Great Future in *Plastics*? The Judicial Repeal of Standing for Environmental Organizations in SEQRA Cases

By Peter Henner

Ten years ago, in *Society of Plastics v. County of Suffolk*,[1] the Court of Appeals, by a 4-3 vote, reiterated that: (1) standing cannot be based on a claim of economic injury;[2] and (2) it is necessary to demonstrate a "special injury," different from the injury suffered by the community at large, to have standing to challenge a proposed action that was "geographically centered" or "site-specific."[3] *Plastics* has been the basis of a growing body of case law rejecting standing by individuals and organizations with clear and obvious environmental interests.

Even though the intent of the Court in *Plastics* may have been to prevent commercial entities from using SEQRA as a tool to pursue an anti-environmental agenda, the practical effect of the decision has been to provide a powerful weapon for commercial entities and agencies to insulate SEQRA determinations from judicial review in cases brought by citizens, environmental organizations, and even by affected municipalities. In this article, I will present an argument that strong corrective action is needed, either in the form of a pronouncement from the Court of Appeals, or in the form of legislation, in order to preserve standing in SEQRA cases for community and environmental groups, and for the public at large. Without such corrective action, I believe that SEQRA will cease to function as a tool to make sure that the environmental impacts of proposed governmental action are considered.

Judge Hancock's bitter dissent, joined by Judges Simons and Titone, characterized the holding in *Plastics* as "a decided change in the course of the Court's carefully developed jurisprudence in interpreting and implementing SEQRA since its enactment 15 years ago. It denotes an apparent lessening in what has been recognized as this Court's 'powerful commitment to the goal of SEQRA.'"[4] Under the majority opinion, "someone who alleges environmental damage from an action which applies generally to an entire area and indiscriminately affects everyone in the area is precluded from judicial review. . . . The rule, as it is employed here, can thus present a virtual impasse to judicial review."[5]

Judge Hancock also noted that the majority opinion "stresses the danger of allowing challenges by 'pressure groups, motivated by economic self-interests, to misuse SEQRA for [improper] purposes.'" He inquired rhetorically whether "the application of the [new special injury rule] depend[s] in some way on the identity of the objector rather than on whether the injury objected to is within the zone of interest?"[6]

The majority opinion in *Plastics*, written by Judge Kaye and joined by Chief Judge Wachtler and Judges Bellacosa and Alexander, stated that a showing of special harm had previously been required for SEQRA standing in "site-specific cases," and the Court expressly decided not to reach the question of whether special harm was required in cases of "general" harm. Therefore, incredible as it may seem today, the Court stated "no new standing requirement is fashioned by the majority." According to Judge Kaye, the only disagreement with the dissent was whether the countywide ordinance at issue in *Plastics* could be characterized as a "site-specific" action, which would require a showing of special harm to establish standing.[7]

Ten years later, it is clear that the standing requirement established in *Plastics* has radically reshaped SEQRA litigation. Although standing was routinely assumed in SEQRA cases in the 1980s, today "the standing issue is alive and well in environmental law, and one that counsel must seriously address."[8]

Judge Hancock, in his dissent, gave the example of a hypothetical local law permitting all of the residents to throw garbage into the streets. Since the same harm from this ordinance would be shared by all of the residents, it would appear that none of the residents would be able to demonstrate a special harm, and no one would have standing to challenge the enactment of the ordinance on SEQRA grounds.[9] The majority explicitly refused to consider this hypothetical.[10] However, courts, with increasing frequency, have treated such actions as "site-specific," and have rejected SEQRA challenges because of a failure to show "special harm." Furthermore, in a number of cases where actions are clearly "site-specific," such as the proposed construction of new developments, neighbors and local organizations have been held not to have standing because their environmental interests cannot be distinguished from the interests of the community at large.

This problem has now reached alarming proportions. In a recent case, a respected Supreme Court Justice, now-retired Harold Hughes, cited *Plastics* to hold that employees who would occupy a proposed new office building and neighbors of the site of the building both lacked standing because: "SEQRA does not provide universal standing due to both legislative and judicial concern over the potential for improper use of citizen suits as a delaying tactic by those whose interests are only marginally related to or inconsistent with the purposes of the statute."[11] In other words, *Plastics* is now cited for the proposition that SEQRA challenges can be

viewed as nuisances and delaying tactics, rather than as the public's opportunity to ensure that environmental concerns are fully considered by agency decision-makers.

SEQRA Standing Before *Society of Plastics*

SEQRA was initially enacted in 1975, effective in 1976.[12] It is doubtful that the Legislature expected that standing would be a major bar to potential litigants challenging determinations under SEQRA. SEQRA was modeled after the federal National Environmental Policy Act and, in 1975, it was very easy to establish standing under NEPA.[13] Furthermore, the obvious intention of the Legislature was to require agencies to consider the environmental implications of their actions and to involve the public in the review of these actions. Thus, it would appear likely that the state Legislature intended SEQRA standing requirements to be at least as liberal as the standards used by federal courts under NEPA.

