Neighborhood Character and SEQRA: Courts Struggle with Homeless Shelters, Prisons, and the Environment

INTRODUCTION

All actions taken by New York state agencies must comply with New York's State Environmental Quality Review Act, SEQRA, which went into effect in 1975.[1] Its stated purpose is to "promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state."[2]

One of the most notable features of SEQRA is its expansive definition of "environment," which encompasses not only "the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, [and] objects of historic or aesthetic significance"[3] but also "existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character."[4] SEQRA's purpose section is modelled after that of NEPA, the National Environmental Protection Act,[5] but its definition of the environment goes beyond that of NEPA.[6]

This Note argues that SEQRA's expansive definition of the environment makes SEQRA vulnerable to abuse. Given the statute's broad language, private litigants have the ability to challenge agency action that only remotely affects the physical en-

1. For an excellent discussion of background and early case law developments under SEQRA, see *Symposium on the New York State Environmental Quality Review Act*, 46 ALB. L. REV. 1097-1305 (1982).

2. N.Y. Envtl. Conserv. Law § 8-0101 (McKinney's 1984).

3. *Id.* at § 8-0105(6).

4. *Id.* (emphasis added).

5. *See* 42 U.S.C. § 4321 (1982).

6. For a thorough discussion of the differences between SEQRA and NEPA, see N. Orloff, *SEQRA: New York's Reformation of NEPA*, 46 ALB. L. REV. 1128 (1982). In that commentator's words, "NEPA jurisprudence recognizes a relatively narrow range of environmental effects in connection with making the threshold decision on whether an impact statement is required. 'Effects' covers impacts on the physical environment. It does not encompass social and economic consequences. The range of environmental effects cognizable under SEQRA is broader." *Id.* at 1135 (footnote omitted).

vironment. For example, while there have been no reported cases arguing that a proposed agency action would adversely affect flora, there have been numerous cases where plaintiffs have challenged those actions which will affect "neighborhood character."

Part I of this note addresses the mechanics of the statute, including the ways in which litigants can bring actions under SEQRA, and Part II deals with the expansive definition of environment under the statute. Part III examines the courts' struggle to reconcile the goals of SEQRA with the immediate needs of the community, and Part IV compares SEQRA to NEPA. Finally, the Conclusion suggests that SEQRA and the regulations implementing it could be modified to make the statute less vulnerable to abuse.

I. THE MECHANICS OF SEQRA

SEQRA requires the preparation of an environmental impact statement (EIS).[7] In addition, SEQRA requires that agencies consider and discuss alternatives to actions[8] and that mitigation measures be taken to minimize the adverse environmental impacts of any actions which are taken.[9] Specifically, Section 8-0109(2) of SEQRA provides that "[a]ll agencies . . . shall prepare, or cause to be prepared by contract or otherwise an environmental impact statement on any action they propose or approve which may have a significant effect on the environment."[10]

In accordance with Section 8-0109(4), an agency "shall make an initial determination whether an environmental impact statement need be prepared."[11] If this determination is positive, the agency next "shall prepare or cause to be prepared a draft environmental impact statement [DEIS]."[12] Finally, "the agency shall prepare and make available the environmental impact statement," within forty-five days if a public hearing has been held or within sixty days if there has been no public hearing.[13]

7. N.Y. Envtl. Conserv. Law § 8-0109 (McKinney's 1984).
8. *Id.* at § 8-0109(2)(d).
9. *Id.* at § 8-0109(2)(f).
10. *Id.* at § 8-0109(2).
11. *Id.* at § 8-0109(4).
12. *Id.*
13. *Id.* at § 8-0109(5).

Under SEQRA, a litigant can challenge either the "negative declaration" that no EIS is required or the sufficiency of the EIS itself. As mentioned above, SEQRA mandates that adverse environmental impacts be mitigated. SEQRA Section 8-0109(8) provides that:

> When an agency decides to carry out or approve an action which has been the subject of an environmental impact statement, it shall make an explicit finding that the requirements of this section have been met and that consistent with social, economic and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided.[14]

The New York courts have used the "hard look doctrine" in reviewing agency actions under SEQRA, which means that courts "must limit their review to whether the appropriate agencies identified the relevant areas of concern, took a 'hard look' at them and made a 'reasoned elaboration' of the basis of their determination; the courts [sic] role is a supervisory one."[15] Actions in New York City are also governed by the regulations promulgated by the City of New York, entitled City Environmental Quality Review (CEQR), as authorized by and in implementation of SEQRA.[16]

