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DEC's Part 617 Regulations, As Amended: A Guide to the Implementation of SEQRA

Peter R. Paden*

I. Introduction

The New York State Environmental Quality Review Act (SEQRA)¹ has, in the some ten years of its existence,² transformed the process by which state and local governmental agencies conduct or regulate planning and development activities. Every state agency, every county, city, town and village government, department or agency, every planning board, zoning board, and school board, and every sewerage, water or other special district is required to comply with the procedural and substantive mandates of the Act. These mandates are designed to insure that all planning and regulatory activities shall, "consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects."³

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1. N.Y. Evtl. Conserv. Law §§ 8-0101 to -0117 (McKinney 1984 & Supp. 1988). The Act is referred to as "SEQR," which is the terminology found in the New York State Department of Environmental Conservation (DEC) regulations (N.Y. Comp. Codes R. & Regs. tit. 6, Part 617 (1987)), and "SEQRA," the acronym used in this publication.

2. The New York State Legislature enacted SEQRA in 1975. 1975 N.Y. Laws ch. 612. It became fully effective over a three year phase-in period, from 1976 to 1978. N.Y. Evtl. Conserv. Law § 8-0117 (McKinney 1984).

3. N.Y. Evtl. Conserv. Law § 8-0109(1) (McKinney 1984).

SEQRA has engrafted hitherto unknown concepts and procedures onto the planning and development process. It has spawned the development of a new vocabulary and methodological approach with which all significant public planning, development and regulatory proposals are to be propounded, evaluated and justified. Due in large part to the expansive definitions of "actions" to which SEQRA applies⁴ and the "environment" it is designed to protect,⁵ and to its affirmative requirement that adverse environmental impacts be mitigated to the greatest practicable degree,⁶ SEQRA's impact has been much more than merely a procedural one. It has imposed certain normative standards on governmental planning.⁷ By no means incidentally, SEQRA has also provided citizens with a powerful tool which can be used to hold public officials accountable for compliance with its mandate, and to obtain input into and leverage upon planning and development

4.

"Actions" include:

(i) projects or activities directly undertaken by any agency; or projects or activities supported in whole or in part through contracts, grants, subsidies, loans, or other forms of funding assistance from one or more agencies; or projects or activities involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use or permission to act by one or more agencies;

(ii) policy, regulations and procedure-making.

Id. § 8-0105(4).

While the statutory definition of "action" is broad, it is not unlimited.

"Actions" do not include:

(i) enforcement proceedings or the exercise of prosecutorial discretion in determining whether or not to institute such proceedings;

(ii) official acts of a ministerial nature, involving no exercise of discretion;

(iii) maintenance or repair involving no substantial changes in existing structure or facility.

Id. § 8-0105(5).

5. "'Environment' means the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character." *Id.* § 8-0105(6).

6. *Id.* § 8-0109(1).

7. See *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 415, 494 N.E.2d 429, 434, 503 N.Y.S.2d 298, 303 (1986); *Town of Henrietta v. Department of Env'tl. Conservation*, 76 A.D.2d 215, 220-21, 430 N.Y.S.2d 440, 445-47 (4th Dep't 1980). See generally, Gitlen, *The Substantive Impact of the SEQRA*, 46 Alb. L. Rev. 1241, 1248-53 (1982).

decisions.⁸

The statutory language is broad, but somewhat spare, confined to articulating guiding principles and concepts. The key provision very simply requires that all agencies⁹ prepare an environmental impact statement (EIS) on any action they propose or approve that may have a significant effect on the environment.¹⁰ The EIS is to provide "detailed," but "clearly written" and "concise" information about the action's likely environmental impact and about ways in which adverse impacts might be minimized; and it must suggest alternatives sufficient to provide a basis to decide whether or not to undertake the action.¹¹ The initial decision whether or not to require an EIS must be made "as early as possible" in the process of formulating a proposal.¹² If an EIS is required, a draft EIS (DEIS) must be prepared.¹³ After the DEIS is circulated for public comment, with or without a hearing, the final EIS (FEIS) is completed. Finally, and of critical importance, when an agency decides to carry out or authorize an action that has been the subject of an EIS, the agency must expressly find that SEQRA has been complied with and that, "consistent with social, economic and other essential considerations, to

8. While few would question SEQRA's potency as a vehicle for public input and its impact upon planning and regulatory processes, *see, e.g.*, *Orchards Assoc. v. Planning Board*, 114 A.D.2d 850, 494 N.Y.S.2d 760 (2d Dep't 1985), the precise contours of its use in this regard have yet to be clearly defined. Moreover, it is established that judicial review of actions under SEQRA is subject to significant limitations. *See, e.g.*, *Jackson*, 67 N.Y.2d at 416-17, 494 N.E.2d at 434, 503 N.Y.S.2d at 304-05; *Aldrich v. Pattison*, 107 A.D.2d 258, 486 N.Y.S.2d 23 (2d Dep't 1985); *Horn v. International Business Machines Corp.*, 110 A.D.2d 87, 493 N.Y.S.2d 184 (2d Dep't 1985).

9. Agency is defined in the statute as any state or local agency. N.Y. Env'tl. Conserv. Law § 8-0105(3) (McKinney 1984).

10. *Id.* § 8-0109(2).

11. *Id.*

12. *Id.* § 8-0109(4).

13. *Id.* § 8-0109(4).

The purpose of a draft environmental statement is to relate environmental considerations to the inception of the planning process, to inform the public and other public agencies as early as possible about proposed actions that may significantly affect the quality of the environment, and to solicit comments which will assist the agency in the decision making process in determining the environmental consequences of the proposed action.

Id.

the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided."¹⁴

The succinctness with which the essence of SEQRA can be summarized masks the remarkable breadth of its application and its effect on all levels of public planning. While the statute fills in some of the blanks, detailed guidance for the implementation of SEQRA, including both the myriad procedural aspects and substantive standards, is set forth in the regulations of the New York State Department of Environmental Conservation (DEC).¹⁵ Familiarity with these regulations is essential for anyone who would understand the SEQRA process.¹⁶

The purpose of this article is to provide an overview of the SEQRA regulations. Having initially promulgated the regulations shortly after the statute was enacted,¹⁷ the DEC recently completed a sweeping revision, which became effective on June 1, 1987. The revisions were intended to improve the

14. *Id.* § 8-0109(8).

15. The Act specifically requires the Commissioner of the DEC to promulgate implementing regulations, and specifies in some detail their scope and content. *Id.* §§ 8-0113(1) & (2).

16. While the DEC regulations provide the primary regulatory guidance on implementing SEQRA, the practitioner must be aware that all agencies are directed by the Act to create and publish "such additional [regulatory] procedures as may be necessary." *Id.* § 8-0113(3). Such regulations must be "consistent" with DEC's regulations and "no less protective of environmental values, public participation, and agency and judicial review." *Id.* § 8-0113(3)(a). (The DEC regulations restate and expand on the statutory provisions relating to the inter-relationship between DEC's regulations and those of other agencies, encouraging agencies to incorporate SEQRA into existing procedures and exhorting agencies to cooperate, coordinate and consult together in carrying out SEQRA review. See N.Y. Comp. Codes R. & Regs. tit. 6, § 617.4 (1987).)

Accordingly, it is always necessary to inquire whether the agency with which one is dealing on a SEQRA matter has its own regulatory guidelines. It is important to bear in mind that while such regulations cannot be less restrictive than DEC's, they can be and sometimes are, more restrictive. See, e.g., discussion of New York City's City Environmental Quality Review (CEQR) regulations, N.Y. City Exec. Order 91 (1977), in *Chinese Staff and Workers Ass'n v. City of New York*, 68 N.Y.2d 359, 364-68, 502 N.E.2d 176, 179-81, 509 N.Y.S.2d 499, 502-04 (1986).

17. DEC first promulgated SEQRA regulations on March 22, 1976, seven months after the New York Legislature approved SEQRA. 1975 N.Y. Laws ch. 612. These regulations were amended in 1978, in 1982, and, most recently, in 1987.

SEQRA process based upon the experience of the preceding decade.¹⁸ The DEC articulated a number of specific objectives: to improve the quality of environmental review; to clarify issues and procedures; to streamline the review process; to provide greater certainty; to codify landmark court direction; to improve the opportunity for public participation; and to provide guidance and models to assist agencies to make legally sufficient decisions.¹⁹ Thus, the revised SEQRA regulations attempt to clarify and summarize existing law and practice. In so doing, they provide a comprehensive outline for the implementation and application of the environmental review process required by the Act.

II. Overview of the SEQRA Regulations

The regulations address a host of questions posed, and largely unanswered, by the terms of SEQRA itself. They provide extensive guidance on how and when initial determinations are to be made as to whether or not an EIS will be required. These initial determinations are termed "positive declarations" and "negative declarations."²⁰ They provide for the identification of the agency, designated as the "lead agency," which is responsible for making those determinations in the common situation where more than one governmental entity has a role to play in the regulatory or decision-making process.²¹ The regulations identify a category of actions,

18. N.Y. Dep't of Env'tl. Conservation, SEQRA Findings Statement, at 1 [hereinafter SEQRA Findings Statement]. True to its own mandate, DEC subjected its regulatory revisions to a full SEQRA review, resulting in a final generic EIS, N.Y. Dep't of Env'tl. Conservation, Final Generic Environmental Impact Statement: State Environmental Quality Review Act Regulations (Feb. 18, 1987) [hereinafter DEC/GEIS], and SEQRA Findings Statement. These documents provide a wealth of useful information regarding the agency's interpretation of SEQRA and its intentions in effectuating the 1987 regulatory revisions.

19. SEQRA Findings Statement, *supra* note 18, at 1.

20. A negative declaration is "a written determination by a lead agency that the implementation of the action as proposed will not result in any significant environmental effects." N.Y. Comp. Codes R. & Regs. tit. 6, § 617.2(y) (1987). Conversely, a positive declaration means that the proposed action "may have a significant effect on the environment and that an environmental impact statement will be required." *Id.* § 617.2(cc).

21. *Id.* § 617.6.