The federal courts' standards for standing, as of the early 1970s, were extremely liberal. The U.S. Supreme Court had just decided the case of *United States v. SCRAP*,[14] where the plaintiff was able to establish standing on the basis of a very attenuated claim that higher rail freight charges would result in increased pollution in national parks, which would cause injury to the plaintiff organization, whose members utilized the national parks.[15]

Furthermore, the New York State Court of Appeals had indicated its willingness to establish liberal standing rules shortly before the enactment of SEQRA.[16] In *Dairylea Cooperatives v. Walkley*, the Court of Appeals held that a plaintiff must demonstrate that: (1) he has suffered an "injury in fact" from the action under consideration, and (2) the asserted interest is arguably within the zone of interest that the statute in question seeks to protect.[17]

The early cases pertaining to SEQRA standing applied a liberal standard. In *Glenhead-Glenwood Landing Civic Association Civic Council v. Town of Oyster Bay*,[18] the two-part test of *Dairylea Cooperatives* was applied to SEQRA cases.[19] In *Glenhead-Glenwood*, the court was satisfied that the requirements for standing had been met, since the individual plaintiffs lived in close proximity to the affected land, and "the asserted environmental consequences of the instant project fall within the zone of interest protected by SEQRA."[20] The court also refused to make a distinction between those plaintiffs who lived in the town and those who lived beyond the town, "since the environmental effects of the proposed development are matters of more than local consequence that will affect residents and nonresidents."[21]

Prior to the late 1980s, it was generally assumed that a petitioner under SEQRA could establish standing based upon economic interests. It was explicitly noted that a petitioner could establish standing "in light of the fact that anyone who can show an adverse environmental impact causing him or her injury as result of agency action . . . (has) standing to bring an action."[22] Concerns unrelated to environmental impact do not constitute grounds to deny standing.

In *Schenectady Chemicals v. Flacke*,[23] a chemical company was permitted to challenge the determination of DEC to grant a mining permit because of its interest in the aquifer that supplied its water needs. Even though the interest of the company was purely economic, the petitioner was assumed to have standing without discussion.

Similarly, in *Industrial Liaison Committee of Niagara Falls Chamber of Commerce v. Williams*,[24] an association of industrial wastewater dischargers was granted standing based upon their "speculative" claims that they "used the surface waters of the state."[25] The court even noted that petitioners' concerns would "appear to be too insignificant to confer standing under the federal National Environmental Policy Act. Nevertheless, the court held that petitioners had standing "in light of SEQRA's broad definition of environment."[26]

It is important to remember that SEQRA defines the environment to include "economic" considerations.[27] Therefore, it would seem logical that at least some forms of economic injury should be deemed to be environmental injury. For example, in *Chinese Staff and Workers Association v. City of New York*,[28] the Court of Appeals held that impacts associated with "long-term secondary displacement of residences and businesses" must be considered as part of the environmental analysis of a proposed high-rise apartment building in lower Manhattan. Although these impacts could properly be characterized as "economic," the Court apparently assumed that the petitioners had standing to maintain the lawsuit.

Nevertheless, in *Mobil Oil Corp. v. Syracuse Industrial Development Agency*,[29] the Court of Appeals held that "to qualify for standing to raise a SEQRA challenge, a party must demonstrate that it will suffer an injury that is environmental and not solely economic in nature."[30] Mobil alleged that it would suffer injury as a result of the secondary and cumulative impacts of a proposed development plan because the plan would require the relocation of oil tanks, with the possible adverse impact of increased fuel costs for commercial and industrial customers. Since these injuries were characterized as purely economic, Mobil was therefore held not to have standing to maintain a SEQRA challenge to the proposed plan.

In *Mobil*, the Court also reiterated the need to demonstrate "something more than the interests of the public at large . . . to entitle a person to seek judicial review," citing *Sun-Brite Carwash v. Board of Zoning and Appeals*.[31] In *Sun-Brite*, Judge Kaye writing for a unani-

mous Court, held that "the status of neighbor does not . . . provide the entitlement, or admission ticket to judicial review" because the petitioner "may be so far from the subject property that the effect of the proposed change is no different from that suffered by the public generally."[32]

In other words, even if Mobil had been able to establish a harm that was environmental rather than "economic," that harm would still have to be different from the harm that was suffered by the public at large. The Court held that Mobil, like the petitioner in *Sun-Brite*, had failed to establish this special harm.