II. The Breadth of "Environmental Concerns" Under SEQRA

It is not necessary for a proposed action to have a primary impact upon the physical environment for SEQRA to come into play, because such things as "existing community or neighborhood character" are explicitly included in the definition of the environment spelled out in Section 8-0105(6).[17] In the recent case of *Chinese Staff and Workers Association v. City of New York*,[18] the New York Court of Appeals discussed the breadth of the language of SEQRA. That case involved the proposed construction of high-

14. *Id.* at § 8-0109(8).

15. Greenpoint Renaissance Ent. Corp. v. New York, 137 A.D. 2d 597, 524 N.Y.S.2d 488, 491 (2d Dep't 1988). *See also* Glen Head-Glenwood Landing Civic Council, Inc. v. Town of Oyster Bay, 88 A.D.2d 484, 453 N.Y.S.2d 732 (2d Dep't 1982).

16. *See* Chinese Staff and Workers Ass'n v. City of New York, 68 N.Y.2d 359, 361, 502 N.E.2d 176, 177, 509 N.Y.S.2d 499, 500 (1986) (referring to Executive Order No. 91, Aug. 24, 1977). Several of the cases discussed *infra* involve the Uniform Land Use Review Procedure (ULUP), as well as SEQRA and CEQR, but this note will focus on SEQRA.

17. N.Y. Envtl. Conserv. Law § 8-0105(6).

18. 68 N.Y.2d 359, 502 N.E.2d 176, 509 N.Y.S.2d 499 (1986).

rise luxury condominiums in the Chinatown area. The court said: "[T]he impact that a project may have on population patterns or existing community character, with or without a separate impact on the physical environment, is a relevant concern in an environmental analysis since the statute includes these concerns as elements of the environment."[19] The lead agencies involved in that case had determined that no EIS was required,[20] but the court held that they had not adequately considered the potential displacement of local residents and businesses.[21] The court nullified the special permit that had been granted and mandated further environmental review.[22] Because that case involved the construction of luxury condominiums for people that could presumably find housing elsewhere, there were arguably no competing policy reasons that would have justified going ahead with the project without first performing further environmental analysis. In situations discussed below, however, where important public projects are at stake, the provisions of SEQRA become much more problematic.

III. SEQRA IN THE COURTS—HOMELESS SHELTERS AND PRISONS

The problem of homelessness in New York City has received a great deal of attention lately. Unfortunately, although the problem is widely recognized, solutions to the problem are not widely agreed upon.[23] The "not in my backyard" syndrome prevails, i.e., everyone agrees the homeless should be housed but nobody wants them housed in his or her neighborhood.[24] Unfortunately, SEQRA provides an easy opportunity for those living in the vicinity of proposed homeless shelters to go to court and attempt to halt or delay those projects by citing "environmental" concerns.

When state and city agencies take steps to deal with acute problems such as homelessness or prison overcrowding, their actions are subject to SEQRA. Normally, that would mean that the relevant agency would first determine whether the proposed ac-

19. *Id.* at 366, 502 N.E.2d at 180, 509 N.Y.S.2d at 503.

20. *Id.* at 362, 502 N.E.2d at 178, 509 N.Y.S.2d at 501.

21. *Id.* at 368, 502 N.E.2d at 181, 509 N.Y.S.2d at 504.

22. *Id.* at 369, 502 N.E.2d at 182, 509 N.Y.S.2d at 505.

23. *See, e.g.*, J. Alter, N.F. Greenberg and S. Doherty, *The Homeless: Out in the Cold*, NEWSWEEK, Dec. 16, 1985 at 106.

24. *See, e.g.*, Winerip, *Neighborliness, The Homeless and Westchester*, N.Y. Times, Feb. 26, 1988, at B1, col. 1.

tion "may have a significant effect on the environment." If the answer is yes, then the agency would prepare an environmental impact statement and take the requisite mitigation measures.