“Type I actions,” presumed to have a significant environmental impact and, hence, to require an EIS;²² and a second category, “Type II actions,” conclusively determined not to have such an impact on the environment — in effect, outside of SEQRA.²³ These two lists create a total of three categories into which every action must fall, being either Type I, Type II or “unlisted.”²⁴ The regulations establish substantive criteria for evaluating the significance of a Type I or unlisted action’s anticipated environmental impact.²⁵ They also provide a measure of substantive guidance regarding the content of an EIS, including the extent and detail with which it must address anticipated beneficial and adverse impacts, alternatives, mitigation measures, and such sensitive and potentially controversial matters as the nature and possible significance of unavailable information regarding foreseeable catastrophic scenarios.²⁶ Finally, the regulations detail the procedures and standards for making the substantive SEQRA findings required as a condition of project approval.²⁷

In covering all of this ground, the regulations address some of the major conceptual issues that beset the process. These include determining at what point in the planning process an EIS must be prepared; when circumstances warrant that a series of proposals be viewed as one in order to avoid “segmentation;” when a generic EIS or a supplemental EIS may be required; and the extent and manner in which adverse

22. *Id.* § 617.12.

23. *Id.* § 617.13.

24. The regulations define two other types of actions, “exempt” and “excluded” actions. Exempt actions include civil and criminal enforcement proceedings, non-discretionary acts, maintenance or repair actions requiring no substantial change in an existing structure or facility, emergency actions, and New York State legislative actions. *Id.* § 617.2(q). (These are, of course, exempt because they are, by statutory definition, “non-actions.” See, *supra*, notes 4 & 9.) Excluded actions are actions undertaken prior to the enactment of SEQRA, actions subject to environmental review under articles VII and VIII of the Public Services Law, and actions taken by the Adirondack Park Agency. N.Y. Comp. Codes Rules & Regs. tit. 6, § 617.2(f) (1987). Like Type II actions, actions that fall into these two categories are not required to go through the SEQRA review process.

25. N.Y. Comp. Codes Rules & Regs. tit. 6, § 617.11 (1987).

26. *Id.* § 617.14.

27. *Id.* § 617.9.

impacts must be identified and alternatives must be presented and evaluated. The regulations also contain extensive exhortations to promote administrative efficiency in the implementation of SEQRA, as well as procedures designed to accomplish this result, and a variety of other administrative and procedural provisions to ensure proper record-making, notice and public participation in and access to the process.

A. *General Principles*

At the outset,²⁸ the regulations present a collection of provisions addressing two major concepts: the breadth and strength of SEQRA's application in public decision making; and the need for extensive cooperation and coordination among whatever number of public agencies have an interest or involvement in the application under review.

1. *The Breadth of SEQRA*

The regulations emphasize the expansive sweep of the statutory provisions: "No agency involved in an action shall carry out, fund or approve the action until it has complied with the provisions of SEQR[A]."²⁹ In short, SEQRA applies to all actions³⁰ by all governmental agencies,³¹ which simply

28. The first two sections of the DEC regulations are directed to preliminary matters. Section 617.1, subtitled "Authority, Intent and Purpose," largely restates general statutory language authorizing the promulgation of the regulations, *Id.* § 617.1(a) (restating N.Y. Evtl. Conserv. Law § 8-0113 (McKinney 1984)) and setting forth the underlying legislative purpose, *Id.* § 617.1(b), (c) & (d) (restating N.Y. Evtl. Conserv. Law §§ 8-0101, 8-0103 (McKinney 1984)). It also declares the intention of the drafters to create a statewide regulatory framework for implementing SEQRA by all state and local agencies. *Id.* § 617.1(e). Section 617.2 contains numerous definitions, referred to in the text where relevant. *Id.* § 617.2.

29. *Id.* § 617.3(a).

30. The statutory definition of "actions," *see, supra*, note 4, is expanded by the regulations to include:

(1) projects or physical activities, such as construction or other activities that may effect 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;

cannot proceed with any project until its provisions have been complied with.³²

The regulations go on to spell out two equally significant corollaries. First, “[n]o physical alteration related to an action shall be commenced by a project sponsor until the provisions of SEQRA have been complied with.”³³ In other words, under SEQRA an agency or project sponsor may not shoot first and ask questions later. Actual work cannot begin, even if it is preliminary in nature or arguably leaves room for flexibility regarding the completed project, until there has been either a negative declaration or a full EIS followed by SEQRA findings. However, agencies are not precluded from engaging in planning activities necessary to getting a project off the ground before an EIS is conducted.³⁴ This distinction between preliminary planning activities, on the one hand, and approval of a project or physical alterations effectuating an action, on

(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; and

(4) any combinations of the above.

N.Y. Comp. Codes Rules & Regs. tit. 6, § 617.2(b) (1987).

31. The regulatory definition of “agency” simply restates that set forth in the statute: “any State or local agency.” N.Y. Comp. Codes Rules & Regs. tit. 6, § 617.2(c) (1987).

32. The practical significance of this proposition is, of course, limited to actions that are subject to substantive SEQRA review — Type I and unlisted actions. Actions are immune from any degree of scrutiny under SEQRA as soon as they are identified as Type II, exempt or excluded. *See, supra*, text accompanying notes 22-24.

33. N.Y. Comp. Codes Rules & Regs. tit. 6, § 617.3(a) (1987).

34. The regulations note that:

Nothing in the Part shall prevent an agency or an applicant from:

(1) conducting concurrent environmental, engineering, economic, feasibility and other studies and preliminary planning and budgetary processes necessary to the formulation of a proposal for action, provided those activities do not commit the agency to commence, engage in or approve such action; or

(2) engaging in review of any part of an application to determine compliance with technical requirements, provided that no such determination shall entitle or permit the applicant to commence the action unless and until all requirements of this Part have been fulfilled.

Id. § 617.3(c).

the other, is consistent with the line drawn by decisional law regarding the point at which an EIS must be conducted and completed.³⁵

Second, introducing the theme of intra-agency coordination that runs throughout, the same section directs that “[n]o agency shall issue a decision on an action that it knows any other involved agency has determined may have a significant effect on the environment until a final EIS and finding statement have been filed.”³⁶ Thus, once *any* “involved agency”³⁷ has issued a positive declaration, *all* other involved agencies must be bound by that decision and refrain from taking final action with respect to the project until there has been compliance with the Act.

These provisions lead logically to the result that with regard to any action subject to substantive SEQRA review, an application for funding or approval cannot be considered complete until either there has been a negative declaration — a determination that no significant adverse impact may be expected,³⁸ or a draft EIS has been accepted for public review in conjunction with other review and approval procedures.³⁹

35. Compare *Tri-County Taxpayers Ass'n, Inc. v. Town Board*, 55 N.Y.2d 41, 432 N.E.2d 592, 447 N.Y.S.2d 699 (1982) with *Programming & Systems, Inc. v. New York State Urban Dev. Corp.*, 61 N.Y.2d 738, 460 N.E.2d 1347, 472 N.Y.S.2d 912 (1984). As noted by the Court of Appeals in *Tri-County*, the point in the planning process at which an EIS must be prepared is not always indicated by a bright line, an ambiguity (perhaps an inevitable one) that can give rise to litigation. *Tri-County*, 55 N.Y.2d at 45, 432 N.E.2d at 593, 447 N.Y.S.2d at 700. See, e.g., *Nassau/Suffolk Neighborhood Network v. Town of Oyster Bay*, 134 Misc. 2d 979, 513 N.Y.S.2d 921 (Sup. Ct. Nassau County 1987).

36. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.3(a) (1987).

37. Involved agency is defined by the regulations as “an agency that has jurisdiction by law to fund, approve or directly undertake an action.” *Id.* § 617.2(t). There can be and frequently are more than one involved agency with respect to any particular project. See, *infra*, text accompanying notes 51-53.

38. N.Y. Comp. Codes Rules & Regs. tit. 6, § 617.2(y) (1987).

39. *Id.* § 617.3(f)(1) & (2). This section of the regulations goes on to provide that once a draft EIS has been accepted for review, the SEQRA process is to run concurrently with all other review and approval procedures that may apply, but only if a “reasonable time” is provided for preparation, review and public hearings on the draft EIS. *Id.* This may be an important qualification of the general rule that SEQRA procedures are to run concurrently with other review processes. Where a particularly significant or complex project is being reviewed under time limits set by another regulatory scheme, an argument could perhaps be made that additional time should be

Conversely, with regard to Type II, exempt or excluded actions which are not subject to substantive SEQRA review, no determination of significance, EIS or findings are required.⁴⁰

Another important provision relating to the substantive quality of the SEQRA review process represents DEC's attempt to codify in the regulations certain key notions that have evolved in decisional law.⁴¹ It states that *all* involved agencies have the authority, upon completion of an EIS or in connection with a conditioned negative declaration,⁴² "to impose substantive conditions upon an action" so long as the conditions imposed are "practicable and reasonably related to impacts identified in the EIS or the conditioned negative declaration."⁴³

This provision illustrates how SEQRA has expanded the power of state and local government agencies. As suggested by the DEC, while SEQRA does not formally enlarge the jurisdiction of any agency, it charges agencies to assume responsibility for mitigation of projected impacts.⁴⁴ In authorizing an agency to require reasonable and practicable mitigation or conditions, the regulatory scheme clearly opens the way for agency activity or requirements that "serve the purposes of the statute but fall outside the traditional boundaries of narrow agency jurisdiction."⁴⁵ The DEC further commented that, in its view, an agency can impose conditions on any identified impact, whether or not that impact is ultimately found to be significant.⁴⁶

One of the most fertile areas for disagreement in the application and implementation of SEQRA arises in ascertaining precisely the scope of the action that is subject to review. The

allowed to accord a "reasonable time" in the circumstances presented.

40. *Id.* § 617.3(j).

41. See, e.g., *Town of Henrietta v. Department of Env'tl. Conservation*, 76 A.D.2d 215, 430 N.Y.S.2d 440 (4th Dep't 1980). See also DEC/GEIS, *supra* note 18, at 6-7.

42. A conditioned negative declaration is one of the major innovations of the revised regulations. For a discussion of this concept, see, *infra*, text accompanying notes 119-32.

43. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.3(b) (1987).

44. See DEC/GEIS, *supra* note 18, at 6-8.

45. *Id.* at 7.

46. *Id.*

revised regulations observe that "actions commonly consist of a set of activities or steps," and direct that "[t]he entire set of activities or steps shall be considered the action, whether the agency decisionmaking relates to the action as a whole or to only a part of it."⁴⁷ However, the regulations also state that for any one project requiring SEQRA review, only one EIS generally need be prepared, even where the project has multiple phases or parts, so long as each is adequately addressed in the EIS with sufficient detail to analyze the environmental effects.⁴⁸ Absent compelling reasons to the contrary, it is impermissible to conduct a SEQRA review focusing only on a portion of the action.⁴⁹ This approach, called "segmentation,"⁵⁰ is prohibited because by looking only at a single piece or phase of a project, the full implications and impact of the project will plainly tend to be understated.

