

THE SEQR HANDBOOK

3rd Edition - 2010



Division of Environmental Permits
New York State Department of Environmental Conservation



Since it first appeared in March 1982, the SEQR Handbook has been a standard reference book for state, county and local government officials; environmental consultants; attorneys; permit applicants; and the public at large.

When the SEQR regulations were amended in January 1996 some of the information included in the 2nd edition of the handbook, published November 1992, became out of date.

Requests for a new edition of the handbook have been steady. In addition, many people have sent in suggestions, questions and topics for consideration for the next edition.

We've heard you! We have tried to address the topics, concerns and confusions that you have identified. As with earlier handbooks, each topic will be presented in a question and answer format.

We welcome your comments! To send comments, suggestions or corrections, please [e-mail](#). If you prefer to send comments via surface mail, you may send them to:

NYSDEC
Division of Environmental Permits
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SEQR Handbook: Introduction

A. The SEQR Handbook - What is it?

The SEQR Handbook provides agencies, project sponsors, and the public with a practical reference guide to the procedures prescribed by the State Environmental Quality Review Act (SEQR)--Article 8 of the Environmental Conservation Law. It addresses common questions that arise during the process of applying SEQR. The Handbook also attempts to address the needs of individuals who have varying degrees of experience with SEQR. Topics range from an introduction to the basic SEQR process to discussions of important procedural and substantive details.

The Handbook is one of four key documents which establish and describe the SEQR process:

- the law, Article 8 of the Environmental Conservation Law,
- the regulations, [6 NYCRR Part 617](#),
- the [SEQR Cookbook](#) (pdf file, 311 kb), and
- this SEQR Handbook.

The law and regulations prescribe the goals, processes, and decision criteria for environmental reviews under SEQR. The latter two are companion documents. The Cookbook uses a flow-chart approach to describe the steps to take when applying SEQR to a project, while this Handbook provides more detail and guidance.

This is the third edition of the SEQR Handbook, and it entirely replaces the previous editions. This edition reflects the State Environmental Quality Review (SEQR) process as it now stands. It is based on crucial court decisions which have molded the process and the most recent revisions to the statewide SEQR regulations, Part 617 of Title 6 of New York's Codes, Rules and Regulations. **This third edition of the SEQR Handbook is available as an online version only.** There are currently no plans to publish a hard copy, however, a pdf version of the SEQR Handbook will be available in early 2010.

This **Introduction** offers basic instruction in the use of the Handbook, as well as a history and description of the nature of the SEQR law. It also discusses the concept of reasonableness as it applies to SEQR.

Chapters I through VIII contain guidelines on specific SEQR issues as well as detailed explanations of the SEQR process. They are organized by topic to parallel the sequential steps in the required procedures (generally paralleling the regulations and the SEQR Cookbook). They also include special sections on how local land use procedures relate to SEQR plus the relationship of any other review procedures that relate to SEQR. Chapter IX briefly reviews significant court decisions on SEQR.

Whenever possible, subjects are cross-referenced to other portions of the Handbook, to Article 8, or to Part 617.

User Tips:

Each topic is addressed through a series of questions and answers.

Before reading about a particular topic, skim all the questions pertaining to the topic to quickly gain a sense of related issues.

While reading about specific issues in the Handbook, it is always advisable to keep the following basic principles about SEQR in mind:

- Have you determined what the whole action is?
- Have all the relevant environmental impacts been considered?
- If an environmental impact statement is required, has the appropriate range of alternatives been considered, including the "no action" alternative?
- Have you complied with all the steps in the SEQR process?
- Is the information about the action, and its analysis, reasonable and adequate?

In concept, SEQR is a simple and logical evaluation process. However, it does have its own vocabulary of terms and specific required forms. To assist state and local governmental agencies, and the public at large about SEQR, the DEC has posted a great deal of information on the DEC [SEQR website](#) including the regulations (6 NYCRR Part 617), brochures, the SEQR Cookbook, this handbook and other SEQR related materials.

