

DRAFT Generic Environmental Impact
Statement on the Proposed Amendments
to the State Environmental Quality Review
Act (SEQR) Regulations

6 NYCRR Part 617

-and-

**Regulatory Impact Statement, Regulatory Flexibility
Analysis for Small Businesses and Local Governments,
Rural Area Flexibility Analysis, and Statement in lieu of Job
Impact Statement Pursuant to Section 202 of the State
Administrative Procedure Act**

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TABLE OF CONTENTS

EXECUTIVE SUMMARY	i
DRAFT GENERIC ENVIRONMENTAL IMPACT STATEMENT (draft GEIS)	1
1.0 ENVIRONMENTAL SETTING.....	1
2.0 DESCRIPTION OF ACTION, POTENTIAL IMPACTS AND ALTERNATIVES	4
2.1 DEFINITIONS (6 NYCRR §617.2).....	4
2.2 TYPE I LIST (6 NYCRR §617.4).....	4
2.2.1 Introduction	4
2.2.2 Lower Numeric Thresholds for Number of Residential Units.....	5
2.2.3 Revise Type I Parking Space Thresholds Based On Community Size	7
2.2.4 Add Threshold for Historic Resources Consistent With Other Resource Based Items on the Type I List.....	9
2.3 TYPE II LIST (6 NYCRR §617.5).....	12
2.3.1 Upgrade of Structures to Meet Energy Codes (proposed section 617.5[c] [2]) 13	
2.3.2 Green Infrastructure (proposed section 617.5[c] [3])	14
2.3.3 Expansion of Broadband Services (proposed section 617.5[c][7])	15
2.3.4 Co-Location of Cellular Antennas and Repeaters (proposed section 617.5[c] [14])	16
2.3.5 Installation of Solar Energy Arrays (proposed 6 NYCRR 617.5[c] [15] & [16]) 17	
2.3.6 Expand Provisions for Area Variances (proposed section 617.5[c][17], replacing existing items 12 and 13 in section 617.5[c])	22
2.3.7 Minor Subdivisions (proposed section 617.5[c] [18])	22
2.3.8 Sustainable Development (proposed sections 617.5[c] [19, 20, 21 and 22]).	25
2.3.9 Reuse of an Existing Residential or Commercial Structure (proposed section 617.5[c] [23])	29
2.3.10 County planning board referrals under Section 239-m or 239-n of the General Municipal Law (proposed section 617.5[c] [24])	30
2.3.11 Dedication of Parkland (proposed section 617.5[c] [44]).....	31
2.3.12 Acquisition of 100 Acres or less of land to be Dedicated as Parkland (proposed section 617.5[c] [45])	31
2.3.13 Certain Transfers of Land to Provide Affordable Housing (proposed section 617.5[c] [46])	32

2.3.14	Sale and Conveyance of Real Property by Auction Pursuant to Article 11 of the Real Property Tax Law (proposed section 617.5[c] [47]).....	33
2.3.15	Brownfield Clean-up (proposed section 617.5[c] [48])	34
2.3.16	Anaerobic Digesters (proposed section 617.5[c] [49]).....	36
2.4	MANDATORY SCOPING (6 NYCRR §617.8).....	40
2.5	PREPARATION AND CONTENT OF ENVIRONMENTAL IMPACT STATEMENTS (6 NYCRR §617.9).....	44
2.5.1	Determining the Adequacy of a Draft EIS.....	45
2.5.2	Mitigation Measures: Vulnerability to Storm-related Impacts	47
2.6	GENERIC ENVIRONMENTAL IMPACT STATEMENTS (6 NYCRR §617.10).....	48
2.7	SEQR FEES (6 NYCRR §617.13).....	49
2.8	COASTAL CONSISTENCY	51
	REGULATORY IMPACT STATEMENT (SAPA §202-A).....	54
	REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES AND LOCAL GOVERNMENTS (SAPA §202-B).....	58
	RURAL AREA FLEXIBILITY ANALYSIS (SAPA §202-BB).....	60
	STATEMENT IN LIEU OF JOB IMPACT STATEMENT (SAPA 202-A [2][A])	61
	APPENDIX A.....	62
	APPENDIX B.....	67
	POSITIVE DECLARATION AND NOTICE OF SCOPING	67
	APPENDIX C	70
	DRAFT SCOPE	70
	APPENDIX D	79
	LIST OF INDIVIDUALS/GROUPS THAT PROVIDED COMMENTS ON DRAFT SCOPE	79
	APPENDIX E.....	81
	FINAL SCOPE	81
	APPENDIX F.....	98
	SUPPORTIVE RESEARCH FOR SUSTAINABLE DEVELOPMENT TYPE II ACTION ...	98
	End Notes.....	102

EXECUTIVE SUMMARY

Enacted into law on August 1, 1975, the State Environmental Quality Review Act (SEQR) requires a process that introduces the consideration of environmental factors into the planning and approval of actions that are undertaken, funded or approved by local, regional or state agencies. It applies to all state and local agencies in New York when they are making a discretionary decision to *undertake, fund* or *approve* an action that may affect the environment. By incorporating a systematic interdisciplinary approach to environmental review in the early planning stages of projects and approvals, SEQR enables agencies involved in the review of development projects and other types of governmental actions that may impact the environment to avoid or reduce any significant adverse impacts from such actions. The primary tool of the SEQR process is the environmental impact statement (EIS). If the lead agency determines that a proposed action may have a significant effect on the environment, then it must prepare an EIS or cause one to be prepared. The purpose of the EIS is to explore ways to minimize adverse environmental effects or to identify a potentially less damaging alternative. SEQR is both a procedural and substantive law. In addition to meeting strict procedural requirements, the law mandates that agencies act on the substantive information produced in the environmental review.¹ Such information could and often should result in project modification or even project denial if environmental concerns are overriding and adequate mitigation of adverse impacts or a reasonable alternative is not available.

To accomplish the purposes of SEQR, the Legislature directed the Commissioner of the Department of Environmental Conservation (“DEC” or “the Department”) to establish procedures that would guide all agencies in its implementation. These procedures are set out in Part 617 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Part 617). Part 617 was initially promulgated in 1976. Over the years, a series of amendments were adopted to reflect the development of the SEQR process. The most significant amendments to Part 617 were made in 1978, 1987 and 1995.

The Department proposes to once again update Part 617 to reflect the Department’s experience with SEQR during the two decades since the last major update of the SEQR regulations. The basic purpose of the proposed amendments is to streamline the SEQR process without sacrificing meaningful environmental review. If adopted, the amendments would expand DEC’s statewide Type II list of activities (actions not subject to further review under SEQR), modify certain thresholds in the Type I list of actions (actions deemed more likely to require the preparation of an environmental impact statement (EIS), make scoping of EISs mandatory (scoping is now optional), and better define the acceptance procedures for draft EISs.

The Department is also proposing an amendment to 6 NYCRR section 617.10 (Generic EISs) that would clarify the ability of a lead agency to deny an action for which

it has prepared a generic EIS. This additional language would simply make express something that is implicit, namely that an agency that has undertaken to prepare a programmatic generic environmental impact statement can abandon the program or complete the EIS and make negative findings. Under the existing regulations, no final EIS need be filed if an action is withdrawn under 6 NYCRR section 617.9 (a) (5) (i). The Department also proposes amendments to implement the statutory EIS on the web requirement (Chapter 641 of the Laws of 2005) and a number of other changes to encourage the electronic filing of EISs (see Express Terms, 6 NYCRR section 617.12) and changes to 617.13 to add greater transparency (benefitting the project sponsors and the public) when a lead agency engages private consulting firms and charges the costs back to project sponsors. The proposed changes to sections 617.10 and 617.12 are not evaluated below since they are non-substantial, technical and would not under any circumstance have a significant, adverse impact on the environment.

The proposals were developed through an extensive stakeholder outreach effort (see Appendix A for the list of participants). In collaboration with the Empire State Development Corporation, the Department's staff met with stakeholders representing the development, municipal, and environmental communities at various locations throughout the state.²

Stakeholders agreed that SEQR continues to play a key role in ensuring that environmental concerns factor into agency decision making and on the need to update the regulations to make the process more efficient and less frustrating to the regulated community. Many participants expressed agreement on the need for additional classes of Type II actions. The most recurrent concern was the one expressed by participants representing business and industry over the length of time that some SEQR reviews took to complete and that the length of time of such reviews is an impediment to businesses contemplating a re-location from other states to New York. In response to this concern, the Department is proposing changes to the scoping process, and rules governing the acceptance of the draft environmental impact statement. The newly proposed Type II actions entirely exempt an additional list of activities, which the Department has determined would not have a significant impact on the environment, from SEQR review.

The proposed amendments are intended to build on the modernization of the environmental assessment forms (EAFs) that became effective on October 7, 2013. The Department views the proposed changes to the text of Part 617, in combination with the new EAFs and their integration with web-based geographic information systems (spatial data platform), as part of a larger effort to modernize SEQR.

Finally, the Department appreciates the input of the stakeholder community who volunteered their time to help formulate the proposals that follow. Collectively, their suggestions and comments on the workings of the regulations embody the considerable wisdom and experience of professionals, municipal officials and ordinary citizens who have been practicing SEQR at the state and local level for many years.

DRAFT GENERIC ENVIRONMENTAL IMPACT STATEMENT (draft GEIS)

1.0 ENVIRONMENTAL SETTING

The environmental setting of an action includes the existing environment, any existing uses of the project site, and a general characterization of adjoining areas. However, since DEC is undertaking a rule making, with state-wide applicability, rather than a specific development project there is no environmental setting as that term is usually understood. In lieu of the normal discussion of environmental setting, the Department will discuss environmental setting in terms of the historical background to the present rule making (as it has done in past rule makings under Part 617), which is useful in understanding the Department's regulatory intent and the trajectory that SEQR rule making has taken over the years. ³

The SEQR statute (ECL §8-0113, in particular) directed the Commissioner to establish rules to guide all agencies in the implementation of SEQR. The rules, which were codified in Part 617, were initially promulgated in 1976. A series of amendments were adopted in 1978, 1982, 1987 and 1995 to clarify and fine tune the regulations as well as to reflect developments in case law.

In 1978, the Department amended the Type I and Type II lists. DEC also provided procedures for excluded (grandfathered actions) and Unlisted actions. The amendment also revised the Type I list of actions so that it could be used more easily by nontechnical agency decision-makers. Model environmental assessment forms were added to the rule. In 1987, the Department made some procedural additions to Part 617. The changes added the options of scoping of EISs, and of using conditioned negative declarations. The amendment also added procedures for supplementation of draft and final EISs, rescission of negative declarations, re-designation of lead agency, and agency consideration of reasonably foreseeable catastrophic impact analysis. Clarifications were made regarding EIS alternatives. The Department added new and modified definitions and criteria for legally sufficient negative declarations and documentation requirements for Unlisted actions.

In the 1995 revisions, the Department made significant changes to the regulations governing scoping and created additional Type II actions. The 1995 revised regulations provided that if scoping is initiated, the project sponsor was required to submit a draft scope, and that, within 60 days of its submission, the lead agency must provide a final written scope to the project sponsor. The revisions further provided that all relevant issues should be raised before the issuance of the final written scope. If a person or agency raises issues after that time, the project sponsor may incorporate such information into the draft EIS at its discretion. Language was added to clarify that the results of a coordinated review are binding on all involved agencies, and the Type II list was revised to include exempt and excluded actions so there would be a single list of actions not subject to further review under SEQR rather than three lists from the statute and earlier versions of the regulations (i.e., excluded, exempt and Type II).

The 1995 revisions were challenged in the case of *West Village Committee v. Zagata*.⁴ The petitioners in that case challenged the newly enacted scoping provisions on the ground that they would allow the project sponsor to determine the content of the EIS rather than the lead agency, which under the law has ultimate responsibility for the environmental review process. The Court rejected petitioners' argument since the regulations still required the lead agency to determine the final scope of the EIS. The Appellate Division, on appeal, also upheld DEC's additions to the Type II list. The challenged additions included commercial structures up to 4,000 square feet; school building expansions up to 10,000 square feet; one- to three-family residences in approved subdivisions; accessory structures; all area variances for one- to three-family residences; forest management practices on less than ten acres of land; and the interpretation of existing codes, rules or regulations. In upholding the Department's Type II expansion, the Court stated: "Our examination of DEC's final generic EIS discloses that it separately discussed each proposed addition to the type II list, identified the primary impacts such addition would have on the environment, explained why they were not significant and addressed the comments submitted during the SEQRA process. Inasmuch as petitioners have not come forward with evidentiary proof establishing that DEC's analysis is founded upon spurious data or is otherwise deficient, we shall defer to DEC's expertise."⁵

In 2009, the Department, through its Region 3 office, in collaboration with Mid-Hudson Patterns for Progress, convened a workgroup of Hudson Valley SEQR stakeholders to consider finding ways to improve the implementation of SEQR that did not require regulatory or legislative changes. Participants, however, also discussed amending the regulations to make scoping mandatory; expanding the "Type II" list, and making timelines and deadlines longer but mandatory and enforceable with default provisions. This effort culminated in a 2010 report entitled "State Environmental Quality Review (SEQR) Dialog, A regional effort to identify opportunities to improve the SEQR process," which contained specific recommendations.

Beginning in 2011, the Department, in collaboration with the Empire State Development Corporation, convened a series of stakeholder meetings around the state to discuss possible improvements to the SEQR regulations (see Appendix A for a partial list of persons who attended stakeholder meetings as well as organizations represented at those meetings). Specifically, the stated goal of such possible improvements would be to reduce compliance costs, speed the process where possible, and eliminate unnecessary reviews, all without sacrificing environmental protection. Echoing the earlier Hudson River dialogue, the Department heard the following suggestions:

- Institute mandatory scoping;
- Add to the Type II list (actions not subject to SEQR), including revisions to encourage smart growth;
- Improve and require more realistic time frames for determining significance and completing environmental impact statements (EISs);
- Make changes to some of the Type I thresholds;
- Adopt improved remedies where time frames are exceeded consistent with SEQR legal authority; and

- Consider an advisory role for the Department in determining whether another lead agency's draft environmental impact statement (DEIS) is adequate to begin the public review process.

The stakeholder meetings continued through spring 2013, and included private, municipal, and state agency stakeholders as well as environmental organizations.

In 2012, DEC updated the environmental assessment forms (EAFs) that appear in the appendices to Part 617 with electronic forms tied to a geographic information system.⁶ The EAFs are used to assist the lead agency in determining whether a particular action may have a potentially significant adverse impact on the environment. Such a determination triggers the requirement for the preparation of an environmental impact statement. The full EAF and short EAF had not been updated since 1978 and 1985, respectively. Although the forms are only model forms, they are used without modification by most units of state and local government in New York —the City of New York being a notable exception.⁷ EAFs are the primary implementing tool of SEQR as they are used to determine whether an EIS is required and serve as a gathering tool for environmental data and analysis — whether or not an EIS is ultimately prepared.⁸

The Department has engaged in thousands of SEQR reviews since the 1995 amendments to the SEQR regulations, and through its experiences associated with these reviews it believes that the proposed changes to the SEQR regulations, if adopted, would make SEQR a more precise and meaningful tool for evaluating, avoiding, and mitigating adverse environmental impacts from governmental decisions while lifting some of the burdens imposed on municipal agencies and the regulated community. Other factors call for the Department to improve SEQR, including changes in other environmental laws that interact with SEQR such as enhanced stormwater regulations, and increased local capacity for environmentally compatible planning through adoption of comprehensive plans and development controls. In addition, the Department seeks to improve the speed and efficiency of the SEQR regulatory process without sacrificing environmental protection.

2.0 DESCRIPTION OF ACTION, POTENTIAL IMPACTS AND ALTERNATIVES

This section discusses the objectives and rationale, impacts and alternatives for the major proposed changes. In some instances there is no discussion of alternatives, as none, other than the no action alternative, have been identified. To focus the discussion, this section also includes the draft express terms. Regulatory language that is proposed to be deleted is shown in brackets, e.g., [Type I], and new language is underlined, e.g., new language.

2.1 DEFINITIONS (6 NYCRR §617.2)

The Department proposes to amend the definition section of the regulations (section 617.2) to add definitions for the terms “green infrastructure,” “municipal center,” and “previously disturbed” as well as to make non-substantial changes to two existing definitions (“critical environmental area” and “environmental assessment form”). The three new definitions relate to new Type II actions (section 617.5), which encourage retrofit of existing structures with green infrastructure and sustainable development. They are discussed in their respective contexts (namely under the discussion of the Type II actions to which they relate). The Department has also proposed some clarifying modifications to the definition of “scoping” in section 617.2 in connection with the changes proposed for section 617.8 on scoping. The new definitions support the proposed Type II actions that encourage environmentally sound practices. They, along with some modifications to existing definitions (“critical environmental area,” “environmental assessment form,” “positive declaration,” and “scoping”), will not result in any significant adverse impacts.

2.2 TYPE I LIST (6 NYCRR §617.4)

2.2.1 Introduction

Under section 8-0113(2) (c) (i), the Legislature has authorized the Commissioner to adopt lists of “actions” or “classes of actions” that are more likely to require environmental impact statements. These are called Type I actions. Aside from the presumption as to potential environmental significance, if an action is classified as a Type I actions the lead agency must complete the full EAF and coordinate its review among involved agencies. The list of such actions is set out in section 617.4 of Part 617. The Type I list of actions also contains various thresholds by which actions that would otherwise be classified as Unlisted actions (actions subject to SEQR that are not specifically called out as Type I) are elevated to Type I actions. The Department proposes three modifications to the Type I List that primarily involve changes to the thresholds set out in the Type I list as follows:

2.2.2 Lower Numeric Thresholds for Number of Residential Units

Proposed Regulatory Language:

617.4(b) (5) (iii) in a city, town or village having a population of [less than] 150,000 persons or less, [250] 200 units to be connected (at the commencement of habitation) to existing community or public water and sewage systems including sewage treatment works;

617.4(b)(5)(iv) in a city, town or village having a population of greater than 150,000 persons but less than 1,000,000, [1,000] 500 units to be connected (at the commencement of habitation) to existing community or public water and sewage systems including sewage treatment works;

617.4(b) (5) (v) in a city, town or village having a population of [greater than] 1,000,000 or more persons, [2,500] 1000 units to be connected (at the commencement of habitation) to existing community or public water and sewage systems including sewage treatment works;

Objectives, Rationale, and Benefits:

The Department proposes to reduce the thresholds for residential subdivisions in the Type I list identified as 617.4(b) (5) (iii–v). There is little information in the 1978 draft and final EIS for the original classification that demonstrates a basis for the selection of the thresholds other than that numbers in a rural and urban area should be different.

The current thresholds are rarely triggered, however, because they were set far too high and fail to include some truly large-scale development projects that should be classified as Type I. If such projects were to be classified as Type I, project sponsors and lead agencies would be required to complete the more comprehensive full EAF. Further, for these larger projects, their continued treatment as Unlisted actions means that they may not receive the coordinated review required for Type I actions despite their scale, unless a positive declaration is identified during review by an involved agency acting in the role of lead agency.

Large subdivisions are frequently the subject of an EIS and because of their scale, location and nature, when proposed on new sites, often have one or more potentially significant impacts on the environment due to the need for the expansion of infrastructure such as water, sewer and roads to serve the new development. The proposed changes will bring the review of more large subdivisions into conformance with the reasoning behind the Type I list as discussed in section 617.4(a), that being the identification of "...actions and projects that are more likely to require the preparation of an EIS than Unlisted actions."

To evaluate how the threshold reductions might affect projects that would now be treated as Type I actions, but are not currently treated as such, DEC staff evaluated a sample of housing construction projects reported in the Environmental Notice Bulletin (ENB) for four different years (2006, 2008, 2010 and 2012). (The Department does not believe that a more recent sampling of projects would yield a significantly different evaluation.) An ENB sample study was selected because the ENB provides information on all positive declarations issued for projects reviewed under SEQR (for both Type I

and Unlisted actions). It also provides data on all Type I actions that receive negative declarations (meaning no potentially significant impacts). This allowed for an analysis of projects that fall within the threshold limits (i.e. 200 units to 250 units) — to assess the number of additional projects that would be classified Type I by the revised thresholds.

In this sample, 545 reported projects were found within the four years that were reviewed. A total of 246 projects were identified within the sample that revealed both the significance determination of the project (negative or positive declaration) and the number of residential units associated with the proposed developments. The number of units ranged from 1 to 750. The remaining 299 sample projects did not provide sufficient information to be useful for this comparative exercise.

In populations of less than 150,000, 22 projects already existed in the ENB sample above the 250 unit threshold. Of these, 73% (or 16) received positive declaration determinations, while the remaining six projects had negative declarations. When the threshold was lowered to 200 units, DEC found an additional seven projects in the sample that fell between 250 and 200 units. Five of these (representing 71% of the sample) were found to be positive declarations with two negative declarations. This suggests that lowering these thresholds will capture a few more projects that received positive declarations, and capture them at about the same percentage of positive declaration to negative declaration (71% and 73% positive declarations to 29% and 27% negative declarations) as currently recorded for projects above the 250 unit threshold. Since the raw numbers are small, the similarity of percentages cannot be considered statistically valid, but the relative percentages do provide a sense of consistency.

For the second and third thresholds, the sample displayed no projects in the greater than 150,000 to one million population range for construction of units between 500 and 1000 in size, and only one project with 1000 or more units in the greater than one million population range (from New York City). In fact, several projects in populations over one million that appeared in the ENB sample were for much smaller unit size developments and all received negative declarations. Therefore, it is reasonable to say that the lower thresholds may result in some larger scale residential development projects being classified as Type I actions, especially with respect to those subdivisions subject to a threshold reduction on account of location (e.g., subdivisions occurring within or substantially contiguous to an agricultural or historic district or park [see 6 NYCRR 617.4 (b) (8), (9) and (10)]).

The Department also notes that there are other anticipated benefits to be derived from this revision. In terms of public access and participation, the Department expects that lowering the three thresholds will improve opportunities for the public to comment on large scale projects. Under present circumstances, where there are no assurances or commitments to perform coordinated reviews for Unlisted actions, it is more likely that the public and reviewing agencies would suffer from a lack of shared knowledge. The coordinated review requirement for Type I actions serves to encourage sharing of information and to prevent “silo-ing” of reviews where agency reviewers do not communicate with other governmental agencies involved in a project review. Sponsors also risk undergoing multiple uncoordinated reviews when large projects are treated as

Unlisted actions, only to re-start the process if a positive declaration is identified. Thus, the benefit is that coordinated review of these larger scale actions would be assured, resulting in a more cohesive, orchestrated review of the action.

The regulatory burden is procedural in that the project sponsors and lead agency would be required to complete the full EAF and coordinate review. They would also be subject to the presumption of significance for Type I actions.

Potential Impacts:

There are no anticipated negative impacts associated with this threshold change. The proposed threshold adjustments would not substantively change individual reviews as the hard look standard is applicable to both Unlisted and Type I actions. Rather, the change would improve how the determination of significance is made for many projects that previously did not receive the treatment as a Type I action. Under the new thresholds, public input and coordination between agencies is expected to improve. In addition, the risk is minimized for sponsored projects undergoing separate reviews as Unlisted actions to be re-reviewed (with time lost) when a positive declaration is identified.

Projects now identified with negative declarations that would be classified as Type I actions because of the lower thresholds should not be impacted except the project sponsors would be required to complete the full EAF and the project would be subject to coordinated review. Overall, all three thresholds, despite the proposed change, are still quite high and can be expected to involve complex projects. Further, for projects in New York City, the City Environmental Quality Review Act (CEQR)⁹ is specific to the needs of the city.

Alternatives:

No Action - The “no action” alternative would retain the current numbers that were established in 1978, which, as discussed above, fail to properly classify actions that should be classified in the Type I category.

Another alternative would be to further reduce the threshold for residential subdivisions to fewer lots (e.g., 75 and 150 construction units), which would result in the Type I classification for such subdivisions. However, municipalities that believe that the thresholds are still too high have the authority to lower them further by adopting a municipality specific Type I list under the authority contained in section 617.14.

2.2.3 Revise Type I Parking Space Thresholds Based On Community Size

Proposed Regulatory Language:

617.4(b) (6) (iii) - parking for 500 vehicles in a city, town or village having a population of 150,000 persons or less;

617.4(b) (6) (iv) - parking for 1000 vehicles in a city, town or village having a population of 150,000 persons or more;

Objectives, Rationale, and Benefits:

The Department proposes to add a threshold for parking spaces for communities of 150,000 persons or less. The number of parking spaces is a surrogate used in the SEQR process for establishing the level or potential for impact from development proposals. Large commercial or industrial development projects will generally require a substantial amount of associated parking spaces. Construction of surface parking lots can result in the loss of green space and generate a large volume of stormwater. Facilities that require large amounts of parking can also result in potential impacts on traffic and community character.

A common and often recommended measurement for determining the number of parking spaces that will be required for a project is based on the amount of gross floor area.¹⁰ Using this measure, one parking space would be required for every 200 square feet of gross floor area of a building. For communities of less than 150,000 persons, the applicable Type I threshold for the construction of commercial or industrial facilities is 100,000 square feet of gross floor area. This equates to 500 parking spaces. By adding this new threshold for communities of 150,000 persons or less it will change the applicability of the existing parking threshold — parking for 1000 vehicles — so that it will apply only to communities of 150,000 persons or more.

Potential Impacts:

This proposed change will have no adverse environmental impact. It may result in more commercial and industrial activities being classified as Type I actions. This would result in more activities being required to use a full EAF rather than a short EAF. These projects may incur additional costs but many of these projects would likely have triggered the existing Type I threshold of 100,000 square feet of gross floor area. In addition, any proposed project that will require either 500 or 1000 parking spaces will likely result in several resource concerns that are better investigated through the process used for Type I actions. The possible loss of green space, potential stormwater runoff, increases in traffic and the potential for a change in community character due to the possible need for changes to zoning are all impacts that would have to be assessed. All of these issues make these activities more likely to require an EIS and therefore meet the test for inclusion on the Type I list. The major benefit of this proposed change is that it will give to communities of 150,000 persons or less another tool or marker to use in determining when a project would be more likely to have a significant adverse environmental impact.

Alternatives:

The “no action” alternative would retain the current Type I threshold at 1000 vehicles for all municipalities without regard to size.

The second alternative would be to reduce the number of parking spaces for all communities to 500 or less vehicles. This alternative has the advantage of being simpler to understand. On the other hand, given the diversity of municipalities in New York State it would be difficult to arrive at one set of numbers that would fit every municipality from Montauk to Buffalo. Any municipality that feels that the numbers

selected are still too high has the authority to lower them further by adopting a municipality specific Type I list under the authority contained in section 617.14.

2.2.4 Add Threshold for Historic Resources Consistent With Other Resource Based Items on the Type I List¹¹

Proposed Regulatory Language:

617.4(b) (9): any Unlisted action (unless the action is designed for the preservation of the facility or site),that exceeds 25 percent of any threshold established in this section, 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 (Volume 36 of the Code of Federal Regulations, parts 60 and 63, which is incorporated by reference pursuant to section 617.17 of this Part), 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 the National Register, or that] is listed on the State Register of Historic Places or that has been determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places pursuant to sections 14.07 or 14.09 of the Parks, Recreation and Historic Preservation Law [(The National Register of Historic Places is established by 36 Code of Federal Regulations (CFR) Parts 60 and 63 , 1994 (see section 617.17 of this Part)];

Objectives, Rationale, and Benefits:

The Department proposes to establish a revised threshold for designating Unlisted actions as Type I actions because of proximity to historic resources and to include properties that have been determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation eligible for listing on the State Register of Historic Places.