Recognizing that certain projects simply cannot be delayed, even for environmental review, courts have struggled to find ways to allow needed projects to go forward while still complying with SEQRA. The New York Court of Appeals' decision in *Matter of Board of Visitors—Marcy Psychiatric Center v. Coughlin*[25] seemingly found a way to get certain projects off the hook. That case involved the proposed conversion of a mental health facility into a medium security prison. Citing the critical shortage of correctional facilities in New York State,[26] the court discussed the emergency provision contained in the SEQRA regulations. An exemption is provided for:

> emergency actions which are immediately necessary on a limited and temporary basis for the protection of life, health, property or natural resources, provided that such actions are directly related to the emergency and are performed to cause the least change or disturbance, practicable under the circumstances, to the environment. Any decision to fund, approve or directly undertake other activities after the emergency has expired is fully subject to the review procedures of this Part. . . .[27]

In *Coughlin*, the plaintiff Board of Visitors took the position that no action should be taken prior to the filing of an environmental impact statement by the State. Using this argument, the Board had won its case at both the trial court and appellate court levels.[28] The State's position was that the emergency nature of the prison shortage problem justified the decision not to file an EIS prior to the initiation of a project. The New York Court of Appeals explained that the Commissioner of Correctional Services, charged with the implementation of the project, had issued a "positive declaration"; the Commissioner had recognized that the conversion of the health facility into a prison could have an impact on the environment as defined by SEQRA.[29] Thus the Commissioner had made known his intention of filing an environmental impact statement in accordance with Section 8-

25. 60 N.Y.2d 14, 453 N.E.2d 1085, 466 N.Y.S.2d 668 (1983).
26. *Id.* at 16, 453 N.E.2d at 1086, 466 N.Y.S.2d at 669.
27. 6 NYCRR 617.2 (q)(4).
28. 60 N.Y.2d at 16, 453 N.E.2d at 1087, 466 N.Y.S.2d at 669.
29. *See id.* at 17-18, 453 N.E.2d at 1087, 466 N.Y.S.2d at 670.

0109 of the statute.[30] Normally, of course, that would have meant that the governmental agency would have been prohibited from taking any action on the project until the EIS had been filed and reviewed. At the same time, however, the Commissioner had issued a "Declaration of Emergency," designating the Marcy Project as an emergency action "because immediate action must be undertaken and there is insufficient time to commence and complete SEQRA Review prior to the commencement of the action."[31]

The appellate division disagreed with the commissioner's findings with respect to limited emergency, finding the Marcy project to be more in the nature of a permanent measure taken to deal with a deeply entrenched problem.[32] The New York Court of Appeals, however, took a broader view of "limited emergency":

> Concededly the case now before us does not present the classic example where immediate action is required to meet an emergency in which the effect of the action may be immediately realized. There is apparently no quick solution which will immediately eliminate the problems of overcrowded jails. But that does not mean that there is no crisis or that there is no need to take immediate action to lay the foundation for a program which may provide relief in the near future.[33]

With respect to the fact that the Marcy conversion would be a permanent, rather than a temporary measure, moreover, the court said that:

> This, of course, would be an important consideration if the State were seeking complete exemption from all the requirements of the SEQRA. But here the State has recognized its obligation to file an environmental impact statement, submit to the review required by the statute and take all action necessary to minimize the impact of the project prior to completion. It only urges dispensation from the general requirement that no action be taken on the project prior to the filing and subsequent review proceedings.[34]

In *Gerges v. Koch*,[35] the New York Court of Appeals took the strong position that it would be "judicially irresponsible" to mandate that "detention facilities which are now ready and available

30. *Id.*
31. *Id.*
32. *Id.* at 19-21, 453 N.E.2d at 1088-1089, 466 N.Y.S.2d at 671-672.
33. *Id.* at 20, 453 N.E.2d at 1089, 466 N.Y.S.2d at 672.
34. *Id.* at 21, 453 N.E.2d at 1089, 466 N.Y.S.2d at 672.
35. 62 N.Y.2d 84, 464 N.E.2d 441, 476 N.Y.S.2d 73 (1984).

