

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Petition of

MARTIN S. BAKER, ROBERT J. KAFIN,  
NEAL D. MADDEN, ROSEMARY NICHOLS,  
DAVID PAGET, DANIEL PALMIERI,  
DIANNA W. RIVET, JOEL H. SACHS,  
ROBERT C. STOVER

DECLARATORY  
RULING

DEC 8-01

For a Declaratory Ruling  
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By petition filed July 23, 1984, nine distinguished members of the Bar of the State of New York seek a Declaratory Ruling pursuant to §204 of the State Administrative Procedure Act ("SAPA") and 6 NYCRR Part 619, on several legal issues concerning the implementation of the State Environmental Quality Review Act ("SEQRA"), Article 8, Environmental Conservation Law. These issues relate generally to the following:

- (1) the ability of an agency without specific decision-making jurisdiction to serve as a "permanent" lead agency, as for instance an advisory board within a municipality;
- (2) the ability of an agency to grant preliminary non-binding "approvals" to an action prior to a determination that an environmental impact statement (EIS) may be required;
- (3) the phasing of a project;
- (4) the legal standard for and the relationship of mitigation measures to a proposed action;

- (5) the proper scope of alternatives;
- (6) the standards for review of projects for which an EIS has been proposed;
- (7) the circumstances under which a supplemental EIS is required;
- (8) the legal obligations of an agency which acquires SEQRA responsibilities after a project has undergone SEQRA review by other involved agencies;
- (9) the statute of limitations applicable for challenging SEQRA compliance; and
- (10) the basis for and legal limits of the emergency action exemption from SEQRA.

For the reasons set forth below, the statutory framework of SEQRA is not one for which the Department of Environmental Conservation ("DEC") is authorized under SAPA to issue declaratory rulings in most instances. DEC must itself comply with SEQRA, and is only in a position to apply SEQRA to others in specific statutory circumstances. It is in the public interest to grant this petition to clarify both the scope of DEC's authority under SAPA and to respond to the issues for which DEC is competent to grant a ruling. The petition, therefore, is granted.

I. Authority to Issue Declaratory Rulings.

Pursuant to section 204 of the State Administrative Procedure Act ("SAPA"), an agency "may issue a declaratory ruling with

respect to the applicability to any person, property or state of facts of any rule or statute enforceable by it". Enforcement, as defined in Black's Law Dictionary, means "to put into execution; to cause to take effect; ... to compel obedience to". DEC, like other state agencies, has authority to enforce the regulations it promulgates, see generally ECL Article 71. Although SEQRA is included within the Environmental Conservation Law, it directs "all agencies" to "to carry out its terms". ECL §8-0107. Enforcement of SEQRA has been solely through judicial review on the petition of citizens, environmental and public interest groups, corporations or governmental bodies. See Marsh, SEQRA's Scope and Objectives, 46 ALB. L. REV. 1097, 1106 (1982); and Crary, Procedural Issues Under SEQRA, 46 ALB. L. REV. 1211, 1230 (1982).

Neither the express language of SEQRA, nor its implementing regulations required by ECL §8-0113, authorize the Commissioner of Environmental Conservation to enforce SEQRA, except in the limited circumstances described below. Indeed, the legislative history, the findings and declaration in ECL §8-0103 and the statutory framework for SEQRA implementation all evidence a contrary intent.

The principle of equality among state and local agencies pervades SEQRA. For example, "all agencies", not just the Department of Environmental Conservation, are required to conduct

their affairs with due consideration to preventing environmental damage as stewards of the air, water, land and living resources, and are obliged to protect the state's natural resources for the present and future use of the People of the State. ECL §8-0103. This principle of equality among governmental agencies is further emphasized by the legislative mandate that each agency adopt its own environmental review regulations consistent with SEQRA, incorporating areas of environmental protection into its own decision-making processes. ECL §8-0107, ECL §8-0109(1), and ECL §8-0113(3).

