



**Environmental impact statements at contaminated sites - by
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The New York State Environmental Quality Review Act (SEQRA) requires a review of potential environmental impacts of a project before a proposed project can obtain required approvals. Other environmental statutes require the remediation of contaminated sites. Because the SEQRA process examines impacts of the proposed project and the current environmental condition of the site is not an impact, the SEQRA process can often proceed without an examination of environmental conditions.

The recent decision in *Boise v City of Plattsburgh* 2023WL55279461 (3d Dept, August 17, 2023) suggests that the distinction between environmental impacts and environmental conditions is not so clean. It held that the City of Plattsburgh Planning Board violated SEQRA by not examining the details of the remediation of the site. The case arose out of the proposed redevelopment of 3.4 acres of property previously owned by the city and included a brownfield site that had been remediated under the supervision of the New York State Department of Environmental Conservation (DEC). The remediation left some contamination behind and included engineering controls to prevent the spread of that contamination. Additionally, a Site Management Plan that outlined the process for, and the safety precautions to be taken, was prepared in the event there was development of the site.

During the SEQRA process, the contamination was dealt with by identifying the DEC Record of Decision and Site Management Plan. The Site Management Plan included precautions to be taken if

future development impacts the engineering controls. Among those precautions would be creation of a site-specific Health and Safety Plan (HASP). Petitioners claimed that this discussion did not meet the standard of taking a hard look at impacts. And the court agreed.

The court based its decision largely on the fact that the HASP needs to be created and reviewed as part of the SEQRA process. In other words, it is not enough to say that DEC has determined how risks are going to be mitigated and the DEC process will include creation of a site-specific HASP. The SEQRA process must include a review of the HASP. The concern expressed by the court was that relying on the DEC process would “insulate it [the HASP] from public scrutiny.”

This decision is surprising because most courts would likely have agreed with Justice Egan, who dissented in part. Justice Egan reasoned that the SEQRA process had taken the required “hard look” at the contamination issue. It included a full discussion of the history as well as DEC’s decision regarding how future development was to be handled. Indeed, the court’s statement that the citizens “have the right” to insist on environmentally safe construction “in accordance with SEQRA” seems to overstate the role of SEQRA. SEQRA is procedural. It requires an examination of the issues. DEC may provide informal interpretations and general guidance during the SEQRA process but they do not have a formal role in the SEQRA review conducted by other agencies. DEC performs the substantive review of the HASP to determine how the contamination is dealt with.

A number of questions can be raised about this decision. First, the court expressed concern about public scrutiny, when the DEC brownfields process includes a thorough citizen participation element. Assuming the public has the right to review and comment, is it necessary for the public to have two opportunities to review and comment? Second, what if the planning board disagrees with DEC regarding elements of the HASP? Third, is this decision consistent with existing caselaw, when the only cases cited by the court that suggest a review of the remediation process during SEQRA review were cases in which remediation was necessary, but DEC had not yet concluded its process. See, *Bronx Committee for Toxic Free Schools v New York City School Construction Authority*, 20 NY 3d 148 (2012). The Planning Board’s review of what DEC has done may be more limited than its review of an issue that DEC may address in the future.

The decision raises significant questions about the interplay between the SEQRA process and the environmental remediation process that will need to be addressed in future decisions.

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