. . . stand vacant pending resolution of the continuing controversy between the parties. . . ."[36] That was a case in which petitioners sought to enjoin respondents from implementing a proposal to convert and use the Brig at the Brooklyn Navy Yard as a medium security prison.[37] A week after the proceeding was instituted, the agencies involved issued a "negative declaration" such that an environmental impact statement would not be required.[38] Because the proceeding to enjoin the facility preceded the negative declaration, the court held that the validity of that declaration could be challenged in a later proceeding.[39] In the meantime, however, the emergency nature of the prison overcrowding situation compelled that the Brig facility be put to immediate use.[40]

Lower courts have likewise granted dispensation from SEQRA by generously applying the emergency provision. The recent case of *Spring-Gar Community Civic Association, Inc. v. Homes for the Homeless, Inc.*,[41] for example, dealt with a homeless project. There, plaintiffs brought an action to enjoin the establishment of a residence for approximately 715 homeless people.[42] They brought a nuisance claim as well as a claim under SEQRA.[43]

The court was sympathetic to the plaintiffs and said that "the change in the use of Saratoga Inn from a transient hotel (the former Holiday Inn) to a facility for homeless families may have a check on the existing population patterns and neighborhood patterns, so as to require the city to at the very least make a threshold determination as to the environmental impact of its actions under SEQRA and CEQR."[44] However, the court further found that the emergency nature of the homeless plight in New York City "is so life-threatening and of such proportions as to come within the meaning of the applicable emergency provisions . . . so as to provide *some dispensation* from the requirements generally governing

36. *Id.* at 95, 464 N.E.2d at 446, 476 N.Y.S.2d at 78.

37. *Id.* at 88, 464 N.E.2d at 442, 476 N.Y.S.2d at 74. Petitioners actually challenged the project on the grounds that it violated both CEQR and the Uniform Land Use Review Procedure (ULURP), 476 N.Y.S.2d at 75, but the case has been cited in subsequent cases involving SEQRA.

38. *Id.* at 90, 464 N.E.2d at 443, 476 N.Y.S.2d at 75.

39. *Id.* at 94, 464 N.E. 2d at 445, 476 N.Y.S. 2d at 77.

40. *Id.* at 95, 464 N.E.2d at 446, 476 N.Y.S.2d at 78. *See also* Silver v. Koch, 525 N.Y.S.2d 186 (1st Dep't 1988)(applying *Gergers* to temporary mooring of a prison barge).

41. 135 Misc. 2d 689, 516 N.Y.S.2d 526 (Sup. Ct. 1987).

42. *Id.*, 516 N.Y.S.2d at 400.

43. *Id.* at 693, 516 N.Y.S.2d at 401.

44. *Id.* at 697, 516 N.Y.S.2d at 404.

environmental standards."[45] The court then addressed specific problems with the proposed shelter and urged the legislature to address the issue.[46] In the meantime, while not enjoining the project, the court mandated that the city initiate environmental proceedings consistent with SEQRA and CEQR.[47]

In *Hart Island Committee v. Koch*[48] a trial court dealt with a neighborhood association's attempt to enjoin the construction of a correctional facility on Hart Island. Defendants claimed exemption from filing an EIS on the basis that an emergency existed.[49] The court explained that "[t]he emergency claimed here is the overcrowding in the City prisons which in 1983 caused Federal Judge Morris Lasker to direct the release of over 600 detainees."[50] While

> [i]t is clearly not the type of emergency that will result in imminent disaster if action is not taken forthwith . . . the creation of prison space to handle the increasing numbers of persons detained and sentenced for imprisonment in City prisons requires action, with some dispatch, to comply with the prisoners' constitutional rights and avoid another forced release of inmates.[51]

The court cited to the New York Court of Appeals' decision in *Coughlin* for authority that such a situation constitutes an emergency under the SEQRA regulations.[52]

The plaintiffs in *Hart Island Committee* challenged the validity of the emergency provision regulation itself, but with no success: "The court finds that the adoption of emergency regulations is reasonable when considering the goals of SEQRA . . . as it is prudent that at times government be able to act promptly when faced with a condition that cannot await the completion of the SEQRA process."[53] The court's ultimate conclusion was to deny an injunction with respect to the actual renovation of Hart Island but to "enjoin the transfer of any prisoners to the facility until the processes required by the said laws are completed."[54]

45. *Id.* at 698, 516 N.Y.S.2d at 405 (emphasis added).
46. *Id.* at 699, 516 N.Y.S.2d at 405.
47. *Id.* at 700, 516 N.Y.S.2d at 406.
48. 137 Misc. 2d 521, 520 N.Y.S.2d 977 (Sup. Ct. 1987).
49. *Id.* at 524, 520 N.Y.S.2d at 979.
50. *Id.*, 520 N.Y.S.2d at 980.
51. *Id.* at 525, 520 N.Y.S.2d at 980.
52. *See id.* at 526, 520 N.Y.S.2d at 980-81.
53. *Id.* at 527, 520 N.Y.S.2d at 981.
54. *Id.* at 528, 520 N.Y.S.2d at 982.

