

review applies, rather than the substantial evidence standard (Matter of Regional Action Group for the Environment, Inc. v Bagata, 245 AD2d 798). If the determination of an agency has a reasonable basis, it is not arbitrary or capricious (Matter of Gabler v New York State Lic. Auth., 43 AD2d 803). The courts will give great deference to the ruling of an agency within its field of expertise so long as a rational basis for the ruling is articulated within the administrative record (Matter of City of Rensselaer v Runcan, 266 AD2d 657). Here, Commissioner Cahill clearly articulated a rational basis for rejecting the ALJ's recommendation upon the fitness issue. The Commissioner favored local experience with WMNY over alleged wrongdoing by the parent corporation in other states. He found that local management of WMNY was of sufficient independence as to overcome any claim of control by WMI and that any prior noncompliance by WMNY was *de minimus*. While this Court might not rule the same way as Commissioner Cahill, the Legislature has chosen to place such choices with DEC, not the court system and absent illegality or irrational conduct, neither of which is present here, the determinations of the Commissioner of DEC will be upheld.

Monitors issue → The next issue is whether the decision of Commissioner Crotty to change the condition of the permit from monitors employed by DEC and funded by WMNY to monitors paid directly by WMNY upon DEC's approval is such a change in policy as to warrant annulment thereof and remand for the development of an appropriate record. In the

to determine if the policy change is rational. The change in policy was put into the process by Commissioner Crotty at the very end of the permit process without allowing either comment or development of an administrative record upon the issue. DEC claims the public monitor policy cost more than the applicants pay for it. However, there is no dollars and cents proof in the record to support this conclusory statement. Also, there is no explanation in the record as to why DEC doesn't simply raise its money charges to applicants if the monitor program is underfunded. It seems that all of these issues should have a fully developed record for court review before such a policy change should be permitted.

All papers, including this decision and order, are being returned to the attorneys for the petitioners. The signing of this decision and order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that section relating to filing, entry and notice of entry.

This memorandum shall constitute both the decision and the order of the Court.

IT IS SO ORDERED.

DATED: ALBANY, NEW YORK
MAY 17, 2004


BERNARD J. MALONE, JR., J.S.C.

other correspondence exchanged by top DEC management after Commissioner Crotty changed the policy from public to private monitors establishes that the new policy was a sea change from the old policy.

DEC now seeks to peddle the change as necessary because the funds collected from the applicants for monitors never meet the actual expenses incurred by DEC in administering the monitor program. The problem is that this contention is advanced for the first time in a conclusory fashion in an affidavit offered in opposition to the petition. DEC also argues that there is no indication that private monitors are not as effective as public monitors and DEC will exercise tight oversight of the private monitors. The problem is that DEC never gave the public notice of the proposed policy change² and the opportunity to comment upon it. More importantly, there is no administrative record upon the issue of private versus public monitors so as to permit a court

²The Court credits the Commissioner's claim that the private monitor system will not be employed in every case, without regard to other factors, and, therefore the policy change need not be published as rule and filed with the Secretary of State (Matter of Guptill Holding Corp. v Williams, 240 AD2d 12). However, an administrative agency must follow its own rules and DEC policy is (see, page five of Exhibit 2 of the affidavit of Henry L. Hamilton sworn to January 13, 2004) that "Commissioner Policies must be published in the ENB as indicated below, unless the policy concerns only the internal management of the agency and does not have any affect on the rights of, or the procedures or practices available to, the public." Obviously, the switch from public to private monitors, with the perception of monitor loyalty being to the entity paying his or her salary, could affect the rights of the public to a safe environment.

In other words, the involved agency is to take a "hard look" before permitting a project that could affect the environment to go forward. The public, if appropriate, is to be given notice of the proposal and the chance to intervene. An administrative record is to be developed to permit intelligent court review. Court review is limited and the determinations of the involved agency are to be upheld unless illegal, irrational or lacking substantial evidence (if a quasi-judicial hearing is mandated by law).

Turning to the legal rules applicable to the change in monitor policy, the law is that a decision of an agency which does not adhere to its own precedents nor indicate a sufficient reason for reaching a different result on essentially the same facts is arbitrary and capricious (see, Matter of Field Delivery Service, 66 NY2d 516). An agency's reason for reaching a different result on similar facts must be reasonably based upon evidence in the record (G. J. & S. Pizzo v McLaughlin, 78 AD2d 653). Despite Commissioner Crotty's protestation that the change from public monitors to private monitors is a "minor, non-substantive revision", the record belies that assertion. In the ten years prior to the issuance of the final permit challenged here, all approvals of DEC of large landfills, such as the one involved here, were conditioned upon the presence of onsite monitors employed by DEC and funded by the applicant. The e-mails and

case of Matter of Coalition for Future of Stoney Brook Village v. Pally, 299 AD2d 481, 483, the Appellate Division set forth the purpose of SEQRA as follows:

"The primary purpose of the State Environmental Quality Review Act (ECL art 8) (hereinafter SEQRA) is to 'inject environmental considerations directly into governmental decision making' (Akpan v Koch, 75 N.Y.2d 561, 569, quoting Matter of Coca-Cola Bottling Co. v Board of Estimate, 72 N.Y.2d 674, 679d 1261; see ECL 8-0109[2]; Matter of Omni Partners v County of Nassau, 237 AD2d 440, 442; Matter of West Branch Conservation Assn. v. Planning Bd. of Town of Clarkstown, 207 AD2d 837, 838). It 'insures that agency decision-makers--enlightened by public comment where appropriate--will identify and focus attention on any environmental impact of proposed action, that they will balance those consequences against other relevant social and economic considerations, minimize adverse environmental effects to the maximum extent practicable, and then articulate the bases for their choices' (Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d 400, 414-415; see Matter of West Branch Conservation Assn. v Planning Bd. of Town of Clarkstown, supra). Literal compliance with the letter and spirit of SEQRA is required, and substantial compliance with SEQRA is not sufficient to discharge an agency's responsibility under the act (see Matter of Golden Mar. Co. v New York State Dept. of Envtl. Conservation, 193 AD2d 742, 743-744; Matter of Rye Town/King Civic Assn. v Town of Rye, 82 AD2d 474, 480-481).

'Judicial review of the SEQRA process is limited to whether the determination of the lead agency was made in violation of lawful procedure, was affected by error of law, or was arbitrary and capricious or an abuse of discretion' (Matter of UPROSE v Power Auth. of State of N.Y., 285 AD2d 603, 607; see Matter of WEOK Broadcasting Corp. v Planning Bd. of Town of Lloyd, 79 NY2d 373, 383). Courts 'may review the record to determine whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination' (Matter of Jackson v New York State Urban Dev. Corp., supra at 417, quoting Aldrich v Pattison, 207 AD2d 258, 265; see Chinese Staff & Workers Assn. v City of New York, 58 NY2d 359, 363-364; Matter of UPROSE v Power Auth. of State of N.Y., supra at 607-608). However, a court may not substitute its judgment for that of the agency; it is not the role of the courts to 'weigh the desirability of any action or to choose among alternatives' (Matter of Jackson v New York State Urban Dev. Corp., supra at 416)."