Where to find more information:

If, after you have explored the on-line information, you still have questions or need clarification on some aspect of the SEQR process, feel free to contact us. There is an "e-mail us" link on the right hand side of each of the SEQR web pages. This will allow you to contact the SEQR staff directly. Questions may also be addressed to:

SEQR Coordinator
Division of Environmental Permits
NYSDEC
625 Broadway, Albany, NY 12233-1750
Telephone 518- 402-9167
E-mail deprmt@gw.dec.state.ny.us

Training for local government agencies is offered through the Department of State, Division of Local Government Services. They can be contacted at:

[New York State Department of State](#)
[Division of Local Government Services](#)
41 State Street
Albany, NY 12231-0001
Telephone: (518) 473-3355
Fax: (518) 474-6572

In addition, the Association of Towns, the bar associations, the Planning Federation and Regional Planning Groups, academic organizations and private trainers periodically offer SEQR training for local government officials and the general public.

B. What is the Purpose of the Act?

When it enacted SEQR, the New York State Legislature stated that its intent was:

"...to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state."

SEQR establishes a process to systematically consider environmental factors early in the planning stages of actions that are directly undertaken, funded or approved by local, regional and state agencies. By incorporating environmental review early in the planning stages, projects can be modified as needed to avoid adverse impacts on the environment.

C. What Are the Key Elements?

SEQR is both a procedural and a substantive law. In addition to establishing environmental review procedures, the law mandates that agencies act on the substantive information produced by the environmental review. This often results in project modifications and can lead to project denial if the adverse environmental impacts are overriding and adequate mitigation or alternatives are not available.

The initial step in assessing a proposed action is to determine whether SEQR applies. The SEQR process must be applied whenever an action is

- directly undertaken by an agency;
- involves funding by an agency; or
- requires one or more new or modified discretionary approvals from an agency or agencies.

If the decision is made that the activity is one that is subject to SEQR review, the next step in the process is to determine what classification of action is being analyzed. The action will fall into one of the following categories:

- Type I – a list of actions, described in Section 617.4, that experience has shown are more likely to have significant adverse environmental impacts;
- Type II – a list of actions described in Section 617.5, that have been determined not to have a significant adverse environmental impact.; or
- Unlisted – all actions that are not Type I or Type II. This is the vast majority of actions that come under SEQR review.

If the action is classified as Type II, SEQR is satisfied, and no further action is required. However, it is advisable to write a note to the file indicating that SEQR was considered, and the action was determined to be classified as Type II.

For Type I and Unlisted actions, the next step is to systematically consider environmental factors involved with the action to make a reasoned determination regarding the likelihood that the action may have a significant adverse impact on the environment. The initial SEQR tool used to make this determination is the Environmental Assessment Form (EAF).

If a significant adverse impact is likely to occur, an Environmental Impact Statement (EIS) is prepared to explore ways to avoid or reduce adverse environmental impacts or to identify a potentially less damaging alternative. If, on the other hand, the determination is made that the proposed action will not significantly impact the environment, then a Negative Declaration is prepared which ends the SEQR process.

An important aspect of SEQR is its public participation component. There are opportunities for outreach and public participation throughout the environmental impact statement (EIS) process. They include:

- coordination with involved and interested agencies for Type I actions,
- public input to scoping, if the lead agency chooses to have a scoping session for the Draft EIS.
- the required 30 day public comment period on the Draft EIS, and
- public hearings, if the lead agency chooses to hold one or more hearings.

These opportunities allow the public and other agencies to provide input into the planning or review process, resulting in a review with a broader perspective. It also increases the likelihood that the project will be consistent with community values.

D. What is the Environmental Notice Bulletin (ENB)?

The ENB is the Department of Environmental Conservation's (DEC) weekly on-line publication that provides a comprehensive, statewide listing of SEQR notices from all state and local agencies.

For more information, go to the ENB pages on this website or contact:

ENB
Division of Environmental Permits
NYS DEC
625 Broadway, Albany, NY 12233-1750
Telephone number: 518-402-9167
E-mail: enb@gw.dec.state.ny.us

E. Where can I find the "SEQR Flow Chart and Time Frames" Publication?

See DEC publication [SEQR Flow Chart and Time Frames](#) (pdf file, 77 kb)

F. What is the Concept of "Reasonableness" as it applies to SEQR?

The range of decision making by agencies and the comprehensive nature of SEQR continually present new circumstances that require judgment to apply SEQR. For instance, SEQR asks the lead agency to decide: how many alternatives should be reviewed; how much information is enough; and is the proposed action really "significant"? All lead agencies routinely face these and similar questions. While there cannot be black and white formula answers to such matters, there is one basic principle or rule that can be used -- the rule of reason.