Since each agency of government anywhere in New York must comply equally with SEQRA, none is in a position to have the exclusive role of issuing a declaratory ruling with respect to the applicability of ECL Article 8 to any person, property or state of facts as contemplated by SAPA. The adherence of each agency's SEQRA regulations to the SEQRA mandate is in the first instance for a court to consider pursuant to the Civil Practice Law and Rules. SEQRA's procedures common to all agencies do not constitute a statute "enforceable" by DEC as contemplated in §204 of SAPA. Review of how any regulatory agency affects the quality of the environment is left to judicial scrutiny, not the dictate of DEC. If each agency, rather than the judiciary were left to separately interpret SEQRA outside the narrow, statutorily prescribed process of adopting its regulations, SEQRA could be subject to varying "binding" constructions. The statute's

central remedial role common to each agency could be frustrated by being fractured into inconsistent applications.

This does not, of course, mean that SEQRA procedures lack direction. The same environmental impact review procedures are common to all agencies. They are applied in any specific instance by the one agency that does have authority to supersede all others, the "lead agency". The lead agency is defined as the agency principally responsible for carrying out or approving an action, ECL §8-0111(6). New York's Legislature has designated each "lead agency" as the guardian of the legal and environmental integrity of the SEQRA process relevant to specific actions within its jurisdiction. Compliance with SEQRA's literal and substantive requirements, and enforcement of its terms, is expressly the responsibility of the lead agency. Stevenson, Early Legislative Attempts at Requiring Environmental Assessment and SEQRA's Legislative History, 46 ALB. L. REV. 1114, p. 1120-22 (1982).

The "lead agency" applies the SEQRA procedures in the concrete circumstances of the facts, persons and property before it. This is, at its core, a detailed analysis of all environmental impacts and alternatives so that an agency may exercise discretion to choose the least environmentally harmful alternative. ECL §8-0109. By its very definition, therefore, there is no way a petitioner's hypothetical or static factual predicate could be presented for a declaratory ruling on how an

agency might apply its SEQRA regulations to any person; the SEQRA process requires a searching inquiry into actual facts on a record. See, e.g., Town of Henrietta v. DEC, 76 A.D.2d 215, 430 N.Y.S.2d 440 (1980). As the Court of Appeals instructed in PASNY v. DEC, 58 N.Y.2d 427, 461 N.Y.S.2d 769 (1983), the State Administrative Procedure Act requires that, for an agency to be competent to issue a declaratory ruling, there must exist "the power of the agency to regulate the procedure governing petitions seeking a ruling." Id. at 772. The essence of environmental reviews is to search beyond any applicant's or petitioner's given set of facts. SEQRA requires the agency to discover the truth of the facts set forth in an environmental impact statement, while SAPA imposes "no requirement that the agency determine the accuracy of the facts as stated in the petition." Id. The Legislature cannot be presumed to have intended that SAPA would be available to obstruct the deliberative procedures of SEQRA. See McKinney's Statutes §141. If the remedial objectives of SEQRA are to be realized, the specific mandate of SEQRA must necessarily govern over the general availability of the declaratory ruling petitions offered through §204 of SAPA.

DEC, despite having been delegated a central role in the implementation of SEQRA, is not a legislatively designated enforcer of SEQRA. DEC's power to regulate the procedure governing how other agencies implement SEQRA is exclusively

through issuing interpretive rules guiding how all agencies will individually promulgate environmental review procedures; DEC lacks the power to actually regulate the other agencies SEQRA implementation.

As set forth in ECL §8-0113, DEC's general responsibilities include the promulgation of regulations defining SEQRA's terms and procedures, the establishment of criteria for determining significance, and the adoption of actions or classes of actions which are more likely to require preparation of an environmental impact statement and those which have been determined not to have a significant effect on the environment. The Legislature also expressly gave the Commissioner specific authority to resolve lead agency disputes, ECL §8-0111(6), determine "ungrandfathering" petitions, ECL §8-0111(5)(a)(i), determine fees on appeal, ECL §8-0113(2)(k), and rule on the validity of individual agency Type II listings, 6 NYCRR 617.4(i). These are the duties which DEC can enforce, as regulator and if necessary through administrative or judicial enforcement actions. In accordance with the express language of §204 of SAPA, the Department may issue declaratory rulings only on questions involving the above "enforceable" four regulatory authorities.