A similar situation was involved in *Greenpoint Renaissance Enter. Corp. v. New York*[55] where a community group sought injunctive relief to prevent a city agency from expanding the size of an area homeless shelter. Once again, the relevant agency had determined that an emergency existed.[56] Prior to the declaration of emergency, petitioners had filed suit alleging that the " 'policy and decision' to add 300 additional men at the Greenpoint site was 'action' within the meaning of . . . SEQRA . . . ."[57] In response, the city argued that "while in good faith it believed that the renovation of the three vacant Greenpoint buildings was exempt from environmental laws, it nonetheless intended to comply fully with CEQR and SEQRA."[58] The trial court made an "administrative decision that the opening of the additional Greenpoint buildings would have a significant impact on the environment,"[59] effectively issuing an "initial determination."[60] The trial court then directed the agency to comply with SEQRA and to file an EIS, in the meantime enjoining the project.[61]

Appellants contended that the trial court had exceeded its authority by determining that an EIS was required, and the Second Department agreed: "The Court of Appeals has made it quite clear that it is not the role of the courts to determine whether an action will have a significant impact on the environment, thereby triggering the requirement for an EIS."[62] Rather, the court must limit its review to determining whether the agency took a "hard look" at the relevant areas of concern.[63] The court explained that it was up to the city agencies to determine whether

> the opening of the additional Greenpoint building would have a significant impact on the environment. . . . The Department of Environmental Protection and the Department of City Planning are apparently now conducting that environmental assessment, but have not yet issued a determination. Thus, until that determination has been made there can be no legal challenge.[64]

55. 137 A.D.2d 597, 524 N.Y.S.2d 488 (2d Dep't 1988).
56. *Id.* at 599, 524 N.Y.S.2d at 490.
57. *Id.*
58. *Id.*
59. *Id.* at 600, 524 N.Y.S.2d at 491.
60. *See* SEQRA § 8-0109(4), N.Y. Envtl. Conserv. Law § 8-0109(4) (McKinney's 1984).
61. 137 A.D.2d at 600, 524 N.Y.S.2d at 490-91.
62. *Id.*, 524 N.Y.S.2d at 491 (citations omitted).
63. *Id.*
64. *Id.*

The Second Department also concurred with the agency's finding that an emergency existed. "Given the nature of the homeless situation, the city could reasonably conclude (as it did) that the Greenpoint Hospital project represents emergency action within the applicable regulations sufficient to allow it to continue with the project pending the completion of environmental review procedures."[65]

Declaring an emergency and then granting limited dispensation from SEQRA as the courts did in the above cases is an awkward solution to the problem raised when the need for a public project clashes with the requirements of SEQRA. First, this solution strains to make the prison overcrowding and homeless situations fit within the SEQRA regulations dealing with emergencies,[66] ultimately undermining the intent of the statute and the emergency regulation provision. Second, delaying compliance with SEQRA until a project is already underway significantly diminishes the usefulness of conducting environmental review.

Because SEQRA demands the preparation of an environmental impact statement for any action that "*may* have a significant effect on the environment,"[67] it has been said that SEQRA has a "low threshold."[68] That is, almost *any* action "may" significantly affect the environment as "environment" is defined by the statute.[69] Thus, even when an agency is allowed to delay compliance with SEQRA, it is likely that the agency will ultimately issue a "positive declaration" that there "may" be a "significant effect on the environment."[70] At that point, the agency will have to prepare an EIS.[71] However, because the project is already underway the pro-

65. *Id.*

66. The emergency provision provides an exemption for "emergency actions which are immediately necessary on a *limited and temporary basis* . . . ." 6 NYCRR 617.2(q)(4) (emphasis added). Courts which have relied on that provision to exempt homeless shelters and prisons from SEQRA have conceded that they are reading the provision broadly. *See, e.g., Coughlin*, 60 N.Y.2d at 20, 453 N.E.2d at 1089, 466 N.Y.S.2d at 672: "Concededly the case before us does not present the classic example where immediate action is required to meet an emergency in which the effect of the action may be immediately realized."; and *Hart Island Comm. v. Koch*, 137 Misc. 2d 521, 524-25, 520 N.Y.S.2d 977, 980: "There is no question that the shortage of prison beds has created, and continues to create, a crisis for the city of New York, which can be said to be an emergency. It is clearly not the type of emergency that will result in imminent disaster if action is not taken forthwith."

