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COMMENT

Cumulative Impacts in Environmental Review: The New York Standpoint

Scott A. Thornton

This comment focuses on the increasingly difficult process of analyzing cumulative environmental impacts of a proposed project under New York's State Environmental Quality Review Act. Most approving agencies and developers are now seeking answers from the courts to the perplexing question of exactly when is this type of impact analysis needed? Finally, the courts are answering some of their questions, but many more remain. The author, using both New York Department of Environmental Conservation administrative hearing records and New York court cases, examines the current trends in this fast developing area of environmental impact review. The comment concludes with a call on the legislature and the courts to act promptly in alleviating the remaining ambiguities in this ever more important aspect of environmental impact review.

Today, with the increasing concern over our state's natural resource base, there is greater recognition that development projects which impact the natural and human environment must be planned and implemented with a long-term

outlook.¹ In the environmental review process of New York State, cumulative impact analysis is the mechanism employed to ensure that developers, both private and public, consider the cumulative environmental impacts of their projects.² In the words of the New York State Legislature, "the commissioner [of the New York State Department of Environmental Conservation] shall have power to: Promote and coordinate management of water, land, fish, wildlife and air resources to assure their protection, enhancement, provision, allocation, and balanced utilization consistent with the environmental policy of the state and take into account the cumulative impact upon all of such resources"³

Cumulative impact litigation is becoming more frequent both in the New York court system and in the New York Department of Environmental Conservation's (DEC) administrative hearing process. While no single definition of cumulative impacts is expected, there are some judicial and administrative trends which will help the practitioner evaluate the probable success or failure of a cumulative impact claim in a State Environmental Quality Review Act (SEQRA) environmental impact statement (EIS)⁴ challenge.⁵

This comment will focus on the more recent judicial and administrative treatment of cumulative impact questions such as: when is a cumulative impacts analysis needed?; what are the criteria for measuring its SEQRA sufficiency?; and what conclusions may be formulated regarding the current state of

1. See Terrence L. Thatcher, *Understanding Interdependence in the Natural Environment: Some Thoughts on Cumulative Impact Assessment Under the National Environmental Policy Act*, 20 ENVTL. L. 611 (1990); Daniel P. Selmi, *The Judicial Development of the California Environmental Quality Act*, 18 U.C. DAVIS L. REV. 197 (1984).

2. See Sandra M. Stevenson, *Early Legislative Attempts at Requiring Environmental Assessment and SEQRA's Legislative History*, 46 ALB. L. REV. 1114 (1982).

3. N.Y. ENVTL. CONSERV. LAW § 3-0301(1)(b) (McKinney 1984 & Supp. 1992).

4. An environmental impact statement, under SEQRA, is a document prepared by an applicant identifying and evaluating potentially significant adverse environmental impacts of the proposed project or action. N.Y. ENVTL. CONSERV. LAW § 8-0103(7) (McKinney 1990); N.Y. COMP. CODES R. & REGS. tit. 6, § 617.1(c) (1987).

5. "SEQRA requires that cumulative impacts be addressed both in determining the significance of an action and in preparing an EIS," Langdon Marsh, *Commentary - Unresolved Issues*, 46 ALB. L. REV. 1298, 1301 (1982).

the law and any developing judicial trends?

Section I will briefly review the origins and history of SEQRA cumulative impacts analysis, arriving at the current legislative and regulatory scheme. Section II will examine the recent judicial and administrative cases ruling on a cumulative impacts claim. The focus will be on the specific facts involved, the reasoning enunciated, and the scope of the decision. Section III will coalesce the various decisions and outline the instances in which cumulative impact challenges to EIS's could be successful. Finally, the conclusion will discuss the future of cumulative impacts analysis in New York State environmental law and its importance in fulfilling the stated goals of the legislature "to foster, promote, create and maintain conditions under which man and nature can thrive in harmony with each other, and achieve social, economic and technological progress for present and future generations."⁶

I. The Course of Cumulative Impacts Analysis Under SEQRA

Congress passed the National Environmental Policy Act (NEPA) in 1970.⁷ It was the federal government's first attempt at regulating the process by which development activities are examined and approved.⁸ The statute created a Council on Environmental Quality (CEQ) "to formulate and recommend national policies to promote the improvement of the quality of the environment."⁹ The CEQ promulgated regulations defining a cumulative impact as:

the impact on the environment which results from the incremental impact of the action [being analyzed] when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but col-

6. N.Y. ENVTL. CONSERV. LAW § 1-0101(3) (McKinney 1984).

7. 42 U.S.C. §§ 4321 - 4370a (1988)(NEPA was passed in 1970, however, the statute is typically referred to as the National Environmental Policy Act of 1969).

8. See Thatcher *supra* note 1, at 611-13.

9. 42 U.S.C. § 4342.

lectively significant actions taking place over a period of time.¹⁰

New York enacted SEQRA in 1975.¹¹ In the five years separating SEQRA's adoption from the passage of NEPA, the New York State Legislature debated many forms of environmental impact assessment legislation.¹² These bills sought EIS preparations for major actions by state agencies and private parties, but no integrated review process was envisioned.¹³ Governor Carey, in his approval memorandum, reiterated that both "state and local agencies had not given sufficient consideration to environmental factors when undertaking or approving" numerous projects and developments.¹⁴

SEQRA, among other things, requires that environmental impact statements be prepared by public¹⁵ or private permit applicants "on any action they propose or approve which may have significant effect on the environment."¹⁶ The prepared EIS must evidence literal compliance with the SEQRA statute and the implementing regulations,¹⁷ not merely substantial

10. 40 C.F.R. § 1508.7 (1991). CEQ regulations are, by their terms and by court precedent, binding on federal agencies. 40 C.F.R. § 1500.3 (1989); *Steamboaters v. Federal Energy Regulatory Comm'n*, 759 F.2d 1382, 1392-93 & n.4 (9th Cir. 1985).