2. *Inter-Agency Coordination and Cooperation*

Besides addressing certain basic, over-arching concepts, the initial substantive section of the regulations deals with the complicated matter of the relationships among different governmental agencies. It is often the case that more than one agency has responsibility for all or part of the action under review. The regulations note that SEQRA does not change the established jurisdiction of these agencies. Rather, the statute allows *all* involved agencies, at the conclusion of SEQRA review, to impose substantive conditions on an action.⁵¹ This

47. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.3(k) (1987).

48. *Id.* § 617.3(k)(2). The regulations note that in certain circumstances, two or more related actions, which alone would not have a significant effect, might have such an effect when considered cumulatively. *Id.* § 617.11(a)(11). In such a case, they should be reviewed together. *And see, infra*, text accompanying notes 204-13.

49. The regulations state that the "[c]onsider[ation] [of] only a part or segment of an action is contrary to the intent of SEQR[A]. . . . Related actions should be identified and discussed to the fullest extent possible." N.Y. Comp. Codes Rules & Regs. tit. 6, § 617.3(k)(1) (1986).

50. Segmentation is defined as "the division of the environmental review of an action such that various activities or stages are addressed under this Part as though they were independent, unrelated activities, needing individual determinations of significance." *Id.* § 617.2(gg).

51. N.Y. Comp. Codes. R. & Regs. tit. 6, § 617.3(b) (1987). *See* N.Y. Eenvtl. Con-

provision is notable in providing that any agency with jurisdiction, including agencies not functioning as the "lead agency,"⁵² can impose affirmative mitigation requirements as long as they are "practicable and reasonably related to the impacts identified in the EIS or the conditioned negative declaration."⁵³

In furtherance of inter-agency coordination, all involved agencies are required to communicate extensively with each other and to cooperate in the course of SEQRA review.⁵⁴ The lead agency must make every effort to consult with applicants, other agencies and the public early in the process to identify issues of concern.⁵⁵ Every agency involved in the proposed action is charged with the responsibility to provide input to the lead agency at all phases of the process: the determination of significance, scoping, and public comment on the EIS.⁵⁶ "Interested agencies"⁵⁷ are strongly encouraged similarly to contribute in their areas of expertise.⁵⁸

B. *Getting Started: Initial Review and Selection of the Lead Agency*

The first steps in the SEQRA review process follow logi-

serv. Law § 8-0109(8) (McKinney 1984). See also P. Weinberg, *commentary*, N.Y. Envtl. Conserv. Law § C8-0109:2 (McKinney 1984).

52. A lead agency is defined as "an involved agency principally responsible for carrying out, funding or approving an action." N.Y. Comp. Codes R. & Regs. tit. 6, § 617.2(v) (1987).

53. *Id.* § 617.3(b). As a matter of practice, agencies generally restrict their comments to matters within their areas of expertise. It is questionable whether a traffic or transportation agency, for example, could impose mitigation measures relating to preservation of water quality.

54. *Id.* § 617.3(g)-(i).

55. *Id.* § 617.3(g). "Early consultations initiated by agencies can serve to narrow issues of significance and to identify areas of controversy relating to environmental issues, thereby focusing the issues requiring in-depth analysis in an EIS." *Id.*

56. *Id.* § 617.3(i).

57. An interested agency is "an agency that lacks the jurisdiction to fund, approve or directly undertake an action but wishes to participate in the review process because of its specific expertise or concern about the proposed action." *Id.* § 617.2(u). It "has the same ability to participate in the review process as a member of the public." *Id.*

58. *Id.* § 617.3(i).

cally from the general principles discussed above. At the outset, there must be a determination as to whether an action may have a significant effect on the environment, and, if so, which agency will take the lead in assuring compliance with the Act.

1. *Initial Review of Actions*

An agency must focus on the SEQRA implications of any new proposal “[a]s early as possible in [its] formulation of an action it proposes to undertake, or as soon as [it] receives an application for a funding or approval action.”⁵⁹ The regulations set out a logical check list or “decision tree.” First, there must be a determination whether the action is exempt, excluded or a Type II action, in which case SEQRA is inapplicable and no further consideration need be given.⁶⁰ Second, it is necessary to consider whether a federal agency may be involved in the action.⁶¹ If so, the regulations set forth guidelines for the manner and extent to which an EIS prepared pursuant to the National Environmental Policy Act (NEPA)⁶² may suffice to fulfill the requirements of SEQRA.⁶³ The agency must also consider whether the action might involve other state agencies,⁶⁴ so that coordination and cooperation among all involved and interested agencies and appropriate selection of a lead agency may be accomplished.

Based upon information then available and the thresholds established by the regulations, a preliminary classification of the action as Type I or unlisted must be made.⁶⁵ The agency must also decide whether to require the full or short Environmental Assessment Form (EAF).⁶⁶ Finally, state agen-

59. *Id.* § 617.5(a).

60. *Id.* § 617.5(a)(1).

61. *Id.* § 617.5(a)(2).

62. 42 U.S.C. §§ 4321-70a (1982 & Supp. III 1985).

63. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.16 (1987). *See, infra*, text accompanying notes 172-75.

64. N.Y. Comp. Codes Rules & Regs. tit 6, § 617.5(a)(3) (1987).

65. *Id.* § 617.5(a)(4).

66. *Id.* § 617.5(a)(5). The full and short EAFs are appended to the regulations, along with other forms provided as models “which may be used to satisfy this Part.”

cies are directed to consider whether the action is located in a coastal area.⁶⁷ If it is, the provisions of the Coastal Zone Management Program⁶⁸ come into play.

Id. § 617.21. Other forms appended to the regulations include: a Scoping Checklist; a Notice of Completion of Draft EIS with and without a Notice of SEQRA Hearing; and a model Findings Statement.

The EAFs are widely used to provide the information upon which initial determinations of significance are based. The full EAF is a thirteen page document that requires considerably more detail than required by the short form, which is a two page document. The regulations expressly require that a full EAF be used to ascertain the significance of all Type I actions, unless a draft EIS has been prepared and submitted on the action by the project sponsor. *Id.* § 617.5(b). Similarly, the short form EAF is generally to be used for unlisted actions. *Id.* § 617.5(c). In this case, however, agencies are granted discretion to require the full EAF if necessary to obtain enough information to make a determination of significance. *Id.*

It is worth noting with regard to the short and long form EAF that these forms provide the framework, largely in fill-in-the-blank format, for complete SEQRA review in the vast majority of projects. The only assured significance of categorizing a project as Type I is that it must be reviewed for a positive or negative declaration on the long form EAF. *Id.* § 617.5(b).

As a practical matter, such forms are no doubt essential to the SEQRA program. It is imperative, however, that those charged with reviewing and evaluating these submissions do so with a critical and inquiring perspective. It is extremely easy to succumb to the temptation of accepting wholesale simple answers to such general questions posed in the short form EAF as: "Could action result in any adverse effects associated with . . . a community's existing plans or goals;" or "with . . . other impacts." The purpose of SEQRA will not be fulfilled unless responses to all such queries are reviewed by persons sufficiently knowledgeable about the issues and, often, the locality to be able accurately to assess the quality of the responses; and unless, where the responses are inadequate, supplementation is required.

67. *Id.* § 617.5(d).

68. Under encouragement from the federal government, (*see* the Coastal Zone Management Act, 16 U.S.C. §§ 1451-64 (1982 & Supp. IV 1986)), New York enacted the Waterfront Revitalization and Coastal Resources Act, N.Y. Exec. Law §§ 910-20 (McKinney 1982 & Supp. 1988). The New York Department of State (DOS) has promulgated regulations pursuant to authority granted within this act. N.Y. Comp. Codes R. & Regs. tit. 19, §§ 600.1-.5 (1984). In short, this regulatory scheme establishes policies and procedures designed to protect the state's coastal areas. DOS has articulated a number of policies regarding the management of coastal areas. *See id.* § 600.5; and U.S. Dep't of Commerce, State of New York Coastal Management Program and Final Environmental Impact Statement (1986). In addition, localities are encouraged to adopt Waterfront Revitalization Programs. State agency actions must be reviewed for consistency with these policies. *See, infra*, text accompanying notes 170, 171 & 193.

2. *Establishment of the Lead Agency*

The basic guidelines for determining lead agency status are straightforward. Where only one agency is involved, there is no decision to be made, and the regulations simply specify the time period within which a determination of significance must take place.⁶⁹ If the agency itself is directly undertaking the action, it must determine the significance "as early as possible in the design and formulation of the action."⁷⁰ If, on the other hand, the agency is acting on an application for funding or approval, it must determine the significance of the action within twenty calendar days of the receipt of the application, the EAF, and any other required information.⁷¹

Where more than one agency is involved, there must be a determination of lead agency status prior to the determination of significance.⁷² For all Type I actions, and for unlisted actions undergoing coordinated review with other agencies, any agency that receives an application for funding or approval or that proposes directly to undertake the action must "as soon as possible" circulate the EAF or draft EIS and other relevant documents to all involved agencies. A lead agency must be agreed upon within thirty calendar days of this distribution.⁷³

Once the lead agency has been established, it must promptly notify the applicant and all involved agencies.⁷⁴ The lead agency must then make a determination of significance within twenty calendar days after its establishment or after its

69. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.6(a) (1987).

70. *Id.* § 617.6(a)(1)(i).

71. *Id.* § 617.6(a)(1)(ii).

72. *Id.* § 617.6(b)(1).

73. *Id.* § 617.6(c)(1). The revised regulations provide no explicit criteria for the selection or designation of a lead agency in the absence of a dispute among potential lead agencies. In this respect, the prior regulations provided greater guidance. They expressly stated that the choice of lead agency should be guided by the same criteria that govern the result where a dispute arises as to the proper lead agency. N.Y. Comp. Codes Rules & Regs. tit. 6, § 617.6(d) (1978). The failure to preserve this guidance in the revised regulations creates an ambiguity of potential significance. *See, e.g., infra*, note 85.

74. N.Y. Comp. Codes Rules & Regs. tit. 6, § 617.6(b)(2) (1987).

receipt of all reasonably necessary information.⁷⁵

With regard to unlisted actions that involve more than one agency, each agency receiving an application for approval must make a determination of significance before granting any authorizations.⁷⁶ If any agency determines that the unlisted action may have a significant impact on the environment, then a lead agency must be identified and a coordinated determination of significance made in accordance with the procedures described above.⁷⁷ Even if an agency determines that the unlisted action will not have a significant impact on the environment, the coordinated review provisions can nevertheless be undertaken.⁷⁸ If these procedures are not undertaken, each involved agency is required to make its own determination of significance, in effect functioning as a separate lead agency.⁷⁹ In such circumstances, before any agency makes a final decision on a project approval, its negative declaration is subject to being superceded by a positive declaration issued by any other involved agency.⁸⁰

The regulations provide that in certain circumstances the lead agency may be changed or "re-established" in the course of the SEQRA process.⁸¹ This is allowed by consent among all involved agencies where a supplement to a generic or final EIS is being prepared, where the original lead agency's jurisdictional basis has for some reason disappeared, or simply by the consent of all involved agencies *and* the applicant.⁸²

75. *Id.* § 617.6(c)(2).