67. SEQRA § 8-0109(2), N.Y. Envtl. Conserv. Law § 8-0109(2) (emphasis added).

68. *See* Ruzow, *SEQRA in the Courts*, 46 ALB. L. REV. 1177, 1180 (1982).

69. *See* SEQRA § 8-0105(6), N.Y. Envtl. Conserv. Law § 8-0105(6).

70. *Id.* at § 8-0109(4), N.Y. Envtl. Conserv. Law § 8-0109(4).

71. *Id.* at § 8-0109(2), N.Y. Envtl. Conserv. Law § 8-0109(2).

cess of preparing an EIS becomes virtually useless. SEQRA, which has been described as both a "look before you leap"[72] and a "balancing"[73] statute, achieves neither goal if environmental impact statements are filed after the fact.

The New York Court of Appeals' express approval of delayed filing in *Coughlin*,[74] moreover, is particularly ironic in light of its earlier decision in *Tri-County Taxpayers Ass'n. Inc. v. Town Bd.*.[75] In that case, the New York Court of Appeals nullified resolutions authorizing the establishment of a sewer district, specifically because the Town Board had not prepared an environmental impact statement in advance.[76] The court there emphasized the importance of making the EIS available before the commencement of an action:

> the evident intention of the Legislature was that the environmental impact statements required to be prepared by a local agency, here the Town of Queensbury, with respect to any action which might have a significant effect on the environment should be accessible to members of the town board and the public prior to action on the proposal in question.[77]

Filing an EIS after the project is underway is significantly less useful because at that point the project already has momentum. In the words of the court: "As a practical matter . . . the dynamics and freedom of decision-making with respect to a proposal to rescind a prior action are significantly more constrained than when the action is first under consideration for adoption."[78] In discussing the *Tri-County* opinion, one commentator noted that "[t]he logic of the court of appeals' action can be seen when it is recognized that SEQRA's mandates for environmental protection cannot be achieved 'to the fullest extent possible' if viewed as an afterthought."[79]

The New York Court of Appeals' decisions in *Chinese Staff*, *Tri-County* and *Coughlin* seem logically inconsistent. It is difficult to reconcile the positions that (1) the impact that a project may have

72. Crary, *Procedural Issues Under SEQRA*, 46 ALB. L. REV. 1211, 1226 (1982).
73. *Id.* at 1216.
74. 60 N.Y.2d at 21, 453 N.E.2d at 1089, 466 N.Y.S.2d at 672.
75. 55 N.Y.2d 41, 432 N.E.2d 592, 447 N.Y.S.2d 699 (1982).
76. *Id.*
77. *Id.* at 46, 432 N.E.2d at 594, 447 N.Y.S.2d at 701.
78. *Id.*
79. Ruzow, *SEQRA in the Courts*, 46 ALB. L. REV. 1177, 1181-1182 (1982) (citation omitted).

on existing community character is a relevant concern under SEQRA and (2) environmental impact statements must be filed before a project is underway with (3) delayed compliance with SEQRA will be allowed if an "emergency" exists. On the other hand, it is not difficult to understand why the court of appeals has advocated delay in some situations while decrying it in another. Put simply, some projects simply cannot wait.

In an earlier court of appeals decision, *Harlem Valley United Coalition v. Hall*,[80] the requirements of SEQRA were dealt with in a slightly different way. The facts were similar to those in *Coughlin*: the case involved conversion of a mental hospital into a detention facility for juveniles convicted of serious crimes.[81] The Director of the Division for Youth had issued a negative declaration, determining that there would be no significant effects upon the environment.[82] The trial court, however, issued a preliminary injunction pending compliance with SEQRA: "respondents blinked away the citizens' well-founded fears of escapes and increased crime risk, ignoring such considerations for the sake of expediency and economy."[83]

The appellate division, however, reversed the injunction, finding the negative declaration reasonable.[84] In a memorandum decision, the New York Court of Appeals affirmed the order of the appellate division:

> The establishment of such a facility will, in most instances, inherently and inescapably pose some community problems wherever it may be geographically located. In any challenge to such an agency's declaration of environmental nonsignificance in regard to such a facility, judicial focus must be on whether the agency failed to consider substantial disadvantages peculiar to a particular location or that the exposure of the community may not be reduced to reasonable proportions by the employment of other means to complete the project at the proposed location.[85]

80. 54 N.Y.2d 977, 430 N.E.2d 909, 446 N.Y.S.2d 33 (1981).

