nature of the maintenance and monitoring plan is an open question.

The court then briefly discussed the intersection of the BCP and SEQRA, declaring that neither the submission of the site management plan to the DEC nor the approval of that plan as part of the BCP justified "short-circuiting SEQRA review." The court stated that the BCP and SEQRA served related but distinct purposes, with SEQRA intended to assure that the main environmental concerns, and the measures taken to mitigate them, were described in a publicly filed EIS, as to which the public had a statutorily required period for review and comment. It rejected the Authority's view that, as to this project, the Authority had already done enough public outreach and had considered enough public comments, concluding that SEQRA required it to take "one step more."[16]

Conclusion

The court's decision was unanimous, but Judge Susan Phillips Read wrote a concurrence that highlighted the uncertainty that developers and lead agencies face when a project reviewable under SEQRA is sited on land accepted in whole or in part into the BCP.

As Read noted, in many instances, developers are able to qualify for an exemption from SEQRA where remedial activities are designed and implemented on a project site pursuant to the BCP.[17] In this case, however, the Authority did not claim that the BCP-related portion of its project was exempt from SEQRA. Perhaps it should have done so, given that the BCP[18] itself provides for public comment.[19]

Alternatively, suppose that the Authority had addressed long-term maintenance and monitoring in the draft RAWP, instead of concluding that inclusion of these details in the draft RAWP was premature. Given that the draft RAWP was subject to public review and comment as part of the formal BCP process, query whether there would have been no need to cover the same topic separately in the EIS or in a supplemental EIS.

In any event, the intersection of the BCP and SEQRA remains unclear, as Read herself acknowledged in a footnote to her concurring opinion. Given that, one can hope that the DEC, as part of the revisions it is planning to the SEQRA rules, will clarify how the BCP and SEQRA requirements fit together.

1. Environmental Conservation Law (ECL) §8-0109(2).
2. ECL §§8-0101 et seq.
3. See "DRAFT SCOPE for the Generic Environmental Impact Statement (GEIS) on the Proposed Amendments to the State Environmental Quality Review Act (SEQRA)" ("Proposed Amendments"), available at http://www.dec.ny.gov/docs/permits_ej_operations_pdf/drftscope617.pdf.
4. See Charlotte A. Biblow, "DEC Proposes First Revisions to SEQRA Regulations Since 1996," NYLJ Sept. 27, 2012, available at http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202572699874.
5. Proposed Amendments, at 1.
6. 2012 N.Y. Slip Op. 07051 (N.Y. Oct. 23, 2012).
7. ECL §27-1401 et seq.
8. ECL §27-1415(7)(a)(ii); 6 NYCRR §375-1.8(h)(1)(ii).
9. 2012 N.Y. Slip Op. 07051 (N.Y. Oct. 23, 2012).
10. Id.
11. Id.
12. Id.
13. Id.
14. Id.
15. 6 NYCRR §617.9(a)(7).
16. 2012 N.Y. Slip Op. 07051 (N.Y. Oct. 23, 2012).
17. See 6 NYCRR 375-3.11(b), which provides:

(b) State environmental quality review act applicability.

(1) Remedy selection and implementation of remedial actions under Department-approved work plans pursuant to ECL article 27, title 14 are not subject to review pursuant to ECL article 8 and its implementing regulations (6 NYCRR Part 617), provided that design and implementation of the remedy do not:

(i) commit the Department or any other agency to specific future uses or actions; and

(ii) prevent evaluation of a reasonable range of alternative future uses of or actions on the remedial site.

…

(3) The exemption set forth in this subdivision is in addition to, and not in place of, other exemptions… that apply pursuant to Parts 617 or 618 of this title (e.g. the enforcement exemption).

18. See ECL §27-1417(3); see also *Matter of Lighthouse Pointe Prop. Assoc. v New York State Dept. of Envtl. Conservation*, 14 N.Y.3d 161, 166 (2010) ("Public notice and opportunities for citizen participation are integral features of the BCP at every stage, from the request to participate [in the program] to issuance of the certificate" of completion issued by the DEC once a site has been cleaned up in accordance with applicable remedial requirements).
19. See New York State Department of Environmental Conservation, DER-23/Citizen Participation Handbook for Remedial Programs §3.1 "Summary of Brownfield Cleanup Program Citizen Participation Requirements" (Jan. 21, 2010), available at http://www.dec.ny.gov/docs/remediation_hudson_pdf/der23.pdf (provides for a 45 day public comment period for a draft RAWP with a public meeting if requested in those cases where the site poses a significant threat to human health or the environment).