11. N.Y. ENVTL. CONSERV. LAW §§ 8-0101-0117 (McKinney 1984 & Supp. 1992).

12. N.Y.S. 8309, N.Y.A. 5200, 193d Sess. (1970); N.Y.S. 4414, N.Y.A. 4894, 194th Sess. (1971); N.Y.S. 8123-A, N.Y.A. 9245-A, 195th Sess. (1972); N.Y.S. 4485, N.Y.A. 6180, 196th Sess. (1973); N.Y.S. 8037-A, N.Y.A. 9470-A, 197th Sess. (1974). See Stevenson, *supra* note 2, at 1115-19 (for a detailed discussion of the legislative history).

13. In the initial legislative bills, separate environmental review procedures were envisioned for state or local governmental bodies and private developers. "[N]one of the earlier bills seriously considered prior to 1974 integrated review of public and private action . . ." Stevenson, *supra* note 2, at 1115-19.

14. 1975 N.Y. Legis. Ann. 438 (Governor's Memoranda on Bills Approved).

15. Governmental agencies subject to the provisions of SEQRA include state agencies and authorities and all local county, municipal and town governing bodies in both a legislative and administrative capacity. N.Y. ENVTL. CONSERV. LAW §§ 8-0105(1), 8-0105(2) (McKinney 1990); N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(t),(w),(hh) (1987).

16. N.Y. ENVTL. CONSERV. LAW § 8-0109(2) (McKinney 1984 & Supp. 1992).

17. The DEC regulations are intended to provide a statewide framework for the implementation of SEQRA. They include procedural requirements for compliance with the law, provisions for coordinating multiple agency environmental reviews, criteria for determining environmental significance, model assessment forms and sample actions. N.Y. ENVTL. CONSERV. LAW § 8-0113 (McKinney 1990); N.Y. COMP. CODES R.

compliance with the spirit of the act.¹⁸

Along with the SEQRA statute, the legislature enacted a change to the general provisions of the New York Environmental Conservation Law (ECL).¹⁹ This additional legislation directs the DEC Commissioner to take into account the cumulative impact of a proposed project upon all state resources when making any determination on the environmental effects of the proposed action.²⁰ This authority, separate from the cumulative impact provisions of SEQRA, gives the DEC an independent obligation to consider cumulative impacts, regardless of the adequacy of their consideration in a submitted EIS.²¹

The implementing regulations for SEQRA contain many references to a cumulative impact analysis.²² In considering the significance of a proposed action "the impacts which may be reasonably expected to result from the proposed action must be compared"²³ to certain criteria. Among the criteria are:

- (10) changes in two or more elements of the environment, no one of which has a significant effect on the environment, but when considered together result in a substantial adverse impact on the environment; or
- (11) two or more related actions undertaken, funded or approved by an agency, none of which has or would have a significant effect on the environment, but when considered cumulatively would meet one or more of the criteria

& REGS. tit. 6, § 617.1(e) (1987). Regulations promulgated by state agencies other than the DEC must be applied in a manner no less protective of the environment than the DEC regulations. *Village of Westbury v. New York State Dep't of Transp.*, 549 N.E.2d 1175, 1177 (N.Y. 1989).

18. *Rye Town/King Civic Ass'n v. Town of Rye*, 82 A.D.2d 474, 442 N.Y.S.2d 67 (2d Dep't 1981), *appeal dismissed* 56 N.Y.2d 985 (1982).

19. N.Y. ENVTL. CONSERV. LAW § 3-0301(1)(b) (McKinney 1984 & Supp. 1992).

20. *Id.*

21. N.Y. COMP. CODES R. & REGS. tit. 6, §§ 617.14(f)(3), 617.11(a)(11) (1987); Casara Dev. Corp., DEC Application No. 8-2634-0065/1-0 (Apr. 9, 1990) (Interim Decision) (application to construct a floating dock marina in Irondequoit Bay).

22. N.Y. COMP. CODES R. & REGS. tit. 6, §§ 617.11(a)(9)-(11), 617.11(b), 617.14(f)(3) & (8), 617.15(a) & (e) (1987).

23. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.11(a)(9) (1987).

in this section.²⁴

In determining the environmental significance of any proposed action, the possible cumulative effects of the proposal must be considered.²⁵ “[T]he lead agency²⁶ must consider reasonably related long-term, short-term and cumulative effects, including other simultaneous or subsequent actions”²⁷ “Reasonably related” refers to any actions²⁸ included in the long-range plan of which the present action is a part, any action likely to be undertaken as a result of the present action, or any action dependent on the present action.²⁹ Clearly, cumulative impact analysis is meant to play a key role in agency determination of environmental significance.

Under SEQRA, the prior regulatory determination of the significance of a proposed project as a Type I³⁰, unlisted³¹ or

24. *Id.* § 617.11(a)(10)-(11).

25. *Id.* §§ 617.11(a)(10)-(11); 617.11(b).

26. “Lead agency” is defined as: “an involved agency principally responsible for carrying out, funding or approving an action, and therefore responsible for determining whether an [EIS] is required in connection with an action, and for the preparation and filing of the statement if one is required.” *Id.* § 617.2(v).

27. *Id.* § 617.11(b).

28. “Actions” include:

(1) projects or physical activities, such as construction or other activities that may affect the environment by changing the use, appearance or condition of any natural resource or structure, that:

(i) are directly undertaken by an agency; or

(ii) involve funding by an agency; or

(iii) require one or more new or modified approvals from an agency or agencies;

(2) agency planning and policy making activities that may affect the environment and commit the agency to a definite course of future decisions;

(3) adoption of agency rules, regulations and procedures, including local laws, codes, ordinances, executive orders and resolutions that may affect the environment;

(4) any combination of the above.

Id. § 617.2(b).

29. *Id.* § 617.11(b)(1)-(3).

30. “Type I” actions are defined in the DEC regulations as those actions or projects determined to be more likely to require the preparation of an EIS than those not so listed. The fact that an action or project has been listed as a Type I action carries with it the presumption that it is likely to have a significant effect on the environment. Examples are listed in the regulations, with an emphasis on actions involving, in some way, large physical changes to the environment. *Id.* § 617.12.

31. “Unlisted” actions are those actions not listed as a Type I or Type II action and not exempt or excluded. *Id.* § 617.2(kk).