76. *Id.* § 617.6(d)(1).

77. *Id.* § 617.6(d)(2).

78. *Id.* § 617.6(d)(3).

79. *Id.*

80. *Id.* The regulations provide no standard regarding the circumstances in which coordinated review should be required or utilized where it is optional. Apparently, any involved agency has the power to require a coordinated review. Coordinated review should be assumed to be the rule, rather than the exception. It avoids the arbitrary and unsatisfactory possibility that if one agency reaches a point of final decision on an action it has determined to have no possible significant environmental effect, a second agency would be precluded from making a contrary determination.

81. *Id.* § 617.6(f)(1).

82. *Id.* Disputes concerning re-establishment are subject to the general dispute resolution procedures set forth in section 617.6(e). *Id.* § 617.6(f)(2). Notice of re-establishment must be given to the applicant within ten days. *Id.* § 617.6(f)(3).

3. *Dispute Resolution Mechanisms*

In the event that involved agencies cannot agree upon which will serve as lead within the requisite thirty day period, any one of them or the project applicant may request the Commissioner of DEC to designate the lead agency.⁸³ The Commissioner shall then designate the lead agency within twenty days after receipt of all relevant information, and after an opportunity for any involved agency or the applicant to comment on the issue.⁸⁴ The regulations provide explicit guidance on the standards by which this designation should be made which can be summarized as follows: (1) a local agency should be the lead agency in an action of primarily local significance; (2) the agency with the broadest governmental powers to investigate the environmental impact should be the lead agency; and (3) the agency capable of providing the most thorough environmental assessment should be lead agency.⁸⁵

The regulations require any agency that would contest the designation of another as lead to act promptly. If an agency receives timely notice of another agency's determination of significance, it must object pursuant to the dispute resolution provisions or forego the right at a later time to require that an EIS be prepared.⁸⁶

83. *Id.* § 617.6(e)(1).

84. *Id.* § 617.6(e)(4). Involved agencies must submit comments within ten days of the Commissioner's receipt of the request. *Id.* § 617.6(e)(3).

85. *Id.* § 617.6(e)(5). Although the regulations, as revised, do not explicitly say so, an argument can be made that the same criteria ought to guide determinations of lead agency status reached by mutual agreement among involved agencies. The prior regulations so provided. *See, supra*, note 73. The criteria articulate logical principles by which to determine the agency most appropriately charged with prime responsibility for SEQRA review. By failing expressly to apply these or any other criteria to undisputed lead agency determinations, the regulations provide no guidance at all and arguably grant unfettered discretion to mutually agreed upon lead agency designations. Such broad latitude, if it is found to exist, may provide a positive element of flexibility to the regulatory process; but it also opens the door to abuses such as, for example, where agencies deliberately designate a state lead in order to avoid more stringent, but more clearly applicable, standards set by a local regulatory scheme.

86. N.Y. Comp. Codes Rules & Regs. tit. 6, § 617.3(h) (1987).

C. *Determining Significance*

Once established, the lead agency's first responsibility is to make a determination of the significance of an action's impact on the environment.⁸⁷ This, obviously, is a decision of fundamental importance. A positive determination of significance will require that a full EIS be prepared. A negative declaration, a determination that there will be no significant effect, will terminate SEQRA review.

1. *General Principles - The "Hard Look" Test*

An EIS cannot be required unless the agency determines that the action includes potential for at least one significant environmental effect.⁸⁸ Conversely, to determine that an EIS will not be required, the lead agency must ascertain that there will in fact be no environmental effect, or that the identified environmental effects will not be significant.⁸⁹ All determinations of significance must be documented "in writing."⁹⁰

To make a determination of significance, the lead agency must consider the entire project and review the information provided on the EAF and any other relevant information against the criteria of significance set forth in the regulations.⁹¹ In this process, the agency must identify all relevant areas of concern, thoroughly analyze the issues, and set forth its findings in writing with a "reasoned elaboration" and "reference to supporting documentation."⁹²

The provisions described above represent a totally new addition to the regulations, reflecting an effort by DEC to codify in the regulations criteria articulated and widely applied in case law, often referred to as the "hard look" test.⁹³ It

87. *Id.* § 617.6(g).

88. *Id.* § 617.6(g)(1)(i). Note that there is no requirement that the environmental effect be adverse. An EIS can be required where *any* significant environmental effect is anticipated.

89. *Id.* § 617.6(g)(1)(ii).

90. *Id.* § 617.6(g)(1).

91. *Id.* § 617.11. See, *infra*, text accompanying notes 95-101.

92. N.Y. Comp. Codes Rules & Regs. tit. 6, § 617.6(g)(2)(i)-(iv) (1987).

93. DEC/GEIS, *supra* note 18, at 18. See, *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 494 N.E.2d 429, 503 N.Y.S.2d 298 (1986); *Aldrich v. Patti-*

is important to bear in mind, as now explicitly stated in section 617.6(g), that this is not only the standard by which full SEQRA review of an EIS is to be judged; it is also the standard that must be met and documented in writing in every negative declaration.⁹⁴

2. Criteria For Determining Significance

In addition to articulating broad general principles, the regulations provide specific criteria to be used by the lead agency in determining whether any proposed Type I or unlisted action may have a significant effect on the environment.⁹⁵ The impacts expected to result from a proposed action must be measured against these criteria.⁹⁶ The list provided in this section is specifically stated to be "illustrative, not exhaustive."⁹⁷ In addition, agencies are permitted to

son, 107 A.D.2d 258, 486 N.Y.S.2d 23 (2d Dep't 1985); *H.O.M.E.S. v. New York State Urban Dev. Corp.*, 69 A.D.2d 222, 418 N.Y.S.2d 827 (4th Dep't 1979).

94. *See e.g.*, *Chinese Staff & Workers Ass'n v. City of New York*, 68 N.Y.2d 359, 502 N.E.2d 176, 509 N.Y.S.2d 499 (1986); *Tehan v. Scrivani*, 97 A.D.2d 769, 468 N.Y.S.2d 402 (2d Dept. 1983); and *H.O.M.E.S. v. New York State Urban Dev. Corp.*, 69 A.D.2d 222, 418 N.Y.S.2d 827 (4th Dep't 1979). The regulations require that a negative declaration be rescinded if at any time prior to final action or approval the lead agency determines that there may be a significant environmental effect, or if there is a change in circumstances. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.6(i) (1987).

95. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.11 (1987).

96. *Id.* § 617.6(g)(2)(ii).

97. *Id.* § 617.11(a). The section sets forth eleven factors identified by DEC to be "indicators of significant effects on the environment:

- (1) a substantial adverse change in existing air quality, ground or surface water quality or quantity, traffic or noise levels; a substantial increase in solid waste production; a substantial increase in potential for erosion, flooding, leaching or drainage problems;
- (2) the removal or destruction of large quantities of vegetation or fauna; substantial interference with the movement of any resident or migratory fish or wildlife species; impacts on a significant habitat areas; substantial adverse effect on a threatened or endangered species of animal or plant, or the habitat of such a species; or other significant adverse effects to natural resources;
- (3) the encouraging or attracting of a large number of people to a place or places for more than a few days, compared to the number of people who had come to such place absent the action;
- (4) the creation of a material conflict with a community's current plans or goals as officially approved or adopted;

develop their own criteria to assist in determining significance, so long as such criteria are adopted in accordance with specified procedures.⁹⁸

In applying the listed criteria, the lead agency is specifically instructed to consider "reasonably related long-term, short-term and cumulative effects" of any simultaneous or subsequent action.⁹⁹ Reasonably related actions include those actions contemplated in a long range plan of which the proposed action is a part; those actions which are likely to be undertaken as a result of the proposed action; or those actions which are dependent upon the proposed action.¹⁰⁰ The significance of any likely consequence of an action must be assessed in connection with its setting, its probability of occurrence, its duration, its irreversibility, its geographic scope, its magnitude, and the number of people it affects.¹⁰¹

(5) the impairment of the character or quality of important historical, archaeological, architectural or aesthetic resources or of existing community or neighborhood character;

(6) a major change in the use of either the quantity or type of energy;

(7) the creation of a hazard to human health;

(8) a substantial change in the use, or intensity of use, of land including agricultural, open space or recreational resources, or in its capacity to support existing uses;

(9) the creation of a material demand for other actions which would result in one of the above consequences;

(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 effect 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 in this section.

Id.

98. *Id.* § 617.11(a). Of course, any such additional criteria must be no less protective of the environment. *Id.* § 617.4(b).

99. *Id.* § 617.11(b). See *Save the Pine Bush, Inc. v. City of Albany*, 70 N.Y.2d 193, 512 N.E.2d 526, 518 N.Y.S.2d 943 (1987).

100. N.Y. Comp. Codes Rules & Regs. tit. 6, § 617.11(b) (1987).

101. *Id.* § 617.11(c).