On the existing Type I list, under 617.4(b) (9) any Unlisted action, regardless of size, that occurs wholly or partially within or substantially contiguous to a historic resource is automatically elevated to a Type I action. This sometimes results in very minor actions being elevated to Type I and thereby requiring the use of the full EAF. Other resource based Type I items in SEQR, such as those addressing agriculture and parkland or open space, currently exist as Type I thresholds that are defined by exceeding 25% of other actions in the Type I category. This proposed revision will bring the treatment of actions proximal to historic resources in line with the other resource based Type I thresholds (i.e. agricultural districts and parkland).

The SEQR regulations at 617.4(a) state that Type I actions are those "... that are more likely to require the preparation of an EIS than Unlisted actions". This change is intended to place projects that are not as likely to require the preparation of an EIS in their rightful category as Unlisted actions.

Under this change, small projects will not escape review as they are still actions subject to SEQR. The revised short EAF now contains specific questions regarding the presence of historic resources. The substance of the issue would therefore not escape

attention. In addition, this proposed revision does not change the substantive requirements of a SEQR review.

This proposed revision has also been expanded to include properties that have been determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation as eligible for listing.

Resource eligibility has not previously been a criteria for this Type I listing and is now being included in this revision to the Type I list to more closely reflect the way that the New York State Office of Parks, Recreation and Historic Preservation treats resource eligibility decisions under State and Federal Historic Preservation Law, wherein listed and eligible properties are given equal treatment under the regulations.

In addition to listing historic properties on the State Register of Historic Places, under the State Historic Preservation Act (SHPA), the Commissioner of OPRHP determines which properties are eligible for listing, and adds them to the statewide Inventory. This long overdue amendment adds these historic properties that are eligible for listing on the State Register to the Type I list and brings thresholds in line with other items on the Type I list.

SHPA was modeled on the National Historic Preservation Act and SEQR was modeled on the NEPA.¹² Under these federal and state laws, the substantive methodologies for evaluating a project's impacts to historic properties do not distinguish between whether the affected historic property is listed on the National or State Registers of Historic Places or has been determined eligible for listing. Listing a property on the Registers, however, affords other protection and benefits, including the popular federal and state programs that provide tax credits to owners for rehabilitating historic properties.

This amendment streamlines the SEQR process in the following ways. First, it alerts lead agencies and project sponsors to the potential for adverse impacts to all historic resources early on when the action is initially classified. Early recognition under SEQR of potential impacts to eligible properties together with the recent expansion of information required in the EAFs regarding impacts to historic properties will create a better substantive record for state agencies to use in their separate consultations with OPRHP under SHPA. It will also create a better record for OPRHP to review when lead agencies ask for technical comments during the SEQR process.

Second, the change provides better coordination of procedures under both SEQR and SHPA. This coordination is especially helpful to lead agencies when a state agency may not be initially involved in an action but later becomes involved as, for example, when state funding becomes available for the project later during the review. The inclusion of eligible properties, therefore, provides consistency with the consideration of historic resources in both NYS Parks Law (Section 14.09) and Section 106 of the National Historic Preservation Act.

Finally, similar proposals to add eligible properties to the Type I list were abandoned in the 1987 and 1995 SEQR amendments primarily because eligible historic properties were not readily identifiable. Today, OPRHP continually updates its Inventory. OPRHP's new Cultural Resources Information System is available through

it's website to provide real time updates as soon as an historic property is determined eligible for listing.

Potential Impacts:

This modification of the Type I list (617.4[b] [9], in particular) is not expected to result in any significant impacts. As discussed above, the threshold for triggering a Type I action will be changed to 25% of any action on the Type I list when adjacent to or including a historic resource that is listed or has been determined eligible for inclusion on the State and National Registers of Historic Places. Projects falling under this threshold will retain their status as Unlisted actions, unless treated differently for some other reason, and reviews for these will be done using the short EAF.

The revised short EAF contains specific language asking about the occurrence of historic resources, namely Part 1, Question 12 asks: Does the site contain a structure that is listed on either the State or National Register of Historic Places? And, is the proposed action located in an archeological sensitive area? Part 2, Question 8 asks “[w]ill the proposed action impair the character or quality of important historic, archaeological, architectural or aesthetic resources? Therefore, the consideration of historic resources would take place in the Short EAF. Although small projects will no longer be reviewed as Type I actions, they are still subject to the full review under SEQR as Unlisted actions. The amendment, therefore, does not change the substance of the review, only the requirement for coordination (which could occur voluntarily in any event).

Alternatives:

The “no action” alternative would retain the current Type I classification and the procedures in place, elevating every project occurring within or substantially contiguous to National Register properties, regardless of size, to the treatment of a Type I action. Many small projects would be subjected to the revised full EAF which is a very comprehensive and rigorous review document with in most cases little if any corresponding benefit.

Another alternative would be to remove the Type 1 action (proximity of any unlisted action to eligible and listed historic properties (617.4[b] [9]) totally from the Type I list and, instead, require that when a listed property may be impacted by a project, the determination of significance must include an evaluation of the potential for impact to the attributes that are the basis for the listing. This is similar to the treatment currently made available to Critical Environmental Areas.

Rather than have historic properties trigger a Type I, the regulation would be revised to say that any project that is adjacent to or contains a historic property must discuss, in the SEQR review, how that project may impact or affect the features that contribute to the significance and importance of the historic property. This alternative would ensure protection of important components of a historic property but relies on the data regarding resource importance being available to the public and on the lead agency being able to determine whether important contributing features may be impacted, likely in constant consultation with OPRHP staff. The OPRHP has also recently made operational changes to how their staff assist the public which might need

to be adjusted to accommodate a SEQR change such as this alternative proposes. The inclusion of this alternative, without proper evaluation, could put more burdens on lead agencies and OPRHP staff. Therefore, before taking any further action on this alternative, an analysis of possible impacts to OPRHP operations would likely be warranted. For these reasons, this alternative has not been further considered in comparison to the selected alternative.

2.3 TYPE II LIST (6 NYCRR §617.5)

Section 8-0113 of the Environmental Conservation Law authorizes the Commissioner to adopt a list of “[a]ctions or classes of actions which have been determined not to have a significant effect on the environment and which do not require environmental impact statements...” This list of actions is set out in 6 NYCRR 617.5, and is known as the Type II list of actions.

The Department proposes to broaden the Type II list. By expanding the list of Type II actions to include additional actions that categorically do not have a significant adverse impact on the environment, local government agencies and project sponsors will benefit from a reduced SEQR workload at no cost to the environment since the proposed list of actions — if undertaken — are ones that would not have a significant impact on the environment. Almost invariably, they are the subject of a negative declaration (would not have a potentially significant impact on the environment). By decreasing repetitive reviews (and attendant paperwork) of actions that are environmentally inconsequential, it will allow agencies to focus their time and resources on those projects more likely to have significant adverse impacts on the environment. The additions to the Type II list are based on discussions that DEC staff have conducted with representatives from state agencies, environmental organizations, business (see Appendix A) and the experience of staff in the Division of Environmental Permits. Some of the proposals have their genesis in the 1995 rule making. DEC staff also studied similar regulations from other states including California and Washington.

An ancillary benefit of some of the proposed additions to the Type II list is that they bring SEQR into alignment with other environmental policy goals of the state by incentivizing environmentally compatible development. Thus, the same activity, which categorically would not have a significant impact on the environment, corresponds with activities that are regarded as sustainable. For example, some of the additions attempt to encourage development on previously disturbed sites in municipal centers with supporting infrastructure and encourage green infrastructure projects and solar energy development — which fulfills other policy goals of the state such as promoting smart growth and renewable energy.¹³ Other proposed items will remove obstacles encountered by municipalities when developing affordable housing in cooperation with not-for-profit organizations. The result is to provide a regulatory incentive for project sponsors to further the State’s policy of sustainable development. Each proposed change will be discussed in more detail in the following sections.

The Department expects that expansion of the Type II list will mean increased regulatory certainty for applicants and municipalities considering such actions and increased attention to the remaining projects that are more environmentally significant.

2.3.1 Upgrade of Structures to Meet Energy Codes (proposed section 617.5[c] [2])

Proposed Regulatory Language:

Replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site, including upgrading of buildings to meet building, energy, or fire codes [, unless such action meets or exceeds any of the thresholds in section 617.4 of this Part].

Objectives, Rationale, and Benefits:

The inclusion of upgrades of existing building to meet new energy codes is consistent with the current intent of the item and furthers National and state policies to promote energy conservation.

The change also simplifies the application of the item by eliminating reference of the thresholds in the Type I list. Eliminating the reference to the Type I thresholds will also remove a potential impediment to an activity that is consistent with sustainable development.

Potential Impacts:

The proposed amendment to include “energy codes” only clarifies that when one replaces, rehabilitates or reconstructs a structure consistent with the code provisions that are currently in effect, it qualifies as a Type II action. This is a reasonable and practicable change to the existing language that will have no significant adverse environmental impact — perhaps a positive effect on the environment. The deletion of the Type I thresholds language will make this item easier to interpret and apply. It will also serve to encourage the replacement and rehabilitation of structures which will further the state’s policy efforts to maximize the reuse of already developed sites with existing infrastructure versus construction on green sites which frequently require the extension of water, sewer and other infrastructure resulting in additional sprawl. It will also further the states sustainable development goals.

Alternative:

The “no action” alternative would return the item to its current wording in the regulation.

Another alternative considered was to add a reference to certain Type I thresholds [617.4(b) (6), (7), (8), (9) and (10)] to limit the size of any replacement, rehabilitation or reconstruction to only those projects that would fall under the Type I thresholds that apply primarily to construction activities. This would reduce the chance for unanticipated impacts from a project that could be classified as Type II under this provision but is so large that one could argue that it should be the subject of a full SEQR review. Directing growth to previously disturbed areas has clear environmental benefits: improved air and water quality, reduction of greenhouse gas emissions, greater habitat and open space protection, farmland preservation, clean-up and re-use of Brownfield sites, elimination of blight, and fish and wildlife protection. Redeveloping existing sites is largely characterized by “smart growth” land use patterns – i.e., higher density; mixed land uses; increased transit accessible and viability; greater roadway connectivity and accessibility; and varied mobility options, such as walking and biking. Taken together,

these land use characteristics have been shown to reduce vehicle miles travelled (VMT) and the number of car trips necessary for daily travel by creating “location-efficiency” – i.e., greater proximity, accessibility and connectivity among land use destinations. This result in turn reduces automobile air pollution and greenhouse gas emissions. For these reasons this alternative was rejected.

2.3.2 Green Infrastructure (proposed section 617.5[c] [3])

Proposed Regulatory Language:

Retrofit of a structure or facility to incorporate green infrastructure practices.

The Department also proposes to amend Section 617.2 (definitions) to add the following definition for “Green infrastructure” to include “practices that manage stormwater through infiltration, evapotranspiration and reuse such as the use of permeable pavement; bio-retention; green roofs and green walls; tree pits, stormwater planters, rain gardens, vegetated swales, urban forestry programs; downspout disconnection; and stormwater harvesting and reuse.”

Objectives, Rationale, and Benefits:

The Department proposes to add green infrastructure practices used in retrofits of a structure, facility or site to the Type II list of actions. The green infrastructure practices have been defined to include permeable pavement; bio-retention; green roofs and green walls; stormwater street trees and urban forestry programs; downspout disconnection; and stormwater harvesting and reuse in retrofit situations. A retrofit includes the replacement of an existing facility or altering of an existing facility for the purpose of incorporating green infrastructure practices. Although these practices could be incorporated in new development and redevelopment projects, their classification as a Type II action is limited to their use in retrofit projects as defined by the Department.

The current Type II item on replacement, rehabilitation or reconstruction is limited to “in kind” construction. This allows for some limited deviations from the existing structure but could be interpreted to preclude the use of green infrastructure in place of the existing more conventional development techniques. The proposed Type II is meant to add some additional flexibility to the Type II action for in-kind replacement where the deviation is to add green infrastructure technology, as defined in the express terms, to an existing building. The definition of “green infrastructure” is not intended to be exclusive as to the green infrastructure practices that could come within this Type II definition as green infrastructure technology continues to evolve.

Potential Impacts:

This proposed change would result in the Type II classification of limited green infrastructure practices that retrofit a specific location, and would have no adverse environmental impact. Indeed, the change may have a significant beneficial impact on the environment. Installation of green roofs or other green infrastructure techniques can substantially improve energy efficiency, reduce generation of runoff and result in the improvement of water quality on a site specific basis. Since this proposed Type II action will only allow retrofits to an existing structure or site it will result in minimal or no additional site disturbance. This would also result in increased clarity and consistency

with regard to classification of these types of projects under SEQR. This proposed change will provide a major benefit as it will promote the adoption of green infrastructure practices to improve existing environmental conditions.

Alternatives:

The “no action” alternative would retain the classification of these projects as Type I and Unlisted actions. This may result in unnecessary costs and time delays to implement these environmentally compatible projects. Green infrastructure components of the projects are not compelled by permit and straight replacement with existing non-green techniques would qualify as a Type II action as a “replacement in kind”. Therefore, the increased environmental review requirements may deter the implementation of these water quality and environmental improvements.

2.3.3 Expansion of Broadband Services (proposed section 617.5[c][7])

Proposed Regulatory Language:

Installation of fiber-optic or other broadband cable technology in existing highway or utility rights of way.

Objectives, Rationale, and Benefits:

High speed broadband service is increasingly seen as an essential component of a competitive business environment. Better broadband means greater opportunities for New Yorkers. Better broadband will provide individuals with the opportunity to connect to educational and workforce development training resources; communities can foster more economic development; businesses can access new markets and create more jobs, and our schools, colleges and universities can conduct high-tech research and development and build an innovative and talented high-tech workforce. But, residents and businesses cannot fully participate in the digital economy without access to broadband. There are still many areas in New York that are underserved and unserved. This Type II item would clarify that the installation of fiber-optic cable in existing highway or utility rights of way will not require environmental review under SEQR.

Potential Impacts:

The Department has determined that the installation of fiber-optic cable would not have a significant adverse impact on the environment given the relatively limited nature of the disturbance that will occur in existing rights of way. Installing cable involves the excavation of existing soils, backfilling the trench, compacting the soil and reseeding to restore the area to its previous state. The installation of aerial cables on existing poles will not involve any significant ground disturbance. Potential impacts common to this type of activity include: noise, fugitive dust, soil disturbance, erosion and stormwater runoff. Since this activity will occur in an existing highway or utility right of way, the area has already been disturbed and is being maintained in an artificial, static habitat. These impacts are all temporary in nature, limited in scope, predictable,

common to other types of maintenance and repair of existing utility systems within an existing right of way and easily managed by standard best management practices. In addition there are multiple regulatory controls already in place to prevent impacts to sensitive environmental features. Project sponsors will still have to obtain wetland permits from state, local and federal agencies and if a project will disturb the bed or banks of a protected stream a stream protection permit would be required.

Alternatives:

The “no action” alternative would keep this item from the Type II list and continue to require a SEQR review, where some other kind of discretionary review is required (e.g. site plan review) prior to the installation of fiber-optic or other broadband cable technology. The no action alternative will result in confusion for local government officials and potentially cause delay in the expansion of broadband services to underserved or unserved areas of the state with no real environmental benefit.

2.3.4 Co-Location of Cellular Antennas and Repeaters (proposed section 617.5[c] [14])

Proposed Regulatory Language:

Installation of cellular antennas or repeaters on an existing structure that is not listed on the National or State registers of historic places or located within a district listed in the National or State registers of historic places or that has not been determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places pursuant to sections 14.07 or 14.09 of the Parks, Recreation and Historic Preservation Law.

Objectives, Rationale, and Benefits:

The current Type II item [617.5(c)(7)] that precludes the installation of radio communication and microwave transmission facilities as a Type II action has generated a substantial number of questions on the SEQR classification for installation of antennas and repeaters on existing structures. These antenna and repeaters can, in many locations, be installed on existing buildings and preclude the construction of a new tower. The placement of antennas and repeaters are meant to extend range and capacity for a system, so to a certain extent location is pre-determined. Existing structures that might serve as locations for antennas and repeaters include substations, residential and commercial buildings, light poles, and power / energy / information distribution poles. It is fairly common practice in many communication projects to look for these types of facilities and appurtenances for co-location. This proposed change would create a better alignment of SEQR with Federal law on co-location. Congress, as part of the Middle Class Tax Relief and Job Creation Act of 2012, provided that a state or local government “may not deny, and shall approve” any request for collocation, removal, or replacement of transmission equipment on an existing wireless tower or base station, provided the action does not substantially change the physical dimensions of the tower or base station.¹⁴ Such co-locations, therefore, would not be subject to

discretionary review under SEQR though local governments retain their authority under the municipal enabling acts as curtailed by Federal law.

Potential Impacts:

The Department believes that the addition of an antenna on an existing tower or pole or other type of structure would not have a significant adverse impact on the environment given the relatively small size of antennas and repeaters. Where they are being co-located, the addition of an antenna or repeater would not be visually significant. Co-location of antennas and repeaters on existing facilities may even limit adverse impacts on the landscape by reducing the need for additional cell towers. Co-location minimizes most new visual impacts and new ground disturbances by utilizing previously disturbed areas containing existing structures. The presence of existing access roads to sites intended for antennas and repeaters further reduces the likelihood of adverse impacts from occurring as no new ground disturbance is needed for roads. Installation of antennas and repeaters on existing buildings nearby to historic resources, whether individual properties or districts, is not considered an adverse impact to these resources because, while perhaps introducing a new element to the general area, it is not a visually intrusive element, and unlikely to change the historic importance of nearby buildings and is considered reversible.

Alternatives:

The “no action” alternative would keep this item from the Type II list and continue to require a SEQR review, where some other kind of discretionary review is required (e.g. site plan review) prior to the installation of cellular antennas and repeaters on existing structures.

Another alternative would be to add the phrase “structure or district” to the proposed listing to prohibit the applicability of this item in a designated historic district, prohibit the installation of cellular antennas or repeaters within 500 feet of a designated historic structure or district and require that all cellular antennas and repeaters that are located within 500 feet of a historic structure or district be camouflaged to reduce visibility. As discussed above, since the installation of antennas or repeaters on non-historic buildings is not seen as an adverse impact to adjacent or nearby historic properties, there is little reason to further explore alternatives that put unnecessary restrictions on the proposed Type II action.

2.3.5 Installation of Solar Energy Arrays (proposed 6 NYCRR 617.5[c] [15] & [16])

Proposed Regulatory Language:

Installation of five megawatts or less of solar energy arrays on a sanitary landfill, brownfield site that has received a brownfield site clean-up order certificate of completion (under 6 NYCRR 375-.3.9), waste-water treatment facilities, sites zoned for industrial use or installation of five megawatts or less of solar canopies at or above residential and commercial parking facilities (lots or parking garages).

Installation of five megawatts or less of solar energy arrays on an existing structure that is not listed on the National or State Register of Historic Places or located within a district listed in the National or State Register of Historic Places or on a structure or within a district that has not been determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places pursuant to sections 14.07 or 14.09 of the Parks, Recreation and Historic Preservation Law.

Objectives, Rationale, and Benefits:

These new Type II actions are intended to encourage placement of solar panels and arrays in areas that have already been disturbed or on structures that already exist. They would also further the goals of the initiative “Reforming the Energy Vision” or “REV” and in particular the NY-Sun initiative to grow the solar energy industry in New York.¹⁵

The installation of solar energy arrays can substantially reduce energy costs and the generation of greenhouse gases. Increasing the amount of solar energy produced in New York State will reduce the generation of greenhouse gases and assist the state in attaining its goals for renewable energy production contained in the State Energy Plan¹⁶ and PlaNYC¹⁷. Additionally, distributed generation (e.g., locating many small renewable energy systems in communities rather than large central power plants) reduces strain on the electrical grid, demand for constructing additional large central power plants, and can improve air quality.

The rooftops of many commercial and industrial facilities are already home to a myriad of heating, ventilation and air conditioning equipment. Several corporations have embarked on the installation of solar energy arrays on roof tops as part of the move to a more sustainable operation. Corporations like Campbell’s Soup, Costco, IKEA, Kohl’s, Macy’s, McGraw Hill, Johnson & Johnson, Staples, Walgreens and Walmart all have programs to place solar arrays on the roofs of their stores. Solar energy projects can be located on structures in such a way that they are hidden from sight or barely visible. The benefits of solar energy arrays include the addition of more clean and renewable energy to New York’s energy supply, creation of construction jobs, potential generation of property tax revenues for system lives of 10 to 20 years, no air emissions, no water is needed to generate power, system equipment operates very quietly, and the systems are self-sustaining.

When a landfill closes, the waste is sealed using a polyethylene cap, buried under compacted soil and seeded with grass. The landfill is then effectively useless, albeit somewhat pleasing to the eye. There are over 1,200 closed landfills in New York. A solar array or energy cover can provide sustainable energy to the facility and also minimizes the typical maintenance costs of grounds keeping and cover soil replacement. The installation of solar energy at a sanitary landfill site would return a currently under used site to a productive use. A closed landfill can therefore continue to have use as a generator of revenue through renewable energy production. Since many sanitary landfills currently generate energy from the combustion of methane gas they already have the necessary infrastructure in place to connect to the electrical grid.

There are currently three solar energy facilities located at sanitary landfills in New York. In the Town of Clarkstown, Rockland County a 2.3 MW solar energy facility was constructed at the Town's decommissioned and capped landfill. This facility was able to be constructed without affecting the transfer station that is still in operation at the site. Similar solar energy facilities have been constructed at sanitary landfills in the Town of Williamson, Wayne County (1.5 MW) and the Town of Patterson, Putnam County (1.0 MW). The Madison County Landfill has installed a solar array capable of generating 50 kW.¹⁸ This facility has installed a thin film flexible solar membrane cover along with a free standing solar array. The City of New York has embarked on a program to develop solar energy at several closed sanitary landfills in the City.¹⁹ Currently several adjoining states have programs to promote the construction of solar energy at sanitary landfills. Massachusetts, Connecticut and New Jersey have programs to transform landfill sites to sources of clean energy. These states have also found that solar arrays can be constructed at landfills with no effect on active or closed landfill cells. The USEPA encourages reuse of landfill and contaminated and formerly contaminated lands for renewable energy production through its "RE-Powering America's Lands" program.

The installation of a solar array at a brownfield site, whether solely on the land parcel(s) constituting the brownfield site, on existing or new buildings or structures or any combination of ground or pole mounted arrays and building or roof mounted arrays would add to the value of reusing the brownfield site.

"Brownfield" is a term used to describe land where a contaminant is present at levels exceeding the soil cleanup objectives or other health-based or environmental standards, criteria or guidance adopted by the Department that are applicable based on the reasonably anticipated use of the property, in accordance with applicable regulations. Once cleaned up, such an area can be reused/redeveloped to become a productive asset to the local community. Former brownfield sites may become parks, residential, commercial, or industrial uses, but must be redeveloped in a way that conforms to local zoning and any comprehensive or master plan.

Under New York's Brownfield Cleanup Program (BCP), the New York State Department of Environmental Conservation (NYSDEC) has been encouraging cleanup and redevelopment of brownfield sites and more recently under its Green Remediation policy (DER-31), has been encouraging more sustainable remediation and reuse of brownfield and other contaminated sites, including the use of renewable energy in both the cleanup and contemplated future use of the site.

Many industrially zoned sites in communities are underutilized. There may be more land zoned for industrial use than can presently be used based on past use patterns. Also, uses not compatible with an industrial activity may have been located in close proximity to what was once an isolated site, making it less desirable for future industrial use. Encouraging the reuse of these sites for the installation of solar arrays will return these areas to a productive use. Installing solar canopies on parking lots and parking garages presents a beneficial activity without significant adverse environmental impacts. It turns a large single-use asphalt lot at a commercial or residential facility into a power plant while also providing shaded parking for patrons and lowering the state's and nation's dependence on more polluting fuels.

Potential Impacts:

The installation of solar arrays can be viewed as a visual intrusion and they can be very land intensive. Solar arrays can also have an impact on the visual character of designated historic structures or districts. However, since this Type II action will utilize only existing structures, previously disturbed sites or sites zoned for industrial use it will greatly minimize new ground disturbance or construction and would not result in a significant adverse environmental impact. When arrays are placed on the ground, such as at landfills or industrial areas visual impacts will not be significant and landscaping can be utilized, as necessary, to reduce any residual impact. Landfill sites also tend to be relatively isolated or have substantial buffer areas. This will further reduce the possibility that these arrays will result in any significant adverse visual impacts to surrounding land uses. Solar arrays can be successfully built on landfills without compromising the integrity of the existing final cap. Foundations can be designed to minimize any impact on the integrity of the cap or existing methane collection systems. There are new thin film, flexible photovoltaic film panels that can be integrated into the cap.²⁰ Experience in New York and other states demonstrate that solar arrays can be successfully constructed on both the flat and side slopes of a landfill with no adverse impact to site integrity.

Generally solar arrays can be accommodated at brownfield sites. When the arrays are constructed on brownfield sites they must be designed and installed in such a way as to not interfere with any planned, ongoing, or completed cleanup or operation /maintenance of any remedy that may be needed at the brownfield site.

Frequently, remedies at brownfields sites include cover systems (e.g., soil or asphalt) intended to eliminate direct contact with contaminated soil or active remediation systems which utilize wells and piping to extract or inject various media and also typically have monitoring wells which require ongoing access. Development of a solar array on a brownfield site can be coordinated with the remediation and redevelopment of the brownfield site such that the remedy can be operated and integrity of the remedy maintained.

Any solar development planned for the BCP site (contemplated future use of the site) would be considered during the development of the site remedy as part of NYSDEC oversight of the cleanup to ensure compatibility of the remedy and reuse of the site.

Construction of solar canopies at existing parking facilities will not result in a significant adverse environmental impact. These sites are already disturbed and covered with impermeable pavement so it will not result in any additional ground disturbance. These canopies are low in profile so offsite visual impact will be negligible or non-existent and if properly designed, solar canopies can also help to manage surface runoff and reduce pollutant loading typically associated with run-off from parking areas. The environmental impacts from solar canopies should all be positive.

For roof-top installations this provision would not allow placement of solar arrays on designated historic resources so impacts to these resources will not be significant.

When solar is installed on roof tops, the visual impacts are greatly reduced due to the lack of visibility to a roof (except perhaps from adjacent roof tops and high rises).

Alternatives:

The “no action” alternative would mean that these activities would continue to require a SEQR review. Leaving these activities off the Type II list would miss the opportunity for creating a regulatory incentive for the installation of solar arrays at sites that have no significant adverse impacts associated with the installation and operation of solar power. No action would also miss the opportunity to align SEQR with the State Energy Plan and the PlaNYC which seek to expand the development of solar resources in the state.

The second alternative is to remove the restriction for designated historic properties. This alternative risks impacting the characteristics of a building that make it historically important. The Department considers it to be prudent to leave decisions regarding the placement of solar arrays on historic properties as decisions reviewed under SEQR on a case-by-case basis. At the same time, however, it needs to be recognized that the placement of solar systems on historic properties is not always an adverse impact or intrusion. The federal Advisory Council on Historic Places (ACHP) has acknowledged that some solar placements can be sensitively done on historic properties without damage to the integrity or importance of the structure. Stated in *Sustainability and Historic Federal Buildings*, an ACHP publication dated May 2, 2011, “[s]olar panels tend to have the least visual impact on historic buildings with flat roofs and parapets, when compared to other on-site renewable energy applications. The angle at which a panel is installed is important, and the more horizontal the orientation, the less visible and conspicuous it becomes. There are also other products such as solar “laminates” on the market that lay flat on a roof top and are less visually intrusive.” In addition, Jean Carroon, member of the National Trust for Historic Preservation Sustainable Preservation Coalition reported to a US Senate panel that green and historic can be compatible, stating “Historic buildings with metal and slate roofs can often accept solar panels without damaging the existing fabric. Placement can be discreet and the installations can be reversible.”²¹

The third alternative would be to place a different limit on the size of the installation. The ability and technology to hide or screen solar arrays on roofs in order to not create impacts exists. For example, the largest roof top solar array in New England is being installed in West Davisville, RI, on two privately owned buildings located in the Quonset Business Park. The solar array has been described as about 8,000 panels, largely unnoticed to passersby because it is set back 10 feet from the edge of the roof and the panels are only about 2 to 3 feet off the roof. Palmer Moore, a developer with Nexamp, a Mass.-based solar energy company installing the system, has been quoted as saying ““The nice thing about it is that, despite its scale, you would never know it’s there because it’s on a rooftop.”²² As for closed landfills, these properties are already relatively secluded or are usually a somewhat concealed site location. Solar at landfills and brownfields that have been remediated is actually just a re-use, for good reason, of already disturbed and recovered land.

