COMMENTARY

Navigating NY's Pioneering Environmental Justice Law: Implications and Predictions

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Special Sections

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Beginning on Dec. 30, 2024, New York will implement a transformative law to address environmental justice and protecting disadvantaged communities from disproportionate impacts from pollution. The forthcoming Environmental Conservation Law Section 70-0118 prohibits New York State Department of Environmental Conservation (DEC) from issuing permits for new projects with any impacts that "may cause or contribute more than a de minimis amount of pollution to a disproportionate pollution burden on the disadvantaged community." This law has been coined the "nation's strongest environmental justice law." It also marks a significant step in ensuring that environmental burdens are more equitably distributed and that historically marginalized areas are not further compromised by industrial activities and development.

When an agency undertakes, funds, or approves an action, the New York State Environmental Quality Review Act (SEQR) requires the environmental impact of that action to be considered. If there are none, a negative declaration can be issued, and the action can proceed without further SEQR analysis. For projects that may have the potential for a significant adverse effect, an environmental impact statement (EIS) must be prepared. For attorneys representing applicant developers, a positive declaration can often be viewed as a significant setback, typically resulting in months, if not years, of additional work before multiple boards and agencies. This much more expansive scope of work often includes the need for costly expert consultations, extended public hearings in packed rooms, and frequently the emergence of ad hoc opposition groups whose true aim is project eliminations rather than addressing genuine environmental concerns.

It is a common misconception that environmental justice is adequately considered under the current SEQR procedural standards. The purpose of SEQR is to incorporate the consideration of environmental factors into the decision-making process of agency action. The term environment includes "the physical conditions that will be affected by a proposed action, including … existing patterns of population concentration, distribution or growth, existing community or neighborhood character, and human health." While disadvantaged communities could be considered within "community or neighborhood character," there no requirement for such consideration. "Community or neighborhood character" is not defined in SEQR, so it is open for interpretation by developers and agencies. Because SEQR requires an EIS when there may be adverse environmental impacts, developers and agencies are incentivized to give "community or neighborhood character" the narrowest definition possible, as to not consider environmental justice impacts a category for negative impacts.

New York courts generally reinforce this narrative through highly deferential standards of review of SEQR agency actions including assessing whether an action is arbitrary and capricious or whether an action following a hearing is supported by substantial evidence. Judicial review of SEQR is limited to whether the determination is arbitrary and capricious, an abuse of discretion, or affected by an error of law. Courts are not permitted—and most often they will abstain—from substituting their judgment for that of the agency, even if they disagree with the ultimate physical, environmental, or sociopolitical impacts. Agencies are not required to address "every conceivable environmental impact," only the ones explicitly outlined by SEQR.

In one such Court of Appeals case, when petitioners argued that the action negatively impacted an disadvantaged community's urban heat and stormwater runoff, the court held that because there were no published standards to address these areas of concern, the agency did not need to consider those impacts and properly issued a negative declaration. So, because "community and neighborhood character" is not defined in SEQR, and courts do not enforce analysis of environmental justice community impacts, agencies have hardly any legal consequences for choosing not to consider those communities. As a consequence, the impacts can be asymmetric on certain disadvantaged communities to the distinct advantage of other.

With the adoption of ECL Section 70-0118, the New York Legislature has sent a clear signal that it intends to prioritize the consideration of environmental impacts on disadvantaged communities beginning at the local review level. It provides that when a new project subject to an applicable permit issuance, modification, or renewal, DEC must consider whether the action If the action does cause or contribute to the disproportionate pollution burden, the applicant must prepare an "existing burden report." If through the burden report and public commentary, the DEC determines that the action will contribute more than a de minimis amount of pollution, the department shall require operational changes to the project to reduce such pollution before issuing, modifying or renewing the applicable permit. Scholars have argued that the new law will add a new criteria to SEQR, since permitting falls within the scope of agency action. One thing is certain, is the uncertainty courts will now face when enforcing this environmental justice mandate at all levels from project conceptualization all the way through implementation and full-scale development.

This new law is narrow in the sense that it only applies to actions undertaken by DEC and does not reach the local land use level. Courts are unlikely to broaden its application since their role will continue to be confined to interpreting and not expanding this law in the place of the legislature. This principle is particularly relevant under the new law, where courts' roles will still be to determine whether DEC adhered to statutory requirements, not to question the agency's discretion unless it acted arbitrarily or capriciously or without substantial evidence for its findings. The law should not be seen as a replacement for the careful presentation of comprehensive socioeconomic and environmental justice data by both applicants and opponents. Therefore, the onus remains on these parties to develop a thorough and well-documented administrative record that clearly articulates real, fact-based environmental justice concerns, and to avoid conclusory and politically driven arguments that are not fact-driven.

For courts, the scope of judicial review should remain strictly confined to the contents of the administrative record. This drives home the importance of meticulous preparation and thoughtful consideration at every stage of the project review process—whether before planning, zoning, town and village boards, or commissions. While the new law introduces additional considerations for DEC, it does not alter the fundamental role of courts in reviewing agency actions. Courts must continue to ensure that decisions are rationally based and lawful and grounded in the evidence, avoiding any temptation to inject their own (non-record based) views into the process. Consequently, developing a robust, fact-based record will remain central to court decisions and the evolving body of case law just as other areas of SEQR review have evolved through the courts.

Though this new law may not go as far as some might hope in protecting disproportionately impacted communities, it is a significant step toward reducing environmental inequities. At the very least, it marks the beginning of a broader national effort to move closer to environmental justice and equity.

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