The regulations provide abundant support and tools for basing judgments on how to manage the SEQR process by choosing a reasonable approach. The principle of

reasonableness, as put into practice in SEQR decision making, has been upheld by the decisions of the courts (see Landmark Court Decisions on SEQR). In addressing the review of impacts the courts have limited the consideration of impacts to reasonably related potential impacts. The court decisions have also stated that not every conceivable impact needs to be considered; speculative impacts may be ignored.

The EAF and the Concept of Reasonableness:

The Full Environmental Assessment Form assists the agency with applying the reasonableness principle. In the Purpose statement at the beginning of the Full EAF, the instructions recognize that "Frequently there are aspects of a project that are subjective and unmeasurable" and that "those who determine significance may have little or no formal knowledge of the environment or may not be technically expert in environmental analysis" Given these practical limitations, SEQR asks that these decision-makers identify and consider, in an orderly manner, the relevant potential impacts of an action. The Part 1 (Project Information) instructions to the project sponsor state that "It is expected that completion of the Full EAF will be dependent on information currently available and will not involve new studies, research or investigation." However, if an impact is judged relevant and significant, a subsequent EIS may require new studies, research or investigation.

The initial instruction to the lead agency in Part 2 (Analysis) of the Full EAF states that: "In completing the form the reviewer should be guided by the question: Have my responses and determinations been reasonable? The reviewer is not expected to be an expert environmental analyst." In the instructions for Part 3 (Evaluation) of the Full EAF, the preparer decides "if it is reasonable to conclude that this impact is important." Following that instruction, a series of questions tests the reasonableness of the decision.

Continuing with the determination of significance, the regulations ask that the lead agency identify and address relevant areas of environmental concern. If a potential impact is too speculative, it should not be addressed. The agency's responsibility is to deal with impacts that are reasonably foreseeable.

In the criteria for determining significance, when addressing potentially relevant long-term, short-term and cumulative impacts, the lead agency is directed to consider those that are "reasonably related." The criteria also include the following reasonable qualifiers to the indicators of significance:

- a substantial adverse change
- substantial increase or decrease
- removal or destruction of large quantities
- large number of people
- material conflict
- impairment of character or quality
- a major change
- creation of a hazard
- creation of a material demand

The EIS and the Concept of Reasonableness:

In the scoping procedures of Part 617, the regulations speak about reasonableness in several ways. In 617.8(d) "Failure of an involved agency to participate in the scoping process will not delay completion of the final written scope." Therefore, an applicant can

reasonably expect that the SEQR scoping process will continue even if an involved agency fails to fulfill its responsibility in a timely fashion. In 617.8(a) "irrelevant or non significant" issues may (reasonably) be eliminated from further consideration; and in 617.8(f)(5) "the final written scope should include...the reasonable alternatives to be considered."

In Part 617.9(5)(v) the regulations require that the draft EIS describe and evaluate "the range of **reasonable** alternatives to the action that are feasible, considering the objectives and capabilities of the project sponsor." For private applicants, site alternatives should be limited to parcels owned by, or under option to, a private applicant. To demand otherwise would place an unreasonable burden on most applicants to commit to the control of sites which they do not otherwise have under option or ownership.

When the lead agency receives a draft EIS from the project sponsor, the lead agency's responsibility is to determine whether the document is adequate for public review, in terms of both its scope and content. These are reasonable expectations. The regulations do not demand that the draft EIS be perfect. That would be an unreasonable expectation.

For supplemental EISs, the regulations limit further analysis to issues either not addressed or inadequately addressed in the EIS, and only those dealing with significant adverse impacts. To make it easy to supplement, or to allow supplements to revisit all issues, would be unreasonable.

Finally, in preparing its SEQR findings, each involved agency must apply the following tests. It must consider the reasonable alternatives and choose one which minimizes or avoids adverse environmental impacts to the maximum extent practicable. The findings must incorporate conditions requiring practicable mitigation measures to ensure that the adverse environmental impacts of the least damaging alternative will be avoided or minimized.