Therefore, as of 1990, there was authority for the proposition that a SEQRA litigant could not rely on a showing of economic damage, even though such economic damage was arguably part of the broad definition of environment. There was also authority for the proposition that a showing of special harm needed to be demonstrated to establish standing. However, it was the combination of these two doctrines in *Society of Plastics*, that has resulted in a virtual revolution in the law pertaining to standing in New York State.

Society of Plastics

The action at issue in *Plastics* was a Suffolk County ordinance that banned the use of certain plastic products in retail food establishments. This ordinance was challenged by a nationwide trade organization representing the plastics industry. In order to establish standing, the association relied upon one member in Suffolk County, about whom "few facts are known."[33] A number of environmental organizations, including the Environmental Defense Fund, the Natural Resources Defense Council, and the Sierra Club, appeared at the legislative hearing in support of the challenged law. The Court expressed its outrage at the use of SEQRA to challenge an environmentally beneficial ordinance, noting

> were it appropriate to consider the merits here—which it is not—the few paragraphs in the dissent regarding the adverse effects of the Plastics Law could be multiplied many times over, by the statements and submissions of the environmentalists as to the beneficial effects of the bill, viewed as a first step toward resolving the County's garbage crisis. The plastics industry brought this to a halt.[34]

The Court acknowledged that the legislative history of SEQRA was "not definitive."[35] Nevertheless, the Court inferred intent to impose "some limitation on standing to challenge administrative action" from the fact that the Legislature had failed to enact a "citizen suit bill."[36]

The Court discussed, in passing, the establishment of the "injury in fact" standard in federal environmental cases, including the *SCRAP* case discussed above, but distinguished the case under consideration because the petitioner trade association had "not demonstrated that the interest it asserts in this litigation are germane to its purposes."[37] In other words, even if the plastics industry had an environmental interest, the fact that its primary interest was economic was a sufficient basis to deny standing. The Court explained "though couched as environmental harms, plaintiff's assertions of injury by and large amount to nothing more than allegations of added expense it might have to bear if plastics products were banned and paper products substituted."[38]

Finally, the Court characterized the action under consideration as geographically centered, because the impact of the action would have a site-specific impact upon landfills in Suffolk County. This is a significant expansion in the law pertaining to the identification of a proposed action as general or site-specific. Prior to *Plastics*, site-specific projects were associated with specific developments or directly associated with specific sites, such as zoning decisions, or the construction of a new facility. *Plastics* was the first case to identify a project which, on its face, covered a large geographic area (such as an entire county) as a site-specific project that required a prospective standee to demonstrate a special harm.

In short, in order to reach the desired result that a trade organization did not have standing,[39] the Court (1) assumed that there was legislative hostility to the idea of liberalized standing for SEQRA litigants; (2) for the first time speculated as to the actual motive of a SEQRA plaintiff and permitted standing to be denied as a result of such speculation; and (3) characterized an action that obviously had impacts over a wide geographic area as site-specific, to require a showing of special harm. Despite the Court's disclaimer, the combined impact of these holdings had a tremendous synergistic impact on the law of standing for SEQRA plaintiffs.

Impact of *Society of Plastics*

A. Claims of Economic Injury in SEQRA Cases

Initially, it should be noted that there is no clear dividing line between interests that are clearly "economic" and interests that are "environmental." In *Plastics*, the Court was apparently motivated by its belief that the trade association did not actually have any environmental interest, especially since the environmental claim was asserted in opposition to a recycling law. However, many impacts, especially adverse impacts upon residential property owners, cannot be readily characterized as either environmental or economic. The owners of property affected by land use decisions may not need to demonstrate special harm and may not even have to

assert non-environmental claims.[40] However, by characterizing certain impacts as "economic," SEQRA standing has been denied to entities that may well suffer impacts that are within SEQRA's definition of "environment."

For example, in *Young v. Pirro*,[41] a case decided three months before *Plastics*, the city of Syracuse was denied standing to challenge Onondaga County's alleged failure to comply with SEQRA in connection with a redistribution of sales tax revenue. The loss of revenue would have impacted the delivery of city services, affected urban neighborhoods, and possibly forced Syracuse to raise residential property taxes, with potentially serious adverse impacts to neighborhood character. Nevertheless, these impacts were held to be economic, not environmental.

