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Law: State Environmental Quality Review Act - by Aaron Gershonowitz

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What "actions" are subject to the State Environmental Quality Review Act?

Anyone familiar with the process by which local governments decide whether to approve real estate developments knows that environmental quality review can be a difficult and time consuming process. A recent appellate division decision is something of a primer on when environmental review is required.

In *Sierra Club v Martens*, 2018 WL 343744 (2d Dep't, January 10, 2018), the Department of Environmental Conservation (DEC) approved a water withdrawal permit for a power plant in Queens without any environmental review. The Sierra Club challenged the approval, arguing that government agencies are not permitted to take any action without going through the environmental

review process. DEC responded by arguing that the permit approval is not an "action" as that term is used in the environmental quality review act because act excludes "acts of a ministerial nature" from the definition of "action." Thus, the court was faced with the issue of what "actions" does the environmental review act apply to.

DEC argued that the act was ministerial because it did not have a choice—the water withdrawal statute said that DEC "shall issue" the permit, implying that it has no discretion regarding how to act. The Sierra Club responded by pointing out that the same provision said "subject to appropriate terms and conditions," which implies that DEC does have discretion regarding how to act.

The court began its reasoning by noting the purpose of the State Environmental Quality Review Act was to mandate the consideration of environmental factors in decisions on all proposed activities. That means that whenever an agency is exercising its judgment regarding whether to proceed with an action, environmental issues must be part of the decision making process. Based on that, the court decided that the DEC's ability to impose "appropriate terms and conditions" required an exercise of judgment by the agency and was therefore an "action" to which the State Environmental Quality Review Act applies.

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