More than one agency may be involved in the SEQR process, and each is independently responsible for balancing the project benefits against adverse impacts and mitigation. Since SEQR does not change the jurisdictions of the agencies, this balancing enables the SEQR process to gather and analyze information, then apply this information based on the jurisdictions, interests and concerns of each agency. This flexibility is a further example of the rule of reasonableness incorporated into SEQR.

G. History

The SEQR statute was worded to allow a phased implementation schedule (Table 1, below). This was done to give government officials time to adjust their administrative procedures for different types of actions. The details of the SEQR process and dates for the phasing in of categories of actions were developed by DEC and filed as regulations. The statewide regulations that implement SEQR are known as Part 617 of 6 NYCRR.

As years passed (after SEQR was completely phased in and in full application), DEC realized that changes to Part 617 were needed to improve the process and clarify sections that engendered multiple questions from agencies subject to SEQR. Several amendments to the regulation have occurred. Table 2, below, chronicles the history of SEQR regulatory changes.

**Table 1
ECL ARTICLE 8 – STATE ENVIRONMENTAL QUALITY REVIEW ACT**

| Effective Date | Changes or Applications |
|-----------------------|--|
| September 1, 1976 | Phase 1 Direct actions by state agencies (Type I and Unlisted) became subject to SEQR. |
| June 1, 1977 | Phase 2 Direct Type I actions by local governments and Type I actions funded by state agencies. |
| September 1, 1977 | Phase 3 Type I actions funded by local governments and approvals to act for Type I actions by state agencies and local governments. |
| November 1, 1978 | Phase 4 All remaining actions subject to SEQR (that is, all Unlisted actions for local governments and all Unlisted actions and approvals to act for Unlisted actions funded by state agencies). |

**Table 2
SEQR Regulations – 6 NYCRR Part 617
Chronology of Regulatory Changes**

| Effective Date | Amendments |
|-----------------------|---|
| March 22, 1976 | Original SEQR regulations adopted |
| January 24, 1978 | Repealed and readopted with a phased implementation schedule, changes in organization, amended Type I and Type II lists and identified and provided procedures for "Excluded" (grandfathered) actions. |
| November 1, 1978 | Procedures were provided for the "Unlisted" category of actions subject of SEQR. The amendment also totally revised the Type I list of actions likely to require an EIS so that it could be more easily used by non-technical agency decision-makers. Also provided was a practical (model) EAF to assist the lead agency in determining significance for Type I actions, and a model short EAF to assist in determinations for Unlisted actions. |
| December 12, 1978 | A minor revision reinstated one of the Type II actions regarding extension of utility service to certain types of residential development. This item had been accidentally omitted in the November 1, 1978 amendment. |
| October 8, 1982 | Requirement were added that EISs and Findings Statements for state agency actions in coastal areas must be consistent with the applicable requirements of the Waterfront Revitalization and Coastal Resources Act of 1981, Article 42 and Section 916(a) of the Executive Law, implemented by 19 NYCRR Section 600.5. |
| June 1, 1987 | This was a substantial revision that: <ul style="list-style-type: none"> • added a number of procedural changes such as scoping, conditioned negative declarations; supplementing draft and final EISs, rescission of negative declarations, and redesignation of lead agency; • clarified what is a reasonable alternative; • added new definitions; and |

| | |
|---------------------------|---|
| | <ul style="list-style-type: none"> provided guidance on legally sufficient negative declarations, the substantive nature of SEQR, and the documentation requirements for Unlisted actions. |
| September 2, 1987 | Minor amendment to correct two typographical errors found in the filing of March 6, 1987. |
| January 1, 1996 amendment | <p>Major revisions to the regulations were made including:</p> <ul style="list-style-type: none"> Sections of the regulations rearranged for greater clarity and to better mirror the SEQR process; Guidance on the elements of scoping and requirements for public participation in scoping were added; Actions were added to the Type II list, and Exempt and Excluded actions were lumped under Type II; Changes were made to the format of EISs; Changes were made to the way actions involving Critical Environmental Areas are assessed. |
| June 30, 2001 amendment | Addresses for the DEC Central Office were updated. |
| July 3, 2001 amendment | Address for submissions to the Environmental Notice Bulletin (ENB) was corrected, and the address for the on-line ENB website was provided. |
| February, 2005 amendment | Requires every Environmental Impact Statement (EIS) (Draft EIS (DEIS) and Final EIS (FEIS)) to be posted on a publicly accessible Internet Web site. |

For those who were most familiar with the SEQR regulation before the 1996 amendments, a roadmap of which sections moved where, is included in section H, which follows.