81. For a discussion of the facts *see* the trial court opinion. 106 Misc. 2d 627, 434 N.Y.S.2d 618 (Sup. Ct. 1980).

82. *Id.*

83. *Id.* at 633-34, 434 N.Y.S.2d at 622 (citations omitted).

84. 80 A.D.2d 851, 436 N.Y.S.2d 764 (2d Dep't 1981).

85. 54 N.Y.2d at 979-80, 430 N.E.2d at 909, 446 N.Y.S.2d at 33-34.

Here, then, the lead agency made a negative determination of environmental nonsignificance as opposed to the positive determination made by the agency involved in the *Coughlin* case.

The plaintiffs in *Coughlin* did not precisely articulate what their "environmental" concerns were with respect to the conversion, relying instead on the positive declaration made by the lead agency involved.[86] It seems likely, however, that their concerns were similar to those of the plaintiffs in the *Harlem Valley* case, i.e., concerns about the nature of the facility's incoming population.[87] Implicitly, it seems that the Director of the Division of Youth, in making the determination of environmental nonsignificance in *Harlem Valley*, did not believe that the "citizens' fears" described by the trial court[88] warranted the preparation of an environmental impact statement under SEQRA. Ultimately, the court of appeals agreed. In the *Coughlin* case, however, preparation of an EIS—albeit after the fact—was mandated.[89]

One commentator, discussing *Harlem Valley*, seemed to suggest that the decision there undermined the low threshold requirements for preparation of environmental impact statements: "the analysis suggested by the court for judicial review and for agency decisions preceding such review does not belong at the determination of significance stage if SEQRA's 'low threshold' is to be observed."[90]

Perhaps, however, the threshold set by SEQRA is simply too low. Courts are forced to accept determinations of environmental nonsignificance, even if technically "incorrect" according to the strict letter of SEQRA, in order to allow needed projects to go forward. *Harlem Valley* and *Coughlin* all involved the conversion of existing buildings into new types of facilities; no construction of new buildings was involved. Thus, the impact on the physical environment was minimal. Under SEQRA, however, the definition of "environment" is so broad that almost any opposition to a project can be couched in environmental terms.

86. 60 N.Y.2d at 17, 453 N.E.2d at 1087, 466 N.Y.S.2d at 670.
87. 106 Misc. 2d at 633-34, 434 N.Y.S.2d at 622.
88. *Id.*
89. 60 N.Y.2d at 21, 453 N.E.2d at 1089, 466 N.Y.S.2d at 672.
90. Ruzow, *supra*, note 68, at 1180.

III. COMPARISON OF SEQRA TO NEPA

While plaintiffs have not refrained from using NEPA to block unpopular projects, the language of that statute makes it somewhat easier for courts to dismiss objections only tenuously related to the physical environment. In *Nucleus of Chicago Homeowners Association v. Lynn*[91] for example, plaintiffs sought to block a public housing project. The homeowners association claimed that the proposed project would significantly affect the environment and that therefore HUD was required to file an environmental impact statement. The homeowners claimed that "the social characteristics of the prospective tenants of the housing units will have an adverse impact on the quality of the environment"[92] and sought to enjoin the acquisition of housing sites pending the filing of an environmental impact statement. They specifically alleged that:

> as a 'statistical whole,' tenants of public housing possess a higher propensity toward criminal behavior and acts of physical violence, a disregard for the physical and aesthetic maintenance of real and personal property, and a lower commitment to hard work. Therefore . . . the construction of public housing will increase the hazards of criminal acts, physical violence, and aesthetic and economic decline in the immediate vicinity of the sites.[93]

Thus, the plaintiffs claimed, the public housing project would have "a direct adverse impact upon the aesthetic and economic quality of their lives."[94]

The court found the plaintiffs' interpretation of NEPA's requirements unpersuasive. "At the outset," said the court, "it must be noted that although human beings may be polluters (i.e., may create pollution), they are not themselves pollution (i.e., constitute pollution)."[95] Citing *Hanly v. Kleindienst*,[96] the court noted: "It is doubtful whether psychological and sociological effects upon neighbors constitute the type of factors that may be considered in making such a determination since they do not lend

91. 372 F. Supp. 147 (N.D. Ill. 1973), *aff'd*, 524 F.2d 225 (7th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976).