2.3.6 Expand Provisions for Area Variances (proposed section 617.5[c][17], replacing existing items 12 and 13 in section 617.5[c])

Proposed Regulatory Language:

Lot line adjustments and area variances not involving a change in allowable density.

Objectives, Rationale, and Benefits:

This proposed revision would expand the applicability of the existing Type II exemption for individual lot line and set back variances to all area lot line adjustments and area variances so long as the variance does not change the allowable density under a local government's zoning law. Area variances are subject to the review and approval of zoning boards which are required under state law to consider environmental factors in their decision to either issue or deny the requested relief (see, for example, Town Law §267-b). Under the state enabling law criteria for granting area variances, the zoning board must consider whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district and impose conditions for the purpose of minimizing any adverse impact such variance may have on the neighborhood or community. This existence of such criteria is not a substitute for the SEQR process; however, area variances are categorically not by themselves environmentally significant. If an area variance is a component of another action that is subject to SEQR (e.g., a development that requires a special use permit or site plan approval) then the lead agency would be required to include consideration of the environmental impacts of the variance as a component of the whole action.

Potential Impacts:

The Department does not believe there are any potentially significant adverse impacts from this expansion of the Type II category for area variances and lot-line adjustments. Stand-alone area variances, not involving a change in allowable density, should never result in a significant adverse environmental impact. As discussed above, zoning boards may only grant such variances where it finds that the variance will not have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district. State law requires that zoning boards grant the minimum variance necessary and impose conditions to minimize adverse impacts. Under whole action theory, area variances that are a component of another action that is subject to SEQR would be considered in evaluating the overall impact of the action.

Alternative:

The "no action" alternative would remove this item from the Type II list and continue the current situation which would restrict area variances to only one-, two- and three- family residences and lot-line variances.

2.3.7 Minor Subdivisions (proposed section 617.5[c] [18])

Proposed Regulatory Language:

Subdivisions defined as minor under a municipality's adopted subdivision regulations, or subdivision of four or fewer lots, whichever is less, that involve ten acres or less, and provided the subdivision was not part of a larger tract subdivided within the

previous five years and is not within or substantially contiguous to a critical environmental area that has been designated pursuant to section 617.14 of this Part.

Objectives, Rationale, and Benefits:

Under the municipal enabling laws for subdivision plat review (e.g., Town Law §276) towns, villages and cities may define subdivisions as major or minor with the review procedures and criteria for each set forth in the local regulation. Minor subdivisions have a speedier and less complicated process associated with them since they involve the creation of fewer lots.²³ Along these lines, municipalities often define minor subdivisions as four or fewer lots or two lots. Minor subdivisions present the opposite case from large-scale subdivisions (which the Department believes should have a lower Type I threshold), which often have potentially significant impacts associated with them. On the other hand, the impacts of minor subdivisions are very predictable and controllable, as set forth below, through modern design techniques which for any parcel of land more than one acre in size would include compliance with the Department's stormwater general or individual permit. Since most minor subdivisions would be classified as Unlisted actions (unless located next to a property listed on the National Register, agricultural district or parkland), notice of negative declarations for such projects would not appear in the Environmental Notice Bulletin and thus there is no reliable way to track the number of negative declarations that have been issued for such projects. For the years 2006, 2008, 2010 and 2/3 of 2012, the number of the positive declarations for subdivisions with four lots or less (classified as Type I because of location) was 5. This equates to 11% of the total number of subdivisions (45) with four or fewer lots that were Type I actions on account of location and therefore listed in the Environmental Notice Bulletin. This percentage would greatly shrink if all subdivisions were added to the total number. Lead agencies have likely issued negative declarations for the vast majority of minor subdivisions.

By placing certain minor subdivisions on the list of actions that do not require environmental review under SEQR, the proposed amendment would reduce unnecessary administrative burdens on agencies and landowners with no loss of environmental protection. In the case of these minor subdivisions, agencies could focus their attention on fulfilling the requirements of the municipal enabling laws for subdivision plat review (*see, for example*, Town Law §§276, 277; *see also*, New York State Department of State, James A. Coon Technical Series, *Subdivision Review in New York*, available at <http://www.dos.ny.gov/lg/publications.html>) and the requirements of the State Pollution Discharge Elimination System (SPDES) to control stormwater (which apply to any disturbance of an acre or more).²⁴ Both sets of laws include environmental considerations that are especially relevant to subdivisions.

Potential Impacts:

The impacts of such subdivisions are predictable and the municipal enabling laws provide an ample grant of authority to municipalities to consider the typical and expected environmental impacts of minor subdivisions.²⁵ Municipalities with zoning can also regulate density and require clustering to reduce impacts. Under such circumstances coupled with the additional caveats for numbers of acres, location within

or next to a critical environmental area, provides assurance that such actions would not have a significant effect on the environment.

The typical impacts associated with minor subdivisions are those associated with the development that follows the division of land into lots, which are clearing, grading and filling of the site, noise, dust and runoff. In the case of minor subdivisions, these impacts are minor in nature and easily controlled by modern construction techniques including those required through the Department's stormwater individual and general permits.

Additional impacts from occupancy of the structure to be located in the subdivisions are use of pesticides and herbicides for lawn and garden care and the construction and operation of water supply wells and onsite sanitary systems. Since the impacts from the construction or expansion and subsequent occupancy are well known and predictable the preparation of an EIS for these projects offers little value to an agency. In addition, there are multiple regulatory controls already in place to prevent impact to sensitive environmental features (e.g., Federal and State wetlands permitting).

Finally, the expressed concern with this proposed Type II is that applicants for subdivision approval will choose to evade environmental analysis by submitting multiple minor subdivision applications for the same parcel of property rather than one application that would be comprehensively reviewed under SEQR. This impact is addressed through the restriction that the subdivision was not part of a larger parcel that was subdivided in the past five years and the limitation on the number of subdivided acres that could fall into the Type II category.

Alternatives:

The "no action" alternative would remove this item from the Type II list and continue to require a SEQR review for minor subdivisions. To the extent that a minor subdivision did not qualify as a Type I action, local governments would retain the ability to, through adoption of their own lists of Type II actions, classify such subdivisions as Type II actions.

The second alternative would be to limit the Type II exemption to two-lot subdivisions, which would correspond to how minor subdivisions are defined in some or many municipalities. It does not, however, appear as if potential impacts (if any) would be materially mitigated or avoided by this alternative.

A third alternative would be to limit the Type II exemption to areas with existing sewer and water systems or communities with adopted zoning laws. This alternative would arguably mitigate impacts since communities with zoning have conferred upon themselves greater powers to avoid impacts (if any) from growth associated with subdivisions. Communities without zoning, however, tend to be rural towns where the impacts of a very small subdivision would not be significant.

A fourth alternative would be to limit the Type II action to areas outside of agricultural districts established pursuant to Article 25-AA of the Agriculture and Markets Law — whose purpose is to encourage the continued use of farmland for agricultural production. There may be some concern that the proposed Type II would help to incentivize the conversion of agricultural lands to residential lots. The Department does

not believe this is a significant issue given the other restrictions placed on the proposed Type II action. However, the addition of this further restriction on the proposed Type II action would insure that residential subdivisions in agricultural districts continue to receive consideration under SEQR.

A fifth alternative would be to remove the restriction on acres. Arguably, the lot size restriction does not avoid or mitigate environmental impact; it only limits the tracts of land that the Type II classification would be applicable to. On the other hand, the restriction on acreage serves to indirectly favor use of the Type II classification in more already developed areas that have a higher level of infrastructure already in place — thereby indirectly avoiding additional residential sprawl to areas that do not contain residential infrastructure.

2.3.8 Sustainable Development (proposed sections 617.5[c] [19, 20, 21 and 22])

Proposed Regulatory Language:

(17) On a previously disturbed site in the municipal center of a city, town or village having a population of 20,000 persons or less, with an adopted zoning law or ordinance, construction of a residential or commercial structure or facility involving less than 8,000 square feet of gross floor area, not requiring a change in zoning or a use variance or the construction of new roads, where the project is subject to site plan review, and will be connected (at the commencement of habitation) to existing community owned or public water and sewerage systems including sewage treatment works that have the capacity to provide service;

(18) On a previously disturbed site in the municipal center of a city, town or village having a population of more than 20,000 persons but less than 50,000 persons, with an adopted zoning law or ordinance, construction of a residential or commercial structure or facility involving less than 10,000 square feet of gross floor area, not requiring a change in zoning or a use variance or construction of new roads, where the project is subject to site plan review, and will be connected (at the commencement of habitation) to existing community owned or public water and sewerage systems including sewage treatment works that have the capacity to provide service;

(19) On a previously disturbed site in the municipal center of a city, town or village having a population more than 50,000 persons but less than 250,000 person , with an adopted zoning law or ordinance, construction of a residential or commercial structure or facility involving less than 20,000 square feet of gross floor area, not requiring a change in zoning or a use variance or construction of new roads, where the project is subject to site plan review, and will be connected (at the commencement of habitation) to existing community owned or public water and sewerage systems including sewage treatment works that have the capacity to provide service;

(20) On a previously disturbed site, within one quarter of a mile of a commuter railroad station, in a municipal center of a city, town or village having a population of 250,000 persons or more, with an adopted zoning law or ordinance and within a transit oriented zoning district or transit oriented overlay zoning district, construction of a residential or commercial structure or facility involving less than 40,000 square feet of gross floor area, not requiring a change in zoning or a use variance or construction of new roads, where the project is subject to site plan review, and will be connected (at the

commencement of habitation) to existing community owned or public water and sewerage systems including sewage treatment works that have the capacity to provide service.;

As set out above, in connection with these new Type II actions, the Department proposes to add the following definitions to section 617.2 as follows:

“Municipal center’ means areas of concentrated and mixed land uses that serve as central business districts, main streets, and downtown areas;” and

“Previously disturbed’ means a parcel of land in a municipal center that was occupied by a principal building used for residential or commercial purposes where the building has been abandoned or demolished.”

Objectives, Rationale, and Benefits:

The four proposed Type II actions described above — which allow for a sliding scale of re-development activity depending on population levels — are actions that would not have a significant impact on the environment. Development of sites that have been previously disturbed and that have existing infrastructure categorically result in significantly less environmental impact than developing undisturbed sites (that are not located in downtown or main street areas). The proposed Type II actions would in effect create a regulatory incentive for redevelopment of existing sites in downtown and main street areas already served by public infrastructure, which has clear environmental benefits over “greenfield” sites that have not been already developed. The Department has set out in Appendix F a list of supportive research for the proposition that locating development on such areas has less impact on the environment than development on previously undisturbed sites without existing infrastructure and that is automobile dependent.²⁶ Further, State policy favors development of existing sites in municipal centers.²⁷

The Department has conditioned the proposed Type II categories for sustainable development on conformance with zoning and site plan review, which insures that the classification may only be applied in those local jurisdictions that have exercised the tools given to them by the State Legislature to appropriately manage land use. The Legislature has given cities, towns and villages authority to manage land use and many of its impacts. These powers are constitutionally enshrined in Article IX of the State Constitution and implemented through the Statute of Local Governments, the Municipal Home Rule Law, city charters (e.g., the New York City Charter) and the other municipal enabling acts (e.g., Article 16 of the Town Law and Article VII of the Village Law). As a consequence, small scale impacts of a project (that do not rise to the level of significant under SEQR) can be addressed through the municipal land use review process (i.e., comprehensive planning, zoning and special use permits or site plan review, or both).

The Department has proposed definitions for municipal center and previously disturbed to identify the types of properties that were intended to benefit from the Type II, namely downtown, previously built on locations already served by existing infrastructure. The Department considered many other formulations to convey this meaning as downtown areas are usually defined through municipal comprehensive

plans and then implemented through zoning. They cannot be precisely defined in a state-wide rule making for hundreds of municipalities across the state.

Potential Impacts:

Potential adverse impacts are avoided because of the many limitations built into the proposal. To qualify, among other requirements, the building must be on a site that is occupied or previously occupied by a principal building, small in scale (based on a relative scale according to population). It has to be connected to existing sewer and water, located in a downtown or mixed use location, and subject to site plan review (which enables municipalities to review a project based on a wide list of community and environmental considerations).

Directing growth to previously disturbed areas has clear environmental benefits: improved air and water quality, reduction of greenhouse gas emissions, greater habitat and open space protection, farmland preservation, clean-up and re-use of Brownfield sites, elimination of blight, and fish and wildlife protection. Development within “municipal centers” is largely characterized by “smart growth” land use patterns – i.e., higher density; mixed land uses; increased transit accessible and viability; greater roadway connectivity and accessibility; and varied mobility options, such as walking and biking. Taken together, these land use characteristics have been shown to reduce vehicle miles travelled (VMT) and the number of car trips necessary for daily travel by creating “location-efficiency” – i.e., greater proximity, accessibility and connectivity among land use destinations. This result in turn reduces automobile air pollution and greenhouse gas emissions.

Compact, higher-density development, for example, reduces travel distance between buildings and land uses. Mixed-use zoning places a variety of life’s daily destinations – home, work, recreation, retail shopping, civic – within close and accessible proximity to residences and one another, thus further reducing the miles we travel and the number of car trips necessary to access these amenities. And roadway connectivity offers more travel route options, quicker and easier access to our daily destinations, and generally less traffic congestion. Density, mixed land uses and transportation connectivity also combine to yield a built environment that is conducive to walking, biking, mass transit and trip-bundling (i.e., minimizing the number of trips by accessing several destinations in one condensed trip), which also reduces adverse environmental impacts.

Conversely, sprawling development patterns – dispersed, low-density, single-use, disconnected development on the metropolitan fringe – tend to increase travel distances among daily destinations, which increases automobile dependence, VMT and greenhouse gas emissions. Researchers estimate that 50 – 60% of increases in VMT since 1950 are attributable to sprawling development patterns. Streamlining development projects in “municipal centers” offers a powerful antidote to sprawl, and its concomitant auto reliance and adverse environmental impacts.

Location does matter, and in the context of vehicle emissions, location matters a great deal. Indeed, without land use changes, particularly regarding the location of development, the State and nation simply cannot meet meaningful greenhouse gas emission reduction goals.

The Department believes that the proposed sustainable development Type II action for the largest category of building size and communities, involving buildings with less than 40,000 square feet in communities of 250,000 persons or more, should only apply to areas within one half mile of a passenger train station. This is to account for the fact some of the communities where this largest category could potentially apply (e.g., in Nassau and Suffolk counties) contain some very large and dispersed communities (in terms of population) with no readily definable downtown areas. Because of the way many of these Long Island communities were developed in the post-World War II era, the proposed Type II category might end up applying to areas where the proposed Type II category could potentially contribute to sprawl rather than provide an incentive for sustainable development. This limitation would help to insure that the Type II category is not inappropriately applied in areas that would not constitute municipal centers. The larger category also corresponds to communities that have transit and opportunities for transit oriented development including the City of Buffalo as well as many Long Island communities.²⁸ The proposed Type II action could help to incentivize the efforts of those communities in promoting transit oriented development.²⁹ In particular, Buffalo has many areas in need of downtown revitalization. The city, however, has an important asset, namely a light rail system that serves the municipal center of the city. The Type II could assist the City in making areas near the light rail stations more attractive to developers and therefore nodes of development activity in the city center.

Alternatives:

The “no action” alternative would remove these items from the Type II list. If these items were not adopted as part of the Type II list the potential benefits of directing growth into existing municipal centers would not be realized.

The second alternative would be to change the population numbers and the amount of allowed development for each category or provide only one or two categories. Population numbers and their corresponding size of development could be adjusted upward or downward. Following stakeholder meetings the Department added an additional category for communities under 20,000 and reduced the size of development allowed. The Department believes that the current numbers are appropriate given the other limiting provisions built into the items.

A third alternative would be to prohibit use of this category of Type II action when the project includes demolition or if the site is located substantially contiguous to or within a designated or eligible historic structure or district. These additional provisions could be added to further limit the applicability of the Type II item. The Department believes that adding the additional caveats would not avoid or reduce impacts. Since this category of Type II actions are intended to encourage redevelopment of vacant lots in the urban setting and the project would be subject to site plan review any issues associated with the compatibility of the proposed action to existing historic resources can be adequately addressed through the site plan review process. In addition, this proposed provision will not preempt existing historic or architectural reviews or permits required by a municipal agency.

2.3.9 Reuse of an Existing Residential or Commercial Structure (proposed section 617.5[c] [23])

Proposed Regulatory Language:

In a city, town or village with an adopted zoning law or ordinance, reuse of a commercial or residential structure where the activity is consistent with the current zoning law or ordinance.

Objectives, Rationale, and Benefits:

The built environment of New York State contains many structures that are currently vacant or abandoned. For example, the City of Albany has recently determined that there are 809 vacant buildings in the city.³⁰ These vacant structures, if not properly maintained, contribute to urban blight and suburban flight and are an under used resource. Many of these structures could be reused for housing or commercial development rather than developing a previously undeveloped site. Returning a vacant residential or commercial structure to a productive use can reduce blight, improve the vitality and live-ability of a neighborhood and return structures to municipal tax rolls.

Potential Impacts:

Since these properties generally have existing infrastructure, the suite of potential environmental issues is very limited, easy to predict and routinely handled under municipal land use regulations. The reuse of a residential structure will: generate traffic, have air emissions from heating and cooling, use water and generate wastewater, solid waste and noise. All of these impacts are limited in nature, will in many cases be using existing infrastructure and routinely handled through the existing local land use approval process and code reviews. The reuse of a commercial structure will also: generate traffic, have air emissions from heating and cooling, use water and generate wastewater, solid waste and noise but on a slightly greater level.

The requirement that the activity must be consistent with current zoning will limit the applicability of the Type II to those projects that have been pre-determined by the local municipality to be an allowable use.

Rehabilitation of an existing building avoids the “embodied energy” required for new construction – i.e., the energy (and concomitant pollution and environmental degradation) required to extract, produce and transport new construction materials, and the actual construction of the building. (A common phrase among green building advocates is “the greenest building is the one that isn’t built.”)³¹ An existing structure already possesses its embodied energy, with the exception of maintenance and rehabilitation. And unlike new construction, rehabilitation involves largely labor (usually local), and less materials. Rehabilitation also avoids the disposal of building materials in a landfill that would result from the ultimate demolition of an existing building that is not maintained or restored.³² Since one-quarter of the material in solid waste facilities is comprised of construction debris (much of which is from building demolition), the minimization or avoidance of building demolition through rehabilitation reduces solid waste.

The rehabilitation of existing structures in municipal centers also reaps environmental benefits through Brownfield clean-up and re-development. According to the Preservation League of New York State, 27% of the historic rehabilitation projects in Rhode Island's historic rehabilitation tax credit program (2002 – 2006) were located in Brownfield areas; one would expect similar – or greater – correlations in New York State.

Alternatives:

The “no action” alternative would remove this item from the Type II list and continue to require a SEQR review prior to the proposed reuse of a vacant or abandoned structure to the extent there is a discretionary review involved in the reuse. This may serve as a deterrent to the redevelopment of existing structures and result in development of a previously undisturbed site with all of the impacts associated with the development of a green field site.

Another alternative would be to expand this provision to apply to all structures including industrial uses - Industrial uses frequently involve processes that use or store hazardous chemicals, require permits for air and water emissions, result in fugitive emissions of non-regulated compounds and may require new infrastructure to store or treat water and air emissions. Also, industrial uses have a greater range of potential impact issues that are more difficult to predict when compared to residential and commercial activities and generally they fall outside of the traditional land use authority. For these reasons, this alternative was rejected.

2.3.10 County planning board referrals under Section 239-m or 239-n of the General Municipal Law (proposed section 617.5[c] [24])

Proposed Regulatory Language:

The recommendation of a county or regional planning entity made following referral of an action pursuant to General Municipal Law, sections 239-m or 239-n.

Objectives, Rationale, and Benefits:

A frequently asked question by town and county planners is whether the county or regional planning board recommendation is subject to SEQR. County planning board recommendations are advisory opinions and not subject to SEQR. This proposal would codify the status of such recommendations thereby bringing greater certainty to the law.

Potential Impacts:

This potential amendment will not have a significant adverse impact on the environment of the State of New York. These advisory activities presently do not trigger a SEQR review.

Alternative:

The “no action” alternative would remove this item from the Type II list. An explanation of this interpretation by the courts is already included in the SEQR Handbook so deleting this regulatory change would result in no real change in practice but it would miss an opportunity to provide municipalities and county planning agencies with clear direction on the applicability of SEQR to the 239-m & n process.

2.3.11 Dedication of Parkland (proposed section 617.5[c] [44])

Proposed Regulatory Language:

Dedication of parkland.

Objectives, Rationale, Benefits:

SEQR requires a close look at development projects that will be located in or next to parklands. In general, parkland is accorded special protection in the law. (Over eighty years ago in *Williams v. Gallatin* [229 N.Y. 248, 253], the Court of Appeals explained "[a] park is a pleasure ground set aside for the recreation of the public, to promote its health and enjoyment.") The SEQR regulations accomplish the hard look requirement by including in the Type I list (actions more likely to require an EIS) any unlisted action "occurring wholly or partially within or substantially contiguous to any publicly owned or operated parkland, recreation area or designated open space," if such use exceeds 25 percent of any of the Type I thresholds. On the other hand, the Department does not believe that the dedication of parkland, whereby the State or a municipal government devotes land for parkland purposes, has under any circumstances a significant, adverse impact on the environment. Therefore, the Department believes that the act of dedicating land as parkland should be added to the Type II list. This Type II addition was mentioned by participants at one or more of the stakeholder meetings. This proposed Type II action applies only to the dedication of land as parkland and would not exempt park management or developments plans or actions that would otherwise be subject to SEQR as Unlisted or Type I actions.

Alternative:

The "no action" alternative would not add dedication of parkland to the Type II list. The Department would also consider an alternative that would restrict the number of acres above which parkland dedication would no longer qualify as a Type II action.

2.3.12 Acquisition of less than 100 Acres of land to be Dedicated as Parkland (proposed section 617.5[c] [45])

Proposed Regulatory Language:

An agency's acquisition of less than one hundred acres of land to be dedicated as parkland.

Objectives, Rationale, and Benefits:

Adding the action of acquiring land as parkland to the Type II list was requested by participants at stakeholder meetings. This proposed Type II item applies only to acquisition of land as parkland and does not exempt from SEQR any accompanying management or development plans or construction projects intended for the parkland.

This change would substantially streamline the regulatory process for what are relatively simple actions of acquiring parkland by state and local agencies. Parkland helps mitigate the local effects of storm and extreme heat events, particularly in urban areas, making communities more resilient to the effects of climate change, especially in the urban environment by helping to lower concentrations of greenhouse gases in the

atmosphere, and depending on the location, building resiliency allowing communities to better adapt to the effects of climate change including major storm events.

Potential Impacts:

Just as dedication of parkland would have no adverse impact on the environment, acquisition of smaller parcels of land for parkland have no significant adverse impact on the environment given their intended use. The acquisition of larger parcels of property — one hundred acres or more — present other considerations or possible impacts were they to be developed with larger scale, active recreational uses. Such plans, if they exist, should be evaluated under SEQR as part of the initial decision to acquire larger parcels of parkland.

Alternatives:

The no action alternative would retain the existing language of the regulation by which even small acquisitions for parkland had to be evaluated under SEQR.

Other alternatives would be to limit the number of acres of land under the proposed Type II category to smaller purchases or to increase the number of acres within the Type II category. Doing so, however, might require an amendment of section 617.4[b] [4], the Type I item for acquisitions of 100 acres or more. The Department would also consider restricting the Type II category to parkland acquisitions for passive recreational uses, or to require that the acquisition and intended use has been identified and assessed in, for example, an adopted recreational or comprehensive plan (which would encourage planning).

2.3.13 Certain Transfers of Land to Provide Affordable Housing (proposed section 617.5[c] [46])

Proposed Regulatory Language:

Transfer or conveyance of five acres or less by a municipality or a public corporation to a not-for-profit corporation for the construction or rehabilitation of one, two or three family housing.

Objectives, Rationale, and Benefits:

One of the basic concepts of SEQR is the “whole action”. Having the land transaction of a proposed activity subject to review under SEQR, when the activity itself is listed as a Type II action, is not consistent with this concept. If the overall action has been classified as Type II then the individual components of that action should also be Type II. This quirk has also resulted in affordable housing projects like those sponsored by not-for-profit agencies being required to undergo SEQR review for the transfer of land from a municipality to a not-for-profit organization when the activity involved the construction of a one, two or three family residence which is a Type II action. Adding this item to the Type II list will therefore rationalize the process by which municipalities transfer land to not-for-profit organizations such as Habitat for Humanity and Neighborhood and Rural Preservation companies that are organized for, among other purposes, to build or develop affordable housing. The proposed Type II action could

have a positive impact on the provision of affordable housing that previously required the preparation of an EAF and a determination of significance due to the underlying land transaction.

Potential Impacts:

Since part of the underlying action—construction or expansion of a single-family, a two-family or a three-family residence — is already classified as a Type II action, the addition of this provision is not expected to have a significant adverse impact on the environment.

The proposed Type II action would contribute to the state’s policy of sustainable development by encouraging the reuse of distressed or abandoned properties in urban areas and increasing the stock of affordable housing in such areas. When development occurs in existing communities it can reduce vehicle miles traveled, decrease greenhouse gas emissions, leaves more and larger areas for the natural process of absorption and filtering stormwater and leaves ecosystems intact to support diverse plant and wildlife populations.

Alternative:

The “no action” alternative would remove this item from the Type II list. Not adding this activity to the Type II list would continue the current practice of subjecting these very desirable and sustainable activities to undergo a SEQR review because of the land transfer with no environmental benefit.

Additional alternatives would be to reduce the acreage that could be transferred under this Type II action or to eliminate the requirement that such transfers be made to not-for-profits groups like Habitat for Humanity since, according to the Division of Housing and Community Renewal, for-profit actors are also involved in the development of affordable housing and the impact would not change based on the character of the transferee. The Department determined that five acres was sufficiently large to cover most in-fill projects given their location in more urban environments.

2.3.14 Sale and Conveyance of Real Property by Public Auction Pursuant to Article 11 of the Real Property Tax Law (proposed section 617.5[c] [47])

Proposed Regulatory Language:

Sale and conveyance of real property by public auction pursuant to Article 11 of the Real Property Tax Law.

Objectives, Rationale, and Benefits:

A municipality or a state agency may acquire land through foreclosure or other means where the land reverts to the agency due to a failure of the owner to remain current on property taxes. State law requires that the municipality or agency dispose of this land through a public action to the highest qualified bidder. The municipality or agency has no discretion but to abide by the results of the auction. Currently, agencies are ostensibly required to perform a SEQR review since the sale, lease or other transfer of greater than 100 acres is a Type I action and transfers of parcels of land that are

under 100 acres are classified as Unlisted actions. Arguably, such transactions would fall under the existing Type II exemption for actions that are ministerial (6 NYCRR 617.5[c][19]). This proposed revision would clarify that such actions should be classified as Type II actions.