In 1998, three municipalities, the cities of Oswego, Fulton and Cohoes, The New York Conference of Mayors, as well as a Buffalo City Councilman, challenged the Public Service Commission's approval of Niagara Mohawk's Power Choice plan; by which the utility intended to divest itself of its generating assets, as part of the deregulation of the electric industry. The cities asserted that there were numerous environmental impacts associated with the determination to proceed with the divestiture of generating assets, including dramatic impacts on local property tax revenues and the city services dependent on such revenues, as well as the possibility that deregulation might result in a shortage of electric power and higher prices for all consumers.[42] The petition was dismissed on the grounds that the cities' interests were purely economic, and were therefore insufficient to confer standing.[43]

More recently, in *Benson v. City of Albany*,[44] members of the Public Employees Federation who were employed by the New York State Department of Environmental Conservation challenged the determination of the city of Albany to grant site plan approval for the new DEC building, alleging that Albany had failed to consider the environmental impacts of the shortage of parking and the absence of mass transportation in downtown Albany. The DEC employees claimed standing because of the prospective environmental harm associated with increased commuting time and the negative impacts associated with having to drive to downtown Albany. These impacts were dismissed as non-environmental. The court noted that "those PEF members . . . will be impacted by their own choices of where to live and how to commute." Concerns about the adequacy of parking, as any suburban planning board that has ever considered a new strip mall well knows, are a part of the environmental analysis of new commercial uses. Yet, the concerns of employees who will not have adequate parking and who will be exposed to urban traffic congestion are deemed "economic," and the employees are found not to have standing.[45] In this case, as noted above,[46] the court also questioned the sincerity of the environmental interest that was asserted, citing *Society of Plastics* as its authority to question the genuineness of petitioner's motivation.

B. Decline of "General" Actions in SEQRA Standing Analysis

Although *Plastics* is generally cited for the proposition that a claim of economic injury is insufficient to establish standing, the requirement to demonstrate a showing of special harm for actions which are deemed to be "site-specific" has had a far greater impact. The *Plastics* majority stated: "we explicitly do not reach the question of standing to challenge actions that apply indiscriminately to everyone" and therefore claimed to have left open the question of whether a showing of special harm would be required to challenge an action deemed to be "general." Unfortunately, in the last ten years, courts have interpreted *Plastics* to impose a requirement that virtually every action is "site-specific," and to require a showing of special harm for virtually all SEQRA challenges, with the exception of challenges brought to land use actions that directly affect an owner of real property.

For example, *Plastics* was recently cited for the proposition that "it is well-settled that unless the claimed SEQRA violation relates to a zoning enactment, a party must allege a specific environmental injury which is "in some way different from that of the public at large."[47]

In *Long Island Pine Barrens v. Town of Islip*,[48] the Second Department cited *Plastics* for the proposition that "it is well-settled that, in land use matters, 'the plaintiff, for standing purposes, must show that it would suffer direct harm, injury that is in some way different from that of the public at large.'" Taking these two cases together, it appears to be the law that a showing of special harm is required for any environmental action, including land use matters, unless the issue is a zoning enactment.

For example, in *Schulz v. New York State Department of Environmental Conservation*,[49] the Third Department characterized the adoption of the 1989-1990 update to the state solid waste management plan as "not an instance 'where solely general harm would result from a proposed action' as a consequence of which a SEQRA challenge could possibly be based upon mere 'potential injury to the community at large'" (citing *Plastics*). If an update of a statewide plan is deemed to require a showing of special harm because it will have localized impacts, it is difficult to imagine any action that will be regarded as a "general" action not requiring a showing of special harm, inasmuch as any "action" will have some localized impacts somewhere.

Indeed, there are very few, if any, recent cases where a court has interpreted an action under review to be a "general" action, which does not require a showing of special harm by the prospective SEQRA petitioner. In another action brought by Mr. Schulz, *Schulz v. Warren County Board of Supervisors*,[50] a SEQRA determination pertaining to "sewering within the town of Hague" was found to be a site-specific action, despite alleged prospective impacts upon Lake George. In an earlier action brought by Mr. Schulz against the New York State Department of Environmental Conservation,[51] the court had treated a determination by DEC to adopt a consolidation plan requiring the closure of a separate landfill to require a showing of "*direct* harm" (emphasis in original) different from the public at large.

The Long Island Pine Barrens Society sought standing based upon its concerns that the "sole source aquifer" that supplies water to Long Island may be adversely impacted by developments. Since the aquifer encompasses a large geographic area, some developments on Long Island could, arguably, be considered to be general in scope. However, the Society's concerns with respect to impacts on the aquifer in connection with a 121 unit residential real estate project to be constructed in a designated Special Groundwater Protection Area were rejected, because the members of the society could not establish any concerns "different in kind and degree from the community generally."[52]

In *Heritage Coalition v. City of Ithaca*,[53] the Third Department held that "[a]ppreciation for historical and architectural buildings does not rise to the level of injury different from that of the public at large for standing purposes."[54] This decision effectively forecloses organizations concerned about historic buildings from challenging determinations made with respect to these buildings, under SEQRA, and, presumably, also under section 14.09 of the Parks, Recreation and Historic Preservation Law, since members of such groups will never be able to establish an interest separate from that of the public at large.

