

Memorandum in Opposition to S.1635 / A.3423

June 08, 2009

S.1635 (Thompson) / A.3423 (Bradley) - AN ACT to amend the environmental conservation law, in relation to enacting the environmental access to justice act

The Independent Power Producers of New York, Inc. (IPPNY) is a trade association representing companies involved in the development of electric generating facilities, the generation, sale, and marketing of electric power, and the development of natural gas facilities in the State of New York. IPPNY represents almost 75 percent of the electric generating capacity in New York.

IPPNY strongly opposes the passage of S.1635 / A.3423. Enactment of this legislation would send chilling signals that will discourage new investment and job creation in the state, as well as create competitive disadvantages, in relation to other areas of this country, for New York's industries, workers, and consumers. As a result, much needed economic development in this state that is vital to our economic recovery would occur in other states.

Specifically, the bill would amend the State Environmental Quality Review Act (SEQRA) to state that, if a person institutes a proceeding under Article 78 of the Civil Practice Law and Rules alleging violations of SEQRA, such person shall not be denied standing solely on the grounds that the injury alleged by such person does not differ in kind or degree from the injury that would be suffered by the public at large.

SEQRA requires all state and local government agencies to consider environmental impacts equally with social and economic factors. The courts have expressed concern about SEQRA litigation, where challenges can generate interminable delay and interference with crucial projects. Specifically, the case (77 N.Y. 2d 761 (1991)), Court of Appeals Society of Plastics v. Suffolk County, is a seminal case in New York on standing. (Standing is a legal concept that enables a party with a sufficient stake in a controversy to file a court action.) This case discusses the importance of requiring injury in fact, as opposed to generalized concerns. New York courts traditionally have limited standing to review SEQRA challenges to a party who asserts it would suffer unique environmental harm (i.e., harm that is different than that suffered by the general public). This well-established rule extends to organizational standing and requires at least one member of an association to demonstrate that it had standing to sue individually in order to survive a standing challenge.

Additionally, this legislation is unnecessary, given the existing broad powers and duties of the New York State Attorney General. Existing law provides that, whenever in his judgment the public interest requires it, the Attorney General inquires into matters concerning the public peace, public safety and public justice. Also, the Commissioner of the NYS Department of Environmental Conservation (DEC) has adopted a formal policy (CP-29), which provides guidance for incorporating environmental justice concerns into the DEC environmental permit review process, the department's application of SEQRA, its enforcement program, and public participation.

Furthermore, the bills will encourage additional litigation, without significantly enhancing environmental protection in New York. Few cases are brought to address environmental issues that are not already being addressed through the DEC's enforcement actions. Additionally, a private party is able to employ existing Federal citizen suit provisions against alleged violations of Federal law. In many cases, a private party also can use Federal citizen suit provisions against alleged violations of New York State permits and regulations, which are developed pursuant to Federal statutes and / or related to Federal programs that have been delegated to the state.

For the reasons stated above, IPPNY opposes S.1635 / A.3423.

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