In any event, the environmental assessments for this activity are meaningless since the agency, at the time of the auction, has no idea regarding the ultimate use of the property by the new owner (in addition to having no real discretion regarding the ultimate disposition of the property except to award it to the highest bidder). Any subsequent development proposal for the property will generally result in an environmental review if the proposed action requires a discretionary permit or approval from a state or local agency and the activity is not a Type II action.

Potential Impacts:

The Department has not identified any significant adverse environmental impacts should this activity become codified as a Type II action. SEQR requires that an agency conduct an environmental review at the earliest possible time. But there are situations where that leads to an environmental review that is essentially meaningless because the details needed to conduct a review are not yet available and as arguably in this case the agency has no discretion to change what it is doing. This is one of those situations. The agency disposing of the property has no control over the future use of the property; it has no discretion but to sell the property to the highest bidder. This addition to the Type II list would merely codify an action as Type II that is arguably ministerial and not subject to SEQR in any event.

Alternatives:

The “no action” alternative would remove this item from the Type II list and continue to cause confusion regarding the appropriate classification of the action.

Another alternative would be to limit the item by including the phrase “unless such action meets or exceeds the criteria found in 617.4(b)(4) of this Part.” - Since there are no identified significant adverse impacts it is not necessary to impose additional limitations on this item.

A third alternative would be to expand this proposed listing to allow for disposition of land by any means - Expanding the proposed Type II action to allow for all land dispositions to be covered would raise several issues. Dispositions involving more than 100 acres would conflict with the existing Type I action threshold. If the agency disposing of the property has discretion as to the ultimate new owner it is more likely that details regarding the subsequent reuse of the property will be known at the time of the disposition meaning that a proper environmental review could be completed at the time of the disposition.

2.3.15 Brownfield Clean-up (proposed section 617.5[c] [48])

Proposed Regulatory Language:

Brownfield site clean-up agreements under Title 14 of Article 27 of the Environmental Conservation Law, provided that design and implementation of the remedy do not commit the Department or any other agency to specific future uses or

actions or prevent an evaluation of a reasonable range of alternative future uses of or actions on the remedial site.

Objectives, Rationale, and Benefits:

The Department's Brownfield Clean-up regulations (6 NYCRR 375-3.11 [b]) exempt from SEQR remedy selection and implementation of remedial actions under Department-approved work plans pursuant to ECL article 27, Title 14 provided that design and implementation of the remedy do not commit the Department or any other agency to specific future uses or actions; and prevent evaluation of a reasonable range of alternative future uses of or actions on the remedial site. This exemption contained in the Brownfield cleanup regulations was noted in Judge Read's concurring opinion in *Matter of Bronx Committee for Toxic Free Schools v. New York City School Construction Authority* (20 N.Y.3d 148). In that case, the Court held that the New York City Schools Construction Authority was required to prepare a supplemental EIS for its long term maintenance and monitoring plan. In her concurring opinion, Judge Read suggested that DEC should reconcile SEQR with the Brownfield exemption. The exemption, which appears in the Brownfield cleanup regulations, does not currently exist in the SEQR regulations. This item would clarify that the development and implementation of a Brownfield clean-up agreement, including plans for long term maintenance and monitoring of the site, is a Type II action with the same caveats as that currently exist in 6 NYCRR §375-311(b),, namely that future development plans and alternatives for the Brownfield would be fully subject to SEQR. The cleanup itself and plans to clean-up the site would be a Type II action.

Potential Impacts:

There are no potential adverse impacts associated with the inclusion of this activity as a Type II action. The process of investigating and the subsequent clean-up of a Brownfield site are tightly controlled by existing state and federal regulation. The current Brownfield clean-up process requires an environmental review that is comparable and in many areas exceeds the requirements for an environmental review under SEQR due to the highly technical nature of the site assessments. In addition, each step of the process includes a rigorous and proscriptive citizen participation plan.

Alternative:

The "no action" alternative would mean that this proposed Type II action would not be added to the Type II list.

2.3.16 Anaerobic Digesters (proposed section 617.5[c] [49])

Proposed Regulatory Language:

Construction and operation of an anaerobic digester, at a publically-owned wastewater treatment facility or a municipal solid waste landfill, provided the digester has a feedstock capacity of less than 150 tons per day, and only produces Class A digestate that is beneficially used or biogas to generate electricity or to make vehicle fuel, or both.

Objectives, Rationale, and Benefits:

This new Type II action is intended to encourage placement of anaerobic digesters at existing publically-owned wastewater treatment facilities or operating solid waste landfills.

Anaerobic Digestion is a naturally occurring process where microorganisms continuously breakdown organic material in an oxygen deprived area to produce biogas and a fertilizer product. Food waste is the second largest category of municipal solid waste in the United States, accounting for approximately 18% of the waste stream (“Organic: Co-Digestion,” 2014). Rather than allowing this material to go into a landfill, the food waste can be diverted to anaerobic digesters. Digesters can be located at wastewater treatment plants. They can also manage the biosolids produced at the plant. This process could help to diminish the amount of municipal solid waste being sent to landfills while creating a renewable source of energy and other useful by-products.

In 2012, the United States produced about 251 million tons of trash, with 18% of that amount consisting of food waste. Municipal solid waste (MSW) recovery was almost 87 million tons but food waste recovery was only 2% (“Municipal Solid Waste,” 2014). Although food waste was 36.4 million tons of MSW, only 1.7 million tons were recovered. In 2008, New York alone produced 36 million tons of waste, with about 23% of this being organic. Using the process of anaerobic digestion and taking the second largest contributor from the municipal waste stream could help to decrease MSW disposal, increase renewable energy generation, and increase the production of organic soil amendments.

Biogas

Anaerobic digesters produce biogas. Biogas results from the breakdown of organic matter into mostly methane and carbon dioxide. Captured biogas is transported from the digester using a pipe either directly to a gas use device or to a gas treatment system where hydrogen sulfide can be removed to prevent corrosion of the combustion device (“Biogas Handling,” 2014). The biogas is then used to start an engine-generator set where it produces electricity that is often more than enough for the facility itself to run on as well as have excess electricity sold to a utility or the biogas can be burned off using a flare. This engine generator set also produces a lot of waste heat that can be collected and used to maintain the temperature of the digester or heat the surrounding

buildings, or both. Processed biogas, also known as biomethane or renewable natural gas, can be also be used to produce vehicle fuel.

An anaerobic digestion facility at a wastewater treatment plant that manages biosolids from the plants can significantly increase the quantity of biogas produced by adding food scraps, food processing waste, and other high energy wastes. Therefore, regulators and operators of such plants have shown an increased interest in the addition of these organics to digesters at treatment plants.

Digestate

Digestate or effluent is product that was once influent and has been processed through the digester. Effluent can either be solids or liquids or a mix of both depending on whether the system has a solid-liquid separator. This effluent is low in odor and rich in nutrients. If a liquid solid separator is used then the liquid can be used as a fertilizer. The solids can be used as livestock bedding or soil amendments (fertilizer) on the farm with excess being sold.

An anaerobic digester can be operated at various temperatures and detention times. DEC specifies two levels of treatment that digesters can operate under – termed Class A and Class B. Class A treatment occurs at a higher temperature than Class B. The temperature and detention time for Class A insures that any disease-causing organisms (pathogens) are reduced to below detectable levels. Since the Class A material does not contain pathogens, there are few restrictions on the use of the digestate, assuming the other applicable standards (heavy metal content, etc.) are also met. Class B treatment reduces the pathogen content but does not insure complete destruction. Therefore, the Department requires a permit for each site where Class B digestate is applied and imposes several requirements (types of crops that can be grown, success restrictions, etc.) that must be followed. The anaerobic digester itself, whether operated as Class A or Class B, will be essentially the same.

Wastewater Treatment Facilities and Landfills

Wastewater treatment facilities have been utilizing anaerobic digestion since the 1920's. Anaerobic digestion systems at municipal wastewater treatment plants help to not only breakdown biosolids (sewage sludge) but also eliminate pathogens in wastewater. The end result of this process is an improvement in water quality. Anaerobic digesters at wastewater treatment facilities are becoming more prominent around the world. In the United Kingdom, over 66% of that nation's sewage sludge is treated using an anaerobic digestion system. In the state of California, there are almost 140 wastewater treatment facilities that use anaerobic digesters ("Organics: Co-Digestion," 2014).

Wastewater treatment facilities are an ideal location for anaerobic digestion systems for a number of reasons. The biggest factor is that they already have the existing infrastructure. Some of these facilities have excess capacity since they were

built to handle the waste load of large corporations that have since left the state. With this excess room, wastewater facilities can also accept outside food waste and other organics. Since anaerobic digestion already produces renewable energy, by adding food waste it could help to increase their energy yield. This can have an even greater impact on the wastewater treatment facility by making them self-sufficient and perhaps generating excess electricity to be sold back to the local utility. In doing so, they are increasing their revenue through tipping fees, improving their biogas generation, decreasing their environmental impact, and diverting food waste from landfills.

Municipal solid waste landfills can divert loads of food scraps that would otherwise be placed into the landfill to an anaerobic digester located on-site. The digester would reduce the amount of organics placed in the landfill and extend the life of the landfill. Anaerobic digestion should not increase the amount of vehicular traffic at the landfill since the same material that would be brought to the landfill for disposal will be diverted to the anaerobic digestion. In addition to conserving landfill capacity, the biogas generated by the anaerobic digestion can be used in existing landfill gas collection and electric-producing equipment. The majority of the landfills in the State already have engines to convert biogas to electricity so the addition of an anaerobic digestion system will fit well with the existing infrastructure at the landfill, with little visual or other environmental impacts.

Food Waste

Even though the digestion of sewage sludge produces biogas, food waste is known to produce even more biogas when sewage sludge and food waste are combined. A study by East Bay Municipal Utility District in Oakland, California showed that food waste has three times as much energy potential as biosolids alone. Even with such high amounts of energy potential, co-digestion only occurs in about 22% of currently operating systems in the U.S.

- | |
|--|
| <ul style="list-style-type: none">• Cattle Manure = 25m³ gas/ton• Biosolids = 120m³ gas/ton• Food waste = 376m³ gas/ton |
|--|

By anaerobically digesting 100 tons of food waste per day for five days a week, enough power would be produced for 1,000 homes. If 50% of the food waste generated in the U.S. each year was anaerobically digested, enough electricity would be generated to power over 2.5 million homes for a year.

Potential Impacts:

In theory, the construction of anaerobic digesters may cause a visual intrusion and an increase in truck traffic. However, since this Type II action is restricted to anaerobic digestion facilities at existing publicly-owned wastewater treatment plants and landfills it would not result in significant adverse environmental impacts. The wastewater treatment plants already have numerous tanks, buildings, and other structures in place. The digester would not be substantively different from the structures already on-site. Similarly, municipal solid waste landfills have storage structures and other structures on-site similar in character to a digester. Also, truck traffic already exists for the various

operations at the treatment plants and landfills and additional traffic for delivery of food scraps or other organics would likely be limited compared to the existing traffic to the facility. For a municipal landfill there will be no additional truck traffic since this material is already being brought to the landfill for disposal. Tanker trucks used to deliver the organic material to a sewage treatment facility will likely range from 5,500 to 11,600 gallons in size. One gallon of water weighs 8.34 pounds, so a load of material will weigh between 45,870 pounds (22.93 tons) to 96,744 pounds (48.37 tons). This means that a 150 ton/day facility will require from 3 to 7 trucks/day for delivery of organic material. This assumes that all of the material will be trucked to the site. The addition of 3 to 7 truck trips/day to an existing waste water treatment plant would not in any event result in a significant addition to traffic entering or leaving the facility. Since the bulk of the organic material will be generated onsite this estimate of additional truck traffic is very conservative and the actual number of trucks at most sites will probably be closer to the lower estimate.

Publically-owned wastewater treatment facilities and municipal solid waste landfills may, in some instances, be located in environmental justice communities. A review of existing facilities in New York State reveals that approximately 33% of these facilities are located within two miles of a potential environmental justice area. For the same reasons that the placement of anaerobic digesters would not cause a significant impact in non-environmental justice communities they would not do so even if situated near environmental justice communities. Further, the construction of an anaerobic digester would still require a permit under the Department solid waste regulations (6 NYCRR Part 360). Those permits include, as part of the permit review process, a specific screen for the presence of potential environmental justice areas. If a potential environmental justice area was found application of Commissioner's Policy – 29 would be required.

As discussed above, the diversion of food waste and other high energy organic wastes from landfills to anaerobic digesters would reduce the amount of organics placed in the landfill, extend the life of the landfill, increase renewable energy generation and increase the production of organic soil amendments

Alternatives:

The “no action” alternative would mean that these activities would continue to require review under the SEQRA. On the other hand, adding these activities to the Type II list would create a regulatory incentive for the construction of anaerobic digesters at sites where anaerobic digestion of waste would be a highly compatible activity. Selecting the No Action alternative would also mean that organic wastes will continue to be landfilled taking up valuable landfill space, decreasing site life and requiring expansion of existing facilities into present green field areas — without the possible incentive created by the regulatory incentive to reduce this wasteful practice.

The second alternative would be to place a different limit on the size of the anaerobic digester. The size chosen (150 tons per day) represents a digester that can easily blend into the visual and operational aspects of a wastewater treatment plant or landfill that would be interested in a digester. A smaller size would not be large enough to generate the amount of biogas needed to justify the investment and produce

sufficient amounts of electricity. This alternative was not selected since the reduction in the identified impacts from constructing a facility smaller than 150 tons/day does not justify the reduction in the utility of the item and it would continue the current practice of landfilling with its attendant impacts.

A third alternative would limit this Type II item to only one of the two facility types. This alternative could be selected if it was determined that the impacts from the construction and operation of an anaerobic digester at one of the facility types would result in impacts that were different in scale or potentially significant. Since both publically-owned wastewater treatment facilities and municipal solid waste landfills would involve construction at an existing site that is already dedicated to an industrial activity the addition of an anaerobic digester would not introduce a new or different type or scale of use to the site. Both facility types already possess similar structures and are the source of truck traffic. The Department does not expect that the impacts will be dissimilar in scale or type so this alternative was not selected.³³

2.4 MANDATORY SCOPING (6 NYCRR §617.8)

The changes to section 617.8 (scoping regulation) would make scoping mandatory, and provide a better link between the content of the environmental assessment process, the final written scope, and the draft environmental impact statement. In connection with these proposed changes, the Department has proposed some clarifying modifications to the definition of “scoping” in section 617.2. The changes strengthen the regulatory language to encourage the preparation of concise EISs targeted only at studying, avoiding or reducing potentially significant impacts identified through the determination of significance and the scoping process.

Scoping was included in the SEQR regulations adopted in 1987 as “...the process by which the lead agency identifies the potentially significant adverse impacts related to the proposed action that are to be addressed in the draft EIS ... [see 6 NYCRR 617.2(af)]”. As such, scoping was not mandatory, public participation was not required, a written scope of issues was to be completed within 30 days of the filing of the positive declaration, the lead agency was required to provide a written justification for the inclusion of new information following the issuance of the written scope and a “Scoping Checklist” was provided to serve as a guide for scoping.

Changes to the scoping process were made through the 1995 amendments of the SEQR regulations (which became effective on January 1, 1996). The scoping provisions were revised to address problems brought to the Department's attention since scoping was formally recognized in the 1987 SEQR regulations. The problems included i) lack of specific guidance on the scoping process, ii) lack of a requirement for public participation, iii) reluctance of project sponsors to participate in scoping due to the perception that it had no definitive end point and iv) inappropriate use of the scoping checklist which, instead of being used to focus the draft EIS, was used by agencies as a one size fits all outline for every draft EIS.

Under the 1995 amendments scoping was still optional but strongly encouraged. If scoping was conducted, a draft scope and public review was required, and the

timeframe for the production of a final written scope was extended to 60 days (to allow time for public participation). Also, the project sponsor was authorized to revise the final written scope and include information provided following the release of the final written scope in the draft EIS, or to treat the late information as a comment on the draft EIS which would be addressed in the final EIS. In addition to the changes in the regulatory provisions, the scoping checklist, which had been Appendix D, was removed from Part 617.³⁴

DEC strongly considered making scoping mandatory in 1995 but decided that leaving scoping optional would allow agencies, project sponsors and the public to gain experience with the new provisions and the opportunities afforded by the changes in the regulations. There was also concern that certain projects may not require scoping due to the limited nature of the associated impacts or limited interest or concern about the project. A full discussion on the changes made to the scoping process can be found in the 1995 generic EIS (http://www.dec.ny.gov/docs/permits_ej_operations_pdf/finalgeis.pdf).

Overall, scoping provides a large benefit to the EIS process. A consensus has emerged that EISs too often become defensive with inordinate stress on discussion of impacts that are trivial or not significant —making it more difficult to focus on those impacts that are truly significant. An EIS should focus on the central issues, but unfortunately, EISs sometimes contain too much minutiae that unreasonably prolongs the process.

For more EISs to be consistently focused on significant impacts, scoping must be made mandatory. Scoping is a critical step in identifying issues that must be discussed in the EIS and eliminating less significant issues from further discussion. Additionally, scoping should build on the environmental assessment process by which an agency determines that an EIS is warranted. A draft EIS should focus on each of those issues that Part 3 of the EAF identifies as requiring additional assessment. By the same token, issues determined during the environmental assessment as not having a significant adverse environmental impact should not be re-evaluated in the draft EIS.

The need for more predictability, consistency and finality in the determination of the adequacy of the draft EIS is provided by adding language to clarify the limits of the lead agency's authority to reject a draft EIS as not adequate.

Proposed Regulatory Language:

617.8(a) - The primary goals of scoping are to focus the EIS on potentially significant adverse impacts and to eliminate consideration of those impacts that are irrelevant or [non-significant] not significant. Scoping should result in EISs that are focused on relevant, potentially significant, adverse impacts. Scoping is [not] required for all EISs [. Scoping] and may be initiated by the lead agency or the project sponsor.

(b) [If scoping is conducted,] I[t]he project sponsor must submit a draft scope that contains the items identified in paragraphs (e)[(f)](1) through (5) of this section to the lead agency. The lead agency must provide a copy of the draft scope to all involved agencies, and make it available to any individual or interested agency that has expressed an interest in writing to the lead agency.

[(c) If scoping is not conducted, the project sponsor may prepare a draft EIS for submission to the lead agency.]

(c) [(d)] Involved agencies should provide written comments reflecting their concerns, jurisdictions and [information] needs for environmental analysis sufficient to ensure that the EIS will be adequate to support their SEQR findings. The lead agency shall include such informational needs in the final scope, unless they are unreasonable in scope or irrelevant to the involved agency's jurisdiction. Failure of an involved agency to participate in the scoping process will not delay completion of the final written scope.

(d)[(e)] Scoping must include an opportunity for public participation. The lead agency may either provide a period of time for the public to review and provide written comments on a draft scope or provide for public input through the use of meetings, exchanges of written material, or other means.

(e) [(f)] The lead agency must provide a final written scope to the project sponsor, all involved agencies and any individual that has expressed an interest in writing to the lead agency within 60 days of its receipt of a draft scope. The final written scope should include:

- (1) a brief description of the proposed action;
- (2) the potentially significant adverse impacts identified both in Part 3 of the environmental assessment form [the positive declaration] and as a result of consultation with the other involved agencies and the public, including an identification of those particular aspect(s) of the environmental setting that may be impacted;
- (3) the extent and quality of information needed for the preparer to adequately address each impact, including an identification of relevant existing information, and required new information, including the required methodology(ies) for obtaining new information;
- (4) an initial identification of mitigation measures;
- (5) the reasonable alternatives to be considered;
- (6) an identification of the information[/] or data that should be included in an appendix rather than the body of the draft EIS; and
- (7) a brief description of the [those] prominent issues that were considered in the review of the environmental assessment form or raised during scoping, or both, and determined to be [not] neither relevant nor [not] environmentally significant or that have been adequately addressed in a prior environmental review [.] and the reasons why those issues were not included in the final scope.

Objectives, Rationale, and Benefits:

The Department's proposal places more emphasis on using the EAF as the first step in scoping. The revised EAFs are much more comprehensive than previous versions and updated to cover the range of issues lead agencies typically encounter in the environmental assessment process. This should allow a lead agency to assess, in a thorough fashion, all of the potential impacts and to establish a basis for distinguishing between issues that need additional scrutiny in an EIS and issues that do not require any further analysis and can be excluded from the EIS scope. Scoping can then be used to determine the depth and type of assessment that will be required in a draft EIS.

The Department's proposal also provides clearer language on the ability to target an EIS. As explained above, a consensus has emerged among stakeholders that EISs

are commonly filled with information that does not factor into the decision or that is not significant. This is driven by the defensive approach agencies and project sponsors take in developing an EIS record. In pursuit of a “bullet proof EIS”, the tendency is to include information even though the environmental assessment has already concluded that an issue is not substantive or significant. When EISs are bloated with information that will not factor into the final decision they become difficult to read, distracting the reviewer from issues that are truly consequential to decision making. Reducing clutter in an EIS will also allow lead agencies and project sponsors to increase the depth of analysis of impacts that are significant in the decision-making process.

The Department’s proposal will provide better guidance on the basis for accepting or rejecting a draft EIS for adequacy. The current regulations make the project sponsor responsible for accepting or deferring issues that arise following the preparation of the final written scope. This change was made in the 1995 amendments to give definite closure to the scoping process. However, a lead agency can undermine the decision of a project sponsor by simply rejecting a draft EIS as inadequate for failure to include issues that were deferred by the project sponsor. This is a form of double jeopardy and it can lead to a protracted debate as to the adequacy of a draft EIS. A lead agency should not be able to reject a draft EIS as inadequate when the project sponsor has decided to defer an issue and treat it as a public comment about a draft EIS, consistent with 617.8(h). The proposed language will clarify that such a decision by a project sponsor cannot serve as the basis for rejecting a draft EIS as inadequate to start the public review process. The draft EIS was never intended to be a perfect document. That is why the draft EIS is made available for public review and followed by the final EIS.

Potential Impacts:

The Department believes that making scoping a required step for the preparation of all EISs would have a positive environmental impact. This will result in channeling all EISs through a public process to affirmatively determine which impacts, identified during the environmental assessment process, require additional study in the EIS and which impacts do not require additional study.

The proposed revision clarifies that a lead agency cannot reject a draft EIS as inadequate on a project sponsor’s decision to treat late information as comment to be addressed in the final EIS. If the issue is substantive and relevant then it is in the project sponsor's best interest to include it in the draft EIS as the Supreme Court noted in *West Village Committee v. Zagata* (challenge to the 1995 SEQRA amendments).³⁵ If the project sponsor chooses not to include this material or if it is submitted so late as to make it difficult to include at that point, then the potential risk of the need for a supplement to the draft or final EIS is a risk that the project sponsor must assume. This proposed change will reinforce the importance of identifying all pertinent issues during the scoping process.

Alternatives:

The “no action” alternative would retain scoping as an optional procedure and continue the current situation where a lead agency can undermine the intent of the current regulations to provide closure to the process of issue identification. Both of the

proposed changes should help to ensure that issues are identified as early in the process as possible and that the process can move forward on the basis of the issues that have been identified as being significant.

An alternative would be to provide the lead agencies with the authority to include “late items” after the preparation of the final scope. Lead agencies had this authority until the provision found at section 617.8(g) was added in 1995. Lead agencies at the local and state level can be very susceptible to the claim that additional information is needed. This is part of the defensive nature of SEQR review. In most cases it serves only to bloat the draft EIS with information that has already been assessed and dismissed — adding significant time and expense to the preparation of a draft EIS.

Another alternative would be to require that scoping must include a public meeting. As discussed in the 1996 generic EIS, the Department considered this alternative but dismissed it in order to provide lead agencies with more flexibility in conducting a scoping process and also in recognition that a scoping meeting is not necessarily the most efficient way to solicit public input. The circulation of a draft scope and the submission of written comments is a much more effective way to involve the public in the scoping process — especially in the age of mass communication through e-mail. However, lead agencies are allowed the option of using any or all such methods, including public meetings, in the conduct of scoping.

A last alternative would be to allow more time for scoping. However, any time frame selected can be modified under section 617.3(i) of the regulations and it should not take more than the already provided time to settle on a scope for almost any action.

2.5 PREPARATION AND CONTENT OF ENVIRONMENTAL IMPACT STATEMENTS (6 NYCRR §617.9)

The proposed changes to section 617.9 among other changes, define what it means for a draft EIS to be “adequate” for purposes of public review as follows: “A draft EIS is adequate with respect to scope and content for the purpose of commencing public review if it meets the requirements of the final scope, section 617.9(b) of this Part, and provides the public and involved agencies with the information necessary to evaluate project impacts, alternatives, and mitigation measures.” On a resubmitted draft EIS, that was determined to be inadequate, the proposed new regulatory language states: “The determination of adequacy of a resubmitted draft EIS must be based solely on the written list of deficiencies provided by the lead agency following the previous review.” The proposed regulations include two other provisions that would serve to streamline the EIS process, namely 1) that “[i]nformation submitted following the completion of the final scope and not included by the project sponsor in the draft EIS cannot be the basis for the rejection of a draft EIS as inadequate but such information may require a response to comment in the final EIS or the preparation of a supplemental EIS in accordance with section 617.9 (a) (9), and 2). As is the case under the current regulations, if such information relates to a significant impact or identifies one not included in the final scope then the project sponsor may include the information in the draft EIS.

The last proposed changes to section 617.9 relate to ensuring that actions that are subject to an EIS, account for projections of sea level rise and changes in the frequency and character of storm events as a result of climate change. DEC proposes to add “measures to avoid or reduce both an action’s environmental impacts and vulnerability from the effects of climate change including sea level rise and flooding” to the topics that should be covered in an EIS for development projects where flooding may be a significant issue. Secondly, DEC also proposes to add “impacts on the use of renewable energy” to the list of impacts that may be considered in an EIS identified in 617.9(b) (5) (iii) (e).

2.5.1 Determining the Adequacy of a Draft EIS

Proposed Regulatory Language:

§ 617.9 Preparation and content of environmental impact statements

(a) Environmental impact statement procedures. (1) The project sponsor or the lead agency, at the project sponsor's option, will prepare the draft EIS. If the project sponsor does not exercise the option to prepare the draft EIS, the lead agency will prepare it, cause it to be prepared or terminate its review of the action. A fee may be charged by the lead agency for preparation or review of an EIS pursuant to section 617.13 of this Part. [When the project sponsor prepares the draft EIS, the document must be submitted to the lead agency.]

(2) The lead agency will use the final written scope, if any, and the standards contained in this section to determine whether to accept the draft EIS as adequate with respect to its scope and content for the purpose of commencing public review. This determination must be made in accordance with the standards in this section within 45 days of receipt of the draft EIS. A draft EIS is adequate with respect to scope and content for the purpose of commencing public review if it meets the requirements of the final written scope, section 617.9(b) of this Part, and provides the public and involved agencies with the necessary information to evaluate project impacts, alternatives, and mitigation measures.

(i) If the draft EIS is determined to be inadequate, the lead agency must identify in writing the deficiencies and provide this information to the project sponsor. Information submitted following the completion of the final scope and not included by the project sponsor in the draft EIS cannot be the basis for the rejection of a draft EIS as inadequate but such information may require a response to comment in the final EIS or the preparation of a supplemental EIS in accordance with section 617.9 (a)(7).

(ii) The lead agency must determine whether to accept the resubmitted draft EIS within 30 days of its receipt. The determination of adequacy of a resubmitted draft EIS must be based solely on the written list of deficiencies provided by the lead agency following the previous review.

Objectives, Rationale, and Benefits:

Determining the adequacy of a draft EIS, which is the responsibility of the lead agency, is a challenging step in the EIS process. If scoping becomes a mandatory requirement as proposed above, it is important to use that final written scope as the roadmap for the draft EIS. If the project sponsor produces a draft EIS that is consistent

with the final written scope it should be presumed that the document is adequate to commence the public review process.