Similarly, challenges to actions taken with respect to the management of public property, including the sale or purchase of governmental assets, may also be foreclosed, because such actions will apparently be considered to be site-specific, rather than general. For example, in *Montecalvo v. City of Utica*,[55] a group of "publicly minded citizens" did not have standing to challenge "the proposed sale and transfer of the 60-year-old municipal water system to a regional authority"[56] because they could not "demonstrate some 'special injury' beyond their bare identities as voters, taxpayers, ratepayers, property owners, residents or citizens concerned about or involved in public affairs."[57]

Mindful of the above case law, the petitioners in *Benson v. City of Albany* attempted to characterize the siting of the new DEC headquarters in downtown Albany as a "general action."[58] Petitioners argued that the siting was part of the "Albany plan" which involved an intention to redevelop downtown Albany, in accordance with an overall development plan. This issue was not addressed at all in the unreported decision of Justice Hughes, nor was it addressed by the Third Department. Petitioners had argued that the lower court decision had effectively insulated the question of SEQRA compliance from public review because, under the court's decision, no one ever could have standing. During oral argument, Justice Peters asked counsel for the developer: "Who would have standing to challenge the decision of the City of Albany?" In response, counsel could not identify any individual or group which would have standing, but merely reiterated the claim that the petitioners did not have standing.

C. Standing Requirements in Site-Specific Actions

In addition to applying the "special injury" requirement to virtually all cases involving SEQRA standing, courts have also applied the standard strictly since *Plastics*. Consequently, standing has been denied to putative petitioners who had a clear environmental interest in a proposed project.

One of the most egregious examples of the denial of standing is *Buerger v. Town of Grafton*.[59] In *Buerger*, the petitioner owned lakeside property within 600 feet of the proposed access road of a new subdivision. She alleged that construction of the access road would cause flood damage, forest habitat degradation, and that previous construction activity had polluted the waters of the lake. Nevertheless, her claim of standing was denied because "while these are serious concerns, they are not specific to petitioner but are general concerns shared by all the residents of the area."

Even if the petitioner is a municipality representing the interests of its citizens, it must still demonstrate "special harm." In *Dyer v. Town of Schaghticoke*,[60] the city of Mechanicville was denied standing in a SEQRA challenge to a special use permit granted for the construction of a hot mix asphalt plant on the other side of the Hudson River from the city. The city's environmental concerns about "excessive noise caused by industrial operations, greatly increased traffic and air pollution, and a possible destruction of the ecosystem" were "insufficient to demonstrate that the City may suffer unique environmental harm."

The Third Department has also held that "the proximity of petitioner's properties to the proposed facility . . . is insufficient, without more, to confer standing; actual injury must be shown" in determining that the alleged "unsavory environmental effects petitioner claims will result from the increased light, noise and traffic generated by the facility do not afford standing,

for they are no different in kind or degree from that suffered by all in the general vicinity."[61]

In *Schulz v. Warren County Board of Supervisors*,[62] petitioners' concern with the possibility of increased development and runoff pollution into Lake George was found to be insufficient for standing purposes, because petitioners' injuries were no different from those of the public at large.

Those cases where courts have found special injury have usually based their holdings on the property rights of the petitioner. For example, in *Many v. Sharon Springs*[63] and *Long Island Pine Barrens Society v. Town of Islip*,[64] the petitioners were found to have standing based upon interference with water rights. In *Many*, a possible injury to petitioners' well was found sufficient to demonstrate a special environmental injury. Similarly, in *Pine Barrens*, the Society was able to establish standing because three of its members alleged that they had a problem with rust in their drinking water, and the parcel under consideration was a possible source of replacement water. Absent this specific concern, petitioners presumably could not have demonstrated special injury.

In *Committee to Preserve Brighton Beach v. City of New York*,[65] a homeowners' association was granted standing because a proposed project would "impact on their sight lines, the availability of light, potentially on the flow of sea air to their residences, and from the presumptive diminishment of their own property interests with the change in neighborhood character." Similarly, in *Steele v. Town of Sale*,[66] a property owner was granted standing based on a claim that his scenic view would be adversely affected by the construction of a cell tower. In both of these cases, the environmental interest is also a particular economic interest of a property owner.

These cases illustrate that a putative SEQRA plaintiff must have an interest which is: (1) in close geographic proximity to the proposed action; (2) specifically identified, rather than a general interest in preventing pollution; and (3) distinguishable from the interests of the community at large. For the most part, the standards cannot be met by environmental organizations that rely upon the interests of affected members, but can be met by individuals or commercial entities that have an economic interest with respect to a proposed action.