Type II³² action is important both to the project sponsor and the approving agency. An action listed as a Type I action must undergo a full environmental review process, including both draft and final environmental impact statements,³³ public hearings,³⁴ findings statements³⁵ and a significant amount of review time. Type II actions are subject to a much simpler and shorter review process because they do not require EIS preparation.³⁶

Significance determination starts the whole environmental review process.³⁷ In including cumulative impact analysis at this stage of the process, state agencies and DEC have attempted to fulfill the mandate of the state legislature that the environmental review process promote consideration of long-term development goals.³⁸ By placing cumulative impacts in the significance determination stage,³⁹ the DEC regulations insure that every proposed project that needs an agency approval will have its cumulative impacts examined.

32. "Type II" actions are those "[a]ctions or classes of actions which have been determined not to have a significant effect on the environment." and do not require EIS's. *Id.* § 617.13(a).

33. "Environmental impact statement" (EIS) means a written document prepared in accordance with the regulations. *Id.* 617.2(n). It provides a means for agencies to give early consideration to environmental factors and facilitates the weighing of social, economic and environmental issues in planning and decision making. *Id.* § 617.14(a). "An EIS may be either a 'draft' or a 'final'. A draft EIS is the initial statement prepared by either the applicant or the lead agency and circulated for review and comment. The lead agency is responsible for the preparation of the final EIS." *Id.* § 617.2(n).

34. Public hearings are optional under SEQRA as means of review of draft EISs. The regulations list the considerations involved in determining the need for a hearing and the type or manner of a hearing is left to the discretion of the lead agency. *Id.* § 617.8(d). The DEC uses both legislative and adjudicatory type hearings for the purpose of compliance with SEQRA. N.Y. COMP. CODES R. & REGS. tit. 6, § 624 (1985)(permit hearing procedures).

35. "Findings Statement" is defined "as a written statement prepared by an involved agency, in accordance with section 617.9 of this Part, after a final EIS has been filed, that certifies that the SEQR[A] requirements have been met and provides written support for agency decision." N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(r) (1987).

36. *Id.* § 617.13.

37. *Id.* § 617.6.

38. N.Y. ENVTL. CONSERV. LAW § 3-0301(1)(b) (McKinney 1984 & Supp. 1992).

39. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.11 (1987).

After a proposed project, a Type I or unlisted action, has been determined to possibly have a significant impact on the environment, the sponsor is required to prepare an EIS (both draft and final) under the SEQRA regulations.⁴⁰ The body of a draft EIS must contain "a statement and evaluation of the environmental impacts of the proposed action, including the reasonably related short and long-term effects, cumulative effects and other associated environmental effects."⁴¹ Every draft impact statement in New York State must contain a cumulative impacts analysis.⁴² Although no specific elements of this analysis are defined, the DEC has outlined some sources of cumulative impacts.⁴³ The DEC has also concluded that it can determine the significance of an action solely on its cumulative impacts and deny or modify a project based on those same issues.⁴⁴

At the present time, the regulatory scheme relating to cumulative impact analysis has two separate aspects. First, DEC regulations require the consideration of cumulative impacts in determining the environmental significance of any proposed action.⁴⁵ Second, if the proposed action could have significant environmental effects, the project sponsor must complete an EIS which also specifically addresses cumulative impacts.⁴⁶ With this regulatory scheme outlined, the next section will review the pertinent case law, both in the courts and in the DEC administrative hearings,⁴⁷ in order to examine how

40. *Id.* § 617.8.

41. *Id.* § 617.14(f)(3).

42. *Id.*

43. Examples include:

- a. individually minor but collectively significant actions occurring either together or consecutively over time;
- b. continuing impacts from a given project over time;
- c. impacts from actions induced by an initial action.

Langdon Marsh, *Commentary - Unresolved Issues*, 46 ALB. L. REV. 1298, 301 n.16 & 17 (1982) (citing *New York State Dep't of Environmental Conservation, Cumulative Impacts and SEQRA 1* (draft version 1981) (establishing draft guidelines for dealing with cumulative impacts)).

44. *Id.*

45. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.11 (1987).

46. *Id.* § 617.14(f)(3).

47. When permit applications involve complex factual issues, and/or entail sub-

SEQRA and its implementing regulations have been applied.

II. The Cumulative Impacts Cases

A. The Wetlands / Critical Habitat Cases

Cumulative impact analysis is of special importance when the proposed action is situated in a wetland⁴⁸ or critical habitat⁴⁹ area. In the DEC administrative hearing process, wetland permits⁵⁰ (both tidal and freshwater) account for sixty-five percent of the most recent cumulative impact cases.⁵¹ The limited and fragile resources of these areas have prompted both the DEC and the courts to carefully examine the cumulative impact of any development action upon them.

Every EIS requires a cumulative impacts analysis, but

stantial public controversy, a hearing before a DEC Administrative Law Judge (ALJ) is often convened. Hearings are also used to prosecute administrative charges that a person has violated permit conditions and/or provisions of the Environmental Conservation Law and regulations. N.Y. COMP. CODES R. & REGS. tit. 6, § 624 (1981).

48. "Freshwater wetlands" means lands and waters of the state as shown on the freshwater wetlands map which contain any or all of the following: (a) lands and submerged lands commonly called marshes, swamps, sloughs, bogs, and flats supporting aquatic or semi-aquatic vegetation." N.Y. ENVTL. CONSERV. LAW § 24-0107(1) (McKinney 1984 & Supp. 1992).

"Tidal wetlands" shall mean and include the following: (a) those areas which border on or lie beneath tidal waters, such as, but not limited to, banks, bogs, salt marsh, swamps, meadows, flats or other low lands subject to tidal action, including those areas now or formerly connected to tidal waters.

Id. § 25-0103(1).

49. The term critical habitat for a threatened or endangered species means:

(i) the specific areas within the geographical area occupied by the species, at the time it is listed [as endangered], on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection.

16 U.S.C. § 1532(5)(A) (1988).

50. Freshwater wetland permits allow an applicant to perform an activity or erect a structure that will impact a regulated wetland or an adjacent area. N.Y. ENVTL. CONSERV. LAW § 24-0701 (McKinney 1984); N.Y. COMP. CODES R. & REGS. tit. 6, § 662, 663 (1985). Tidal wetlands permits allow an applicant to perform an activity or erect a structure that will impact a tidal wetland or its adjacent area. N.Y. ENVTL. CONSERV. LAW § 25-0401 (McKinney 1984); N.Y. COMP. CODES R. & REGS. tit. 6, § 661 (1977).