H. Roadmap of Part 617 before and after the 1996 Amendments

| 6 NYCRR PART 617 COMPARISON OF SECTIONS BEFORE AND AFTER 1996 AMENDMENTS | |
|---|---|
| OLD SECTIONS | NEW SECTIONS |
| 1 - AUTHORITY, INTENT & PURPOSE | 1 - AUTHORITY, INTENT & PURPOSE -- same location |
| 2 - DEFINITIONS | 2 - DEFINITIONS -- same location |
| 3 - GENERAL RULES | 3 - GENERAL RULES -- same location |
| 4 - INDIVIDUAL AGENCY PROCEDURES -- moved to new 14 | 4 - TYPE I ACTIONS -- revised content of old 12 |
| 5 - INITIAL REVIEW OF ACTIONS -- moved to new 6 | 5 - TYPE II ACTIONS -- revised content of old 13 |
| 6 - LEAD AGENCY & | 6 - INITIAL REVIEW OF ACTIONS AND ESTABLISHING |

**6 NYCRR PART 617
COMPARISON OF SECTIONS BEFORE AND AFTER 1996 AMENDMENTS**

| OLD SECTIONS | NEW SECTIONS |
|---|--|
| DETERMINATION OF SIGNIFICANCE -- split into new 6 and 7 | LEAD AGENCY -- includes old 5 and part of old 6 |
| 7 - SCOPING -- moved to new 8 | 7 - DETERMINING SIGNIFICANCE -- includes part of old 6 and old 11 |
| 8 - EIS PROCEDURES -- incorporated in new 9 | 8 - SCOPING -- revised content of old 7 |
| 9 - DECISION-MAKING & FINDINGS -- moved to new 11 | 9 - PREPARATION AND CONTENT OF ENVIRONMENTAL IMPACT STATEMENTS -- includes old 8 and old 14 |
| 10 - NOTICE & FILING -- changed title and moved to new 12 | 10 - GENERIC IMPACT STATEMENTS -- same content as old 15 |
| 11 - CRITERIA FOR DETERMINING SIGNIFICANCE -- incorporated in new 7 | 11 - DECISION-MAKING AND FINDINGS REQUIREMENTS -- revised content of old 9 |
| 12 - TYPE I ACTIONS -- moved to new 4 | 12 - DOCUMENT PREPARATION, FILING, PUBLICATION AND DISTRIBUTION REQUIREMENTS -- revised content of old 10 |
| 13 - TYPE II ACTIONS -- moved to new 5 | 13 - FEES AND COSTS -- revised content of old 17 |
| 14 - EIS PREPARATION & CONTENT -- incorporated in new 9 | 14 - INDIVIDUAL AGENCY PROCEDURES TO Apply SEQR -- same content as old 4 |
| 15 - GENERIC EISs -- moved to new 10 | 15 - ACTIONS INVOLVING A FEDERAL AGENCY -- same content as old 16 |
| 16 - ACTIONS INVOLVING FED AGENCY -- moved to new 15 | 16 - CONFIDENTIALITY -- same content as old 18 |
| 17 - FEES AND COSTS -- moved to new 13 | 17 - REFERENCED MATERIAL -- same content as old 19 |
| 18 - CONFIDENTIALITY -- moved to new 16 | 18 - SEVERABILITY -- new section added |
| 19 - REFERENCED MATERIAL -- moved to new 17 | 19 - EFFECTIVE DATE -- revised content as old 20 |
| 20 - EFFECTIVE DATE -- moved to new 18 | 20 - APPENDICES -- revised content of old 21 -- retaining Appendices A, B & C: <ul style="list-style-type: none">• short EAF• long EAF• visual addendum |
| 21 - APPENDICES -- D through I are repealed - model EAFs (Appendices A, B and C) remain. | |

Chapter 1: Agencies and Decisions Subject to SEQR

A. Agencies Subject to SEQR: The Who, What, and When

In This Section You Will Learn:

- which state and local agencies must implement SEQR;
- which agencies are excluded from complying with SEQR; and
- what agency enforces SEQR.