D. Standing for Economic Actors

Despite the expressed intention of the majority in *Plastics* to respond to "the danger of allowing special interest groups or pressure groups, motivated by economic self-interest, to misuse SEQRA,"[67] economic actors have, for the most part, been able to maintain SEQRA challenges to actions that affect their interests, while environmental and community groups have been precluded by the judicial interpretation of *Plastics*.

Obviously, a developer or an applicant for a permit or a license has the standing to challenge any environmental condition that is imposed by a municipality or by a regulatory agency, or to challenge a regulation. For example, an industrial association was assumed to have standing to challenge the adequacy of the environmental review conducted by DEC of proposed DEET regulations in *Chemical Specialties Manufacturers v. Jorling*.[68]

Economic actors are likely to own property in the immediate vicinity of proposed actions and are therefore likely to be able to assert standing under the exception for owners of affected property recognized in *HAR v. Town of Brookhaven*. For example, mining companies in *Skenesborough Stone, Inc. v. Village of Whitehall*[69] and *Patterson Materials Corp. v. Town of Pawling*,[70] as well as *Gernatt Asphalt v. Town of Sardinia*,[71] were held to have standing to challenge alleged SEQRA noncompliance of the enactment of local laws.

In *Niagara Mohawk Power Corp. v. Village of Green Island*,[72] the owner of a hydroelectric facility which was the subject of a condemnation proceeding successfully challenged the condemnation because of noncompliance with SEQRA. Although the issue of standing was raised by the village of Green Island, the court did not address the issue in its decision.[73]

Thus, economic actors who would like to use SEQRA to protect their own commercial interests have been relatively unaffected by the holding in *Plastics*. In contrast, individuals who have an environmental interest that is not related to a property interest, especially when they do not actually have an ownership interest in property, have frequently not been able to meet the requirements of a cognizable environmental injury distinguishable from that of the community at large.[74]

Current State of the Law

In his dissent, Judge Hancock rhetorically inquires whether the petitioners would have had standing to question the adequacy of the environmental review in *Industrial Liaison Committee v. Williams*[75] and *Save the Pine Bush v. City of Albany*[76] under the decision of the majority in *Plastics*.[77] Ten years later, the answer is clearly no. Furthermore, many SEQRA litigants in landmark cases would have been similarly precluded under the new standard.

Many of the important SEQRA decisions arise from cases where community residents, or organizations representing them, have challenged governmental action. For example, the well-known "hard look" test was conclusively established as the relevant standard to measure the adequacy of an environmental review in *H.O.M.E.S. v. New York State Urban Development Corp.*[78] In *H.O.M.E.S.*, urban residents challenged the determination to tear down a large sports stadium and replace it with the Carrier Dome.

The residents alleged that the UDC had failed to consider the impact of the project on traffic congestion and parking. The court identifies them only as "landowners in the City of Syracuse" who "reside in close proximity to the former Archbold Stadium on the campus of Syracuse University." In *Glen Head-Glenwood v. Town of Oyster Bay*,[79] which adopted the two-part test of *Dairylea Cooperatives* for SEQRA cases in New York, similar allegations were deemed sufficient. In the Third Department, prior to *Plastics*, prospective plaintiffs were granted standing based on allegations that they resided in the area, without a showing that they were property owners.[80] In all of these cases, there is nothing to indicate that petitioners' interests could be in any way distinguished from the interests of the community at large, there is little, if any, discussion of the particular "environmental" interest, nor is there any discussion of the motivations of petitioners.

In *Chinese Staff and Workers Association v. City of New York*[81] and *Jackson v. New York State Urban Development Corp.*,[82] which involved the impacts of major projects on New York City neighborhoods, the issue of standing was not even raised. However, it is not clear that any prospective standee lived in close enough proximity to the project, nor does it appear that anyone could make a showing of "special harm" in New York City as a result of urban displacement.

If these cases were tried today, petitioners could expect a vigorous challenge on the issue of standing. Mere ownership of property may now be necessary, but is no longer sufficient for standing. In any event, if the environmental injury cannot be distinguished from the injury to the public at large, an environmental injury may not be enough to confer standing.

Before *Plastics*, "the 'special harm' rule [was] simply an 'injury-in-fact' rule applied in situations where the objector is not directly a party to the challenged action."[83] Today, the "identifiable trifle"[84] that the supreme court once held to be sufficient for establishing an "injury in fact" no longer applies, at least for SEQRA challenges brought by petitioners whose interest is only "environmental," and cannot claim to be exempt from the "special harm" requirement under *HAR Enterprises*.

Judge Hancock, writing ten years ago, characterized the prospective impact of the holding in *Plastics* as a "new standing rule [which] will undeniably make review of a municipality's compliance with SEQRA more difficult."[85] Ten years ago, it was fashionable to discuss the need to "level the playing field." The Court's decision in *Plastics* may have been intended to level the playing field by attempting to restrict economic entities from misusing SEQRA, but it has had the effect of locking genuine environmental interests, represented by neighborhood groups, environmental organizations and municipalities out of the arena.