51. Of the most recent forty-one DEC decisions relating to cumulative impacts issues, twenty-seven have been applications from development in wetlands (tidal and freshwater) and critical habitat areas. These figures were compiled using a term (cumulative impact) search on the LEXIS service.

generalized concerns, without some evidence of probable cumulative impacts, are not sufficient enough issues to merit DEC adjudication in an EIS hearing.⁵² In a hearing involving an application to build a floating dock marina in Irondequoit Bay, Monroe County, DEC Commissioner Jorling dismissed the cumulative impacts claims of the intervenors for this very reason, stating that “[the] intervenor, though pointing out that there are fourteen projects planned [on the bay] . . . [gave] no detail or analysis . . . as to what stage of development these projects were at or to what extent particular effects would cause problematic cumulative impacts.”⁵³ Challenges to the sufficiency of an EIS’s cumulative impacts analysis must contain something more than generalized claims of cumulative environmental impact.⁵⁴

In wetland permit application cases, the DEC looks at the specific areas of cumulative impact concern (i.e., wildlife habitat, open space and aesthetic values)⁵⁵ and addresses them, without regard to the size or extent of the particular project involved. In a recent permit hearing, *Louis Abrams*,⁵⁶ involving the construction of a single-family residence near a tidal wetland on Long Island, the DEC denied the variance application citing cumulative impacts.⁵⁷ “While the magnitude of the adverse impacts that would result from this project may not be large, the adverse impacts would nevertheless be unduly severe when considered in a cumulative context and with regard to the creation of a precedent in the immediate neighborhood.”⁵⁸

52. Cassara Dev. Corp., DEC Application No. 8-2634-00065/1-0 (Apr. 9, 1990) (NYDEC Interim Decision) (application to construct a floating dock marina in Irondequoit Bay).

53. *Id.*

54. See N.Y. COMP. CODES R. & REGS. tit. 6, § 624.6(c) (1981) (permit hearings issue determination guidelines).

55. *Louis Abrams*, DEC Application No. 10-84-1512 (Jan. 10, 1986) (NYDEC Decision) (tidal wetland permit sought in effort to construct a single-family house because construction would entail elimination of an adjacent wetland buffer area and disregard setback requirements).

56. *Id.*

57. *Id.* at 1.

58. *Id.* at 16 (Hearing Report of Administrative Law Judge A. Pearlstein).

In the wetland environmental area, cumulative impacts are a crucial aspect of any application and the DEC will deny permits based on cumulative impacts arguments.⁵⁹ The DEC has been consistent in applying strict standards regarding development in wetland or critical habitat areas. The burden of proving that the proposed development will not have significant adverse or cumulative effects on the area environment falls on the party requesting the permit or variance.⁶⁰ The limited size (i.e. single-family residences) of a proposal does not eliminate cumulative impacts as an issue.⁶¹

The leading court case on critical habitat areas is the 1987 New York Court of Appeals case of *Save the Pine Bush, Inc. v. City of Albany*.⁶² The case revolved around a challenge to city ordinances changing the zoning of the Pine Bush area of the City of Albany, the last remaining large pine barrens on inland sand dunes in the United States.⁶³ The defendants-respondents argued that analysis of cumulative impact is not mandatory when projects under consideration are separately owned.⁶⁴ The court disagreed, holding that "when an action with potential adverse effects on the environment is part of an integrated project designed to balance conflicting environmental goals within a subsection of a municipality that is ecologically unique, the potential cumulative impact of other proposed or pending projects must be considered pursuant to SEQRA before the action may be approved."⁶⁵ The special circumstances relating to the critical habitat in a legislatively defined, discrete geographical area moved the court to declare the zoning change null and void as a violation of SEQRA.

59. *See id.*; Robert L. Hathaway, DEC Application No. 10-85-0048 (Aug. 22, 1986) (NYDEC Decision)(tidal wetland permit for construction of a vertical face timber bulkhead and placement of fill).

60. Robert L. Hathaway, DEC Application No. 10-85-0048, 2 (Aug. 22, 1986) (NYDEC Decision).

61. Irving H. Hulse, DEC Application No. 10-83-1138 (June 12, 1985) (NYDEC Decision) (tidal wetland permit and variances sought for the construction of a single-family house with an on-site septic system).

62. 512 N.E.2d 526 (1987).

63. *Id.* at 528.

64. *Id.* at 531.

65. *Id.* at 527.

“Where a governmental body announces a policy to reach a balance between conflicting environmental goals — here, commercial development and maintenance of ecological integrity — in such a significant area, assessment of the cumulative impact of other proposed or pending developments is necessarily implicated in the achievement of the desired (SEQRA) result.”⁶⁶

Recently, the issue of a missing cumulative impacts review was the critical factor in an appellate division determination involving the SEQRA sufficiency of 224 approved projects scheduled for the Pine Barrens area of Long Island.⁶⁷ In *Pine Barrens*, the appellate division carefully examined the regulatory scheme surrounding the Central Pine Barrens and the deep flow groundwater recharge area which underlies it.⁶⁸ The court recognized the irreplaceable value of this recharge area in Long Island and noted that the Pine Barrens soils lack the capacity to filter out possible contaminants which could pollute the aquifer.⁶⁹ The critical ecological importance of this area has been recognized by the United States Environmental Protection Agency (EPA), the New York State Legislature and Suffolk County, Long Island.⁷⁰ In fact, the state legislature enacted the Sole Source Aquifer Protection Law (ECL article 55) which defines a “special groundwater protection area” as a “recharge watershed area . . . which is particularly important for the maintenance of large volumes of high quality groundwater for long periods of time.”⁷¹

The supreme court had ruled that despite legislative enactments recognizing the ecological importance of the area, no comprehensive plan specifically limiting development in the Pine Barrens had been promulgated and, therefore, the involved municipalities had no obligation to consider cumula-

66. *Id.* at 531

67. *Long Island Pine Barrens Soc’y, Inc. v. Planning Board of the Town of Brookhaven*, No. 91-04244, 1992 N.Y. App. Div. LEXIS 3252 (2d Dep’t Mar. 9, 1992).