3. *Type I Actions, Type II Actions and Critical Environmental Areas*

In addition to the general criteria discussed above, the regulations provide two lists of actions, classified as Type I and Type II, that play an important role in assessing the significance of an action, or, in the case of the Type II list, the applicability of SEQRA to the action under consideration. Additionally, the regulations allow localities to designate areas of critical environmental importance or sensitivity, and thus create a presumption in favor of a more searching SEQRA review for any action proposed within its bounds.

a. *Type I Actions*

The list of Type I actions set forth in the regulations is of critical importance.¹⁰² Any action falling within the parame-

102. *Id.* § 617.12(b) provides:

The following actions are Type I if they are to be directly undertaken, funded or approved by an agency:

- (1) the adoption of a municipality's land use plan, the adoption by any agency of a comprehensive resource management plan or the initial adoption of a municipality's comprehensive zoning regulations;
- (2) the adoption of changes in the allowable uses within any zoning district, affecting 25 or more acres;
- (3) the granting of a zoning change, at the request of an applicant, for an action that meets or exceeds one or more of the thresholds given elsewhere in this list;
- (4) the acquisition, sale, lease, annexation or other transfer of 100 or more contiguous acres of land by a State or local agency;
- (5) construction of new residential units which meet or exceed the following thresholds:
 - (i) 10 units in municipalities which have not adopted zoning or subdivision regulations;
 - (ii) 50 units not to be connected (at commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works;
 - (iii) in a city, town or village having a population of less than 150,000: 250 units to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works;
 - (iv) in a city, town or village having a population of greater than 150,000 but less than 1,000,000: 1,000 units to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works; or

ters described in the Type I list is deemed more likely to require the preparation of an EIS than so-called unlisted actions.¹⁰³ Although the list does not purport to be exhaustive, if an action or project does fit within the descriptions of this

(v) in a city, town or village having a population of greater than 1,000,000: 2,500 units to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works;

(6) activities, other than the construction of residential facilities, which meet or exceed any of the following thresholds; or the expansion of existing non-residential facilities by more than 50 percent of any of the following thresholds:

(i) a project or action which involves the physical alteration of 10 acres;

(ii) a project or action which would use ground or surface water in excess of 2,000,000 gallons per day;

(iii) parking for 1,000 vehicles;

(iv) in a city, town or village having a population of 150,000 persons or less: a facility with more than 100,000 square feet of gross floor area;

(v) in a city, town or village having a population of more than 150,000 persons: a facility with more than 240,000 square feet of gross floor area;

(7) any structure exceeding 100 feet above original ground level in a locality without any zoning regulation pertaining to height;

(8) any non-agricultural use occurring wholly or partially within an agricultural district (certified pursuant to Agriculture and Markets law, article 25, section 303 and 304) which exceeds 25 percent of any threshold established in this section;

(9) any Unlisted action (unless the action is designed for the preservation of the facility or site) occurring wholly or partially within, or substantially contiguous to, any historic building, structure, facility, site or district or prehistoric site that is listed on the National Register of Historic Places, or that has been proposed by the New York State Board on Historic Preservation for a recommendation to the State Historic Preservation Officer for nomination for inclusion in said National Register, or that is listed on the State Register of Historic Places (The National Register of Historic Places is established by 36 Code of Federal Regulation (C.F.R.) Parts 60 and 63, 1986 (see section 617.19 of this Part).);

(10) any Unlisted action, which exceeds 25 percent of any threshold in this section, occurring wholly or partially within or substantially contiguous to any publicly owned or operated parkland, recreation area or designated open space, including any site on the Register of National Natural Landmarks pursuant to 36 C.F.R. Part 62, 1986 (see section 617.19 of this Part);

(11) any Unlisted action which exceeds a Type I threshold established by an involved agency pursuant to section 617.4 of this Part; or

(12) any Unlisted action which takes place wholly or partially within or substantially contiguous to any critical environmental area designated by a local or state agency pursuant to section 617.4(h) of this Part.

103. *Id.* § 617.12(a).

section, there is a presumption that it is likely to have a significant effect and require an EIS.¹⁰⁴ Determinations of significance in any particular case must, of course, be based upon comparisons of the impact of the proposal with the general criteria listed in section 617.11.¹⁰⁵

Additionally, it is important to note that agencies are allowed to adopt their own list of Type I actions.¹⁰⁶ In so doing they may adjust thresholds to make the list more inclusive, with the only explicit limit being that an agency may not designate as Type I an action that has been defined as Type II in the succeeding section.¹⁰⁷

b. *Critical Environmental Areas*

The regulations provide a tool by which localities can, without the formality of publishing their own Type I lists, insure the same level of scrutiny for actions proposed within areas of known environmental sensitivity. Specifically, there is a formal procedure for the designation of Critical Environmental Areas (CEA's).¹⁰⁸ Public notice and a hearing are required

104. *Id.* § 617.12(a)(1).

105. *Id.* Both positive and negative declarations on Type I actions must be maintained on file readily accessible to the public by each agency. They must state that they have been prepared in accordance with the statute, indicate agencies and individuals from whom further information can be obtained, and set forth the determination and documentation required by the regulations. Notice must then be published in the Environmental Notice Bulletin (ENB), a bi-weekly DEC publication. See N.Y. Envtl. Conserv. Law § 3-0306(4) (McKinney 1984). They must be filed, at a minimum, with the Commissioner of DEC, the Regional DEC office, the Chief Executive of the political subdivision involved, the lead agency, the applicant, and any other involved agency. N.Y. Comp. Codes R. & Regs. tit. 6, §§ 617.10(a), (b) (1987).

Similar notice and filing requirements apply to all other significant steps in the SEQRA process, the acceptance of a draft or final EIS, and the conduct of a hearing, in order to insure full public access and input. *Id.* § 617.10(c), (e) & (f). In addition, all draft and final EIS's must be made available to the public. *Id.* § 617.10(d) & (g).

106. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.12(a)(2) (1987).

107. *Id.*

108. *Id.* § 617.4(h). To be designated a CEA, an area must have an exceptional or unique character with regard to one or more of the following factors:

- (i) a benefit or threat to human health;
- (ii) a natural setting (e.g. fish and wildlife habitat, forest and vegetation, open space and areas of important aesthetic or scenic quality);
- (iii) social, cultural, historic, archeological, recreational, or educational values;

prior to designation.¹⁰⁹ Notification of the designation must be filed with the Commissioner of DEC and other appropriate officials and published in the Environmental Notice Bulletin (ENB).¹¹⁰ Once designated, any action within a CEA is subject to review as though it were a Type I action.¹¹¹

It is worth noting that the only assured result of CEA designation is, as with other Type I actions, that a long form EAF must be utilized in making the initial determination of significance.¹¹² There is no assurance that an EIS will be required.¹¹³ It should also be noted that the regulations contemplate that the state may designate CEA's with respect to state owned or managed lands.¹¹⁴

c. *Type II Actions*

Actions described on the Type II list are conclusively declared not to require an environmental impact statement, an environmental assessment review, or a negative declaration.¹¹⁵ In effect, Type II actions are not subject to SEQRA. The list of Type II actions set forth in the regulations is binding on all agencies, although other agencies can create their own list of additional Type II actions.¹¹⁶

The list is a regulatory articulation and expansion of statutory provisions specifically excluding from actions subject to SEQRA such matters as enforcement proceedings, official ministerial acts involving no exercise of discretion, and maintenance or repair activities involving no substantial change to

or

(iv) an inherent ecological, geological or hydrological sensitivity to change which may be adversely affected by any change.

Id. § 617.4(h)(1).

109. *Id.* § 617.4(h).

110. *Id.* § 617.4(h)(2) & (3).

111. *Id.* §§ 617.4(h), 617.12(b)(12).

112. *Id.* § 617.5(b).

113. *Id.* § 617.12(a).

114. *Id.* § 617.4(h).

115. *Id.* § 617.13(a).

116. *Id.* § 617.13(b). They cannot, of course, designate as Type II any action that is on the DEC Regulations' list of Type I actions, since to do so would be less protective of the environment. *Id.* § 617.13(c).

existing structures or facilities.¹¹⁷ As noted earlier, whether or not an action is Type II is considered at the very outset of SEQRA review, and if an action is determined to be a Type II, all SEQRA review activities will cease.¹¹⁸

4. *Conditioned Negative Declarations*

As part of the effort to streamline the SEQRA process, the 1987 amendments add the concept of the conditioned negative declaration (CND).¹¹⁹ The idea is simple. For a limited class of actions, the lead agency has the option to determine that there will be no significant impact if, but only if, certain mitigating measures are required of the project sponsor.¹²⁰

CNDs are available in limited circumstances. They may only be considered for unlisted actions involving an applicant.¹²¹ Thus, they are not available for any Type I action, nor for any unlisted action which arises on the initiative of an agency directly proposing to undertake a project. A full EAF, as opposed to a short form, must be prepared,¹²² coordinated review must be completed,¹²³ and the lead agency must determine that the substantive conditions imposed upon the project can eliminate or adequately mitigate all significant impacts.¹²⁴ Notice of the CND setting forth the conditions imposed must be published in the ENB.¹²⁵

117. N.Y. Envtl. Conserv. Law § 8-0105(5) (McKinney 1984). The regulations set forth a long list of common governmental activities such as: replacement of a facility on the same site that does not meet any of the Type I thresholds; granting individual setback or lot line variances; paving existing highways without adding to the travel lanes; opening streets to repair and maintain existing utilities; other maintenance or management practices; inspection and licensing activities; purchases and sales of furnishings and equipment or supplies (with specified exceptions); collective bargaining; license, lease or permit renewals; and information gathering activities. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.13(d) (1987).

118. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.13(a) (1987).

119. *Id.* § 617.6(h). While new to the SEQRA regulations, the CND has been in use elsewhere for some time. *See, e.g.* CEQR, N.Y. City Exec. Order 91 (1977).

120. N.Y. Comp. Codes Rules & Regs. tit. 6, § 617.6(h)(1)(iii) (1987).

121. *Id.* § 617.6(h)(1).

122. *Id.* § 617.6(h)(1)(i).

123. *Id.* § 617.6(h)(1)(ii).

124. *Id.* § 617.6(h)(1)(iii).

125. *Id.* § 617.6(h)(1)(iv). Like a positive or negative declaration, a CND must

After all of the above procedures have been accomplished, a draft EIS will be required if comments are received regarding previously identified or newly raised significant environmental impacts, or regarding the adequacy of the proposed mitigation measures, that would be sufficient to support a positive declaration.¹²⁶ Similarly, a draft EIS will be required if requested by the applicant.¹²⁷

The CND is arguably a modification of procedure beyond the statutory authority of SEQRA.¹²⁸ Under SEQRA, once it is determined that an action may have a significant environmental effect, an EIS would appear to be mandated.¹²⁹ The CND allows a full SEQRA review to be aborted on the basis of information in the long-form EAF and other documents, a review falling far short of an EIS.¹³⁰ The DEC has noted that the CND provision is being introduced on an experimental basis; its use will be monitored and the agency will consider changing or eliminating the procedure if "abuses become apparent."¹³¹ The DEC has also suggested that any conditions imposed are permanent and that it contemplates that a proceeding to enforce the conditions could be brought, where necessary.¹³²

state that it has been prepared in accordance with the statute, indicate agencies and individuals from whom further information can be obtained, and set forth the determination and documentation required by the regulations. It must be filed with the Commissioner of DEC, the Regional DEC office, the Chief Executive of the political subdivision involved, the lead agency, the applicant, and any other involved agency. A CND must be maintained on file, readily accessible to the public. *Id.* 617.10(a)(1).

126. *Id.* § 617.6(h)(2).

127. *Id.* § 617.6(h)(3).