Endnotes

1. 77 N.Y.2d 761 (1991).
2. *Id.* (citing its then recent holding in *Mobil Oil v. City of Syracuse*, 76 N.Y.2d 428 (1990)).
3. *Id.* (citing *Sun-Brite Carwash v. Town of North Hempstead*, 69 N.Y.2d 406 (1987)).
4. *Id.* at 786, quoting Weinberg, McKinney Practice Commentaries, ECL § C8-0109:4 (1988).
5. *Id.* at 786.
6. *Id.* at 793.
7. *Id.* at 780.
8. Weinberg, McKinney Practice Commentaries, ECL § 8-0109 (1997).
9. 77 N.Y.2d at. 789.
10. 77 N.Y.2d at 781.
11. *Benson v. City of Albany* (Sup. Ct., Albany Co. Jan. 20, 1999), *aff'd on opinion below*, 266 A.D.2d 625 (3d Dep't 1999).
12. 1975 N.Y. Laws ch. 612.
13. Michael B. Gerrard, *et al.*, *Environmental Impact Review in New York*, pp. 7-67 (citing *United States v. SCRAP*, 461 U.S. 669 (1973) and *Sierra Club v. Morton*, 405 U.S. 727 (1972)).
14. 416 U.S. 669 (1973).
15. Interestingly, the majority in *Plastics* cited *SCRAP*, a federal case, with apparent approval, for this definition of "injury-in-fact." 77 N.Y.2d 776.
16. *Cf. Douglaston Civic Ass'n v. Galvin*, 36 N.Y.2d 1 (1974) where the Court indicated that it was "troubled by the apparent readiness of our courts in zoning litigation to dispose of disputes over land use on questions of standing without reaching the merits, an attribute which is glaringly inconsistent with the broadening rules of standing in related fields."
17. 38 N.Y.2d 6, 9 (1975).
18. 88 A.D.2d 484 (2d Dep't 1982).
19. This test is still applied in SEQRA cases, *cf. Gernatt Asphalt v. Town of Sardinia*, 87 N.Y.2d 668, 687 (1996).
20. 88 A.D.2d 490.
21. 88 A.D.2d 490.
22. *Bliek v. Town of Webster*, 104 Misc. 2d 852, 859 (Sup. Ct., Monroe Co. 1980); *New York State Builders Ass'n v. State of N.Y.*, 98 Misc. 2d 1045, 1050 (Sup. Ct., Albany Co. 1979).
23. 83 A.D.2d 460 (3d Dep't 1981).
24. 131 A.D.2d 205, 209 (3d Dep't 1987).
25. *Id.* at 209-210.
26. *Id.* at 210.
27. ECL § 8-0105(6) defines environment to include "existing patterns of population concentration, distribution or growth, and existing community or neighborhood character." *See* 6 N.Y.C.R.R. § 617.2(l). "SEQRA defines environment to include socioeconomic elements." *Industrial Liaison Comm.*, 131 A.D.2d at 209.
28. 68 N.Y.2d 359 (1986).
29. 76 A.D.2d 428 (4th Dep't 1976).
30. *Id.* at 433.
31. 69 N.Y.2d 406, 413 (1987).
32. *Id.* at 422.
33. *Society of Plastics v. County of Suffolk*, 77 N.Y.2d 761, 776 (1991).

34. *Id.* at 780.

35. *Id.* at 771.

36. *Id.* at 771.

37. *Id.* at 776.

38. *Id.* at 777.

39. Today, it is still noted that "business associations have brought SEQRA lawsuits and they have generally been successful in obtaining standing." Michael B. Gerrard, *et al.*, *Environmental Impact Review*, pp. 7-78.

40. *HAR Enterprises v. Town of Brookhaven*, 74 N.Y.2d 524 (1989) (the plaintiff did not articulate any specific environmental injury).

41. 170 A.D.2d 1033 (4th Dep't 1991).

42. The Public Service Commission maintains, of course, that deregulation will improve competition and lower electric rates. The substance of that argument is beyond the instant discussion; however, the question that petitioners sought to raise was whether the environmental analysis that the PSC performed in support of its conclusion complied with SEQRA. The Court could only consider this issue if petitioners had standing. Since they did not have standing, the PSC environmental analysis was effectively unreviewable.

43. *Oswego v. Public Service Comm'n*, Index No. 2115-98 (Sup. Ct., Albany Co. May 21, 1998).

44. *Benson v. City of Albany* (Sup. Ct., Albany Co. Jan. 20, 1999), *aff'd on opinion below*, 266 A.D.2d 625 (3d Dep't 1999).