68. *Id.* at *7.

69. *Id.*

70. *Id.* at *9.

71. N.Y. Evtl. Conserv. Law § 55-01073 (McKinney 1990).

tive impacts under SEQRA.⁷² The appellate court rejected, by a three to two majority, that formalistic reading of *Save the Pine Bush*.⁷³ "There is no question that in enacting ECL article 55, the Legislature has identified the Pines Barrens as a discrete, environmentally sensitive groundwater source, prescribing concrete remedial measures which necessarily mandate a comprehensive overview and consideration of the area in its entirety."⁷⁴ The court went on to say that "[i]n the present case, the various projects — although functionally unrelated — are similarly linked by virtue of their potential to adversely affect an irreplaceable natural resource located within a discrete, geographic area. We decline to construe the many legislative findings and statutes, all of which were clearly intended to foster the careful stewardship and preservation of the Pine Barrens, as something less than a 'plan' within the meaning of the applicable authorities."⁷⁵ The case was remanded, reinstating the cumulative impacts claim.

These cases interpreted the meaning of cumulative impacts in relation to critical habitats and sensitive ecological areas. They determined and reiterated that even if a proposed action is merely one of many planned or proposed projects in a discrete geographic area, a cumulative impacts analysis of all those projects must be undertaken.⁷⁶ They are consistent with the DEC rulings on similar applications, and further support the notion that in cases where a critical habitat or wetlands is involved, a thorough cumulative impacts analysis is essential to fulfill the requirements of SEQRA.⁷⁷

B. The Government-Sponsored Project Cases

The area of public project/action cumulative impact cases presents different questions regarding the scope of the

72. *Pine Barrens*, 1992 N.Y. App. Div. LEXIS 3252 at *15.

73. *Id.* at *17.

74. *Id.* at *20-21.

75. *Id.* at *22-23.

76. *Id.*; *Save the Pine Bush, Inc. v. City of Albany*, 512 N.E.2d 526 (1987).

77. See generally *Save the Pine Bush*, 512 N.E.2d 526; *Pine Barrens*, 1992 N.Y. App. Div. LEXIS 3252.

SEQRA cumulative impact requisites. The primary contention in these public project cases is that the governing body involved is undertaking the project as part of an overall master plan. The SEQRA regulations clearly seek to avoid short term, compartmentalized environmental reviews.⁷⁸ "It is entirely consistent with requiring comprehensive review pursuant to SEQRA of all separately proposed actions at a given geographic area to determine their cumulative environmental impact."⁷⁹ Complications and contradictions arise in the DEC hearings and the courts when they are called on to determine the scope of the SEQRA implementing regulations regarding reasonably related effects and subsequent or simultaneous actions.⁸⁰ In DEC administrative hearings, the department has not fully outlined the parameters of the implementing regulations. Broad statements of applicability appear in some cases.⁸¹ "Clearly the [DEC] has both the authority and the obligation to assess potential cumulative impacts that a project may have when taken into account with other projects."⁸² DEC in some instances examines the cumulative impacts of the future operation of a project.⁸³ "It is also important that the department consider not only the actual effects of current operation but the potential effects that may not have yet

78. N.Y. COMP. CODES R. & REGS. tit. 6, §§ 617.2(b), 617.3(k) (1987).

79. *Guptill Holding Corp. v. Williams*, 531 N.Y.S.2d 648 (1st Dep't 1988).

80. For the purpose of determining whether an action will cause one of the foregoing consequences, the lead agency must consider *reasonably related* long-term, short-term and cumulative effects, including other simultaneous or subsequent actions which are:

- (1) included in any long-range plan of which the action under consideration is a part;
- (2) likely to be undertaken as a result thereof; or
- (3) dependent thereon.

N.Y. COMP. CODES R. & REGS. tit. 6, § 617.11(b) (1987) (emphasis added).

81. See *Quail Ridge Associates*, DEC Application No. 3722-29-1, 4 (May 26, 1988) (NYDEC Decision) (water supply permit); *Central Hudson Gas & Electric Corp.*, DEC Application No. UPA 30-83-0544, 4 (June 19, 1985) (NYDEC Decision) (permit to convert Danskammer Steam Generating Station from oil to coal burning).

82. *Quail Ridge Associates*, DEC Application No. 3722-29-1, 4 (May 26, 1988) (NYDEC Decision) (water supply permit).

83. *Bayville*, DEC (Mar. 30, 1989) (NYDEC Interim Decision) (water supply permit).

manifested themselves.”⁸⁴ The factors most often cited in DEC hearing decisions as dispositive in evaluating a cumulative impact analysis are: (1) are the projects linked by common management?; (2) are the projects immediately adjacent or in the same geographic area of impact?; (3) do the projects affect similar resources?; and (4) are the projects individual components of the same overall project?⁸⁵ While these factors are important in DEC decisions, the reasonably related project standard remains subject to continuing divergent application.⁸⁶

The divergence in application of this “reasonably related” standard is even more identifiable in the court decisions. How related must these government-sponsored projects be to require that their adverse environmental effects be considered cumulatively? “Not every conceivable environmental impact, mitigating measure, or alternative must be identified and addressed before a final environmental impact statement will satisfy substantive requirements of SEQRA.”⁸⁷ It is left to the courts to decide when environmental impacts should or should not be considered in an EIS.

The court review standard of agency SEQRA decisions is stated best as follows: “Nothing in the law requires an agency to reach a particular result on any issue, or permits the courts to second-guess the agency’s choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence.”⁸⁸ The courts do not substitute their judgment for that of the deciding agency, rather they only look to assure that

84. *Id.* at 1.

85. See generally *W.A. Aggregate Co., Inc.*, DEC Application No. 70-85-0251 (Dec. 28, 1987) (NYDEC Decision) (permit sought for the continued operation of a sand and gravel mining operation); *Regional Gravel Products, Inc.*, DEC Application No. 8053-46-0428 (Feb. 11, 1987) (NYDEC Decision) (permit for proposed sand and gravel mine).