128. See DEC/GEIS, *supra* note 18, at 19.

129. N.Y. Env'tl. Conserv. Law § 8-0109(2) (McKinney 1984).

130. While the CND may present troubling theoretical problems, it has great practical appeal. Where a project would qualify for a negative declaration but for one or a few readily ascertainable aspects as to which adequate mitigation measures are relatively apparent, it is arguably wasteful to require an EIS. The CND provides a short circuit to the expensive and lengthy EIS process in circumstances where the cost of doing one may be thought to outweigh the benefits. Proponents of the CND point out that if it were not an option in situations where it is available, the project proponent could avoid doing an EIS another way. The application could simply be withdrawn and a revised proposal submitted that includes the mitigation measures.

131. DEC/GEIS, *supra* note 18, at 19-20.

132. *Id.* at 19.

This provision provides a good example of the way in which the regulations may broaden the power of agencies beyond their traditional jurisdiction. It also may provide citizens groups or others with a form of action under SEQRA to enforce a condition imposed under a CND, even after a project is under way, or perhaps even after it is completed.

D. *Environmental Impact Statement Procedures*

For the majority of actions, SEQRA review will stop with the issuance of a negative declaration or a CND. However, for those actions that receive a positive declaration, the procedures described to this point are merely preliminary. Having been determined to carry the possibility of significant environmental effect, such actions must become the subject of a full EIS.

1. *Scoping*

Upon determining that an action may have a significant impact on the environment and that an EIS will be required, the question arises as to how the scope and content of the EIS will be defined. While both the statute and the regulations provide general guidance, it is obviously impossible to anticipate the needs of every action or project at that level of generality. Accordingly, the regulations provide for a formal "scoping" procedure, which is optional, whereby the lead agency, the applicant and other interested parties can meet at the outset to identify the relevant issues to be addressed in the draft EIS.¹³³

Scoping is a flexible concept, which can occur through meetings, written exchanges, or other forms of communication among the lead agency, the applicant and involved agencies. It

133. N.Y. Comp. Code R. & Regs. tit. 6, § 617.7 (1987). This section is totally new with the 1987 amendments. While the prior regulations were silent on the point, scoping was a concept and practice in fairly wide use before the recent amendments were adopted. See, e.g., N.Y. Dep't of Env'tl. Conservation, SEQRA Handbook (Mar. 1982)(available from Dep't of Env'tl. Conservation, 50 Wolf Road, Albany, N.Y. 12233); CEQR, N.Y. City Exec. Order 91 (1977). The revised regulations attempt to regularize and provide standard guidance for the process.

can be initiated by either the lead agency or the applicant. If the lead agency wishes to initiate the procedure, it must circulate a written scope of issues to the applicant and all involved agencies within thirty calendar days after the filing of the positive declaration.¹³⁴

The extent of the scoping process and the methods for obtaining information are a function of the complexity of the project, the degree of public concern and the significance of the environmental impacts. Involved agencies are instructed to provide input into the scoping process reflecting their own areas of expertise. In addition, the lead agency has discretion to invite participation by other interested agencies and even the public.¹³⁵

Where scoping has taken place, the lead agency must identify each issue as specifically as possible to the preparer of the EIS. However, the agency is not bound by the terms of the scoping document developed as a result of this process. If the agency later determines that other issues not included on the original list should be addressed, it must simply prepare and circulate a written statement explaining the basis for this conclusion.¹³⁶

Scoping is intended to provide for more than a laundry list of issues. Where utilized, it "should identify the extent and quality of information needed . . . to properly address each concern."¹³⁷ In practice, scoping sessions can be of critical importance in establishing agreement at the outset between the preparer of the DEIS and the lead agency on such crucial matters as the nature, extent and depth of data to be generated and the methodologies to be employed in the analysis. Failure to resolve such issues early on can lead to extensive and costly delays in redoing portions of a preliminary

134. N.Y. Comp. Codes Rules & Regs. tit. 6, § 617.7(a) (1987).

135. *Id.* § 617.7(b). Under the National Environmental Policy Act (NEPA) regulations, public participation in the scoping process is mandatory. 40 C.F.R. 1501.7 (1987).

136. N.Y. Comp. Codes Rules & Regs. tit. 6, § 617.7(c) (1987). Annexed to the revised regulations as Appendix D is a scoping checklist, which provides a convenient point of reference in the scoping process. *Id.* § 617.21.

137. *Id.* § 617.7(d).

DEIS prior to certification. Scoping can also be useful in eliminating certain issues from review and in identifying the often vital questions of what alternatives to the proposed action will be discussed, and how and to what extent comparative data and analysis regarding those alternatives will be provided.¹³⁸

2. *Time Periods for Preparation and Review of the EIS*

Following issuance of a positive declaration and the scoping process, if utilized, the draft, and then the final EIS must be prepared. The draft EIS may be prepared by the applicant, if any, or, at the option of the applicant, by the lead agency. However, if the applicant chooses not to prepare the EIS, the lead agency has the choice to prepare the EIS itself, to cause the EIS to be prepared, or to terminate its review of the action.¹³⁹

When the applicant prepares the EIS, it must submit a draft to the lead agency, which then has thirty days to determine whether or not to accept the draft as satisfactory in scope and content, sufficient to allow public review.¹⁴⁰ This

138. *Id.*

139. *Id.* § 617.8(a). Section 617.17 provides guidelines for the imposition of fees and costs by a lead agency for the oversight or the preparation of the EIS. For residential projects, the fee cannot exceed two percent of the total project cost. *Id.* § 617.17(b). For non-residential construction projects or projects involving the extraction of minerals, the fee may not exceed one half of one percent of the total project costs. *Id.* § 617.17(c) & (d). A dispute resolution mechanism is provided for situations where an applicant chooses to contest a fee. Such matters are to be resolved by the chief fiscal officer of the lead agency or his designate. *Id.* § 617.17(f). Although such proceedings are not to interfere with or delay the EIS process or the action at issue, presumably the decision of the chief fiscal officer is subject to Article 78 review. The DEC's schedule of fees and costs for reviewing or preparing an EIS is set forth in Section 618.1. N.Y. Comp. Codes R. & Regs. tit. 6, § 618.1 (1988).

140. *Id.* § 617.8(b)(1). The lead agency may receive an additional thirty days to review the draft upon written notice to the applicant. *Id.* § 617.8(b)(2). If the lead agency determines that the draft is inadequate, it must identify the inadequacies in writing for the applicant. *Id.* § 617.8(b)(3). The lead agency is again given a thirty day period to determine the adequacy of a resubmitted draft. *Id.* § 617.8(b)(4).

These time limits were added in the 1987 revisions in response to a perceived problem with lack of timely review and to decisional law requiring an act of "acceptance" by the lead agency. See DEC/GEIS, *supra* note 18, at 24-25; *East Clinton Developers, Inc. v. Town of Clinton*, 88 A.D.2d 416, 453 N.Y.S.2d 763 (2d Dep't 1982). In practice, these deadlines prove somewhat "soft," if not chimerical. There is usually

determination is to be based upon the written scope of issues, if one was prepared, and the substantive outline regarding the preparation and content of an EIS provided in the regulations at section 617.14.¹⁴¹

When the DEIS has been prepared by the lead agency, or if submitted by the applicant when it has been determined to be sufficient, the lead agency files a notice of completion.¹⁴² This filing begins the public comment period, which can be no less than thirty days in length.¹⁴³ The lead agency must also, at this juncture, determine whether or not a public hearing is in order.¹⁴⁴ This decision is determined by the degree of inter-

an opportunity for extensive informal input to and feedback from the lead agency and other involved agencies regarding the adequacy of a draft, or portions of it, prior to its formal submission for acceptance. Thus, by the time the document is submitted, its contents have been scrutinized in some detail and the proponent should have a fairly good idea that it is at least generally in "acceptable" form. This process can take as long as is required to reach the necessary accommodations.

Moreover, the unfortunate fact is that even once documents have been formally submitted, the time limits for their review are subject to reasonably easy evasion by the lead or other reviewing agencies. An applicant hoping to obtain project approval from these agencies is rarely in a position forcefully to demand compliance with the time restrictions. Because the approvals at issue virtually always turn on the exercise of discretionary judgments on a wide range of matters, applicants generally work hard at maintaining a positive relationship with reviewing officials, and try to avoid adversarial posturing, or threats of litigation. However, these newly added time limitations will be useful in reinforcing the point that agencies do not have unbridled discretion to delay SEQRA review. *Id.* at 423, 453 N.Y.S.2d at 767. At some point, such delay should, at a minimum, give rise to *mandamus* relief.

141. For a discussion of the content of an EIS, see, *infra*, text accompanying notes 176-201.

142. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.8(c) (1987). The notice of completion must state the name and address of the lead agency, and the name and telephone number of a person who can provide further information. It must provide a brief description of the action, its location, and the nature of the potential impacts; a statement of how copies of the draft EIS can be obtained; and a statement of the time period within which comments will be requested and accepted. Such notice must be published in the ENB and filed with the Commissioner of the Department of Environmental Conservation, the DEC regional office, the chief executive officer of the political subdivision in which the action is located, and the lead agency. *Id.* § 617.10(c).

143. *Id.*

144. Notice of a public hearing must be filed in a manner similar to the notice of completion and published at least fourteen days in advance of the hearing in a newspaper of general circulation within the area effected by the action. *Id.* § 617.8(d)(1). The public hearing must be held no less than fifteen and no more than sixty days

est in the action shown by the public or other agencies, the significance of the issues raised, the adequacy of the mitigation measures, the consideration of alternatives provided in the EIS, and the extent to which a hearing is perceived as useful in the decision-making process.¹⁴⁵ Wherever possible, the SEQRA hearing is to be incorporated into existing hearing procedures that may otherwise apply to the project under review.¹⁴⁶

After a notice of completion is filed, public comments on the DEIS will be received for no less than thirty days if a hearing has not been held, or no less than ten days after a hearing.¹⁴⁷ The agency or applicant must then prepare and file a final EIS.¹⁴⁸ If, by this point in the process, the proposed action has been withdrawn, or if the DEIS and comments have led the lead agency to determine that there will not be any significant impact on the environment, an agency is given the option not to file a final EIS.¹⁴⁹ In such a case, a negative declaration must be prepared and filed.¹⁵⁰ The regulations allow for an extension of time to prepare and file a FEIS where it is necessary to do an adequate job, where problems with the proposal require reconsideration or modification, or for other good causes.¹⁵¹ Upon completion of the FEIS, a notice of completion must be filed.¹⁵²

after the filing of the notice. *Id.* § 617.8(d)(2).

145. *Id.* § 617.8(d).