45. A second group of PEF members, who lived in the vicinity of the proposed new headquarters, was denied standing because they failed to demonstrate "special harm" different from other Albany residents.

46. *See* note 11 and accompanying text.

47. *Boyle v. Town of Woodstock*, 257 A.D.2d 702, 704 (3d Dep't 1999).

48. 261 A.D.2d 474 (2d Dep't 1999).

49. 188 A.D.2d 854, 855-856 (3d Dep't 1992).

50. 206 A.D.2d 672 (3d Dep't 1994)

51. *Schulz v. New York State Dep't of Envtl. Conservation*, 186 A.D.2d 941 (3d Dep't 1992).

52. *Long Island Pine Barrens Soc'y v. Town of Brookhaven*, 213 A.D.2d 484, 485 (2d Dep't 1995) (citing *Sun-Brite Carwash*).

53. 228 A.D.2d 862 (3d Dep't 1996).

54. *Id.* at 864.

55. 170 Misc. 2d 107 (Sup. Ct., Oneida Co. 1996).

56. 170 Misc. 2d at 108.

57. *Id.* at 116.

58. The author represented the petitioners in *Benson*.

59. 235 A.D.2d 984 (3d Dep't), *appeal denied*, 89 N.Y.2d 816 (1997).

60. 251 A.D.2d 907, 909 (3d Dep't 1998).

61. *Many v. Sharon Springs*, 218 A.D.2d 845 (3d Dep't 1995); *see Piela v. Van Voris*, 229 A.D.2d 94 (3d Dep't 1997) (where the mere allegation of proximity to a proposed project was held insufficient).

62. 206 A.D.2d 672 (3d Dep't 1994).

63. 218 A.D.2d 845 (3d Dep't 1995).

64. 261 A.D.2d 474, 475 (3d Dep't 1999).

65. 214 A.D.2d 335, 336 (1st Dep't 1995).

66. 200 A.D.2d 870 (3d Dep't 1994).

67. 77 N.Y.2d at 774.

68. 85 N.Y.2d 382, 396 (1995).

69. 229 A.D.2d 780 (3d Dep't 1996).

70. 221 A.D.2d 608 (2d Dep't 1995).

71. 87 N.Y.2d 668, 687 (1996).

72. 265 A.D.2d 761 (3d Dep't 1999), *appeal dismissed*, 94 N.Y.2d 891 (2000).

73. In an article in this publication in Spring 2001, "Do Condemnees in EDPL Proceeding Automatically Have Standing to Challenge the Taking on the Grounds of SEQRA Noncompliance?" Joseph Durkin and Sara Potter persuasively argued that, under *Plastics*, and subsequent cases, a condemnee whose property is being seized may not have standing to challenge SEQRA noncompliance. However, Niagara Mohawk successfully raised the issue of SEQRA noncompliance in the *Green Island* case, and was also raising the issue in a challenge to a condemnation of a hydroelectric facility by the city of Oswego before the Fourth Department when Oswego discontinued its condemnation efforts after a change in city administration after an election.

    The author attended the oral argument of *Green Island* in his capacity as special counsel for the city of Oswego.

74. For a contrary example, see *McGrath v. North Greenbush*, 254 A.D.2d 614 (3d Dep't 1998). In *McGrath*, a commercial establishment was denied standing to challenge a zoning ordinance because its interests with respect to traffic congestion and decreased property values were purely economic and not different from the community at large. In contrast, a petitioner who alleged that she lived within 500 feet of the sight was permitted to assert standing based upon her claims of harm from increased noise, traffic and degradation of the neighborhood. However, the petitioner still needed to assert her interest as a property owner, and the interest still needed to be "environmental."

75. 131 A.D.2d 205 (3d Dep't 1987) (challenge to statewide water quality regulations).

76. 70 N.Y.2d 193 (1987) (challenge to zoning regulations affecting sensitive environmental area).

77. 77 N.Y.2d at 789.

78. 69 A.D.2d 222 (4th Dep't 1979).

79. 88 A.D.2d 484 (2d Dep't 1982).

80. *Friends of Woodstock v. Town of Woodstock*, 152 A.D.2d 876, 878 (3d Dep't 1989).

81. 68 N.Y.2d 359 (1986).

82. 67 N.Y.2d 400 (1986).

83. *Society of Plastics v. County of Suffolk*, 77 N.Y.2d 761, 789 (1991) (Hancock, J., dissenting).

84. *United States v. SCRAP*, 412 U.S. 669, 689 (citing Davis, *Standing: Taxpayers and Others*, 35 U. Chi. L. Rev. 601, 613 (1973)).

85. 77 N.Y.2d at 793.

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