92. *Id.* at 148.

93. *Id.* at 149.

94. *Id.*

95. *Id.*

96. 471 F.2d 823, 833 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

themselves to measurement."[97] Such "environmental" concerns are not encompassed by NEPA's definition of "environment."

Concerns of a primarily social nature were likewise rejected by the court construing NEPA in *Como-Falcon Community Coalition, Inc. v. United States Dep't of Labor.*[98] There, plaintiffs opposed the creation of a Job Corps Center which was to be located on a former college campus; they claimed an EIS should have been prepared.[99] Noting that there would be no primary impact on the physical environment, the court said that "[t]he social and economic factors raised by the Coalition's complaint are not encompassed within the provisions of NEPA, and under the circumstances of this case, need not have been considered by the Department in its determination of whether to file an EIS."[100]

The court in *Como-Falcon* found that renovating an existing educational facility was not tantamount to changing the neighborhood character and found it relevant that no new buildings were to be constructed.[101] Instead, "[c]ollege students will be replaced with disadvantaged youths who will undergo vocational training."[102]

This case was somewhat similar to the *Nucleus* case in that it was the nature of the incoming people, rather than buildings themselves, to which the plaintiffs apparently objected. Environmental statutes, however, are ill-suited to these complaints because, in the words of Judge Hoffman, people themselves are not pollution.

IV. Conclusion

SEQRA should address concerns about the environment but not mere "people pollution." Admittedly, it is difficult for an environmental statute to encompass the wide array of legitimate environmental concerns without being vulnerable to misuse, but the breadth of SEQRA's definition of "environment" makes it particularly susceptible.

Perhaps the most obvious way to deal with this problem would be to amend SEQRA to eliminate the statute's reference to "ex-

97. 372 F. Supp. at 150.
98. 609 F.2d 342 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).
99. *Id.* at 344.
100. *Id.* at 345.
101. *Id.* at 347.
102. *Id.*

isting community or neighborhood character." Under a statute thus amended, it would be more difficult for plaintiffs to challenge projects that merely converted existing facilities from one use to another. Alternatively, the SEQRA regulations could be modified with respect to their definition of "emergency." Homelessness and prison overcrowding are certainly not short-term emergencies, but rather long-term problems which demand long-term solutions. However, both problems have reached crisis proportions and the need for facilities is great. The courts' solution thus far has been to grant such facilities limited dispensation from SEQRA, but this solution is problematic. Forcing such projects to comport with SEQRA after the project is already underway both undermines the environmental review process and leaves the projects vulnerable to further legal challenges down the road.

In the words of the court in *Harlem Valley*: "the establishment of such a facility will, in most instances, inherently and inescapably pose some community problems wherever it may be geographically located."[103] Rather than having a system in place which encourages neighbors in each chosen geographical location to litigate, however, perhaps SEQRA regulations should prescribe particular mitigation measures (e.g., provisions for security) with respect to these facilities.

In a perfect world, neighborhood associations and individuals would, of their own volition, "resist using SEQRA as a delay tactic"[104] when publicly needed projects are at stake. Given, however, that SEQRA's enforcement is dependent upon private litigation for enforcement,[105] and given the reality that litigants are frequently motivated by self-interest, the words of the statute and regulations themselves must counteract the temptation to abuse.

Katherine Baird Russo

103. Harlem Valley United Coalition, Inc. v. Hall, 54 N.Y.2d at 979, 430 N.E.2d at 909, 446 N.Y.S.2d at 33.

104. Ulasewicz, *The Department of Environmental Conservation and SEQRA: Upholding its Mandates and Charting Parameters for the Elusive Socio-Economic Assessment*, 46 ALB. L. REV. 1255, 1283 (1982).

105. Crary, *supra*, note 72, at 1230.