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Court challenges to SEQRA negative declarations: New cause for vigilance



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Environmental review for proposed land use "actions" - such as subdivision and site plan development approvals and municipal zoning changes - under the State Environmental Quality Review Act (SEQRA) and its implementing regulations often involves preparation and public review of extensive environmental impact statements (EISs). However, the SEQRA regulations also provide that a lead agency's issuance of a "negative declaration" for a proposed action (i.e., a determination that the action will not result in any significant adverse environmental impact) terminates environmental review before an EIS is ever prepared or considered.

Because negative declarations have such conclusive effects on SEQRA review, they are regularly challenged in Court by parties claiming that either (1) a lead agency failed to comply with SEQRA procedures before issuing the negative declaration, or (2) the lead agency failed to identify the relevant areas of environmental concern for the proposed action, take a "hard look" at those areas, or set forth a "reasoned elaboration" for its conclusion that no significant adverse environmental impact will result from the proposed action. Successful court challenges to negative declarations depend on a number of propitious circumstances, including (1) it takes only one potentially significant adverse environmental impact to require preparation and review of an EIS for a proposed action, (2) Courts require "literal," not merely "substantial," compliance with SEQRA procedures, (3) Courts have stated there is a "low threshold" for requiring preparation of an EIS, and (4) many agencies either do not fully comprehend the requirements of SEQRA or do not prepare written negative declarations that can withstand a "hard look."

Although SEQRA negative declarations are often vulnerable in court, recent cases from the New York Court of Appeals indicate that the issuance of negative declarations must be carefully monitored so that the opportunity for court review is not lost due to an expired statute of limitations.

For years, New York courts found that SEQRA "negative declarations" - as well as corresponding "positive declarations," which require the preparation of an EIS - are merely preliminary steps in the decision-making process, and thus, not "ripe" for judicial review until a subdivision, site plan, or other approval is granted. However, in its 2003 decision in *Stop-the-Barge v. Cahill*, 1 N.Y.3d 218, the Court of Appeals determined that the four-month statute of limitations began running from the issuance of a "conditioned negative declaration" for proposed installation of a power generator, and not from the subsequent issuance of an air permit for the facility. While, in its subsequent 2006 decision in *Eadie v. Town Board of Town of North Greenbush*, 7 N.Y.3d 306, the Court of Appeals, distinguishing *Stop-the-Barge*, determined that a proceeding to annul a zoning change may be commenced within four months of the time the change is adopted, it also suggested that, where it is the "SEQRA process" that inflicts the injury of which the petitioner complains, the statute of limitations may actually run from the time of the challenged SEQRA action.

In view of the foregoing decisions, it is prudent to act as if the limitations period for challenging a negative declaration commences the day the negative declaration is issued. Because negative declarations need not be advertised in advance, do not require public hearings, and may be issued months or even years before approvals are issued, they can easily fly "under the radar." For this reason, all interested parties, and their legal counsel, would be well advised to maintain constant surveillance - e.g., weekly or bi-weekly review of municipal board agendas and project files of the review and approval processes for proposed actions. In this way, negative declarations can be noted, examined, and, if appropriate, sued upon before anyone can say "too late."

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