If the project sponsor fails to adhere to the final written scope then the document should be rejected as not adequate and the lead agency must provide a written list of the identified deficiencies that the project sponsor needs to correct. When the document is re-submitted, the second review must be based on the list of deficiencies that were identified in the first round of review. This is an issue of fairness and will lead to a more efficient process.³⁶

When there is a dispute over a conclusion reached about an impact, the lead agency must take into consideration that the draft EIS is only a draft. The goal of adequacy is not to resolve all issues to the full satisfaction of the lead agency. If there are legitimate differences in the assessment of an impact between the lead agency and the project sponsor both positions can be presented in the draft EIS. The goal is to provide a document that is adequate to start the public review. Lead and involved agencies can and should continue the review of the draft EIS during the public review period.

Potential Impacts:

This proposed change will not result in a significant adverse environmental impact. It is less likely that a major issue will be missed in the development of the draft EIS if scoping is required. If a major issue was identified by the lead agency following the issuance of the final written scope, then it is generally in the project sponsor's best interest to include it in the draft EIS as pointed out by the Court in *West Village Committee v. Zagata*, "... it would appear that if the issues are significant, it would be in the project sponsor's best interests to include them in the draft EIS rather than being subjected to delay caused by the requirement of a supplemental EIS or litigation challenging the failure to include it in the draft EIS or the adequacy of review during the comment period."³⁷ If the project sponsor chooses not to include this material or if it is submitted so late as to make it difficult to include it at that point, then there is a risk that a supplement to the draft or final EIS will be required. This proposed change will reinforce the importance of identifying all pertinent issues during scoping and the initial review for adequacy of the draft EIS.

Alternatives:

The "no action" alternative is not desired because it would not address the problems with the current language that can result in a protracted review of a draft EIS for adequacy.

Another alternative would be to require that the submitted draft EIS be determined complete if it contains all items listed in the final scope. This alternative would require the default acceptance of the submitted draft EIS if it contained all of the elements identified in the final written scope. Although this may sound desirable on its face it is not practical for numerous reasons: Such a mechanical rule of acceptance could result in the default acceptance of an EIS that was sufficient on its face in terms of topics but inadequate in terms of its substance. It would also conflict with the statute,

which makes clear that determining the adequacy of a submitted draft EIS is the responsibility of the lead agency.

2.5.2 Mitigation Measures: Vulnerability to Storm-related Impacts

Proposed Regulatory Language:

617.9(b) (5) –

(iv) a description of the mitigation measures, including measures to avoid or reduce both an action's environmental impacts and vulnerability from the effects of climate change such as sea level rise and flooding;

Objectives, Rationale, and Benefits:

Mitigating the effects of a changing climate represents one of the most pressing environmental challenges for the State, the nation and the world. The major scientific agencies of the United States — including the National Aeronautics and Space Administration (NASA) and the National Oceanic and Atmospheric Administration (NOAA) — agree that climate change is occurring and that humans are contributing to it. The impacts of climate change are already being felt in the State, including observed temperature increases and sea level rise. Predictions for future climate change impacts in the State further demonstrate the need to take action now to reduce greenhouse gas emissions.

The Department believes that it is critical to ensure that projects built in potentially vulnerable locations are able to withstand and adapt to the effects of climate change. Major storm events in the last few years, such as Hurricane Sandy, Tropical Storm Lee and Hurricane Irene, have resulted in significant impacts on the environment of the state. The storms have had devastating impacts on coastal and in-land areas. Scientists are predicting that the frequency of severe storms will increase due to the effects of climate change from greenhouse gas emissions. .In the aftermath of Hurricane Sandy, Governor Cuomo convened the 2100 Commission to examine and evaluate key vulnerabilities in the State's critical infrastructure systems, and to recommend actions that should be taken to strengthen and improve its resilience to storm damage. The Commission recommended that the State require lead agencies under SEQR to assess climate change adaptation and resilience measures, as well as actions to mitigate climate change, as part of their SEQR environmental impact review. To accomplish this, the report recommended that the Department amend its SEQR Handbook and environmental assessment form workbooks to make clear that adaptation and resilience to climate change should be properly considered when determining the significance of an action under SEQRA.³⁸

The added language will help to implement this recommendation of the NYS2100 Commission. Because of the effects of climate change, a proposed project may have additional significant adverse environmental impacts that must be considered and mitigated in an EIS. Moreover, a proposed project may be vulnerable due to the effects of climate change, and mitigation of such vulnerability must be part of an EIS. The new language will, for example, require lead agencies, when preparing EISs for development projects to consider adaptive measures that will lessen the impacts that the project will

have on the environment as a result of the effects of climate change, and to reduce vulnerability of the project to the effects of climate change.

Potential Impacts:

There are no adverse environmental impacts expected from the proposed, additional regulatory language as consideration of flooding and storm events is a common sense preventative measure against future environmental harm. The proposed regulatory language will confirm that the discussion of mitigation measures in an EIS will need to include consideration of a project's impacts and vulnerability due to the effect of climate change. For example, an EIS will need to discuss adaptation and resilience measures for projects that would be especially vulnerable to the impacts of climate change, including storm damage. Some project sponsors may face the additional cost of conducting such assessments.

Alternative:

The "no action" alternative would result in no change to the existing language of the SEQR regulations though project sponsors may still be reasonably required to discuss issues of adaptation and resilience. The proposed language merely codifies what is implicit in SEQR. Finally, the "no action" alternative may result in lead agencies not performing the necessary review regarding climate change issues or implementing appropriate mitigation measures regarding climate change effects.

Another alternative would be to retain the existing language on mitigation but to amend the definition of "mitigation" in section 617.2 to include the proposed new regulatory language. The purpose of this alternative is to underscore the notion that all projects, whether they are subject to an EIS or not, should account for the impacts that climate change is having on the state's coastal areas and in-land places susceptible to storm damage.

2.6 GENERIC ENVIRONMENTAL IMPACT STATEMENTS (6 NYCRR §617.10)

Proposed Regulatory Language

The Department is also proposing an amendment to 6 NYCRR section 617.10 (Generic EISs) that would clarify the ability of a lead agency to deny an action for which it has prepared a generic EIS as follows:

617.10

(d) When a final generic EIS has been filed under this part:

(1) No further SEQR compliance is required in the following circumstances: a) if a subsequent proposed action will be carried out in conformance with the conditions and thresholds established for such actions in the generic EIS or its findings statement; or b) the lead agency determines not to approve, undertake or fund the action;...

Objectives, Rationale, and Benefits

This additional language would simply make express something that is implicit, namely that an agency that has undertaken to prepare a programmatic generic environmental impact statement can abandon the program or complete the EIS and make negative findings. Under the existing regulations, no final EIS need be filed if an action is withdrawn under 6 NYCRR section 617.9 (a) (5) (i).

Potential Impacts

None.

Alternatives

The “no action” alternative would result in no change to the existing language of the SEQR regulations. However, the ability of a lead agency to prepare negative findings based on a GEIS is already implicit in the SEQR regulations.

2.7 SEQR FEES (6 NYCRR §617.13)

Proposed Regulatory Language:

617.13(e) [Where an applicant chooses not to prepare a draft EIS,] I[t]he lead agency will provide the applicant, upon request, with an estimate of the costs for preparing or reviewing the draft EIS calculated on the total value of the project for which funding or approval is sought. The applicant is also entitled to, upon request, copies of invoices or statements for work prepared by a consultant that are submitted to the lead agency in connection with any services rendered in preparing or reviewing an EIS.

Objective, Rationale, and Benefits:

The Department proposes to clarify the fee assessment authority in the regulations by amending the existing language to provide project sponsors with the ability to request an estimate of the costs for reviewing the EIS and a copy of any invoices or statement of work done by any consultant for the lead agency. This is primarily an issue of fairness and disclosure. A project sponsor should have the right to receive an estimate of the lead agency’s costs for the review of the EIS along with written documentation to support such fees. Currently, the lead agency must provide an estimate to the project sponsor when they take on the responsibility for the preparation of the EIS.

Potential Impacts:

This is merely an accounting issue and it will not result in any adverse impacts.

Alternatives:

The no action alternative would remove this item from the Fees section. This is primarily a fairness issue. All project sponsors deserve an estimate and an accounting of how the money was used. The current situation would not be tolerated by any customer of a service.

A second alternative would be to require that a fee be collected for all EISs and that all EISs are prepared by a third party hired by the lead agency. Currently, the lead agency or the project sponsor at its option may prepare the draft EIS. This is a recurrent issue. It has been discussed since the initial adoption of the SEQR Act in 1975. The statute specifically contemplates the possibility that the applicant will prepare the draft EIS. Subdivision 3 of section 8-0109 states:

An agency may require an applicant to submit an environmental report to assist the agency in carrying out its responsibilities, including the initial determination and, (where the applicant does not prepare the environmental impact statement), the preparation of an environmental impact statement under this article. The agency may request such other information from an applicant necessary for the review of environmental impacts. Notwithstanding any use of outside resources or work, agencies shall make their own independent judgment of the scope, contents and adequacy of an environmental impact statement.

However, the alternative would track the requirements of NEPA.³⁹ The argument for the NEPA approach is that project applicants have an inherent interest in proceeding with a project as proposed and are not interested in considering alternatives or ways to mitigate or avoid environmental impacts.

While there is truth to this argument such an alternative is not workable under SEQR. Unlike NEPA EISs which apply to major actions of federal agencies, SEQR applies to actions undertaken by any state or local agency including school and fire districts. Setting up a process for a third party system for preparation of all EISs would increase the cost and time taken to prepare an EIS as well as being subject to various procurement laws and regulations. Given that many municipalities in New York State do not have full time planning agencies this would be a significant burden. It also may not substantially improve the EIS product. Project sponsor may not be willing to share the details of the project with the selected contractor which could lead to EISs short on substantive analysis due to a lack of understanding of the project. The required public review for all EISs and the requirement that all agencies make their own independent review of the EIS record serves to reduce the inherent bias of a project sponsor being allowed to evaluate its own project.

2.8 COASTAL CONSISTENCY

Under section 617.9 (b) (5) (iv) of the existing SEQR regulations, the GEIS must consider consistency of the proposed rules with applicable coastal policies contained in 19 NYCRR section 600.5. As described above, the rule making includes changes to the Type I list, the Type II list, and the procedures governing scoping and preparation of environmental impact statements. Many of the proposed Type II actions, rules for scoping and acceptance of the draft EIS and completion of the final EIS have no bearing on the State’s coastal policies. The proposed amendments that might have some effect on the State’s coastal policies are set out and discussed in the table that follows:

Coastal Policy	Proposed Rules	Analysis
<p>Section 600.5(a)(5): “Encourage the location of development in areas where public services and facilities essential to such development are adequate, except when such development has special functional requirements or other characteristics which necessitate its location in other coastal areas.”</p>	<p>Proposed 617.5(c) (2), (3) (upgrades of existing structures to meet energy codes and with green infrastructure); 617.5 (c) (18), (19), (20), and (21) (sustainable development Type II actions); 617.5(c) (22) (reuse of existing structures); and 617.5(c) (47) (Brownfield site clean-up agreements).</p>	<p>The proposed Type II actions set out in the middle column would further the coastal policy to encourage the location of development in areas with public services inasmuch as they would provide a regulatory incentive for the reuse of previously disturbed sites with existing infrastructure as discussed above. The proposed Type II actions remove some regulatory barriers to development in pre-disturbed or previously developed areas that contain public services and existing infrastructure.</p>
<p>Section 600.5(c): “Agricultural lands policy. To conserve and protect agricultural lands in the State's coastal area, an action shall not result in a loss nor impair the productivity of important agriculture lands as identified on the coastal area map, if that loss or impairment would adversely affect the viability</p>	<p>Proposed section 617.5(c) (17) (Type II action for minor subdivisions).</p>	<p>Subdivision and conversion of agricultural lands into residential lots is a matter of environmental concern since such subdivisions can impact open space, wildlife, and impair the future capacity of the land for food production. The classification of minor subdivisions as Type II actions would, however, have very limited application to agricultural lands since the Type II action is</p>

<p>of agriculture in an agricultural district, if there is no agricultural district, in the area surrounding such lands.”</p>	<p>Proposed section 617.5(c) (48) (Anaerobic Digesters).</p>	<p>limited to lots of ten acres or less and subdivisions of 4 lots or less within a five year period. Subdivisions of concern would tend to involve much larger parcels and more lots. As such, the proposed Type II would not create an incentive for the conversion of agricultural lands and is therefore not inconsistent with the coastal policy. To the extent that public comment may reveal a conflict between the proposed Type II action and the State's policy to protect and preserve agricultural lands, the proposal identifies an alternative to limit the Type II action to lands outside of agricultural districts. Finally, the proposed Type II actions for sustainable development provide a regulatory incentive to direct development away from agricultural fields and into areas of existing development.</p> <p>The proposed Type II action for anaerobic digesters would have no effect on the loss or impairment or viability of agricultural lands.</p>
<p>Section 600.5(f)(3): Protect, enhance and restore structures, districts, areas or sites that are of significance in the history, architecture, archeology or culture of the State, its communities or the nation.</p>	<p>Amended section 617.4(b)(9) (Type I action for actions that are within or substantially contiguous to certain historic resources).</p>	<p>While smaller scale development projects, which are below the Type I thresholds, would no longer be classified as Type I actions and subject to the full EAF and coordinated review, they would still be subject to SEQR and the substantive considerations regarding impacts to historic resources that currently applies in SEQR. Therefore, no conflict exists with the coastal policy. The proposal</p>

		<p>would also require impact analysis of properties that have been determined to be eligible for listing on the State Register of Historic Places by the Commissioner of Parks, Recreation and Historic Preservation — which would advance the coastal policy to protect historic resources.</p>
<p>Section 600.5(g)(4): Activities or development in the coastal area will be undertaken so as to minimize damage to natural resources and property from flooding and erosion by protecting natural protective features, including beaches, dunes, barrier islands and bluffs. Primary dunes will be protected from all encroachments that could impair their natural protective capacity.</p>	<p>Proposed 617.9(b)(5)(iv) (consideration of measures to avoid or reduce both an action's environmental impacts and vulnerability from the effects of climate change such as sea level rise and flooding).</p>	<p>This proposed amendment to the text of section 617.9 would clearly advance the coastal policy to minimize damage to natural resources from flooding and erosion since such considerations would be explicitly included in mitigation, where relevant, when an EIS is prepared.</p>

REGULATORY IMPACT STATEMENT (SAPA §202-A)

1. Statutory Authority

The Department's statutory authority to amend Part 617 is in Environmental Conservation Law (ECL) § 8-0113, which authorizes the Department, through the Commissioner, to adopt rules and regulations to implement the State Environmental Quality Review Act (SEQR).

2. Legislative Objectives

The purpose of the proposed amendments to Part 617 is to update and improve the efficiency of the SEQR process without sacrificing meaningful environmental review. The proposed changes build on regulatory changes from past SEQR rulemakings, namely the 1995 amendments (effective January 1, 1996) to the SEQR regulations (which supplemented the Type II list and established a more detailed scoping process for environmental impact statements, among other changes) and on the rulemaking that established the new electronic environmental assessment forms that became effective October 7, 2013.

3. Needs and Benefits

The last major amendments to the SEQR regulations occurred two decades ago. This rule making is intended to update the SEQR regulations with additional Type II actions, *i.e.*, adding more actions to the list of actions not subject to further review under SEQR, and with other changes more fully described in the express terms and accompanying environmental impact statement. Many of the concepts and ideas underlying the proposed changes had their genesis in 2011 when the Department convened a series of round table meetings among stakeholders in the SEQR process on ways to streamline the SEQR process without sacrificing meaningful environmental review.

Beginning in 2011 and continuing through 2013, stakeholder meetings were held throughout the state with individuals representing governmental agencies, business, and environmental groups (see, draft generic environmental impact statement or draft GEIS, Appendix A, which has been published on the Department's website at <http://www.dec.ny.gov/permits/83389.html>). In those meetings, the Department asked stakeholders to react to a skeletal outline of proposed changes and to also add their ideas to the list that was prepared by the Department's staff. Stakeholders gave support to tightening the environmental impact statement process (requiring mandatory scoping and enacting more exact requirements on when a draft environmental impact statement can be rejected as inadequate). With some exception, stakeholders also gave support to a proposed list of additions to the Type II list of actions (*i.e.*, actions that would not be subject to further review under SEQR). The express terms are, for the most part, the products of those meetings.

The Department is also proposing a provision to clarify that the discussion of mitigation measures in an environmental impact statement may include, where relevant, an analysis of a project's vulnerability to the effects of climate change such as sea level

rise and flooding. (Energy use and greenhouse gas emissions are already among the topics addressed by SEQR. See ECL §8-0109[2][h] as implemented by 6 NYCRR 617.9[b][5][iii][e] and Policy on Assessing Energy Use and Greenhouse Gas Emissions in Environmental Impact Statements, dated July 15, 2009.) As discussed in the accompanying draft GEIS associated with this rulemaking, this change implements a recommendation of the Governor's 2100 Commission⁴⁰ and ensures that where appropriate mitigation measures will be considered in mitigating the impacts of a project.

4. Benefits

The accompanying draft environmental impact statement contains a specific discussion of objectives and benefits for each proposed change to the SEQR regulations.

5. Costs

a. To the regulated parties:

Because SEQR is a law that requires compliance by government agencies, any effect on the regulated public is indirect. Further, in most cases, the proposals, if adopted, would arguably reduce costs through the creation of additional Type II actions and further streamlining of the EIS process. This is the agency's overall best estimate; however, the economic impact of the amendments to SEQR is impossible to quantify.

Except for the small change to the Type I rule (which lowers the thresholds for when a residential subdivision would be classified as a Type I action) and the proposed change to section 617.9 (regarding sea level rise and storm-impact analysis), the changes streamline the regulations, which reduces costs to regulated parties. For example, the additional Type II actions would no longer be subject to review under SEQR. Mandatory scoping will help insure that environmental issues are considered early on rather than at the end of the process after a project sponsor has already spent large sums of money on moving an application forward. On the other hand, reducing the thresholds for Type I actions and subdivisions may arguably raise costs for subdivision applicants, though there is no way to measure the effect since some of the subdivisions effected by the new proposed rule would be Type I on account of other thresholds and the Type I requirement for coordinated review results in more efficiency of review (which arguably has the effect of reducing costs). The proposed rules in section 617.9 related to sea level rise and flooding may arguably increase costs for some project sponsors of developments that are located in coastal and other flood prone areas where the project requires preparation of an environmental impact statement. The additional costs would be to assess, avoid or mitigate the impacts that may come about from sea level rise or flooding — which as recent storm events show would be a cost-saver in the life cycle of the project and to governmental responders should a major storm event impact the project.

b. To state and local governments;

State and local agencies may decrease their costs (as would project sponsors) where the action involves one of the proposed Type II actions (actions not subject to review under SEQR). State and local governments may incur additional costs on

account of mandatory scoping. This cost is difficult to measure, however, since scoping can decrease costs later in the process by insuring that environmental issues are articulated at an early stage in project review. The concept of scoping is not new as it was first introduced into the SEQR regulations in 1987 and then detailed in the 1995 amendments to the SEQR regulations (effective January 1, 1996). Some manner of scoping currently occurs for all draft EISs. The regulation now specifies how scoping should be done when the scoping option is chosen. Agency staff time spent participating in scoping should be more than offset by a reduction in staff time currently spent determining adequacy of a submitted draft EIS and requesting more information from applicants. Scoping also makes the process more predictable for applicants. Agencies have the authority to assess a fee for preparation or review of a draft or final EIS. This fee includes the cost of scoping. The Department, therefore, believes that, as a whole, state and local governments will see a reduction in costs associated with implementation of SEQR due to the reduction in the number of projects that will be subject to SEQR and the changes that encourage timely and more efficient reviews of actions.

Costs to the Department mainly involve staff time and resources to promulgate these regulations and then to conduct training on them. The Department already conducts scoping on most EISs where it is lead agency. As with most regulatory amendments there will be some cost in retraining people in the SEQR process as a result of this rulemaking. The cost here is short term and minimal. The Department has maintained a training and assistance program for those interested in receiving training and those who have specific questions relating to implementation of the law. The Department also cooperates with the Department of State and statewide organizations such as the Association of Towns, the Conference of Mayors and the New York Planning Federation in the conduct of training. This amendment would require that some additional staff time be devoted to training but it would be a relatively small change from currently existing efforts.

5. Local Government Mandates

There are no additional programs, services, duties or responsibilities imposed by the rule upon any county, city, town, village, school district, fire district or other special district except to require mandatory scoping of all environmental impact statements (where it is now optional). Statistically, there are very few environmental impact statements compared to actions that receive a negative declaration. The proposed regulations otherwise reduce mandates by adding to the number of Type II actions (which are not subject to further review under SEQR). The expansion of the Type II provision for area variances would most likely reduce the regulatory workload of zoning boards since area variances (which are within the jurisdiction of zoning boards of appeals) would only be subject to SEQR if a project required other approvals or permits that were subject to SEQR (e.g., site plan review, legislative zoning changes, use variances and special use permits). The requirement to look at sea level rise and flooding in a proper case is, at best, a minor mandate compared to the consequences of not doing so.

6. Paperwork

With the addition of items to the list of Type II actions there will be a reduction in the need for applicants and lead agencies to complete environmental review forms. (It should be noted, however, that in 2013 the forms became electronic with links to GIS and are now quicker and easier to complete than before). The amendments may, however, result in lead agencies having to prepare more scoping documents because scoping would be mandatory under the proposed new rules. Nonetheless, scoping is only applicable where an environmental impact statement is required and only in a small percentage of actions is an environmental impact statement required. Scoping is, however, a long term time saver in that it allows for early identification of issues. There are no new or additional recordkeeping requirements of a regulated party. An additional requirement is imposed for internet posting of draft scopes.

7. Duplication

There is no duplication of other state or federal requirements. With some of the Type II additions, the regulations are intended to reduce duplication of SEQR review requirements with those carried out under State land use enabling laws (e.g., the sustainable development Type II actions in section 617.5[c]).

8. Alternatives

A list and discussion of the regulatory alternatives is contained in the draft GEIS.

9. Federal Standards

There are no applicable Federal standards inasmuch as SEQR is not a Federal delegated program.

10. Compliance Schedule

The time necessary to comply with these regulatory amendments is not substantial. Some training time may be necessary for those unfamiliar with SEQR but for those familiar with the current regulations the amendments should be easily understood and implemented. Any particular questions will be answered by the Department in its assistance role to state and local agencies and to the regulated public. The Department does anticipate conducting general training on these amendments for those who may want to participate, which would include in person and the preparation of web-based training materials. Compliance is technically required on the effective date of the regulation. The Department proposes that the amendments should take effect three months from the date their adoption is noticed in the New York State Register. This delay in implementation would allow for explanatory materials to be produced and training to occur before the effective date of the new rules. The express terms provide for an effective date of January 1, 2017, which was added as a placeholder since it is difficult to precisely determine when the proposed rules would be adopted (assuming they are adopted). The Department could change this date in the notice of adoption so the amendments become effective three months from the date of their adoption. In addition to physical outreach, the Department would utilize its electronic and web-based resources to train other agencies, local governments, and the public on the new regulations.

REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES AND LOCAL GOVERNMENTS (SAPA §202-B)

1. Effect of Rule

Presently, any proposal, whether made by a business or local government, that involves a discretionary decision by a government agency and that may affect the environment, is subject to an assessment under the State Environmental Quality Review Act (SEQR) — to determine whether it may have a significant impact on the environment, and, if so, the lead agency must prepare an environmental impact statement. An exception lies where that action or project has been categorically determined not to be subject to environmental review (6 NYCRR 617.5[c]). The rulemaking affects all local governments (as they are required to comply with SEQR when approving or undertaking an action), and many small businesses, to the extent they may seek approvals or governmental funding for actions that may affect the environment. The actual effect on small businesses and local governments is very contextual depending on the action that is under consideration. Therefore, the proposed rules potentially affect all local governments and some small businesses but mostly in a way that is beneficial to them.

2. Compliance Requirements

The Department expects that the proposed rules, overall or state-wide, to reduce the cost of complying with SEQR because of the addition of a number of Type II actions (actions that do not require the preparation of an environmental impact statement) and proposed changes to the environmental impact statement process that would streamline the regulatory decision making process that is subject to SEQR. While a small number of large scale subdivisions may change classifications (due to changes proposed to the Type I list of actions contained in 6 NYCRR 617.4), from Unlisted to Type I, that change is procedural. Applicants for large scale subdivisions elevated to the Type I list would be required to complete the full EAF instead of the short EAF and the review of such subdivisions would require coordinated review. Type I actions are also deemed more likely to require the preparation of an EIS. However, only about 200 EISs are prepared on a yearly basis for tens of thousands of actions that are presumably the subject of a negative declaration. The imposition of mandatory scoping for EISs will mean more early work in the EIS process but statewide relatively few EISs are prepared. Finally, language has been added to the list of topics that an EIS may cover to insure consideration is given to the vulnerability of development projects to flooding and sea level rise on account of climate change. Particularly in coastal areas, this may require additional analysis by local governments when they serve as lead agencies, and by small businesses when they are project sponsors. It would be speculative to predict the number of times a project sponsor and lead agency must perform these analyses. Substantive assessment of these topics has long-term benefits, as the nation discovered following the recent spate of hurricanes that have devastated coastal areas, e.g., “Superstorm” Sandy. Planning for major storm events is common sense.

3. Professional Services

The Department expects that there would be little change, if any, in the professional services that a small business or local government would likely employ to comply with this rule. Currently, the professional services that may be needed to prepare SEQR documents include a wide range of technical expertise. Because of the proposed new Type II actions, there may be a decrease in professional services since those actions would no longer require further compliance with SEQR. However, such an effect is difficult to measure.

4. Compliance Costs

The additions to the list of Type II actions may result in the elimination of time and expense for local governments and small business project sponsors.

The proposed changes would also bring greater efficiency to the environmental impact statement process by mandating scoping, creating greater linkages between the determination of significance and the scope of the EIS. The new requirements serve to encourage lead agencies to build on their prior analyses. The proposed regulations would also tighten the rules on whether the lead agency can reject a draft EIS as inadequate. While relatively few actions subject to SEQR (usually larger scale ones) require the preparation of EISs, the business community may realize some benefit in compliance costs from the proposed new procedures that would bring greater certainty to the EIS process. Compliance costs will otherwise remain the same except as discussed above with respect to whether additional professional services may be needed in some cases to timely complete final environmental impact statements.

5. Economic and Technological Feasibility

There are no economic or technological feasibility issues.

6. Minimizing Adverse Impact

There are no adverse economic or regulatory impacts expected from adoption of these rules.

7. Small Business and Local Government Participation.

In preparing the proposed regulatory changes, the Department held numerous stakeholder meetings (that were co-sponsored by the Empire State Development Corporation) where individuals representing business and local governments were asked to identify changes that could be made the regulations. Overall, these meetings were very well attended and the exchange of ideas and proposals was extensive and exhaustive. The list of individuals is attached as Appendix A to the draft environmental impact statement. The Department also issued a draft scope to this draft generic environmental impact statement, which was noticed in the Environmental Notice Bulletin. Through that media, persons from all parts of the state, including businesses and local government officials, were asked to comment on the proposed changes described in the scoping statement.

RURAL AREA FLEXIBILITY ANALYSIS (SAPA §202-BB)

1. Types and estimated numbers of rural areas

The regulations are statewide and thus the rules would apply to all rural areas.

2. Reporting, recordkeeping and other compliance requirements

There is no change from the existing rules except that a relatively small number of additional larger-scale subdivisions that would not otherwise be classified as Type I actions would now be classified as Type I and be subject to the full environmental assessment form rather than the short form and lead agencies will be required to conduct scoping in instances where environmental impact statements will be completed.