1. What agencies are required to comply with the State Environmental Quality Review Act (SEQR)?

All agencies of government at the state, county and local level within New York must comply with SEQR. State agencies are defined as any department, agency, board, public benefit corporation, public authority or commission. The Department of State, the Department of Health, the Dormitory Authority, Department of Transportation and DEC are examples of state agencies that are subject to SEQR. Local agencies include any agency, board, district, commission or governing body, including any city, county or other political subdivision of the state. Local legislative bodies, planning boards, zoning boards of appeal, county health departments, school districts and industrial development authorities (IDAs) are examples of local agencies subject to SEQR. Multi-municipal, multi-county or regional agencies which have approval authority over a particular action are also subject to SEQR.

2. What about the Governor, the New York State Legislature and the courts? Do they have to comply with SEQR?

No. These entities are not classified as "agencies" for the purposes of SEQR compliance. Also, there are very few instances when the Governor, the Legislature or the courts actually undertake, directly fund or approve any action by themselves. If they do it is usually for emergency actions which are excluded from SEQR compliance anyway. In most cases, the Governor issues an executive order, the Legislature passes a law or the courts order something to be done by one of the entities that is classified as an "agency". It is when this agency funds, approves or directly undertakes an action that SEQR must be satisfied.

3. Are there any agencies excluded from complying with SEQR?

In enacting SEQR, The Legislature specifically excluded some decisions by agencies. These include the Adirondack Park Agency for actions on private land within the Adirondack Park (the "Blue Line") and the Public Service Commission for actions involving Articles VII and X of the Public Service Law (e.g. pipelines, transmission lines and power plants). This was done because these two agencies already had a SEQR-like analysis process.

In addition, there are a few narrowly focused exclusions:

- The Metropolitan Transit Authority (MTA) has an exemption for most actions it takes on land that it already owns;
- The New York Power Authority (NYPA) has the potential to be excluded from the provisions of SEQR only to the extent that compliance with SEQR is inconsistent with the terms and purposes of Section 1014 or the Public Officers Law.;
- The Long Island Power Authority is exempt for actions involving the decommissioning of the Shoreham Nuclear Plant.;

- The Thruway Authority was granted an exclusion from SEQR in 1990 for the acquisition of Interstate 287 which connects the Tappan Zee Bridge to the New England Section of the Thruway;
- The Hudson River Waterfront Area was similarly excluded from SEQR requirements in 1990 for the designation of certain portions of the Hudson River shoreline in Manhattan as portions of the Hudson River Waterfront Area, and their simultaneous removal from the West Side Roadway Construction. Area; and
- The New York State Department of Transportation was granted an exemption for certain actions involving addition of travel lanes and other projects on the Long Island Expressway.

4. Does SEQR apply to decisions of local legislative bodies?

Yes. The legislative decisions of city, town, village and county governing bodies that may affect the environment are subject to review under SEQR.

5. Does SEQR apply to school districts and various other agencies with area jurisdictions which do not necessarily coincide with regular municipal boundaries?

Yes. School districts, fire districts, water districts and other agencies with jurisdictional boundaries that differ from individual municipal boundaries are subject to SEQR.

6. Does SEQR apply to decisions of advisory bodies?

No. SEQR does not apply to the recommendations of any agency or body acting in an advisory role. However, such agencies can participate in the SEQR process as [interested agencies](#). Examples of this type of advisory body would be:

- Environmental Management Councils
- Conservation Advisory Committees
- A Planning Board when acting only as a consulting body for the Town Board.

7. May an agency assign its SEQR review responsibilities to another agency? For example, can a town board delegate its responsibilities to a local planning board or conservation advisory counsel?

No. An agency's responsibilities under SEQR to make determinations of significance, to conduct environmental impact reviews, if required, and to make findings following the completion of the Final EIS cannot be delegated to other agencies. However, other agencies may provide assistance in these reviews and determinations, so long as it is clear that the decision making agency is responsible for its own SEQR decisions.

