Be careful what you wish for: A SEQRA negative declaration may be harmful to long term projects

October 25, 2010 - Long Island

Conventional wisdom holds that, on the often arduous road between conception and implementation of a proposed land use project, a "negative declaration" under the State Environmental Quality Review Act (SEQRA) (i.e., a determination that the proposed action will have no significant adverse environmental impact) is a major milestone, and even cause for relief for the project sponsor. At times, however, a negative declaration, true to its name, may actually be detrimental to the development process.

The obvious benefit of a negative declaration is that it effectively ends SEQRA review, pursuant to the SEQRA regulations at 6 NYCRR §617.3(c), and thus allows the project sponsor to proceed to the important business of actually obtaining approvals, rather than spend months or years embroiled in a costly and often contentious environmental impact statement (EIS) process. The downside of SEQRA negative declarations is that they are frequently-and often successfully-attacked in litigation that may not even be filed until the project sponsor has, at great expense of time and talent, successfully passed through public hearings and other important checkpoints on the application highway.

There are several reasons why court challenges to SEQRA negative declarations represent serious threats to the long-term success of land use applications. First, while the doctrine of "substantial compliance" readily excuses minor omissions or missteps in other administrative contexts, the courts hold SEQRA reviewing agencies to a standard of "strict" compliance with the procedural requirements of SEQRA and the SEQRA regulations at 6 NYCRR Part 617. Thus, a seemingly inconsequential error (such as misstating the nature, scope, or location of a proposed action, or failing to file the negative declaration for a "Type I" action with one of five "involved agencies") can result in a court decision invalidating the negative declaration, as well as all development approvals issued after the negative declaration. Such a determination may require not only "redoing" the negative declaration, but also repeating years of public hearings and other hard-won project accomplishments.

Other critical vulnerabilities of SEQRA negative declarations derive from numerous judicial authorities holding (1) there is a "low threshold" for requiring an EIS for a proposed action, and (2) SEQRA reviewing agencies must identify relevant areas of environmental concern for a proposed action, take a "hard look" at those areas of concern, and provide a "reasoned elaboration" for their environmental findings. Under the case law, a negative declaration can be successfully attacked when there is even one potentially significant adverse environmental impact from the proposed project (which automatically precludes a negative declaration and requires preparation of an EIS) or, as too often occurs, the negative declaration presents an incomplete, superficial, conclusory, or otherwise inadequate analysis of relevant environmental issues.

In sum, the issuance of a SEQRA negative declaration may ultimately be counterproductive, given how exposed negative declarations are to court challenge. The real danger-not to be understated-is that judicial invalidation of a negative declaration (possibly months or years after project approvals) may well (1) return the project application to its early stages, (2) require that all post-SEQRA steps of the application process be revisited, and (3) mandate the commencement and completion of a time-consuming and expensive EIS process after all. As strange as it seems, particularly where there exists project opposition with sufficient resources to mount effective litigation, a "positive" declaration, and the EIS process it entails, may actually be the faster road to a viable project.

John Wagner is a partner at Certilman Balin Adler & Hyman, LLP, East Meadow, N.Y.