3. Costs

The Department does not expect any additional costs to comply with the new rules except as described in the Regulatory Flexibility Analysis for Small Businesses and Local Governments.

4. Minimizing Adverse Impact

The proposed rules would not have an adverse impact on rural areas since they have the overall effect of decreasing the regulatory burden and making the SEQR process more efficient. Rural boards are likely to welcome some of the newly proposed Type II actions.

6. Rural area Participation

The Department held stakeholder meetings throughout the state. A roster of individuals who attended the meetings is contained in attachment A to the draft generic environmental impact statement accompanying the proposed rules. As indicated by the roster, meetings were held in upstate locations including Albany and Buffalo. The roster of persons attending the round table discussions included quite a few persons located in rural areas of the State or who regularly work with rural communities. The Department also issued a draft scope to this draft generic environmental impact statement, which was noticed in the Environmental Notice Bulletin. Through that media, the Department solicited comments from all parts of the state including rural areas.

STATEMENT IN LIEU OF JOB IMPACT STATEMENT (SAPA 202-A [2][A])

The proposed amendments to the State Environmental Quality Review Act (SEQR) regulations at 6 NYCRR Part 617 should have no impact on existing or future jobs and employment opportunities as these are procedural revisions to existing rules. The proposal to add categories of Type II actions would constitute a reduction in regulatory burden. The Type I changes are minor and will not affect development or employment. The changes to the environmental impact statement process can be expected to bring greater efficiency to the EIS process.

A Job Impact Statement is not submitted with this rulemaking proposal because the proposal will not have a “substantial adverse impact on jobs or employment opportunities,” which is defined in the State Administrative Procedure Act Section 201-a to mean “a decrease of more than one hundred full-time annual jobs and employment opportunities, including opportunities for self-employment, in the state, or the equivalent in part-time or seasonal employment, which would be otherwise available to the residents of the state in the two-year period commencing on the date the rule takes effect.” The proposed changes to Part 617, which again are generally procedural in nature, are not expected to have any such effect and most likely will not affect or impact jobs or employment opportunities.

**APPENDIX A
HUDSON VALLEY SEQR DIALOGUE PARTICIPANTS**

Meeting Date	Attendee	Organization (if known)
2/17/2010	David Eberle	
	Jeff Anzevino	Scenic Hudson
	Dave Church	
	Suzanne Kinder	
	Kathy Nolan	
	Sandra Kissam	Stewart Park and Reserve Coalition
	Justin Dates	Maser Consulting
	Jennifer Cocozza	DC Planning
	Tom Baldino	Beacon CAD
	Jim Bacon	
	Frank Cullyer	
	Kenneth J. Vogel	
	Connie Coker	Rockland Co. Legislator
	Doreen Tignanelli	
	John Penny	Poughkeepsie Journal
	George Collins	
	James Davis	
	Doreen Wekerce	
	Larry Knapp	Darlin Construction
	Heather Jockson	
	Linda Geary	
	Albert Annunziata	
	George Potanovic	
Jr.		
David Porter		
Joanne Steele	Sierra Club	
Mary McNamara		

**DEPARTMENT OF ENVIRONMENTAL CONSERVATION
STAKEHOLDER OUTREACH MEETINGS**

7/27/2011	Nan Stolzenburg John Caffry Sara Potter Richards Robert S. Derico Kenneth Pokalsky Darren Suarez Kenneth Finger, Esq.	Community Planning & Environmental Associates/AICP Law Offices Dormitory Authority Dormitory Authority Business Council Business Council BRI
8/11/2011	Richard Hyman Nina Peek Beatrice Havranek Charlie Murphy Jonathan Drapkin Larry Wolinsky Marissa Brett Frank McCullough John Nolan Rachel Shatz Soo Kang	BRI VHB/Saccadi & Schult County of Ulster Pattern for Progress Pattern for Progress Pattern for Progress WCA WCA/McCullough, Goldbergers, Staudt Pace Law School ESD ESD
8/31/2011	Rachel Shatz Soo Kang Simon Wynn Philip E, Karmel Kevin Healy Gordon Johnson Wesley O'Brien Robert Kulikowski Graham Trelstad Peter Liebowitz Chris Vitolano Thomas Devaney Hayley Mauskapf Joseph Tazewell Jeffrey Anzevino Mark Chertok Edward Applebome Jen McCormick Andrea Kretchmer Michael Gerrard David Paget Linh Do Steve Eisner	ESD ESD ESD MTA NYC Mayor's Office of Environmental Coordination SVP/AKRF AKRF Langan Engineering & Env. Services Langan Engineering & Env. Services Scenic Hudson ESD Director of Land Use Advocacy, Scenic Hudson, Inc. Sive Paget & Riesel President & CEO/AKRF Deputy Commissioner/ESD Founder & Managing Member of The Kretchmer Companies Columbia University Sive, Paget & Riesel SVP/AKRF Mayor's Office of Env. Remediation

	Mark McIntyre Roger Evans Jeffrey Anzevino David Paget	Mayor's Office of Env. Remediation DEC - Region 1 Scenic Hudson, Inc. Sive, Paget & Riesel
9/1/2011	Roger Evans Jennifer Hartnagel Rachel Shatz Simon Wynn Andrea Lohneiss Desmond Ryan Philip E, Karmel Kevin Healy Jen McCormick Christina Orsi Terri Elkowitz Robert M. Eschbacher Mitchell Pally Robert Deluca Kevin McDonald Carrie Meek Gallagher Richard Leland Joe Gergela	DEC - Region 1 Environmental Advocate ESD ESD ESD Executive Director of Association of a Better LI Deputy Commissioner/ESD Regional Director of Western NY, ESD VHB VHB Office in Hauppauge CEO of LI Builders Institute Group for the East End The Nature Conservancy Dir. Of Sustainability Suffolk Co. Water Authority Fried, Frank, Harris Shriver & Jacobson LLP (#1) Executive Director-LI Farm Bureau
10/21/2011	Paul Tronolone Steve Gawlik Kenneth Swanekamp Matthew N. Davidson Brendan Mehaffy David Mingoia Sundra Ryce Vincent Ricotta Craig Slater Laura St. Pierre Smith Michael Alspaugh Jim Allen Stewart Haney Michael Garland, P.E. Samuel Ferrao Al Culliton Sam Magavern Adam Walters	ESD Vice President Capital Projects, ESD Director-Erie County Director of Communications & Government Relations, Buffalo & Fort Erie Public Bridge Authority Executive Director City of Buffalo Deputy Director-Amherst IDA President & CEO SLR Contracting & Services, Inc. Business Dev. Mgr.-SLR Contracting & Services Inc. Harter, Secrest & Emery Law Offices Vice President, Buffalo Niagara Partnership Senior Planner - Erie County Executive Director Amherst IDA Chief Operating Office - WENDEL Director of Env. Services County of Monroe Niagara County IDA-Niagara County COO-Erie County IDA Co-Director-Partnership For the Public Good The Land, Env. & Energy PracticeGroup Leader
2/20/2012	Jonathan Tingley Sharon D. Kroeger	Tuczinski, Cavalier, Gilchrist & Collura PC Wassauc Hist., Ag. Crossroads, Inc.

	Frank Fish	BFJ Planning
	Bryant Cocks	BC Planning LLC
	John A. Ward	Planning Board Member
	Dominic Cordisco	Drake Loeb
	Chris Ramsdill	Zoning Board Member
	Mary Ellenfinger	Planning Board
	Cathy Magarelli	Town Bd – Woodstock
	Clif Schneider	Town of Cape Vincent-Councilman
	Michael Baden	Town of Rochester-Planning Board Chair
	Sherry Menninger	Town of Sullivan Planning
	Wayen Kennedy	Town of Efrain Planning Board
	Don Markell	Campbell Planning Board
	Tammy M. Ayers	Town of Otisco-Town Clerk
	Bruce Clark	Town of Hague
	Charlotte Mayhew	Town of Plattsburgh
	Diane Drollette	Town of Plattsburgh
	Catherine Clark	Town of Hague
	Joan McDeid	Zoning/Cato
	Cindy Stephenson	Planning/Cato
	Bob Wicichowski	Zoning Board
	Tony Tozzi	Malta Building/Planning Director
	Kris Dimmick	Bernier Carr
	Sam Biondolillo	Town of LeRay - Town Board
	Debbie Biondolillo	Town of LeRay - Town Board
	Herb Engman	Town Supervisor-Town of Ithaca
	Andrew Gilchrist	Tuczinski, Cavalier, Gilchrist & Collura PC
4/24/2012	Walter Pacholczak	AGC NYS, LLC-Vice President
	Tom Goodwin	Monroe County Dept. of Planning & Dev., Planning Mgr.
	Jessica L. Ottney	The Nature Conservancy
	Sean Mahar	Audubon New York
	Laura Haight	NYPIRG
	Kevin Ryan	Ryan Law Group
	Daniel Ruzow	Whiteman, Osterman & Hanna LLP
	Robert Feller	Bond, Schoeneck & King
	Cheryl Roberts, Esq.	Rappoport Meyers, LLP
	Lael Locke	NY Planning Federation
5/10/2012	Mike Elmendorf	AGC NYS, LLC
	Tom Goodwin	Monroe County Dept. of Planning & Dev., Planning Mgr.
	Sean Mahar	Audubon New York
	Brendan Manning	AGC NYS, LLC
	Laura Haight	NYPIRG
	Andrew Reilly	Wendel Companies
	Kevin Ryan	Ryan Law Group
	Daniel Ruzow	Whiteman, Osterman & Hanna LLP
	Robert Feller	Bond, Schoeneck & King
	Cheryl Roberts, Esq.	Rappoport Meyers, LLP
3/26 & 4/19/13	Barbara Warren	Citizens Environmental Coalition

Kathleen Curtis	Clean & Healthy New York
Judith Anderson	Environmental Justice Action Group of Western NY
Saima Anjam	Environmental Advocates of New York
Robert DeLuca	Group for the East End
Richard Amper	Long Island Pine Barrens Society
Eddie Bautista	New York Environmental Justice Alliance
Christine Giorgio	New York Lawyers for the Public Interest
Gavin Kearney	New York Lawyers for the Public Interest
Laura Haight	New York Public Interest Research Group
Misti Duvall	Riverkeeper
Dan Mackay	Preservation League of NYS
Holly Carlock	Scenic Hudson
Andrienne Esposito	Citizens Campaign for the Environment
Paul Beyer	Department of State
Roger Downs	Sierra Club
Mannajo Greene	Clearwater
Katherine Hudson	Riverkeeper

APPENDIX B

POSITIVE DECLARATION AND NOTICE OF SCOPING

Notice of Intent to Prepare

**Regulatory Impact Statement
Draft Generic Environmental Impact Statement
Regulatory Flexibility Analysis
(RIS/DGEIS/RFA)
For
Amendment of Title 6
New York Code of Rules and Regulations
Part 617
Regulations Governing Implementation of the
State Environmental Quality Review Act
July 11, 2012**

This notice is issued pursuant to Part 617 of the implementing regulations pertaining to Article 8 (State Environmental Quality Review Act) of the Environmental Conservation Law.

The New York State Department of Environmental Conservation (DEC), 625 Broadway, Albany, New York 12233-1750, is the lead agency for this rulemaking proposal.

Description of the Action

The New York State Department of Environmental Conservation proposes to amend the existing statewide State Environmental Quality Review Act (SEQRA) regulations (6NYCRR Part 617) to streamline the regulatory process without sacrificing meaningful environmental review.

The proposed amendments constitute an unlisted action and include:

- A. Improve the scoping process;
 1. Require public scoping of Environmental Impact Statements (EIS);
 2. Provide greater continuity between the environmental assessment process, the scope and the draft EIS with respect to content; and
 3. Strengthen the regulatory language to encourage targeted EISs.

- B. Clarify and reduce review requirements:
 - 1. Reduce the numeric thresholds in the Type I list for residential subdivisions and parking;
 - 2. Bring the threshold reduction for historic resources in line with other resource based items on the Type I list; and
 - 3. Expand the number of actions not requiring review under SEQRA (Type II list) to encourage development in urban areas vs. development in greenfields and to allow green infrastructure projects.

- C. Improve timeliness of decision making:
 - 1. Provide more guidance regarding the proper means for determining the adequacy of a draft EIS; and
 - 2. Establish a more meaningful timeframe for the completion of a final EIS.

The Department has not identified any significant adverse environmental impacts from the proposed amendments. However, DEC has chosen to use a generic environmental impact statement (GEIS) as the means to discuss the objectives and the rationale for the proposed amendments, present alternative measures which are under consideration and provide the maximum opportunity for public participation.

Scoping

In an effort to provide early public review of the proposed amendments, the Department of Environmental Conservation is conducting a public scoping of issues to be addressed in the draft GEIS. A draft scope has been prepared to facilitate the scoping discussion. A copy of the draft scope is posted on the DEC website at:
<http://www.dec.ny.gov/permits/6061.html>

Comments and additional information

Comments related to potential significant adverse environmental impacts and additional alternatives to be addressed in the DGEIS should be sent to:
depprmt@gw.dec.state.ny.us . Please include the phrase “Comments on 617 Scope” in the subject line of the e-mail. Comments may also be submitted in writing to:

Division of Environmental Permits & Pollution Prevention
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233-1750

Additional information regarding the proposed amendments can be obtained by contacting the Division of Environmental Permits & Pollution Prevention at:
depprmt@gw.dec.state.ny.us or by calling 518-402-9167.

**Comments on the draft scope
Will be accepted through
August 10, 2012**

APPENDIX C

DRAFT SCOPE

**DRAFT SCOPE
for the
Generic Environmental Impact Statement (GEIS)
on the
Proposed Amendments
to the
State Environmental Quality Review Act (SEQRA)**

6 NYCRR - Part 617

**PREPARED BY THE NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
DIVISION OF ENVIRONMENTAL PERMITS & POLLUTION PREVENTION
July 11, 2012**

Description of the Action

The New York State Department of Environmental Conservation (DEC) proposes to amend the regulations that implement the State Environmental Quality Review Act ("SEQR", Title 6, New York Code of Rules and Regulations (6 NYCRR), Part 617). The principal purpose of the amendments is to streamline the SEQR process without sacrificing meaningful environmental review.

The Department has not identified any significant adverse environmental impacts from the proposed amendments. However, DEC has chosen to use a generic environmental impact statement (GEIS) as the means to discuss the objectives and the rationale for the proposed amendments, present alternative measures which are under consideration and provide the maximum opportunity for public participation.

DEC is conducting this public scoping of the issues to be addressed in the GEIS to allow maximum, early public participation. Comments and suggestions related to the scoping of potential significant adverse environmental impacts and additional alternatives to be considered by DEC should be submitted in writing to the office listed below.

Comments on the draft scope will be accepted through **August 10, 2012**.

Summary of Proposed Amendments to 6NYCRR Part 617

617.2 DEFINITIONS

- ! Add definition of “Green Infrastructure”
- ! Add definition of Minor Subdivision”
- ! Add definition of “Municipal Center”
- ! Revise definitions of:
 - “Negative Declaration”
 - “Positive Declaration”

617.4 TYPE I ACTIONS

- ! Reduce number of residential units in items 617.4(b)(5)(iii), (iv) & (v);
- ! Reduce number of parking slots for municipalities with a population under 150,000; and
- ! Bring the threshold reduction for historic resources [617.4(b)(9)] in line with other resource based items on the Type I list.

617.5 TYPE II ACTIONS

- ! Add new Type II actions to encourage development in urban areas vs. development in greenfields and to encourage green infrastructure projects;
- ! Add new Type II actions to encourage the installation of solar energy arrays;
- ! Add new Type II action that allows for the sale, lease or transfer of property for a Type II action;
- ! Add new Type II action to make minor subdivisions Type II;
- ! Add a new Type II actions to make the disposition of land by auction a Type II action; and
- ! Add a new Type II action to encourage the renovation and reuse of existing structures.

617.8 SCOPING

- ! Make scoping mandatory;
- ! Provide greater continuity between the environmental assessment process, the final written scope and the draft Environmental Impact Statement (EIS) with respect to content;
- ! Strengthen the regulatory language to encourage targeted EISs;
- ! Clarify that issues raised after the completion of the final written scope cannot be the basis for the rejection of the draft EIS as inadequate.

617.9 PREPARATION AND CONTENT OF ENVIRONMENTAL IMPACT STATEMENTS

- ! Add language to require that adequacy review of a resubmitted draft must be based on the written list of deficiencies; and
- ! Revise the timeline for the completion of the FEIS.

617.12 DOCUMENT PREPARATION, FILING, PUBLICATION AND DISTRIBUTION
! Add language to allow for the electronic filing of EIS's with DEC.

617.13 FEES AND COSTS

- ! Add language to require that a lead agency provide the project sponsor with an estimate of review cost, if requested; and
- ! Add language to require that a lead agency provide the project sponsor with a copy of invoices or statements for work done by a consultant, if requested.

The following discussion provides the objectives and rationale for the major proposed changes. It also includes pre-draft language. The pre-draft text amendments show proposed language deletions as bracketed ([XXXX]) and new language as underlined (XXXX). This language is being provided to stimulate discussion and comment on the preliminary changes

TYPE I LIST

Objectives and Rationale: The Department proposes to:

- (1) Reduce some of the thresholds for residential subdivisions. Experience has shown that the thresholds for some of the Type I items for residential construction are rarely triggered because they were set too high in 1978. This change will bring the review of large subdivision into conformance with current practice. Large subdivisions are frequently the subject of an EIS.
- (2) Add a threshold for parking spaces for communities of less than 150,000 persons. A common and often recommended measurement is 1 parking space per 200 square feet of gross floor area of a building. If you are a community of less than 150,000 persons the applicable Type I threshold for the construction of commercial or industrial facilities is 100,000 square feet of gross floor area. This equates to 500 parking spaces.
- (3) Bring the threshold reduction for historic resources in line with other resource based items on the Type I list. On the existing Type I list any Unlisted action, regardless of size, that occurs wholly or partially within or substantially contiguous to a historic resource is automatically elevated to a Type I action. This results in many very minor actions being elevated to Type I. Other resource based Type I items such as those addressing agriculture and parkland/open space result in a reduction in the Type I thresholds by 75%. Given the fact that the new Full EAF now requires much more information it would be very onerous and potentially expensive for a project sponsor to have to complete a Full EAF for a relatively minor activity. Also, the new Short EAF now contains a question regarding the presence of historic resources so the substance of the issue will not escape attention.

Regulatory Text Amendment:

- 617.4(b)(5)(iii) in a city, town or village having a population of [less than]150,000

persons or less, [250]200 units to be connected (at the commencement of habitation) to existing community or public water and sewage systems including sewage treatment works;

- 617.4(b)(5)(iv) in a city, town or village having a population of greater than 150,000 persons but less than 1,000,000, [1,000]500 units to be connected (at the commencement of habitation) to existing community or public water and sewage systems including sewage treatment works;
- 617.4(b)(5)(iv) in a city, town or village having a population of greater than 1,000,000, [2,500]1000 units to be connected (at the commencement of habitation) to existing community or public water and sewage systems including sewage treatment works;
- 617.4(b)(6)(iii) in a city, town or village having a population of 150,000 persons or less, parking for 500 vehicles;
- 617.4(b)(6)(iv) in a city, town or village having a population of 150,000 persons or more, parking for 1000 vehicles;
- 617.4(b)(9) any Unlisted action that exceeds 25 percent of any threshold in this section [(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 the 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 (CFR) Parts 60 and 63, 1994 (see section 617.17 of this Part));

TYPE II LIST

Objective and Rationale: The Department proposes to broaden the list of actions that will not require review under SEQRA. This will allow agencies to focus their time and resources on those projects likely to have significant adverse impacts on the environment. The additions to the Type II list are based on discussions that DEC has conducted with representatives from state agencies, environmental organizations, business and the 30+ years of experience of staff in the Division of Environmental Permits.

A second and more important reason for many of the proposed additions to the Type II list is to try and encourage environmentally compatible development. Many of the additions attempt to encourage development in urban areas vs. development in greenfields and encourage green infrastructure projects and solar energy development. Others proposed items will remove obstacles encountered by municipalities when developing affordable housing in cooperation with not-for-profit organizations. The overall goal is to provide a regulatory incentive for project sponsors to further the State's policy of sustainable development.

Proposed Text Amendment:

- The acquisition, sale, lease, annexation or transfer of any ownership of land to

undertake any activity on this list.

- Disposition of land, by auction, where there is no discretion on the part of the disposing agency on the outcome.
- Re-use of a non-residential structure not requiring a change in zoning or a use variance unless such action meets or exceeds any of the thresholds in section 617.4(b)(6),(8),(9),(10) and (11) of this Part.
- Lot line adjustments and area variances not involving a change in allowable density [replacing existing items 12 and 13 in 6 NYCRR 617.5(c)].
- In municipalities with adopted subdivision regulations, subdivisions involving 10 acres or less and defined as minor under a town, village or city's adopted subdivision regulations or subdivision of four or fewer lots, whichever is less.
- The recommendation of a county or regional planning entity made following referral of an action pursuant to General Municipal Law, sections 239-m or 239-n.
- In the municipal center of a city, town or village having a population of less than 20,000, with adopted zoning regulations, construction or expansion of a residential or commercial structure or facility involving less than 8,000 square feet of gross floor area or construction or expansion of a residential structure of 10 units or less where the project is subject to site plan review, and will be connected (at the commencement of habitation) to existing community owned or public water and sewerage systems including sewage treatment works which have the capacity to provide service and does not involve the construction of new public roads.
- In the municipal center of a city, town or village having a population of greater than 20,000 but less than 50,000, with adopted zoning regulations, construction or expansion of a commercial or residential structure or facility involving less than 10,000 square feet of gross floor area or construction or expansion of a residential structure of 20 units or less where the project is subject to site plan review, and will be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works which have the capacity to provide service and does not involve the construction of new public roads;
- In the municipal center of a city, town or village having a population of greater than 50,000 but less than 150,000, with adopted zoning regulations, construction or expansion of a commercial or residential structure or facility involving less than 20,000 square feet of gross floor area or construction or expansion of a residential structure of 40 units or less where the project is subject to review under local land use regulation, and will be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works which have the capacity to provide service and does not involve the construction of new roads.
- In the municipal center of a city, town or village having a population of greater than 150,000, with adopted zoning regulations, construction or expansion of a commercial or residential structure or facility involving less than 40,000 square feet of gross floor area or construction or expansion of a residential structure of 50 units or less where the project is subject to review under local land use regulation, and will be connected (at the commencement of habitation) to existing

community or public water and sewerage systems including sewage treatment works which have the capacity to provide service and does not involve the construction of new roads.

- Replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site, including upgrading of buildings to meet building, energy, or fire codes, unless such action meets or exceeds any of the thresholds in section 617.4(b)(6),(8),(9),(10) and (11) of this Part.
- Replacement, rehabilitation or reconstruction of a structure or facility, using green infrastructure techniques, unless such action meets or exceeds any of the thresholds in section 617.4(b)(6),(8),(9),(10) and (11) of this Part.
- Installation of rooftop solar energy arrays on an existing structure that is not listed on the National or State Register of Historic Places or installation of less than 25 megawatts of solar energy arrays on closed sanitary landfills.
- Installation of cellular antennas or repeaters on an existing structure that is not listed on the National or State Register of Historic Places.
- Brownfield site clean-up agreements under Title 14 of ECL Article 27.

SCOPING

Objectives and Rationale: The Department proposes to:

- (1) Require public scoping for all EIS's. Currently scoping is not mandatory but all parties have come to accept the importance of public scoping as a tool to focus an EIS on the truly substantive and significant issues. Seeking public input early in the EIS process helps to ensure that all of the substantive issues are identified prior to the preparation of the draft EIS.
- (2) Place more emphasis on using the EAF as the first step in scoping. The revised EAF's are much more comprehensive than the previous versions. This should allow the lead agency to assess, in a thorough fashion, all of the potential impacts and to establish a basis for determining those issues that need additional scrutiny in an EIS and issues that do not require any further analysis and can be excluded from the EIS scope. Scoping can then be used to determine the depth and type of assessment that will be required in the draft EIS.
- (3) Provide clearer language on the ability to target an EIS. All parties agree that many EIS's are currently filled with information that does not factor into the decision. This is driven by the defensive approach agencies and project sponsors take in developing the EIS record. In pursuit of the "bullet proof EIS" the tendency is to include the information even though the environmental assessment has already concluded that the issue is not substantive or significant.
- (4) Provide better guidance on the basis for accepting/rejecting a draft EIS for adequacy. The current regulations give to the project sponsor the responsibility for accepting or deferring issues following the preparation of the final written scope. A lead agency cannot reject a draft EIS as inadequate if the project sponsor has decided to defer an issue and treat it as a comment on the draft EIS. Language would be added to clarify that the decision of the project sponsor cannot serve as the basis for the rejection of a draft EIS as not adequate to start the public review process.

Proposed Text Amendment:

- 617.8(a) - The primary goals of scoping are to focus the EIS on potentially significant adverse impacts and to eliminate consideration of those impacts that are irrelevant or [non] not significant. Scoping should result in EISs that are only focused on relevant, significant, adverse impacts. Scoping is [not] required for all EISs [. Scoping] and may be initiated by the lead agency or the project sponsor.
- 617.8(f)(2) - the potentially significant adverse impacts identified both in Part III of the environmental assessment form [positive declaration] and as a result of consultation with the other involved agencies and the public, including an identification of those particular aspect(s) of the environmental setting that may be impacted;
- 617.8(f)(7) - A brief description of the prominent issues that were raised during scoping and determined to be not relevant or not environmentally significant or that have been adequately addressed in a prior environmental review[.] and the reason(s) why those issues were not included in the final written scope.
- 617.8(h) - The project sponsor may incorporate information submitted consistent with subdivision 617.8(g) of this section into the draft EIS at its discretion. Any substantive information not incorporated into the draft EIS must be considered as public comment on the draft EIS. Information submitted following the completion of the final scope and not included by the project sponsor in the draft EIS cannot be the basis for the rejection of a draft EIS as inadequate.

PREPARATION AND CONTENT OF ENVIRONMENTAL IMPACT STATEMENTS

Objectives and Rationale: The Department proposes to add language to require that the adequacy review of a resubmitted draft must be based on the written list of deficiencies and revise the timeline for the completion of the FEIS.

Determining the adequacy of a draft EIS is a challenging step of the EIS process. If the document has been rejected as not adequate, the lead agency must provide a written list of the identified deficiencies that the project sponsor needs to correct. When the document is re-submitted the second review must be based on the list of deficiencies that were identified in the first round of review. This is an issue of fairness and will lead to a more efficient process. A draft EIS does not have to be perfect. The goal is to provide a document that is adequate to start the public review.

The current language regarding the timeframe for the preparation of the final EIS is unrealistic. It requires that the final EIS be prepared within 45 days after the close of any hearing or within 60 days of the filing of the draft EIS. Rarely, if ever, are these timeframes met. The Department proposes to extend this timeframe and provide certainty for when the EIS process will end.

Proposed Text Amendment:

- 617.9(a)(2) The lead agency will use the final written scope[,if any,] and the standards contained in this section to determine whether to accept the draft EIS as adequate with respect to its scope and content for the purpose of commencing

public review. This determination must be made [in accordance with the standards in this section] within 45 days of receipt of the draft EIS. Adequacy means a draft EIS that meets the requirements of the final written scope and section 617.9(b) of this Part.