146. *Id.* § 617.8(d)(2). For example, in the context of real estate development proposals, the SEQRA hearing is incorporated into the process of review and hearings on subdivision approval under N.Y. Town Law § 276 (McKinney 1987). See *Sun Beach Real Estate Dev. Corp. v. Anderson*, 98 A.D.2d 367, 469 N.Y.S.2d 964 (2d Dep't 1983), *aff'd*, 62 N.Y.2d 965, 479 N.Y.S.2d 341 (1984). In New York City, SEQRA review runs concurrent with public review and hearings under the Uniform Land Use Review Procedure (ULURP). N.Y. City Charter § 197-c (1986).

147. N.Y. Comp. Codes Rules & Regs. tit. 6, 617.8(d)(3) (1987).

148. *Id.* § 617.8(e). The FEIS must be completed within forty-five days after the close of any hearing or sixty days after the filing of a DEIS, whichever is later. *Id.*

149. *Id.* § 617.8(e)(1).

150. *Id.*

151. *Id.* § 617.8(e)(2).

152. *Id.* § 617.8(f). See *id.*, § 617.10(f) & (g).

3. Supplemental Environmental Impact Statements

The 1987 revisions provide for the first time a section that addresses the circumstances in which a supplemental EIS (SEIS) may be required.¹⁵³ The new section provides that at any time *before* the filing of a findings statement,¹⁵⁴ the lead agency can require an EIS to be supplemented with respect to specific issues not addressed or inadequately addressed. A SEIS can be required where (1) there have been changes in the proposed project that have a significant adverse effect; (2) where there is newly discovered information about significant effects that was not previously addressed; or (3) where any other change of circumstances arises that could create a significant adverse effect.¹⁵⁵ In the case of newly discovered information, the regulations articulate three considerations that are to guide the decision whether to require supplementation: the importance of the information, its probable accuracy, and the present state of information in the EIS.¹⁵⁶ Where a SEIS is required, it is "subject to the full [EIS] procedures."¹⁵⁷

The discussion of supplemental EIS procedure added by the 1987 amendments is in some respects incomplete and may well lead to more, rather than less, confusion. Although the

153. *Id.* § 617.8(g). A separate section addressing the circumstances in which supplementation may be required following a generic EIS was also added in the 1987 revisions. *Id.* § 617.15(c)(3). *See, infra*, text accompanying notes 204-10.

154. For a discussion of a findings statement, see *infra* text accompanying notes 163-71.

155. N.Y. Comp. Codes Rules & Regs. tit. 6, § 617.8(g)(1) (1987). There is a question whether the regulations' restriction of the right to require supplementation to the period prior to the filing of a findings statement is valid. There may be circumstances in which an argument for supplementation could be made — based, for example, on newly discovered information — even after the findings statement is filed, but before final approval, or perhaps even before implementation or construction of a project begins. *See E.F.S. Ventures Corp. v. Foster*, 71 N.Y.2d 359, 526 N.E.2d 1345, 520 N.Y.S.2d 56 (1988).

156. N.Y. Comp. Codes Rules & Regs. tit. 6, § 617.8(g)(2) (1987).

157. *Id.* § 617.8(g)(3). This language clearly suggests that the complete EIS review process — draft, public comment period, and final EIS — is contemplated. The DEC's response to comments in its GEIS even suggests that in some circumstances, a scoping session may be required, although it notes that there should be few circumstances in which re-establishment of the lead agency would be necessary. DEC/GEIS, *supra* note 18, at 27.

agency's commentary on this section indicates an intention to incorporate case law on the subject,¹⁵⁸ the language of the regulations fails to do so. For example, DEC evidently believed it was adopting the "implicit" holding of *Webster Associates v. Town of Webster*,¹⁵⁹ which stated that a supplemental EIS may be required where an important issue has been altogether omitted from the draft EIS, an omission that cannot be cured by including the missing analysis in the final EIS.¹⁶⁰ However, the reader will search in vain for any hint in the language of the regulations to that effect.

The concept of a supplemental EIS is potentially controversial, and can understandably be expected to set any developer's teeth on edge. Given the widespread view in the development community that SEQRA often adds lengthy delays and substantial transaction costs to the process, the specter of almost reaching the end of the process and then being told to go back and supplement a study can assume nightmarish proportions. The DEC clearly appreciates the seriousness of such a decision, and the commentary accompanying the revisions suggests that supplements will be infrequently required, and only for significant changes.¹⁶¹ Given the importance of this subject, and the somewhat unclear, but significant exhortation that any supplement "will be subject to the full procedures of this Part,"¹⁶² the DEC would do well to consider clarifying and expanding the guidance provided on this subject soon.

4. *Decision-Making and Findings Requirements*

One of the most significant statutory requirements of SEQRA is that, in deciding to carry out or approve an action that has

158. DEC/GEIS, *supra* note 18, at 27. *See, e.g., Webster Assoc. v. Town of Webster*, 59 N.Y.2d 220, 451 N.E.2d 189, 464 N.Y.S.2d 431 (1983); *Horn v. I.B.M. Corp.*, 110 A.D.2d 87, 493 N.Y.S.2d 184 (2d Dep't 1985); *Glen Head — Glenwood Landing Civic Council, Inc. v. Town of Oyster Bay*, 88 A.D.2d 484, 453 N.Y.S.2d 732 (2d Dep't 1980).

159. 59 N.Y.2d 220, 451 N.E.2d 189, 464 N.Y.S.2d 431 (1983).

160. *Id.* at 228, 451 N.E.2d at 191-92, 464 N.Y.S.2d at 433. *See* DEC/GEIS, *supra* note 18, at 26.

161. DEC/GEIS, *supra* note 18, at 27.

162. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.8(g)(3) (1987).

been subject to an environmental impact statement, an agency must make an explicit finding "that the requirements of this section have been met and that consistent with social, economic and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided."¹⁶³ In furtherance of this directive, the regulations provide that no involved agency can make a final decision authorizing, commencing or funding an action where an EIS has been conducted¹⁶⁴ until it has made written findings that:

- (1) the agency has given consideration to the final EIS;
- (2) the requirements of [the regulations] have been met;
- (3) consistent with social, economic and other essential considerations from among the reasonable alternatives thereto, the action to be carried out, funded or approved is one which minimizes or avoids adverse environmental effects to the maximum extent practicable; including the effects disclosed in the relevant environmental impact statement;
- (4) consistent with social, economic and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided by incorporating as conditions to the decision those mitigative measures which were identified as practicable; and
- (5) contains the facts and conclusions in the EIS relied upon to support its decision and indicates the social, economic and other factors and standards which form the basis of its decision.¹⁶⁵

Formal, written findings must be made by every involved agency, not just the lead agency.¹⁶⁶ Written findings are similarly required for decisions disapproving an action that has

163. N.Y. Env'tl. Conserv. Law § 8-0109(8) (McKinney 1984).

164. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.9(c) (1987). This proscription applies whether the EIS is being conducted pursuant to SEQRA, or NEPA. *Id.*

165. *Id.*

166. *Id.*

been subject to a final EIS. Such findings must recite the facts and conclusions in the EIS relied upon in support of the disapproval.¹⁶⁷

SEQRA findings must be completed within thirty calendar days after the final EIS has been filed.¹⁶⁸ A prior provision allowing for a good cause extension has been removed from the 1987 edition of the regulations.¹⁶⁹ The regulations provide no time limitation for actions proposed or sponsored directly by agencies, presumably because an agency promoting its own project will have adequate incentive to act as quickly as possible.

For any action proposed in a coastal area by a state agency, the regulations require a specific additional finding that the project is consistent with applicable policies of the Coastal Zone Management Program.¹⁷⁰ Moreover, where a local government's waterfront revitalization program has been approved by the Secretary of State pursuant to the Coastal Zone Management Program, no state agency can make a final decision on an action likely to effect the achievement of the policies or purposes of such program absent a written finding that the action is consistent "to the maximum extent practicable" with that program.¹⁷¹

5. *Actions Involving a Federal Agency*

The regulations provide ground rules for an action within the scope of SEQRA that has been the subject of an appropriately prepared environmental impact statement under NEPA.¹⁷² In such circumstances, a separate SEQRA EIS is

167. *Id.* § 617.9(d).

168. *Id.* § 617.9(b). The public must be afforded a reasonable time to file comments on the final EIS for a period of at least ten calendar days after the final EIS is filed, and before the findings are made. *Id.* § 617.9(a).

169. The significance of this change is open to question. It would appear that, as with other time restrictions placed on agencies to comply with SEQRA, this one is largely hortatory.

170. N.Y. Comp. Codes Rules & Regs. tit. 6, § 617.9(e) (1987). *And see* N.Y. Comp. Codes Rules & Regs. tit. 19, § 600.4(b) (1982).

171. N.Y. Comp. Codes Rules & Regs. tit. 6, § 617.9(e) (1987). *And see* N.Y. Comp. Codes Rules & Regs. tit. 19, § 600.4(c) (1982).

172. N.Y. Comp. Codes Rules & Regs. tit. 6, § 617.16 (1987).

not required as long as the federal document is sufficient to allow findings to be made in accordance with the criteria outlined above. However, no agency is allowed to undertake or approve any such action until the final federal EIS has been completed, and the agency itself has then made proper SEQRA findings on the basis of the EIS.¹⁷³ If a negative declaration under NEPA has been filed, that determination of non-significance is not automatically deemed to comply with SEQRA's standards. In such cases, agencies remain responsible to assess the environmental significance of the proposal in accordance with SEQRA and the DEC regulations.¹⁷⁴ In either case, the action of the federal agency in issuing a negative declaration or in preparing a federal draft and final EIS is not controlling on any state or local agency.¹⁷⁵

E. *Substantive Requirements of an Environmental Impact Statement*

The regulations set forth specific guidelines for the preparation and content of both a draft and final EIS.¹⁷⁶ The EIS is to assemble relevant and material facts on which the agency's decision will be based, identify central issues to be decided,

173. *Id.* § 617.16(a).

174. *Id.* § 617.16(b).

175. *Id.* § 617.16(c). This provision follows from the fact that SEQRA is a tougher statute than NEPA in several respects. NEPA requires an EIS only for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c) (1982). SEQRA, in contrast, requires an EIS for any action "which may have a significant effect on the environment." N.Y. Envtl. Conserv. Law § 8-0109(2) (McKinney 1984) (emphasis added). New York courts have aptly described this standard as a "low threshold." *Onondaga Landfill Systems, Inc. v. Flacke*, 81 A.D.2d 1022, 1023, 440 N.Y.S.2d 827, 832 (4th Dep't 1981); *H.O.M.E.S. v. New York State Urban Dev. Corp.*, 69 A.D.2d 222,232, 418 N.Y.S.2d 827, 832 (4th Dep't 1972). Moreover, NEPA is essentially procedural, requiring agencies merely to consider the environmental impact of their proposals. 42 U.S.C. § 4332 (1982). SEQRA, on the other hand, substantively requires that adverse effects be mitigated to the maximum practicable extent. N.Y. Envtl. Conserv. Law § 8-0109 (McKinney 1984).