86. Compare *Village of Bayville* (Mar. 26, 1989) (NYDEC Decision) (water supply permit) with *Cassara Dev. Corp.*, DEC Application No. 8-2634-0065/1-0 (Apr. 9, 1990) (NYDEC Interim Decision) (application to construct a floating dock marina in Irondequoit Bay).

87. *Aldrich v. Patterson*, 486 N.Y.S.2d 23, 29 (1st Dep’t 1985).

88. *Akpan v. Koch*, 547 N.Y.S.2d 852, 855 (4th Dep’t), *aff’d*, 554 N.E.2d 53 (N.Y. 1990).

the agency has complied with the requirements of SEQRA.⁸⁹ With those standards of review in mind, examination of two differing opinions in the New York courts relating to public development projects will be demonstrative. Both decisions rest on the same body of law and the same SEQRA implementing regulations. The cases are representative of the differing decisions coming out of the courts in the cumulative impacts area of environmental review.

In the first public development project case, *Village of Westbury v. New York Department of Transportation*,⁹⁰ the appellate division court ruled that the New York Department of Transportation (DOT) must consider the overall cumulative effect of two DOT-sponsored road improvement projects.⁹¹ The construction on the Northern State Parkway in Long Island proceeded after the DOT had issued a negative declaration (signifying a non-Type I action) of environmental impact on an interchange project.⁹² Also planned by the DOT was a lane-widening project near the interchange construction and on the same roadway.⁹³

The court examined the relevant implementing regulations and found that both projects were part of an overall plan by DOT, and their cumulative effect should have been considered before the issuance of any negative declaration.⁹⁴ The court referred specifically to the section of the regulations relating to phased development, which state that:

agencies should address not only the site specific impacts of the individual project under consideration, but also, in more general or conceptual terms, the cumulative effects on the environment and the existing natural resource base of subsequent phases of a larger project or series of projects that may be developed in the future.⁹⁵

89. *Id.* at 856.

90. 536 N.Y.S.2d 502 (2d Dep't 1989).

91. *Id.* at 503.

92. *Id.*

93. *Id.*

94. *Id.* at 504.

95. *Id.*, see also N.Y. COMP. CODES R. & REGS. tit. 6, § 617.15(e) (1987).

The key factual element in the case, and the one which tied the two projects together, was DOT's own documents which outlined both projects and made the widening-project seem contingent on the completion of the interchange construction.⁹⁶ The New York Court of Appeals, the state's highest court, has now affirmed this decision.⁹⁷

In the *Village of Westbury* decision, the court of appeals concluded that "the environmental effects of the two projects should be considered together."⁹⁸ The court found that the interchange reconstruction is part of an overall plan to improve the traffic flow within the immediate area.⁹⁹ In a final note, the court stated: "We do not suggest that the cumulative effects of all tentative plans for an area must be measured fully in every case. Here, however, DOT sought to solve one localized problem caused by two predominant factors - the design of the interchange and the inadequate capacity of its highways - and the solution for each was related to the other."¹⁰⁰

In the second public development project case, *Stewart Park & Reserve Coalition v. New York State Department of Transportation*,¹⁰¹ the court held that the Department of Transportation was not required to consider the overall cumulative effect of its capital improvement plans for Stewart Airport in Orange County.¹⁰² The plans included the improvement of some airport facilities undertaken in preparation for the beginning of regularly scheduled passenger air service at the airport.¹⁰³ They consisted of "(1) rehabilitation of the existing passenger terminal, (2) expansion of that terminal by some 4,000 square feet to provide a baggage handling area, (3) construction of a circulation road near the terminal and improvement of the airport's main access road, and (4) construc-

96. *Village of Westbury*, 536 N.Y.S.2d at 504.

97. *Village of Westbury v. New York State Dep't of Transp.*, 549 N.E.2d 1175, (N.Y. 1989).

98. *Id.* at 1178.

99. *Id.*

100. *Id.* at 1179.

101. 555 N.Y.S.2d 481 (3d Dep't 1990), *aff'd*, 77 N.Y.2d 970 (1991).

102. *Id.* at 487.

103. *Id.*

tion of a 12,292 unit parking lot."¹⁰⁴ The DOT had issued a negative declaration for its site improvement plan at the airport.¹⁰⁵

The initial decision by the supreme court held that the proposed actions were "part of an overall plan by DOT to permit regular airline passenger service at Stewart International Airport and the cumulative effect of such overall plan should have been considered."¹⁰⁶ The supreme court also directed DOT to include any other actions which form part of the same long-range comprehensive plan in its cumulative impacts analysis.¹⁰⁷

In its reversal, the appellate division laid out what it considered the underlying reasons for cumulative impact studies:

Several purposes underlying the mandatory grouping of multiple actions for environmental consideration have been put forth. First, where there is really but one plan for the development of a single area of special environmental significance, the accurate ecological/social/economic balancing of costs and benefits mandated under SEQRA requires that the cumulative effects of *all* actions within the plan for that area be weighed. The second reason is that grouping the effects of related sequential actions avoids distortions in the balancing process if they were considered in separate succession when the decision in the earlier action may be "practically determinative" of the subsequent action. Lastly, considering the cumulative effects of related actions insures against stratagems to avoid the required environmental review by breaking up a proposed development into component parts which, individually, do not have sufficient environmental significance.¹⁰⁸

After outlining the bases for cumulative effects analysis, the court found none of them particularly applicable to the in-

104. *Id.* at 483.

105. *Id.*

106. *Id.* at 484.

107. *Id.*

108. *Id.* at 486 (citations omitted) (emphasis in original).

stant case. The court found the overall plans for airport development too "attenuated" to require their consideration in a cumulative impacts analysis on the current development.¹⁰⁹ The court stated: "Being part of the same overall master plan for Stewart is not in and of itself conclusive. We do not suggest that the cumulative effects of all tentative plans for an area must be measured fully in every case."¹¹⁰ The key fact in this case was that an EIS for development of the airport at Stewart had been completed in 1977.¹¹¹ The court found these current development projects as being included in the prior study, and, therefore, there was no need for DOT to examine them again.¹¹² The New York Court of Appeals has now affirmed this decision.¹¹³

These two cases exhibit the difficulties and inconsistencies which the New York courts face when an EIS of government-sponsored project is challenged on the cumulative impact of other planned public development. A clear outline of the extent to which public agencies will be responsible for considering cumulative impacts of future projects is needed. The *Westbury* case suggests that the court may be willing to do this outlining now.¹¹⁴

C. Miscellaneous Cases

More infrequently, cumulative impacts issues arise in the context of private development and mining cases.¹¹⁵ Both the courts and the DEC administrative law judges have applied a consistent formula when faced with these cases.