- (i) If the draft EIS is determined to be inadequate, the lead agency must identify in writing the deficiencies and provide this information to the project sponsor.
 - (ii) The lead agency must determine whether to accept the resubmitted draft EIS within 30 days of its receipt. The determination of adequacy of a resubmitted draft EIS must be based solely on the written list of deficiencies provided by the lead agency following the previous review.
- 617.9(a)(5) - Except as provided in subparagraph (iii) of this paragraph, the lead agency must prepare or cause to be prepared and must file a final EIS, within [45 calendar days after the close of any hearing or within 60] 180 calendar days after the lead agency's acceptance of the draft EIS[, whichever occurs later].

[(i) No final EIS need be prepared if:

- (a) the proposed action has been withdrawn or;
- (b) on the basis of the draft EIS, and comments made thereon, the lead agency has determined that the action will not have a significant adverse impact on the environment. A negative declaration must then be prepared, filed and published in accordance with section 617.12 of this Part.]

(i) If the Final EIS is not prepared and filed within the 180 day period, the EIS shall be deemed complete on the basis of the draft EIS, public comment and the response to comments prepared and submitted by the project sponsor to the lead agency. The response to comments must be submitted to the lead agency a minimum of 60 days prior to the required filing date of the final EIS.

(ii) The lead and all involved agencies must make their findings and can issue a decision based on that record together with any other application documents that are before the agency.

[(a) if it is determined that additional time is necessary to prepare the statement adequately; or

(b) if problems with the proposed action requiring material reconsideration or modification have been identified.]

(iii) No final EIS need be prepared if:

(a) the proposed action has been withdrawn or;

(b) on the basis of the draft EIS, and comments made thereon, the lead agency has determined that the action will not have a significant adverse impact on the environment. A negative declaration must then be prepared, filed and published in accordance section 617.12 of this Part.

SEQR FEES

Objective and rationale: The Department proposes to clarify existing fee assessment authority by amending language to provide project sponsors with the ability to request an estimate of the costs for reviewing the EIS and a copy of any invoices or statement of work done by any consultant for the lead agency. This is primarily an issue of fairness and disclosure. A project sponsor should have the right to receive an estimate of the lead agency's costs for the review of the EIS along with written documentation to support such fees. Currently, the lead agency must provide an estimate to the project sponsor when they take on the responsibility for the preparation of the EIS.

Proposed Text Amendment:

617.13(e) [Where an applicant chooses not to prepare a draft EIS, t] The lead agency shall provide the applicant, upon request, with an estimate of the costs for preparing or reviewing the draft EIS calculated on the total value of the project for which funding or approval is sought. The applicant shall also be entitled, upon request to, copies of invoices or statements for work prepared by a consultant.

COMMENT PROCEDURES

Comments on this draft scope will be accepted in writing or by email through **August 10, 2012**. Comments via e-mail should be submitted to: depprmt@gw.dec.state.ny.us . Please insert the phrase "Comments on Part 617 Draft Scope" in the subject line. Alternatively, comments submitted in writing should be sent to:

New York State Department of Environmental Conservation
Division of Environmental Permits & Pollution Prevention
625 Broadway
Albany, New York 12233-1750

APPENDIX D

LIST OF INDIVIDUALS/GROUPS THAT PROVIDED COMMENTS ON DRAFT SCOPE

PART 617 COMMENTS - 2012

Name	Organization
Blow, Steven	DPS
Bonafide, John	Div. of Historic Preservation
Boncke, Bruce	BME Associates
Brant, Sandy	Town of Evans
Brett, Marissa	Westchester County Association
Colan, Maggie	Town of Marbletown Planning Board
Cordisco, Dominic - (Joint ltrs. from)	Hudson Valley Pattern for Progress, Orange Co. Partnership, Builders Assoc. of Hudson Valley & Orange Co Chamber of Commerce
Carlock, Haley	Scenic Hudson, Inc
Carlson, Eric	Empire State Forest Products Association
Derico, Robert	Dormitory Authority of State of New York
Dubuque, Lewis	NYS Builders Association
Haight, Laura	- cmts. Submitted by 17 health, environment & environmental justice orgs
Hall, Joe	Town of Riverhead Planning Department
Kulikowski, Robert	NY Mayors Office of Environmental Coordination
Lithco, George	Jacobowitz and Gubits, LLP
Lyman, Laura	Alliance for Clean Energy New York
Lynch, John	Edward Weinstein Architecture & Planning
Mackay, Daniel	Preservation League of NYS
Meci, Betty Lee	AVC Hearing Aid Center Inc
Merriman, Michael	Ecological Analysis, LLC
Mule, Michael	Suffolk Co. Division of Planning & Environment
Murphy, Richard	Assemblmembers Sweeney & Lavine
Pierson, Ben	RS&RE, BWSP, NYS DOH

Pixley, Caitlin
Porter, David
Rendleman, Laurie

Resnick, Michele Klugman
Rivard, Berneda
Scott, Allan
Shapiro, Susan
Stach, Maximilian
Stolzenburg, Nan

Terry, Mark
Tsamardinos, Jane

Turner, Stuart
Warth, Thomas
Feller, Bob -

EAF QUESTIONS - 2012

Geneslaw, Robert -
Johnson, Gordon -
Harris, Robert -
Meder, Joanne -
Nakkeid, Marius -
Strauss, Valerie -
Turner, Stuart -
Wigell, Barbara -

Sierra Club, Atlantic Chapter
New Paltz
Orange Co. Industrial Development
Agency
Sullivan County Partnership
BME Associates
Sullivan County Partnership
Attorneys at Law
Turner Miller Group
Community Planning & Environmental
Associates
Town of Southold Planning Department
NYS Conferences of Mayors & Municipal
Offices
Turner Miller Group
Hiscock & Barclay, LLP
Bond, Schoeneck & King

Robert Geneslaw Co.
MTA Headquarters
WM Schutt Associates
Frederick P. Clark Associates, Inc.
Question from Norway
Alliance for Clean Energy New York, Inc.
Turner Miller Group
NYS Homes and Community Renewal

APPENDIX E

FINAL SCOPE

**FINAL SCOPE
for the
Generic Environmental Impact Statement (GEIS)
on the
Proposed Amendments
to the
State Environmental Quality Review Act (SEQRA)**

6 NYCRR - Part 617

**PREPARED BY THE NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
DIVISION OF ENVIRONMENTAL PERMITS & POLLUTION PREVENTION
November 28, 2012**

1.0 Description of the Action & Environmental Setting

The New York State Department of Environmental Conservation (DEC) proposes to amend the regulations that implement the State Environmental Quality Review Act ("SEQR", Part 617 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York). The principal purpose of the amendments is to improve and streamline the SEQR process without sacrificing meaningful environmental review. The changes being proposed are modest in nature, not intended to change the basic structure of an environmental review, build on the changes made to the environmental assessment forms and are within the authority of the DEC to implement without seeking additional legislative action. SEQR applies to all state and local agencies in New York State when they are making a discretionary decision to undertake, fund or approve an action.

DEC has proposed changes to the SEQR regulations, which it does not expect to have a significant impact on the environment. However, given the importance of the SEQR regulations in general in all areas of environmental impact review, DEC has chosen to use a generic environmental impact statement (GEIS) as the means to discuss the objectives and the rationale for the proposed amendments, present alternative measures which are under consideration and provide the maximum opportunity for public participation.

2.0 Summary of Proposed Amendments to 6 NYCRR Part 617

617.2 DEFINITIONS

- ! Add definition of “Green Infrastructure”
- ! Add definition of Minor Subdivision”
- ! Add definition of “Municipal Center”
- ! Add Definition of “Replacement in Kind”
- ! Add definition of “Substantially Contiguous”

- ! Revise definitions of:
 - “Negative Declaration”
 - “Positive Declaration”

617.4 TYPE I ACTIONS

- ! Reduce number of residential units in items 617.4(b)(5)(iii), (iv) & (v);
- ! Reduce number of parking slots for municipalities with a population under 150,000; and
- ! Reduce the threshold reduction for historic resources [617.4(b)(9)] in line with other resource based items on the Type I list and add eligible resources.

617.5 TYPE II ACTIONS

- ! Add new Type II actions to encourage development on previously disturbed sites in municipal centers and to encourage green infrastructure projects;
- ! Add new Type II actions to encourage the installation of solar energy arrays;
- ! Add new Type II action that allows for the sale, lease or transfer of property for a Type II action;
- ! Add new Type II action for minor or small scale subdivisions;
- ! Add a new Type II actions to make the disposition of land by auction a Type II action; and
- ! Add a new Type II action to encourage the renovation and reuse of existing structures.

617.8 SCOPING

- ! Make scoping mandatory;
- ! Provide greater continuity between the environmental assessment process, the final written scope and the draft environmental impact statement (EIS) with respect to content;
- ! Strengthen the regulatory language to encourage targeted EISs;
- ! Clarify that issues raised after the completion of the final written scope cannot be the basis for the rejection of the draft EIS as inadequate.

617.9 PREPARATION AND CONTENT OF ENVIRONMENTAL IMPACT STATEMENTS

- ! Add language to require that adequacy review of a resubmitted draft must be based on the written list of deficiencies; and
- ! Revise the timeline for the completion of the FEIS.

617.12 DOCUMENT PREPARATION, FILING, PUBLICATION AND DISTRIBUTION

- ! Add language to encourage the electronic filing of EISs with DEC.

617.13 FEES AND COSTS

- ! Add language to require that a lead agency provide the project sponsor with an estimate of review cost, if requested; and
- ! Add language to require that a lead agency provide the project sponsor with a copy of invoices or statements for work done by a consultant, if requested.

3.0 Discussion of Proposed Changes and Alternatives

The following discussion provides the objectives and rationale for the major proposed changes and the alternatives under consideration. It also includes preliminary express terms. The pre-draft text amendments show proposed language deletions as bracketed ([XXXX]) and new language as underlined (XXXX). This language is being provided to stimulate consideration and comment on the preliminary changes

3.1 Type I List

3.1.1 Regulatory Text Amendment:

- 617.4(b)(5)(iii) in a city, town or village having a population of [less than]150,000 persons or less, [250] 200 units to be connected (at the commencement of habitation) to existing community or public water and sewage systems including sewage treatment works;
- 617.4(b)(5)(iv) in a city, town or village having a population of greater than 150,000 persons but less than 1,000,000, [1,000]500 units to be connected (at the commencement of habitation) to existing community or public water and sewage systems including sewage treatment works;
- 617.4(b)(5)(iv) in a city, town or village having a population of greater than 1,000,000, [2,500] 1000 units to be connected (at the commencement of habitation) to existing community or public water and sewage systems including sewage treatment works;

Objectives and Rationale: The Department proposes to reduce some of the thresholds for residential subdivisions. Experience has shown that the thresholds for some of the Type I items for residential construction are rarely triggered because they were set too high in 1978. There is scant information in the 1978 draft and final EIS that demonstrates any basis for the selection of the thresholds other than the numbers in a rural and urban area should be different. The proposed change will bring the review of

large subdivision into conformance with current practice. Large subdivisions are frequently the subject of an EIS and by nature when proposed on new sites often have one or more potentially significant impacts on the environment due to the need for the expansion of infrastructure such as water, sewer and roads needed to serve the new development.

Alternatives: The “no action” alternative would retain the current numbers which were established in 1978. There is no substantive record supporting the numbers that were selected in 1978. Other suggested alternatives include reducing the number or threshold to a lower number of lots that would trigger Type I classification.

3.1.2 Regulatory Text Amendment:

- 617.4(b)(6)(iii) in a city, town or village having a population of 150,000 persons or less, parking for 500 vehicles;
- 617.4(b)(6)(iv) in a city, town or village having a population of 150,000 persons or more, parking for 1000 vehicles;

Objectives and Rationale: The Department proposes to add a threshold for parking spaces for communities of less than 150,000 persons. A common and often recommended measurement is one parking space per 200 square feet of gross floor area of a building. For communities of less than 150,000 persons the applicable Type I threshold for the construction of commercial or industrial facilities is 100,000 square feet of gross floor area. This equates to 500 parking spaces.

Alternatives: The “no action” alternative would retain the current Type I threshold at 1000 vehicles for all municipalities without regard to size. Other suggested alternatives include reducing the number of parking spaces for all communities to 500 or less vehicles.

3.1.3 Preliminary Text Amendment:

- 617.4(b)(9) any Unlisted action that exceeds 25 percent of any threshold in this section [(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 or State 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 the National Register, or that is] determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places (The National Register of Historic Places is established by 36 Code of Federal Regulation (CFR) Parts 60 and 63, 1994 (see section 617.17 of this Part));

Objectives and Rationale: The Department proposes to bring the threshold reduction for historic resources in line with other resource based items on the Type I list. On the

existing Type I list any Unlisted action, regardless of size, that occurs wholly or partially within or substantially contiguous to a historic resource is automatically elevated to a Type I action. This results in very minor actions being elevated to Type I. Other resource based Type I items such as those addressing agriculture and parkland or open space result in a reduction in the Type I thresholds by 75%. Given the fact that the new Full EAF, which will be effective on April 1, 2013, requires much more information on historic resources it would be unduly onerous for a project sponsor to have to complete a Full EAF for a relatively minor activity. Also, the new Short EAF now contains a question regarding the presence of historic resources so the substance of the issue will not escape attention. This change does not change the substantive requirements of a SEQR review. This listing has been expanded to include properties that have been determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation eligible for listing. This change would make SEQR consistent with both State and Federal Historic Preservation legislation.

Alternatives: The “no action” alternative would retain the current Type I item. Other suggested alternatives include the following: exclude projects that are subject to review under Section 106 of the National Historic Preservation Act of 1966 or 1409 of the State Historic Preservation Act and delete the entire listing but require that when a listed property may be impacted by a project that the determination of significance must include an evaluation of the potential for impact to the attributes that are the basis for the listing.

3.2 Type II List

The Department proposes to broaden the list of actions that will not require review under SEQR. This will make SEQR more meaningful by allowing agencies to focus their time and resources on those projects likely to have significant adverse impacts on the environment. The additions to the Type II list are based on discussions that DEC has conducted with representatives from state agencies, environmental organizations, business (see Appendix A) and the experience of staff in the Division of Environmental Permits.

A ancillary reason for many of the proposed additions to the Type II list is encourage environmentally compatible development. Many of the additions attempt to encourage development on previously disturbed sites in municipal centers with supporting infrastructure and encourage green infrastructure projects and solar energy development. Others proposed items will remove obstacles encountered by municipalities when developing affordable housing in cooperation with not-for-profit organizations. The overall goal is to provide a regulatory incentive for project sponsors to further the State’s policy of sustainable development.

3.2.1 Regulatory Text Amendment:

3.2.2 Preliminary Text Amendment:

- Disposition of land, by auction, where there is no discretion on the part of the disposing agency on the outcome.

Objectives and Rationale: A municipality or a state agency may acquire land through foreclosure or other means where the land reverts to the agency due to a failure of the owner to remain current on property taxes. State law requires that the municipality or agency dispose of this land through a public action to the highest qualified bidder. The municipality or agency has no discretion but to abide by the results of the auction. Currently, agencies are required to perform a SEQR review since the sale, lease or other transfer of greater than 100 acres is a Type I action and amounts under 100 acres are classified as Unlisted actions. The environmental assessments under these circumstances are fairly meaningless since the agency has no idea of what the ultimate use of the property will be by the new owner at the time of the auction. The only guide the agency can use is zoning or the lack of zoning. In addition, the subsequent development of the property will generally result in an environmental review if the proposed action requires a discretionary permit or approval from a state or local agency

Alternatives: The “no action” alternative would remove this item from the Type II list and continue to require a SEQR review prior to the disposition of land by auction. Other suggested alternatives: expand this proposed listing to allow for disposition of land by any means as a Type II action, limit the item by including the phrase “unless such action meets or exceeds the criteria found in 617.4(b)(4) of this Part.”

3.2.3 Regulatory Text Amendment:

- In a city, town or village with an adopted zoning law or ordinance, reuse of a commercial or residential structure not requiring a change in zoning or use variance unless such action meets or exceeds any of the thresholds in section 617.4(b)(6),(8), (9), (10), and (11) of this Part.

Objectives and Rationale: The built environment of New York State contains many structures that are currently vacant. For example, the City of Albany has recently determined that there are 809 vacant buildings in the city. These vacant structures, if not properly maintained, contribute to urban blight and are an under used resource. Many of these structures could be reused for housing or commercial development rather than developing a greenfield site. Since these properties generally have existing infrastructure the suite of potential environmental issues is very limited and are routinely handled under the existing local land use reviews. Returning a vacant residential or commercial structure to a productive use can reduce blight, improve the vitality and liveability of a neighborhood and return structures to the tax role.

Alternatives: The “no action” alternative would remove this item from the Type II list and continue to require a SEQR review prior to the proposed reuse of a vacant or

abandoned structure. Other suggested alternatives: Expand this provision to apply to all structures including industrial uses.

3.2.4 Regulatory Text Amendment:

- Lot line adjustments and area variances not involving a change in allowable density [replacing existing items 12 and 13 in 6 NYCRR 617.5(c)].

Objectives and Rationale: Individual setback and lot line variances and area variances for single, two- or three- family homes are currently Type II actions. This proposed revision would expand the applicability to all types of structures so long as the proposed lot line adjustment or area variance does not change the allowable density. These types of variances are subject to the review and approval of zoning boards which are required under state law to consider environmental factors in their decision to either issue or deny the requested relief.

Alternatives: The “no action” alternative would remove this item from the Type II list and continue the current situation which would restrict area variance to only one-, two- and three- family residences.

3.2.5 Regulatory Text Amendment:

- In cities, towns and villages with adopted subdivision regulations, subdivisions defined as minor under the municipality’s adopted subdivision regulations, or subdivision of four or fewer lots, whichever is less, involves ten acres or less, and provided the subdivision does not involve the construction of new roads, water or sewer infrastructure, and was not part of a larger tract subdivided within the previous 12 months.

Objectives and Rationale: The municipal enabling laws for subdivision plat review (e.g., Town Law §276) authorize municipalities to define subdivisions as major or minor. Minor subdivisions, as defined in many municipal subdivision regulations, usually consist of four or fewer lots or two lots. The municipal enabling laws provide a sufficient grant of authority to municipalities to consider the typical and expected environmental impacts of minor subdivisions. Under such circumstances and the ability of municipalities to condition or deny approvals along with the additional caveats for numbers of acres, connection to utilities, and no construction of new roads, provides assures that such actions would not have a significant effect on the environment.

Alternatives: The “no action” alternative would remove this item from the Type II list and continue to require a SEQR review for minor subdivisions. An alternative would be to disallow the small or minor subdivision Type II when there are sensitive environmental features on the site (e.g., designated critical environmental areas or other identifiable resources). Other alternatives would be to make the Type II item less restrictive by removing one or more of the conditions, e.g., 1) removal of the restriction on establishment of new roads since the restriction may impede context sensitive design for small subdivisions, or 2) removal of the restriction on acres.

3.2.6 Regulatory Text Amendment:

- The recommendation of a county or regional planning entity made following referral of an action pursuant to General Municipal Law, sections 239-m or 239-n.

Objectives and Rationale: This is one of the most frequently asked questions by town and county planners. Since these reviews under 239-m & n are not binding and can be overturned by a majority plus one vote by the municipality they have been interpreted as not triggering SEQR.

Alternatives: The “no action” alternative would remove this item from the Type II list.

3.2.7 Proposed Text Amendment:

- On a previously disturbed site in the municipal center of a city, town or village having a population of less than 20,000, with adopted zoning regulations, construction or expansion of a residential or commercial structure or facility involving less than 8,000 square feet of gross floor area where the project is subject to site plan review, and will be connected (at the commencement of habitation) to existing community owned or public water and sewerage systems including sewage treatment works which have the capacity to provide service and does not involve the construction of new public roads.
- On a previously disturbed site in the municipal center of a city, town or village having a population of greater than 20,000 but less than 50,000, with adopted zoning regulations, construction or expansion of a commercial or residential structure or facility involving less than 10,000 square feet of gross floor area where the project is subject to site plan review, and will be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works which have the capacity to provide service and does not involve the construction of new public roads;
- On a previously disturbed site in the municipal center of a city, town or village having a population of greater than 50,000 but less than 150,000, with adopted zoning regulations, construction or expansion of a commercial or residential structure or facility involving less than 20,000 square feet of gross floor area where the project is subject to review under local land use regulation, and will be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works which have the capacity to provide service and does not involve the construction of new roads.
- On a previously disturbed site in the municipal center of a city, town or village having a population of greater than 150,000, with adopted zoning regulations, construction or expansion of a commercial or residential structure or facility involving less than 40,000 square feet of gross floor area where the project is subject to review under local land use regulation, and will be connected (at the commencement of habitation) to existing community or public water and

sewerage systems including sewage treatment works which have the capacity to provide service and does not involve the construction of new roads.

Objectives, Rationale, and Benefits: Building a structure on a previously disturbed lot with existing road, sewer and water infrastructure substantially reduces the number and severity of potential impacts that must be considered in an environmental review. The four proposed Type II actions that allow for a sliding scale of development depending on population levels are intended to serve as an incentive for development on previously disturbed sites within existing municipal centers. Development of sites that have been previously disturbed and that have existing infrastructure result in less environmental impact than developing undisturbed greenfield sites and these impacts can be readily addressed through the land use review process. Also, the notion that development should be encouraged and funneled into existing sites in municipal centers with existing infrastructure that supports such development, has become part of the State's public policy.

Alternatives: The "no action" alternative would remove these items from the Type II list. Other suggested alternatives include changing the population numbers and the amount of allowed development for each item and the addition of more environmental conditions under which the development would not be allowed such as prohibiting use of this item when the project includes demolition or if site is located substantially contiguous to a designated or eligible historic structure or district.

3.2.8 Regulatory Text Amendment:

- Replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site, including upgrading of buildings to meet building, energy, or fire codes, or to incorporate green building infrastructure techniques, unless such action meets or exceeds any of the thresholds in section 617.4(b)(6),(8),(9),(10) and (11) of this Part.

Objectives and Rationale: The inclusion of upgrades of existing building to meet new energy codes is consistent with the current intent of the item. Also, the current item on replacement, rehabilitation or reconstruction is limited to "in kind" construction. This allows for some limited deviations from the existing structure but could be interpreted to preclude the use of green infrastructure in place of the existing more conventional development techniques. Installation of green roofs or other green infrastructure techniques can substantially improve energy efficiency and reduce generation of runoff. The addition of the specific Type I thresholds provides additional clarity for the application of this item and places limits on the size of the replacement, rehabilitation or reconstruction that could be undertaken as a Type II action.

Alternatives: The "no action" alternative would return the item to its current wording in the regulation. Another alternative would be to not include the provision regarding green building infrastructure techniques.

3.2.9 Regulatory Text Amendment:

- Installation of rooftop solar energy arrays on an existing structure that is not listed on the National or State Register of Historic Places or determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places, or installation of less than 25 megawatts of solar energy arrays on closed sanitary landfills.

Objectives and Rationale: The installation of solar energy arrays can substantially reduce energy costs and the generation of greenhouse gases. The rooftops of many commercial and industrial facilities are already home to a myriad of heating ventilation and air conditioning (HVAC) equipment. This is just another type of HVAC system. This provision would not allow installation on designated historic structures. The redevelopment of a closed sanitary landfill as a solar energy site would return a currently under used site to a productive use. Many closed sanitary landfills currently generate energy from the combustion of methane gas and have the necessary infrastructure in place to connect to the electrical grid.

Alternatives: The “no action” alternative would remove this item from the Type II list. Other suggested alternatives: delete the restriction for designated historic properties, place a limit on the size of roof top installations and reduce the size of an installation on closed sanitary landfills.

3.2.10 Regulatory Text Amendment:

- Installation of cellular antennas or repeaters on an existing structure that is not listed on the National or State Register of Historic Places or determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places.

Objectives and Rationale: The current Type II item [617.5(c)(7)] that precludes the installation of radio communication and microwave transmission facilities as a Type II action has generated a substantial number of questions on the SEQR classification for installation of antennas and repeaters on existing structures. These antenna and repeaters can in many locations be installed on existing buildings and preclude the construction of a new tower.

Alternatives: The “no action” alternative would remove this item from the Type II list and continue to require a SEQR review prior to the installation of cellular antennas and repeaters on existing structures. Other suggested alternatives include: adding the phrase “structure or district” to the proposed listing to prohibit the applicability of this item in a designated historic district, prohibit the installation of cellular antennas or repeaters within 500 feet of a designated historic structure or district and require that all cellular antennas and repeaters that are located within 500 feet of a historic structure or district be camouflaged to reduce visibility.

3.2.11 Regulatory Text Amendment:

- Brownfield site clean-up agreements under Title 14 of ECL Article 27.

Objectives and Rationale: This item would clarify that the development and implementation of a Brownfield clean-up agreement is a Type II action. See Matter of Bronx Comm. for Toxic Free Schools v. New York City Sch. Constr. Auth., 20 N.Y.3d 148, 160 (2012) where Judge Read stated as follows: "...it is uncertain how BCP and SEQRA requirements fit together so as to offer meaningful and non-duplicative re-view of a project. Perhaps DEC will clarify this issue in the context of its proposed SEQRA amendments." The DEC has considered these types of agreements and clean-ups as civil or criminal enforcement proceedings [617.5(c)(29)], which belong to the Type II category.

Alternatives: The "no action" alternative would remove this category of action from the Type II list.

3.3 Mandatory Scoping of EISs

3.3.1 Regulatory Text Amendment:

- 617.8(a) - The primary goals of scoping are to focus the EIS on potentially significant adverse impacts and to eliminate consideration of those impacts that are irrelevant or [non] not significant. Scoping should result in EISs that are only focused on relevant, significant, adverse impacts. Scoping is [not] required for all EISs [. Scoping] and may be initiated by the lead agency or the project sponsor.
- 617.8(f)(2) - the potentially significant adverse impacts identified both in Part III of the environmental assessment form [positive declaration] and as a result of consultation with the other involved agencies and the public, including an identification of those particular aspect(s) of the environmental setting that may be impacted;
- 617.8(f)(7) - A brief description of the prominent issues that were raised during scoping and determined to be not relevant or not environmentally significant or that have been adequately addressed in a prior environmental review[.] and the reason(s) why those issues were not included in the final written scope.
- 617.8(h) - The project sponsor may incorporate information submitted consistent with subdivision 617.8(g) of this section into the draft EIS at its discretion. Any substantive information not incorporated into the draft EIS must be considered as public comment on the draft EIS. Information submitted following the completion of the final scope and not included by the project sponsor in the draft EIS cannot be the basis for the rejection of a draft EIS as inadequate.

Objectives and Rationale: The Department proposes to:

- (5) Require public scoping for all EISs. Currently scoping is not mandatory but all parties have come to accept the importance of public scoping as a tool to focus an EIS on the truly substantive and significant issues. Seeking public input early in the EIS process helps to ensure that all of the substantive issues are identified prior to the preparation of the draft EIS.

- (6) Place more emphasis on using the EAF as the first step in scoping. The revised EAFs are much more comprehensive than the previous versions. This should allow the lead agency to assess, in a thorough fashion, all of the potential impacts and to establish a basis for determining those issues that need additional scrutiny in an EIS and issues that do not require any further analysis and can be excluded from the EIS scope. Scoping can then be used to determine the depth and type of assessment that will be required in the draft EIS.
- (7) Provide clearer language on the ability to target an EIS. All parties agree that many EISs are currently filled with information that does not factor into the decision. This is driven by the defensive approach agencies and project sponsors take in developing the EIS record. In pursuit of the “bullet proof EIS” the tendency is to include the information even though the environmental assessment has already concluded that the issue is not substantive or significant.
- (8) Provide better guidance on the basis for accepting or rejecting a draft EIS for adequacy. The current regulations give to the project sponsor the responsibility for accepting or deferring issues following the preparation of the final written scope. A lead agency cannot reject a draft EIS as inadequate if the project sponsor has decided to defer an issue and treat it as a comment on the draft EIS. Language would be added to clarify that the decision of the project sponsor cannot serve as the basis for the rejection of a draft EIS as not adequate to start the public review process.