176. N.Y. Comp. Codes Rules & Regs. tit. 6, § 617.14 (1987). This section takes substantial direction from the statutory provision addressing the contents of an EIS. Compare N.Y. Envtl. Conserv. Law § 8-0109(2) (McKinney 1984).

and evaluate all reasonable alternatives.¹⁷⁷ It is to be “analytical,” not “encyclopedic,”¹⁷⁸ and “clearly and concisely written in plain language that can be read and understood by the public.”¹⁷⁹ It should not be unnecessarily detailed, addressing only those adverse or beneficial impacts that can reasonably be anticipated or which have been identified in the scoping process. Highly technical material should not be included in the body of the document, but should simply be summarized there and, if necessary, provided in an appendix.¹⁸⁰

The regulations specify with particularity the contents of a required “cover sheet” for any draft or final EIS.¹⁸¹ The cover sheet should set forth basic data regarding the type of proposal, the identity of the preparer, the location of the proposal, the agencies involved, and the relevant time frame for approval and consideration.¹⁸² The regulations also require a table of contents following the cover sheet, together with a summary of the contents of the EIS.¹⁸³

Regarding the substantive content of the documents, the regulations provide that an EIS must (1) contain a description of the proposed action, its purpose, the public need for the action, and benefits the community will derive from the action, including social and economic considerations;¹⁸⁴ (2) provide a concise description of the environmental setting sufficient for the decision maker to understand the environmental

177. N.Y. Comp. Codes R. & Regs. tit 6, § 617.14(b) (1987). A draft of the revised regulations contained a provision that the EIS should “make recommendations” regarding the ultimate decision. This provision was deleted in recognition that the purpose of an EIS is to provide a common and complete data base for informed decision-making, not necessarily to generate uniformity in the conclusion reached by involved agencies, each of which retains independence to “call them as they see them.” DEC/GEIS, *supra* note 18, at 36. The lead agency and all other involved agencies are instructed to cooperate with any applicant preparing an EIS by making available whatever relevant information may be contained in their files. N.Y. Comp. Codes R. & Regs. tit 6, § 617.14(b) (1987).

178. N.Y. Comp. Codes R. & Regs. tit 6, § 617.14(b) (1987).

179. *Id.* § 617.14(c).

180. *Id.*

181. *Id.* § 617.14(d).

182. *Id.*

183. *Id.* § 617.14(e).

184. *Id.* § 617.14(f)(1).

effects and alternatives;¹⁸⁵ (3) provide a statement and an evaluation of the environmental impacts, including reasonably related short and long-term effects, cumulative effects and other associated effects;¹⁸⁶ (4) identify and briefly discuss any adverse environmental effects that cannot be avoided or adequately mitigated;¹⁸⁷ (5) provide a description and evaluation of a range of reasonable and feasible alternatives;¹⁸⁸ (6) identify "irreversible or irretrievable commitments of resources" associated with the action;¹⁸⁹ (7) describe the mitigation measures proposed to minimize adverse impacts;¹⁹⁰ (8) describe any growth inducing aspects of the proposed action;¹⁹¹ and (9) describe the effects the action will have on the use and conservation of energy.¹⁹² If the action is by a state agency and in a coastal area, consistent with the Coastal Zone Management Program, relevant state or local coastal policies must be identified and discussed in the EIS. The proposed action must be reviewed for consistency with those policies.¹⁹³ Finally, all underlying studies, reports or other data collections on which the EIS is premised must be specifically identified in the body of the document.¹⁹⁴

An important substantive addition provided by the 1987 amendments requires a discussion in certain circumstances of any "reasonably foreseeable catastrophic impact on the environment" that may be associated with the project or proposed action.¹⁹⁵ This section assumes that specific information about such impacts may be unavailable because of exorbitant cost to

185. *Id.* § 617.14(f)(2).

186. *Id.* § 617.14(f)(3).

187. *Id.* § 617.14(f)(4).

188. *Id.* § 617.14(f)(5). This discussion must be at a level of detail sufficient to allow a meaningful comparison between the alternatives. The range of alternatives must include a "no action" alternative and may include actions for which no discretionary approvals are needed. Where the project is proposed by a private applicant, alternative sites may be limited to sites owned by the applicant. *Id.*

189. *Id.* § 617.14(f)(6).

190. *Id.* § 617.14(f)(7).

191. *Id.* § 617.14(f)(8).

192. *Id.* § 617.14(f)(9).

193. *Id.* § 617.14(f)(10).

194. *Id.* § 617.11.

195. *Id.* § 617.14(g).

obtain it, because means to obtain it are unknown or because the data that may be available is unreliable. Where such catastrophic impacts can be foreseen and where relevant information is unavailable for these reasons, the EIS is required to identify the nature and relevance of the unavailable or uncertain information, summarize existing credible scientific evidence, if available, and assess the likelihood and consequence of the worst case occurrence, even when its probability is low.¹⁹⁶

This provision is not intended to apply as a matter of routine to all, or even most projects. Rather, it should only apply to actions where dramatic, catastrophic impacts are reasonably foreseeable, as long as the basis for the projected negative impact is not speculative.¹⁹⁷ For example, the regulations specifically state:

This analysis would likely occur in the review of such actions as an oil supertanker port, a liquid propane gas/liquid natural gas facility, or the siting of a hazardous waste treatment facility. It should not apply in the review of such actions as shopping malls, residential subdivisions or office facilities.¹⁹⁸

The regulations specifically allow a draft or final EIS to incorporate by reference all or part of any other document, provided that such documents are made available for inspection along with the EIS.¹⁹⁹ The final EIS is required to include both the draft, any and all revisions or supplements, copies or summaries of all comments received, and the lead agency's responses to all substantive comments. The final EIS is also required specifically to indicate which portions are revised or supplemented from the draft.²⁰⁰ And, of course, the EIS must be made easily and broadly available for review.²⁰¹

196. *Id.*

197. See DEC/GEIS, *supra* note 18, at 38.

198. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.14(g) (1987).

199. *Id.* § 617.14(h).

200. *Id.* § 617.14(i).

201. Both the draft and final EIS must be filed with the appropriate regional

1. *Generic Environmental Impact Statements*

The regulations contain a section devoted entirely to the so-called "programmatic" or "generic" environmental impact statement.²⁰² The generic EIS (GEIS) may be used to analyze a number of separate actions, which when considered alone might have minor effects on the environment, but together may have significant effects. A GEIS may also be used for a sequence of actions contemplated by a single agency or individuals, for separate actions that have common impacts or for an entire program or plan that has wide application and restricts the range of future decision making.²⁰³

Because of the wide scope of the subject matter contained in a GEIS, the regulations contemplate that either a site specific or project specific supplement may in some circumstances be required. Such a supplement would focus more particularly on individual actions undertaken in furtherance of the program or plan reviewed in the GEIS. Where required, a supplemental EIS is subject to the same public comment and notice provisions as a full EIS.²⁰⁴

The 1987 amendments attempt to provide some clarity to the perpetually vexing question of when a supplemental EIS will be required following an action taken under a GEIS.²⁰⁵ No further SEQRA review is required for a subsequent site specific action if the action can be carried out in complete conformity with the conditions and thresholds established and discussed in the findings of the GEIS.²⁰⁶ A supplemental findings statement must be prepared if the subsequent action was adequately addressed in the GEIS, but not in the findings

Department of Environmental Conservation office, the office of the chief executive of the political subdivision involved and with each involved agency. The EIS must be made available to anyone requesting it, subject to the charge of a reasonable fee to cover the costs of copying. If necessary, a copy must be made available in a local library. For actions affecting areas subject to the Coastal Zone Management Program, a copy must also be filed with the Secretary of State. *Id.* §§ 617.10(d), (g).

202. *Id.* § 617.15.

203. *Id.* § 617.15(a).

204. *Id.* § 617.15(b).

205. *Id.* § 617.15(c).

206. *Id.* § 617.15(c)(1).

statement.²⁰⁷ A supplemental EIS will be necessary when the subsequent action was not addressed in the GEIS and the subsequent action involves any significant environmental effects.²⁰⁸

Agencies are specifically authorized to use a generic EIS on "new, existing or significant changes to existing land use plans, development plans and zoning regulations."²⁰⁹ Individual actions carried out in conformance with such plans or regulations may then only require a supplemental EIS in appropriate circumstances. Where projects are developed in phases, a GEIS must address both the site specific impacts of the individual project phase under consideration, and also, in more general or conceptual terms, cumulative effects of subsequent phases of the larger project or series of projects that may be developed in the future.²¹⁰

The regulations acknowledge that a GEIS will be of a different character than an EIS on site specific individual projects.²¹¹ A GEIS can be broader and more general than a site specific EIS, but is permitted to include assessments of site specific impacts if such details are available. A GEIS may be based on conceptual information and may discuss in general terms constraints and consequences of any narrowing of future options. It may present, in general terms, hypothetical scenarios that could or may be likely to occur.²¹² In other words, a GEIS can be written at a level of generality that would be unacceptable in a site specific environmental impact statement. If, however, it is sufficiently detailed, there may not be a need for a supplemental, site specific or project specific EIS.²¹³

207. *Id.* § 617.15(c)(2).

208. *Id.* § 617.15(c)(3). A negative declaration must be prepared if the subsequent action is found not to result in any significant environmental effects. *Id.* § 617.15(c)(4).

209. *Id.* § 617.15(d).

210. *Id.* § 617.15(e).

211. *Id.* § 617.15(d).

212. *Id.*

213. *Id.* § 617.15(c)(1).

III. Conclusion

The DEC regulations implementing SEQRA, as extensively revised in 1987, provide a comprehensive roadmap for participants in the SEQRA process, public officials, private applicants and interested citizens alike, both as to the process by which the Act is to be implemented and the substance of SEQRA review. They provide detailed guidance on numerous points that will arise again and again, regardless of the specific regulatory context in which the SEQRA review is conducted. They are not always crystal clear in their direction. Inevitably, they leave certain gaps to be filled in by time, experience and future decisional law. Nevertheless, they represent a laudable effort to effectuate and improve the application of this enormously far-reaching statute; and they provide a basic starting point for all who, willingly or not, must confront its terms.