8. Must not-for-profit or other private organizations undertake SEQR review before making decisions?

No. The decisions of privately-sponsored not-for-profit or similar organizations such as churches, day-care centers, hospitals, private schools, YMCA's and the Red Cross are not subject to SEQR. However, specific actions proposed by such organizations which require permits or approvals by a government agency may be subject to SEQR. For example, if the

YMCA wished to build a new structure, and the action required a site plan approval, the building of this structure would be subject to SEQR analysis by the town.

9. Who is responsible to see that review under SEQR is actually performed?

Each agency is independently responsible to ensure that its own decisions are consistent with the requirements of SEQR. If more than one agency is involved in decisions related to an overall action and coordinated review is called for, only the agency which takes the lead role in conducting such review makes the determination of significance and oversees the development and review of any required impact statements. (See [Participation in the SEQR Process - A. Coordinated Review](#) for more information on lead agencies.)

10. What agency enforces SEQR?

The Legislature has made SEQR self-enforcing; that is, each agency of government is responsible to see that it meets its own obligations to comply.

While the Department of Environmental Conservation is charged with issuing regulations regarding the SEQR process, DEC has no authority to review the implementation of SEQR by other agencies. In other words, **there are no "SEQR Police."**

11. What happens if an agency does not comply with SEQR?

If an agency makes an improper decision or allows a project that is subject to SEQR to start, and fails to undertake a proper review, citizens or groups who can demonstrate that they may be harmed by this failure may take legal action against the agency under Article 78 of the New York State Civil Practice Law and Rules. Project approvals may be rescinded by a court and a new review required under SEQR. New York State's court system has consistently ruled in favor of strong compliance with the provisions of SEQR. (See also case law to be posted later.)

12. How can DEC assist agencies in implementing the SEQR process?

DEC provides informal interpretations and guidance about the conduct of SEQR. These informal interpretations are based on the experience of DEC staff. DEC, however, cannot provide formal legal opinions about the conduct of SEQR by other agencies. State and local agencies and other interested parties should consult with their own legal counsel for formal interpretations of SEQR law and regulations.

B. Decisions Subject to SEQR: The Who, What, and When

In This Section You Will Learn:

- what types of decisions are subject to SEQR

1. What kinds of agency decisions are subject to review under SEQR?

All "discretionary" decisions of an agency to approve, fund or directly undertake an action which may affect the environment are subject to review under SEQR. Some decisions, however, appear on a predetermined list of types of actions (Type II list of the SEQR Regulations - [6 NYCRR Section 617.5](#)) which have already been determined not to have a

significant adverse impact on the environment or have been otherwise precluded from environmental review under SEQR.

2. What is meant by "...decisions to approve, fund or directly undertake an action"?

Proposed actions frequently involve applications or requests by private individuals or organizations, or even by other public bodies, for agencies to issue a permit, otherwise authorize or provide financial support to such actions. A decision by an agency to deny, permit, conditionally permit or financially support an action by other parties is subject to SEQR. In addition, decisions by agencies to directly undertake a physical action or to directly adopt, amend or modify laws, rules, regulations, procedures, plans or policies are subject to review under SEQR.

3. What are "discretionary" decisions?

Discretionary decisions are those where there are choices to be made by the decision makers that determine whether and how an action may be taken. Examples of discretionary decisions are:

- zoning changes,
- preliminary/final plat approval,
- site plan approval,
- variances,
- special use permits,
- funding of projects by local/state IDA's,
- construction of highways/municipal buildings, and
- environmental permits issued by DEC.

4. What are "non-discretionary" decisions?

Non-discretionary or "ministerial" decisions are based entirely upon a given set of facts, as prescribed by law or regulation, without use of judgment or individual choice on the part of the person or agency making the decision. For example, the issuance of a building permit to construct a residence in an approved subdivision would be ministerial if the plans show the structure will conform to all local building codes. Another example of a ministerial act would be the issuance of a dog license by a town clerk. If the owner can show proof of required vaccinations and can pay the proper fee, the clerk has no discretionary decision - the license must be issued. There is no choice involved on the part of the issuing agent or governmental entity.