Alternatives: The “no action” alternative would result in scoping remaining an optional procedure. Other suggested alternatives: provide the lead agency with the authority to include “late items” after the preparation of the final scope and require that scoping must include a public meeting.

3.4 PREPARATION AND CONTENT OF ENVIRONMENTAL IMPACT STATEMENTS

3.4.1 Regulatory Text Amendment:

- 617.9(a)(2) - The lead agency will use the final written scope[,if any,] and the standards contained in this section to determine whether to accept the draft EIS as adequate with respect to its scope and content for the purpose of commencing public review. This determination must be made [in accordance with the standards in this section] within 45 days of receipt of the draft EIS. Adequacy means a draft EIS that meets the requirements of the final written scope and section 617.9(b) of this Part.

(i) If the draft EIS is determined to be inadequate, the lead agency must identify in writing the deficiencies and provide this information to the project sponsor. Information submitted following the completion of the final scope and not included by the project sponsor in the draft EIS cannot be the basis for the rejection of a draft EIS as inadequate but such information may require the preparation of a supplemental EIS in accordance with section 617.9 (a)(9).

(ii) The lead agency must determine whether to accept the resubmitted draft EIS within 30 days of its receipt. The determination of adequacy of a resubmitted draft EIS must be based solely on the written list of deficiencies provided by the lead agency following the previous review.

- 617.9(a)(5) - Except as provided in subparagraph (iii) of this paragraph, the lead agency must prepare or cause to be prepared and must file a final EIS, within [45 calendar days after the close of any hearing or within 60] 180 calendar days after the lead agency's acceptance of the draft EIS[, whichever occurs later].

[(i) No final EIS need be prepared if:

(c) the proposed action has been withdrawn or;

(d) on the basis of the draft EIS, and comments made thereon, the lead agency has determined that the action will not have a significant adverse impact on the environment. A negative declaration must then be prepared, filed and published in accordance with section 617.12 of this Part.]

(i) If the Final EIS is not prepared and filed within the 180 day period, the EIS shall be deemed complete on the basis of the draft EIS, public comment and the response to comments prepared and submitted by the project sponsor to the lead agency. The response to comments must be submitted to the lead agency a minimum of 60 days prior to the required filing date of the final EIS or this provision does not take effect.

(ii) The lead and all involved agencies must make their findings and can issue a decision based on that record together with any other application documents that are before the agency.

[(a) if it is determined that additional time is necessary to prepare the statement adequately; or

(b) if problems with the proposed action requiring material reconsideration or modification have been identified.]

(iii) No final EIS need be prepared if:

(c) the proposed action has been withdrawn or;

(d) on the basis of the draft EIS, and comments made thereon, the lead agency has determined that the action will not have a significant adverse impact on the environment. A negative declaration must then be prepared, filed and published in accordance section 617.12 of this Part.

Objectives and Rationale: The Department proposes to add language to require that the adequacy review of a resubmitted draft must be based on the written list of deficiencies and revise the timeline for the completion of the FEIS.

Determining the adequacy of a draft EIS, which is the province of the lead agency, is a challenging step of the EIS process. If the document has been rejected as not adequate, the lead agency must provide a written list of the identified deficiencies that the project sponsor needs to correct. When the document is re-submitted the second

review must be based on the list of deficiencies that were identified in the first round of review. This is an issue of fairness and will lead to a more efficient process. The goal is to provide a document that is adequate to start the public review.

The current language regarding the timeframe for the preparation of the final EIS is unrealistic. It requires that the final EIS be prepared within 45 days after the close of any hearing or within 60 days of the filing of the draft EIS. Rarely, if ever, are these timeframes met. The Department proposes to extend this timeframe and provide certainty for when the EIS process will end.

Currently in SEQR any timeframe may be extended by mutual agreement between a project sponsor and the lead agency [See 617.3(i)]. So for large complex projects where the lead agency and the applicant agree that additional time is necessary to prepare the final EIS there is already a provision that would allow the six month clock to be extended. This provision would also not apply to direct actions of an agency.

Alternatives: The “no action” alternative would result in no change to the current language on determining adequacy and the timeframe for preparation of a final EIS. Other suggested alternatives are as follows: Require that the submitted draft EIS be determined complete if it contains all items listed in the final scope and require default acceptance of the submitted draft EIS if the lead agency exceeds the time provided for acceptance; require the applicant to submit a demand letter before the default acceptance is triggered; or add language that would create a narrow exception to the final timeframe where an action is subject to a trial-like adjudicatory hearing which by law becomes part of the record.

3.4.2 Regulatory Text Amendment:

617.9(b)(5) - (iii) ...The draft EIS should identify and discuss the following impacts only where applicable and significant: ...

(f) impacts of greenhouse gas emissions from the proposed action on climate change;

...

(iv) a description of the mitigation measures, including, where relevant, adaptation measures to reduce or avoid an action’s vulnerability to the effects of global climate change;

Objectives and rationale

The major scientific agencies of the United States — including the National Aeronautics and Space Administration (NASA) and the National Oceanic and Atmospheric Administration (NOAA) — agree that climate change is occurring and that humans are contributing to it. Scientists are still researching a number of important questions, including exactly how much the Earth will warm, how quickly it will warm, and what the consequences of the warming will be in specific regions of the world. However, there is enough certainty in the scientific community about basic causes and effects of climate change to justify taking actions that reduce future risks. Under the National

Environmental Planning Act (NEPA, on which SEQR was modeled) and SEQR, the effects of greenhouse gas emissions on the environment is an impact on the environment, which if determined significant by the lead agency would be a topic in an environmental impact statement including measures to avoid or reduce greenhouse gas emissions. The Governor's 2100 Commission, accordingly, made the following recommendation: "The Commission recommends that the State require lead agencies to assess climate change adaptation and resilience measures, as well as actions to mitigate climate change, as part of their SEQRA environmental impact review. To accomplish this, the State would have to amend its SEQRA Handbook to include such a requirement. The State should also ensure that the SEQRA "workbooks" make clear that adaptation and resilience to climate change should be properly considered when determining the significance of an action under SEQRA."⁴¹

The added language will implement the NYS 2100 Commissioner report and codify existing practice.

Major storm events in the last few years have resulted in significant impacts on the environment in the state. Scientists are predicting that storms similar to those experienced will increase in both frequency and intensity due to the effects of climate change. The added language (6.17.9[b][5][iv]) will require project sponsors in areas vulnerable to storm damage (floodplains and coastal areas) to take adaptive measures that will lessen the impacts that their project will have on the environment as a result of the effects of climate change.

Impacts:

There are no adverse environmental impacts expected from the proposed, additional regulatory language. Inclusion of the language will reduce any regulatory uncertainty about whether climate change must be considered in an EIS where the lead agency has determined that greenhouse gas emissions may be significant. The same would apply to the proposed regulatory language to include a discussion of adaptation for projects that would be especially vulnerable to the impacts of storm damage. Some project sponsors may face the additional cost of conducting the greenhouse gas emissions impacts assessment.

Alternatives:

The "no action" alternative would result in no change to the existing language of the SEQR regulations. Project sponsors may still be required to discuss climate change where the lead agency has determined that the impact of greenhouse gas emissions from a project may be significant. The same would be true for adaptation measures.

3.5 SEQR Fees

3.5.1 Regulatory Text Amendment:

617.13(e) [Where an applicant chooses not to prepare a draft EIS, t] The lead agency shall provide the applicant, upon request, with an estimate of the costs for preparing or reviewing the draft EIS calculated on the total value of the project for which funding or approval is sought. The applicant shall also be entitled, upon request to, copies of invoices or statements for work prepared by a consultant.

Objectives and Rationale: The Department proposes to clarify existing fee assessment authority by amending language to provide project sponsors with the ability to request an estimate of the costs for reviewing the EIS and a copy of any invoices or statement of work done by any consultant for the lead agency. This is primarily an issue of fairness and disclosure. A project sponsor should have the right to receive an estimate of the lead agency's costs for the review of the EIS along with written documentation to support such fees. Currently, the lead agency must provide an estimate to the project sponsor when they take on the responsibility for the preparation of the EIS.

Alternatives: The "no action" alternative would remove this item from the Fees section. Other suggested alternatives: require that a fee be collected for all EIS and the EIS be prepared by a third party hired by the lead agency.

4.0 Issues Not Included in the Final Scope

A total of 37 comments letters were received during the public comment period that expired on August 10, 2012. The following is a brief discussion of the major issues that were considered for inclusion in the final scope of the regulatory changes but were dismissed from further consideration in this rule making.

4.1 Allow Conditioned Negative Declarations to be used for Type I Actions

This issue has been debated since the changes to SEQR made in 1987 that recognized the use of conditioned negative declarations (CND) and allowed them to be used for actions classified as Unlisted. It was rejected in 1987, reconsidered and rejected again in 1995. There are three primary concerns regarding the expansion of CNDs to Type I actions. First, Type I actions are presumed, to require the preparation of an EIS. Second, as it stands, the CND process adds an arguably unnecessary level of procedural complication to SEQR and the DEC does not favor carrying it over to Type I actions (which are by definition often the most environmentally significant types of actions. Third, the DEC questions whether it has the statutory authority for expanding the use of CNDs to Type I actions. The 1995 Final Generic EIS on the changes to SEQR has a complete discussion of this issue.

http://www.dec.ny.gov/docs/permits_ej_operations_pdf/finalgeis.pdf

4.2 Establish a Board or Council to Review SEQR Decisions

This issue has been raised by many parties over the years. It would establish an independent board or council that could, on request, review disputes and issue opinions

on the proper implementation of SEQR. The make-up of the body, whether the determination was advisory or mandatory and identifying what parties could seek a review are elements that would have to be established. This issue has been rejected because it is outside of the scope of this regulatory action. Establishing a board or council that could issue a binding decision would require legislation and a change to Article 8 of the Environmental Conservation Law.

4.3 DEC Should Develop a Best Practice Manual

The suggestion has been raised that DEC should prepare a “Best Practices Manual” to establish the recommended or required practices that should be applied for issues that are frequently involved in the environmental review of an activity. This issue would not require a regulatory change so long as the practices were not required to be used by agencies. The suggestion has great appeal. DEC has, for many years, made available a SEQR Handbook to help SEQR practitioners’ with the process questions. A workbook to help users prepare and review the revised EAF forms is in preparation but it will not contain standard methodologies for the conduct of a traffic study, air analysis, wetland survey, etc. New York City (NYC) has taken this approach for activities that are subject to environmental review under the City Environmental Quality Review Act (CEQRA) and this manual is a great source of information. Preparing a best practice manual to cover even the most common environmental issues that could be fairly applied to the varied environments in New York State would be an expensive task which is currently beyond the fiscal capabilities of the DEC.

4.4 Rely on a Licensed Professional to Attest to the Accuracy of the Review

The issue was raised that the regulations should allow or require a lead agency to rely on the expertise of licensed professionals in the resolution of issues during an environmental review. If a licensed professional is willing to attest to the completeness and accuracy of an environmental impact review by affixing his or her stamp on the plan/assessment, that issue should not be the subject of additional scrutiny or debate by the lead agency or interveners. Making this change would significantly undermine the powers of the lead agency and much of the fact-finding that is part of the SEQR process. Although a licensed professional may have arrived at a conclusion there is no guarantee that the selected approach is the most environmentally compatible approach or that the professional is in fact correct or objective. Allowing other experts and the public the opportunity to review and offer comment is a healthy process. Obviously, the conclusions of a licensed professional should carry significant weight in the resolution of an issue. But, it should not be the only determining factor. Giving deference in this fashion would require legislation and a change to Article 8 of the ECL.

APPENDIX F

SUPPORTIVE RESEARCH FOR SUSTAINABLE DEVELOPMENT TYPE II ACTION

I. Sustainable Development and Transportation

- a. *Moving Cooler: An Analysis of Transportation Strategies for Reducing Greenhouse Gas Emissions*, Urban Land Institute (2009).

This report finds that changes in land use patterns, combined with improved transit and transportation options “could achieve meaningful GHG reductions by 2050, ranging from 9 percent to 15 percent without economy-wide pricing.”

- b. *Location Efficiency and Housing Type – Boiling it Down to BTUs*, EPA/Jonathan Rose Companies (2011).

Energy-efficient land use factors identified in this report include (in order of impact): location efficiency – access to transit; size of home; attached versus detached units. The report concludes that “household energy consumption associated with housing and transportation decreases significantly in smaller housing types located in compact, transit-oriented development when compared to similar housing types in conventional, largely automobile-dependent communities.”

- c. *Can Smart Growth Policies Conserve Energy and Reduce Emissions?*, Todd Litman, Portland State University’s Center for Real Estate Quarterly, Vol. 5, No. 2, (Spring 2011).

The report emphasizes that density alone will not achieve the full potential for smart growth to significantly reduce VMT; rather, communities and regions should strive for a potpourri of mutually-reinforcing land use and development patterns – mixed uses, connectivity, transit access, parking access, centeredness and regional accessibility to daily amenities.

- d. *Driving and the Built Environment: The Effects of Compact Development on Motorized Travel, Energy Use, and CO2 Emissions*, Transportation Research Board (TRB) Special Report 298, (2009).

This report projected more modest (compared with other reports cited), but still meaningful, reductions in VMT from Smart Growth changes, concluding that doubling residential density reduces VMT by 5 to 12 percent, or by as much as 25 percent when combined with other changes.

- e. *Land Use and Driving: The Role Compact Development Can Play in Reducing Greenhouse Gas Emissions*, Urban Land Institute, Washington, D.C (2010).

The ULI analyzed and summarized three recent studies on the connection between compact land use /development patterns and driving/VMT – Moving Cooler, Growing Cooler and TRB (all discussed in this section). The report concluded generally that “The benefits of compact development over sprawl are clear and well documented. Compact development creates the underlying foundation for a variety of types of

vibrant, healthy, and pedestrian friendly communities—the types of communities that, many Americans have discovered, improve quality of life. Recent market trends and surveys indicate that Americans want to live in these communities. Adding to this advantage, compact development is a recognized strategy to reduce public infrastructure costs, protect environmentally sensitive lands, and enable a variety of transportation choices. It also helps protect families from increasing household costs, especially those of transportation and utilities, which are directly tied to the price of fuel and energy.”

- f. *Transportation's Role in Reducing U.S. Greenhouse Gas Emissions: Report to Congress*, U.S. Department of Transportation, 2010

This study was mandated by the Energy Independence and Security Act (P.L. 110-140, December 2007) to study “the impact of the Nation’s transportation system on climate change and strategies to mitigate the effects of climate change by reducing GHG emissions from transportation.” Regarding land use and transit access, the report concluded: “Significant expansion of urban transit services, in conjunction with land use changes and pedestrian and bicycle improvements, could generate moderate reductions of 2 to 5 percent of transportation GHG by 2030. The benefits would grow over time as urban patterns evolve, increasing to 3-to-10 percent in 2050. These strategies can also increase mobility, lower household transportation costs, strengthen local economies, and provide health benefits by increasing physical activity.”

- g. *Transit Oriented Development and the Potential for VMT-related Greenhouse Gas Emissions Growth Reduction*, Center for Neighborhood Technology/Center for Transit Oriented Development (2010).

Location matters. For any given household, the number of autos it owns, and how many miles households drive those autos, is largely determined by where the household lives. A household’s VMT and carbon footprint can be dramatically reduced by living in a location efficient neighborhood... this paper shows that by simply living in a central city near transit, the average household can reduce its GHG emissions by 43 percent, compared to the average household... in the most location efficient transit zones [downtowns], a household can reduce its GHG emissions by as much as 78 percent... All this leads to the potential for TOD to contribute to reductions of VMT-related GHG emissions.”

- h. *Predicting Transportation Outcomes for LEED Projects*, Journal of Planning Education and Research, April 12, 2012.

This peer-reviewed article shows VMT reductions associated with various Smart Growth and transportation scenarios. The article found that in communities built to the US Green Building Council’s LEED for Neighborhood Development standards, VMT has been reduced between 24 and 60%, relative to the surrounding region’s metropolitan averages.

II. Sustainable Development and Water Quality

- a. *Protecting Water Resources with Smart Growth*, US Environmental Protection Agency, Washington, DC, May 2004, p. 10.

Strategically-located, higher-density development – particularly in developed areas and traditional “municipal centers” -- has been found to reduce overall per capita storm-water run-off pollution, in turn helping to protect source water quality and the ecosystems/habits it sustains. The EPA concluded that low-density sprawling development patterns actually increase the overall amounts of impervious surface at the watershed level – roads, parking lots, driveways, landscaped lawns -- thus disrupting natural water-cleansing hydrologic functions and increasing pollution from unnatural surface storm-water flow. The EPA found: “Low densities at the site level can increase imperviousness at the watershed level, however, leading to worse overall water quality. This effect is due to the fact that the infrastructure and housing footprint requirements for low-density development at the site level can increase the rate at which land within the watershed is developed... such development also requires greater amounts of transportation-related impervious infrastructure, such as roads, driveways, and parking lots.” The EPA further concludes: “On the other hand, smart growth approaches – such as reusing previously developed land; regional clustering; and developing traditional towns, villages, and neighborhood centers – can accommodate the same activity on less land. In turn, this approach reduces overall imperviousness at the watershed level, thus maintaining watershed functions... higher population densities in concentrated areas can reduce water quality impacts from impervious surfaces by accommodating more people and more housing units on less land.” *Id.*, at pp. 10 – 11.

- b. *Protecting Water Resources with High-Density Development*, US Environmental Protection Agency, 2006.

Focusing specifically on density, the EPA found that higher-density development generally yields less storm-water pollution run-off than typical low-density sprawl. The EPA concluded that a group of eight houses on quarter-acre lots (moderate-density, village-form scale) generates about 6,000 cubic feet of pollution run-off per year; a typical suburban subdivision of eight homes on one-acre lots, in contrast, generates three times the storm-water pollution run-off, or 18,000 cubic feet annually.

- c. *The Value of Green Infrastructure: A Guide to Recognizing Its Economic, Environmental and Social Benefits*, Center for Neighborhood Technology and American Rivers, 2010.

This analysis calculated kWh energy savings from green infrastructure – in particular, cooling, heating and water treatment energy savings from green roofs.

III. Agricultural/Forest Land Preservation

- a. *Planning for Agriculture in New York*, American Farmland Trust, 2011, p. 5.

Dispersed, low-density, single-use development on the metropolitan fringe is the greatest threat to the preservation of agricultural and forest resources. The American Farmland Trust – NY Chapter concluded that, “The loss of New York farmland is largely driven by the migration of residents from cities into

the suburbs and rural communities surrounding them, not by population growth.”

- b. *Putting Smart Growth to Work in Rural Communities*, Smart Growth Network/International City/County Management Association, 2010, p. 4.
The USDA found that between 2002 and 2007 nearly 47,700 acres of farmland in NYS were developed – roughly 9,000 acres annually. And the Brookings Institution found that Upstate New York was experiencing a particularly deleterious development pattern, which it termed “Sprawl Without Growth” – that is, 425,000 acres of farmland were developed between 1982 and 1997, contributing to a 30% increase in developed land with only a 2.6% increase in population. Nationwide trends show a similar pattern. Most population growth is occurring in rural areas at the metropolitan fringe – in the mid-1990s, for example, three-quarters of all development occurred at and beyond the urban fringe, nearly all on one-acre lots or larger.
- c. *Planning for Agriculture in New York*, American Farmland Trust, 2011; see also www.farmland.org and *Putting Smart Growth to Work in Rural Communities*, Smart Growth Network/International City/County Management Association, 2010.
Streamlining and incenting development in municipal centers has the potential to reduce the pressure to build further and further from existing develop areas on rural farm and forest land, and increase opportunities to preserve such lands before sprawling development occurs.

IV. Historic Rehab/Adaptive Re-Use

Many historic structures are located within municipal centers; indeed, one would be hard-pressed to find a successful downtown revitalization effort that did not have historic preservation as a central component – Syracuse, Buffalo, Oswego here in NYS, among others. A focus on municipal centers provides the greatest opportunity to re-develop and re-use existing structures.

Rehabilitation of an existing historic building avoids the “embodied energy” required for new construction – i.e., the energy (and concomitant pollution and environmental degradation) required to extract, produce and transport new construction materials, and the actual construction of the building. (A common phrase among green building advocates is “the greenest building is the one that isn’t built.”⁴²) A historic structure already possesses its embodied energy, with the exception of maintenance and rehabilitation. And unlike new construction, historic rehabilitation involves largely labor (usually local), and less materials -- as a general rule, new construction requires half materials/half labor; historic preservation involves 60-70% labor.

Historic rehabilitation also avoids the disposal of building materials in a landfill that would result from the ultimate demolition of an existing old building that is not maintained or restored.⁴³ Since one-quarter of our garbage in solid waste facilities is comprised of construction debris (much of which from building demolition), the minimization or avoidance of building demolition through historic rehabilitation reduces solid waste. Historic preservation is, in effect, another form of recycling.

Historic preservation in municipal centers also reaps environmental benefits through Brownfield clean-up and re-development.

End Notes

¹ ECL §8-0109(8); *see also, for example*, Ulasewicz, Thomas A., *The Department of Environmental Conservation and SEQRA, Upholding its Mandates and Charting Parameters for the Elusive Socio-Economic Assessment*, 46 Albany Law Review 1255-1256 (1982).

² In addition to the public outreach that was had through the stakeholder review process, the Department also conducted scoping for this GEIS. A positive declaration for this rulemaking with a link to a proposed draft scope appeared in the July 11, 2012 Environmental Notice Bulletin. The public was notified of the final scope in the November 28, 2012 Environmental Notice Bulletin.

³ A more complete description of prior rule makings appears in the 1995 FGEIS, which is published on the DEC's website at <http://www.dec.ny.gov/permits/357.html>.

⁴ 171 Misc. 2d 454 (Sup. Ct. Albany Co. 1996), modified by 242 A.D.2d 91 (3d Dept. 1998), appeal denied by 92 N.Y.2d 802

⁵ *West Village Comm, supra*, 242 A.D.2d at 100.

⁶ See <http://www.dec.ny.gov/permits/6191.html>. The new forms, which became effective on October 7, 2013, are fully electronic and contain an interactive EAF mapper that allows project sponsors to almost instantly identify important environmental resources such as state regulated wetlands are present on the project site. Through a click of a button, the mapper searches the Department's geographic information system for the presence of environmental resources that must be considered in the SEQR process.

⁷ See City of New York, Mayor's Office of Environmental Coordination, http://www.nyc.gov/html/oec/html/ceqr/forms_templates.shtml.

⁸ The new electronic forms were originally scheduled to become effective in October 2012; the effective date was set back to October 7, 2013.

⁹ See, <http://www.nyc.gov/html/oec/html/ceqr/ceqr.shtml>

¹⁰ *Parking Standards*, Michael Davidson and Fay Dolnick, American Planning Association, Planning Advisory Service Report Number 510/511, 2002.

¹¹ These proposed changes have been prepared in consultation with the Office of Parks, Recreation and Historic Preservation.

¹² See Orloff, Neal, *SEQRA: New York's Reformation of NEPA*, 46 Albany Law Review 1128 (1982).

¹³ See ECL Article 6 (State Smart Growth Public Infrastructure Policy Act).

¹⁴ See 47 USC §1455(a) (adopted on Feb. 22, 2012, P.L. 112-96, Title VI, Subtitle D, § 6409, 126 Stat. 232); the Federal Communications Commission recently issued guidance on the meaning of what does it mean to "substantially change the physical dimensions" of a tower or base station and what is a wireless tower or base station.

¹⁵ See <https://www.ny.gov/reforming-energy-vision/learn-more>.

¹⁶ See <http://energyplan.ny.gov/>, last visited on October 6, 2015.

¹⁷ See website for New York City Mayor's Office of Sustainability, <http://www.nyc.gov/html/planyc/html/sustainability/sustainability.shtml>, last visited on October 6, 2015.

¹⁸ New York State Conservationist, December 2012, page 23-25.

¹⁹ See PlaNYC, 2007, page 115, <http://www.nyc.gov/html/planyc2030/html/home/home.shtml>.

²⁰ DEC, New York State Conservationist, December 2012, page 23-25.

²¹ Preserve NJ, July 7, 2008.

²² "NEXAM October 9, 2012.

²³ New York State Department of State, *Subdivision Review in New York State*, James A. Coon Technical Series, p. 19 (Revised 2011).

²⁴ See Department of Environmental Conservation, *Construction Stormwater Toolbox*, published on the Department's website at <http://www.dec.ny.gov/chemical/8694.html>.

²⁵ *Id.*, Review of the Subdivision, beginning on page 48.

²⁶ The Department wishes to express its appreciation to the Department of State, which assisted in providing the supportive research that appears in Appendix F.

²⁷ See, for example, ECL Article 6 (Smart Growth Public Policy Infrastructure Act).

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- ²⁸ See Regional Plan Association, 2013 Long Island Index Special Analysis, How the Long Island Rail Road Could Shape the Next Economy, available at <http://www.longislandindex.org/explore>.
- ²⁹ See Regional Plan Association, Places to Grow, An Analysis of the Potential for Transit-Accessible Housing and Jobs in Long Island's Downtowns and Station Areas, January 2010, available <http://www.longislandindex.org/explore/ba2fab1cacfbf6edd9f2339ca40c9679>.
- ³⁰ See Metroland, April 24, 2013, <http://metroland.net/2013/04/24/blight-fight/>.
- ³¹ *Historic Preservation and Green Building: A Lasting Relationship*, Environmental Building News, January 2007.
- ³² *Economics, Sustainability, and Historic Preservation*, Donovan Rypkema, National Trust for Historic Preservation, October 2005.
- ³³ See, generally, Organics: Co-Digestion Economic Analysis Tool (CoEAT). (2014, December 29). In United States Environmental Protection Agency. Retrieved April 6, 2015, from <http://www.epa.gov/region9/organics/coeat/index.html> and United States Environmental Protection Agency. (2014, February 28). Municipal Solid Waste (MSW) in the United States: Facts and Figures. In United States Environmental Protection Agency. Retrieved March 11, 2015, from <http://www.epa.gov/epawaste/nonhaz/municipal/msw99.htm>
- ³⁴ One or more of the participants in the stakeholder outreach that proceeded this EIS suggested that DEC bring back the scoping checklist.
- ³⁵ 171 Misc. 2d 454, 458, 654 N.Y.S.2d 230 (Sup. Ct. Albany Co. 1996), *modified by* 242 A.D.2d 91 (3d Dept. 1998), *appeal dismissed by* 92 N.Y.2d 802 (1998).
- ³⁶ The primary reasons for a draft EIS to be rejected multiple times is usually because the lead agency has failed to identify all of the items that need to be addressed or there is pressure from project opponents to add additional analysis of impacts into the document either because the document is truly deficient or as a way to defeat the project by delay or cost.
- ³⁷ 171 Misc. 2d 454, 458, *supra*.
- ³⁸ NYS 2100 Commission, *Recommendations to Improve the Strength and Resilience of the Empire State's Infrastructure*, p. 139, available at <http://www.rockefellerfoundation.org/uploads/files/7c012997-176f-4e80-bf9c-b473ae9bbb3.pdf>.
- ³⁹ For a discussion of the issue of whether the lead agency should prepare the draft EIS, see Gerrard, Ruzow and Weinberg, *Environmental Impact Review in New York*, §3.08[2] (Matthew Bender & Company 2012).
- ⁴⁰ Governor Cuomo's 2100 Commission Report, <http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/assets/documents/NYS2100.pdf>, accessed on March 10, 2015.
- ⁴² *Historic Preservation and Green Building: A Lasting Relationship*, Environmental Building News, January 2007.
- ⁴³ *Economics, Sustainability, and Historic Preservation*, Donovan Rypkema, National Trust for Historic Preservation, October 2005.