109. *Id.*

110. *Id.* citing *Village of Westbury v. New York State Dep't of Transp.*, 549 N.E.2d 1175 (N.Y. 1990).

111. *Id.* at 489.

112. *Id.*

113. *Stewart Park & Reserve Coalition v. New York State Dep't of Transp.*, 77 N.Y.2d 970 (1991).

114. *See generally* *Village of Westbury v. New York State Dep't of Transp.* 549 N.E.2d 1175, (N.Y. 1990).

115. *See generally* *Mobil Oil Corp. v. Syracuse Indus. Dev. Agency*, 559 N.E.2d 641 (N.Y. 1990); *E.F.S. Ventures Corp. v. Foster*, 520 N.E.2d 1345 (N.Y. 1988); *Orange Environment, Inc. v. Jorling*, 558 N.Y.S.2d 205 (3d Dep't 1990); *Guptill Holding Corp. v. Williams*, 531 N.Y.S.2d 648 (3d Dep't 1988).

Cumulative impacts are harder to consider when private development is taking place. There has been great reluctance to require private developers to undertake extensive cumulative impacts analysis. To examine all the privately and publicly planned projects in the same geographic area would be extremely costly for a private developer. Both the courts and DEC have looked at certain key factors in ruling on an EIS cumulative impacts challenge. Those factors are common management of facilities or immediately adjacent facilities.¹¹⁶

An example of the application of these factors is the DEC's permit decision in *Central Hudson Gas & Electric Corp.*¹¹⁷ In this hearing, Central Hudson had applied to DEC for permits to convert its Danskammer Steam Generating Station to a coal burning facility and to increase the stack height at its existing Roseton power plant.¹¹⁸ The EIS filed with the application did not address the cumulative impact of both plants on the area air quality.¹¹⁹ The DEC decided that the EIS must address those impacts. It held that: "Critical to a correct application of SEQRA's balancing process here is a proper definition of the scope of its mandated environmental impact analysis. Any evaluation of the cumulative impact of the Applicant's proposed action at Danskammer must take into account the combined air quality and acid deposition impacts of both Roseton and Danskammer."¹²⁰ Since both facilities were under common management and immediately adjacent, the cumulative impacts of both projects should be considered in a comprehensive study.¹²¹

In mining operations, the required cumulative impact analysis focuses on a defined hydrogeologic area.¹²² An exam-

116. See *Guptill Holding Corp.*, 531 N.Y.S.2d 648.

117. DEC Application No. UPA 30-83-0544 (Jun. 19, 1985) (NYDEC Decision).

118. *Id.* at 1.

119. *Id.* at 5.

120. *Id.* at 4.

121. *Id.*

122. Included in a mining permit application must be:

A determination of the probable hydrogeologic consequences of the mining and reclamation operations, both on and off the mine site with respect to . . . the collection of sufficient data for the mine site and surrounding areas so that an assessment can be made by the regulatory authority of the probable

ple of this application is evident in *Guptill Holding Corp. v. Williams*.¹²³ Appellant, Guptill, owned and operated a sand and gravel mining operation and had applied to the DEC for a permit to expand the mining operation.¹²⁴ Guptill claimed that this application was grand fathered and thus not subject to SEQRA review because it had been in operation since before 1975, the enactment date of SEQRA.¹²⁵

The appellate division ruled that Guptill's expansion operation was subject to full SEQRA review because the size and extent of the expansion evidenced a substantial change in operation which mandated SEQRA review.¹²⁶ The court then looked to the scope of the environmental review and stated: SEQRA may require comprehensive review of all separately proposed actions at a given geographic area to determine their cumulative environmental impact. It appears entirely consistent with that rationale to require similar comprehensive review of the cumulative effect, over time, of the incremental steps of the progressive exploitation of mining¹²⁷ As a result, mining operation permit applications must include in their cumulative impact analysis a look at the surrounding geographic area.

III. The Cumulative Impact Arguments

This examination of the New York decisions on cumulative impact analysis has revealed the settled and consistent application of the relevant regulations in some situations.¹²⁸ In other situations, inconsistent and changing application of the regulations is evident.¹²⁹ While each case depends on its

cumulative impacts of all anticipated mining in the area upon the hydrogeology of the area and particularly upon water availability.

30 U.S.C. § 1257(b)(11) (1988); See N.Y. ENVTL. CONSERV. LAW § 23-(b)2711-15 (McKinney 1984 & Supp. 1992).

123. 531 N.Y.S.2d 648 (3d Dep't 1988).

124. *Id.* at 649.

125. *Id.* at 650.

126. *Id.* at 652.

127. *Id.* at 651.

128. See *Save the Pine Bush v. City of Albany*, 512 N.E.2d 526 (N.Y. 1987); *Guptill Holding Corp.*, 531 N.Y.S.2d 648 (3d Dep't 1988).

129. Compare *Village of Westbury v. New York State Dep't of Transp.*, 549

specific facts, some broad outlines of the arguments that have been successful can be made.

In the wetland/critical habitat cases, cumulative impact analysis forms a critical part of the required environmental review.¹³⁰ The fragile and limited resources of these delicate habitats heightens the level of scrutiny given any EIS prepared for this area.¹³¹ The concerns raised in a cumulative impacts argument cannot merely be of a generalized nature, but must be detailed and fully analyzed.¹³² The limited size of an individual project is no exemption from a full cumulative impact study.¹³³ The EIS must consider in their cumulative impact studies such factors as impacts on wildlife habitat, open space, and aesthetic values.¹³⁴ Overall, an EIS prepared for development in critical habitat and wetland areas must contain a complete, detailed cumulative impacts analysis.¹³⁵

When the case involves a government-sponsored development project the scope of the cumulative impact study is not so clear. The courts have held that specifically planned government projects in the same overall plan must be considered cumulatively for environmental review purposes.¹³⁶ Although that decision seems consistent with the long-term environmental review outlook envisioned by SEQRA, the state legislature reacted quickly to limit the decision.¹³⁷ It passed a law

N.E.2d 1175 (N.Y. 1990) *with* Stewart Park & Reserve Coalition v. New York State Dep't of Transp., 555 N.Y.S.2d 481 (3d Dep't), *aff'd*, 77 N.Y.2d 970 (1991).