Accordingly, this ruling is competent to examine only the first question presented, concerning whether an agency can permanently delegate "lead agency" status to a body which does not make the agency's decisions. SAPA does not empower DEC to

issue declaratory rulings on the remainder of the SEQRA questions posed for the reasons stated above. However, these legal constraints on issuance of declaratory rulings in no way diminish DEC's advisory and educational responsibility to assist agencies in fulfilling their SEQRA responsibilities, nor do they impair the Department's authority to implement those areas of responsibility assigned to it. To that end DEC actively provides education, informal interpretations and guidelines on SEQRA implementation to agencies and the public alike. These programs further the goals of SEQRA as expressed in ECL §8-0103. Although as General Counsel exercising DEC's authority under §204 of SAPA and 6 NYCRR Part 619, I lack authority to rule on all but one of the matters presented here, I am directing those matters to the Division of Regulatory Affairs and Civil Counsel to provide guidance as appropriate.

DEC has provided guidance in the form of the SEQR HANDBOOK, as well as by informal opinions of counsel and of the staff in the Division of Regulatory Affairs. The courts, as well as many agencies, have relied upon DEC advice. Guidance is obtained also from the written decisions rendered by the Commissioner on permit applications for major project proposals. Binding direction on implementing SEQRA is set forth in DEC's regulations at 6 NYCRR Part 617. As experience permits, these regulations can be improved; for instance, the DEC Division of Regulatory Affairs

will proposed revisions to Part 617 which are expected to be presented by the fall of 1984. The amendments to Part 617 will address some of the issues raised in the instant petition, will clarify other procedural responsibilities and will codify some important principles now established in case law. The Division of Regulatory Affairs intends to hold early scoping meetings on the proposed revisions. Public cooperation in this effort will assist in refinement of most of the issues raised in the petition. However appropriate such rule-making proceedings may be for the consideration of most of the matters posed by this petition, only one matter may be considered by this Declaratory Ruling.

## II. Lead Agency Designations.

The first issue presented by Petitioners is whether an agency without specific decision-making jurisdiction, as defined in 6 NYCRR §617.1(r), may serve as "lead agency". The Appellate Divisions of the Second and Third Departments have provided an unambiguous answer: an agency can only serve as lead agency if it has jurisdiction to fund or approve an action or is directly undertaking the activity. Glen Head-Glenwood Landing Civic Council v. Town of Oyster Bay, 88 A.D.2d 484 (2nd Dept., 1982); Save the Pine Bush v. Planning Board of the City of Albany, 96 A.D.2d 986, (3rd Dept., 1983).

This interpretation is consistent with the statutory requirement that the lead agency must be the agency principally

responsible for carrying out or approving the action, see ECL §8-0111(6) as clarified further by 6 NYCRR §617.2(r). The court reasoned in the Glen Head case that delegation of lead agency status to an entity without decision-making jurisdiction constitutes an impermissible evasion of the agency's SEQRA responsibilities since the decision-maker is no longer accountable for assembling the environmental record and making the ultimate decision based on that record.

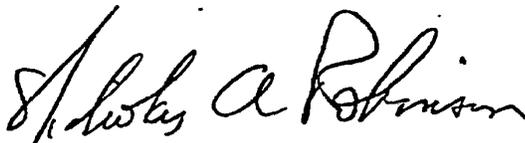
Therefore, a local law that permanently delegates the lead agency responsibilities to environmental quality review boards or other similar non-jurisdictional agencies contravenes SEQRA's mandate that decision-makers directly consider environmental areas of concern along with social and economic factors in the decision-making process. Save the Pine Bush, 96 A.D.2d at 988. For instance, a local government may not permanently delegate "lead agency" roles to conduct environmental reviews to entities which do not make decisions on the action for which approval is sought. This practice is not lawful and local ordinances or agency regulations to the contrary must be revised to assure literal compliance with SEQRA.

This prohibition on a permanent lead agency delegation does not mean that conservation advisory councils, environmental review boards, environmental management councils or similar citizen advisory groups should not be actively involved in the SEQRA review process. On the contrary, SEQRA's goals contemplate

that many lead agencies may wish to seek out the expertise of such entities to assist them in making the requisite SEQRA record and determinations by providing recommendations based on their technical and scientific capabilities and research. In all instances, however, determinations of significance, and adoption of the final environmental impact statement and findings must be made by the lead agency.

DATED: Albany, New York

September 14, 1984

A handwritten signature in cursive script, reading "Nicholas A. Robinson". The signature is written in dark ink and is positioned above a horizontal line.

Nicholas A. Robinson

Deputy Commissioner/General Counsel