130. *Save the Pine Bush*, 512 N.E.2d 526 (N.Y. 1987); Long Island Pine Barrens Soc'y, Inc. v. Planning Board of the Town of Brookhaven, No. 91-04244, 1992 N.Y. App. Div. LEXIS 3252 (2d Dep't Mar. 9, 1992); Robert L. Hathaway, DEC Application No. 10-85-0048 (Aug. 22, 1986) (NYDEC Decision) (tidal wetlands permit for construction of a vertical face timber bulkhead and placement of fill).

131. *See Save the Pine Bush*, 512 N.E.2d 526 (N.Y. 1987); *Pine Barrens*, 1992 N.Y. App. Div. LEXIS 3252.

132. Cassara Dev. Corp., DEC Application No. 8-2634-0065/1-0 (Apr. 9, 1990) (NYDEC Interim Decision) (application to construct a floating dock marina in Irondequoit Bay).

133. *See* Louis Abrams, DEC Application No. 10-84-1512 (Jan. 10, 1986) (NYDEC Decision) (tidal wetland permit to construct a single-family house).

134. *See, id.*

135. *See Save the Pine Bush*, 512 N.E.2d 526, 527 (N.Y. 1987).

136. *Village of Westbury v. New York State Dep't of Transp.*, 549 N.E.2d 1175 (N.Y. 1990).

137. 1990 N.Y. Laws ch. 774, § 14-i(3).

pointedly exempting certain road improvement projects on the Long Island Expressway from being part of any long-term plan so that no cumulative study will be required.¹³⁸

The *Stewart* case exemplified the opposite application of the cumulative impacts regulations.¹³⁹ When the DOT was preparing improvement projects for an airport service expansion, the court found that an eleven year-old EIS satisfied any current SEQRA requirements.¹⁴⁰ Also, the court found the relationship between the airport renovation and the airport development master plan too attenuated to require a cumulative impact analysis of both projects.¹⁴¹ The precise scope of the cumulative impact requirement in these instances remains very subjective. The court of appeals has yet to rectify the inconsistencies with which cumulative impact regulations are interpreted in SEQRA cases.¹⁴²

For private development cases, the issues of common management and geographic relationship seem definitive. Both the courts and the DEC seem reluctant to impose a broad all-encompassing cumulative impact analysis on private development projects unless other projects in the area are

138. *Id.*

139. *Stewart Park & Reserve Coalition v. New York State Dep't of Transp.*, 555 N.Y.S.2d 481 (3d Dep't), *aff'd*, 77 N.Y.2d 970 (1991).

140. *Id.* at 485.

141. *Id.* at 486.

142. A recent case in California thoroughly dealt with a wide-range of cumulative impacts issues. Among other definitions, the California court stated:

The following elements are necessary to an adequate discussion of cumulative impacts:

(1) Either:

(a) a list of past, present, and reasonably anticipated future projects producing related or cumulative impacts, including those projects outside the control of the agency, or

(b) a summary of projections contained in an adopted general plan or related planning document which is designed to evaluate regional or areawide conditions . . . ;

(2) A summary of the expected environmental effects to be produced by those projects with specific reference to additional information stating where that information is available, and

(3) A reasonable analysis of the cumulative impacts of relevant projects . . .

Kings County Farm Bureau v. City of Hanford, 270 Cal. Rptr. 650, 680 (Cal. App. 1990).

New York needs a similar, thorough definition of the scope of cumulative impacts analysis.

under common management or immediately adjacent.¹⁴³ In mining operation cases, because of the potential cumulative environmental impact inherent with the project, the cumulative impact analysis must encompass a given geographic area, regardless of the private or public nature of the other projects.¹⁴⁴

These are some of the more apparent approaches to cumulative impact cases. However, with the continuing inconsistent application of these regulation, any well analyzed site specific cumulative impact argument could be successful. A challenger to an EIS based on a claim of cumulative impacts insufficiency can argue that other projects in the area need to be considered; that the project is part of an overall master plan; and that a critical habitat/wetland area demands thorough examination of cumulative impacts. A defender can counter by asserting that other projects are too geographically remote; that future projects in a master plan are too attenuated and uncertain; and that wetland projects are usually not under common management.

IV. Conclusion

In conclusion, recall that one of the main goals espoused by the creators of SEQRA in 1975 was that this statute would ensure that agencies approving future development projects would place that project in a cumulative context.¹⁴⁵ The legislature specifically noted that:

[i]t is the purpose of this act to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; 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,

143. See *Mobil Oil Corp. v. Syracuse Indus. Dev. Agency*, 559 N.E.2d 641 (N.Y. 1990); *Central Hudson Gas & Elect. Corp.*, DEC Application No. UPA 30-83-0544 (Jun. 19, 1985) (NYDEC Decision) (permit to convert Danskammer Steam Generating Station from oil to coal burning).

144. *Guptill Holding Corp. v. Williams*, 531 N.Y.S.2d 648 (1st Dep't 1988).

145. *Stevenson*, *supra* note 2, at 1115-19.

natural, human and community resources important to the people of the state.¹⁴⁶

Cumulative impact analysis is the area where the opposing forces to those goals will clash in the coming years. Developers will seek to have cumulative impact analysis limited sharply, while environmentalists will seek to broaden the scope of cumulative impacts analysis.

The natural resource and wilderness areas of this state are under increased pressure from development, both public and private. Heightened attention needs to be given to the way an individual project fits in the cumulative environmental framework of its surroundings. With less distance separating new development projects, there is little room for misjudgment in evaluating cumulative impacts.

The importance of cumulative environmental review cannot be overstated. It is hoped that the courts will further heed the policy goals of SEQRA and fully implement and enforce its provisions.

146. N.Y. ENVTL. CONSERV. LAW § 8-0101 (McKinney 1984).