In other instances, the building inspector is required or authorized by law to vary or request modifications in the qualifying criteria for the permit, based on environmental considerations, and such building permit would be subject to SEQR. For example, the proposed construction of an office building in a commercial zone where the building code enforcement officer has been designated as the reviewer for certain aspects of construction review which are normally exercised under site plan review. This exercise of discretion by the building inspector prevents this activity from being a ministerial act, and it should be reviewed under SEQR before a decision is made.

5. What are "actions" under SEQR?

Actions under SEQR include:

- physical projects or activities such as construction of a shopping center or residential development, building a road, dredging a stream or mining gravel;
- adoption or administration of rules, regulations or procedures, by a government agency, such as local zoning, public health regulations, wetland protection or handling of toxic wastes; or
- decisions by agencies on plans or policies such as land use plans, formation of special districts or establishment of policies on use of public lands.

A single overall action may include a combination of the above activities.

6. Is there a distinction between "decisions" and "actions" in applying SEQR?

Yes. In order for SEQR to be applied to any proposed action or related series of actions there must be at least one discretionary decision required by an agency. Often there are several such decisions necessary in order to carry out the action. For example, the "action" of developing a residential subdivision may require separate approval decisions by a town planning board for the subdivision plat, town board or zoning board of appeals if there is a zoning decision, or county health department if on-lot sewer and water facilities are required, and, possibly by the state Departments of Transportation or Environmental Conservation, if highway access or stream or other environmental permits are needed. No decision to approve, fund or directly undertake any part of an action should be made by any of these agencies until SEQR requirements are met. This SEQR review of an action may be done as part of a coordinated review process that involves several governmental agencies.

7. What are direct actions?

Actions that are proposed and undertaken by a local or state agency are called direct actions. This applies to construction "actions" whether agency staff or contractors actually do the design work or the on-site construction work or both.

8. May an agency deny an application for an action subject to SEQR without going through the SEQR process?

No. An agency must comply with SEQR before denying an application that is subject to review under SEQR. Failure by the lead agency to comply may leave the lead agency vulnerable to a procedural challenge to the denial.

9. Isn't it a waste of agency resources and unfair to the applicant to conduct a SEQR review on a project the agency knows it will deny?

There are three reasons why DEC recommends that the SEQR process be completed before the issuance of a denial.

- First, the applicant has a right to due process. Many applicants believe that, given the chance, they can provide the agency with the information necessary to support their application; and they welcome the opportunity to participate in an environmental review.

- Second, the agency might find, following the conduct of the environmental review, that its initial position was not supported by the facts. Contrary to its original belief, the agency may find that the action is approvable.
- Third, completion of the SEQR review gives the agency the strongest possible record to support its decision. If litigation over the denial is likely, having a good SEQR record gives the agency the best environmental basis for defending its decision.

10. What if it is clear that the application will not meet established standards for permit issuance. Does the agency have any options?

Yes. If it is clear that the application will not meet regulatory standards for issuance, and a denial of the application is unavoidable, the agency has some options to consider:

- Explain to the project sponsor how the project fails to meet standards for issuance and recommend that the application be withdrawn. Sometimes a clear explanation of the standards and why those standards cannot be met is sufficient to cause the project sponsor to withdraw the application before significant time or money is spent on the review.
- Explain to the project sponsor how the project fails to meet standards for issuance and suggest changes that might make the project more compatible. Some agencies are more comfortable with this approach than others. Agency staff should never redesign a project for an applicant because this will lead to the expectation that the redesigned project will automatically be approved. You can, however, offer suggestions on how the project sponsor can make his or her project more compatible with the applicable standards and urge that the project be modified and the application resubmitted.
- Issue a negative declaration and deny the application. The negative declaration would identify the possible impacts from the action but note that they do not rise to the level of requiring the preparation of an EIS. The denial would then be based on the applications failure to meet the regulatory standards for permit issuance.

The third option only works when there are clear regulatory standards in place and the denial is based on the failure of the application to meet those standards. If the standards are general in nature, and the denial is based on environmental reasons, then it is likely that this approach would be vulnerable to legal challenge.

11. Are there any situations where an agency can act without SEQR compliance?

Yes. Legislative bodies have the authority to refuse to entertain (not to consider) certain applications like petitions to change the zoning classification of a parcel. If the legislative body chooses not to entertain the petition they do not have to complete SEQR in making that decision. This decision has been placed on the Type II list (see 6 [NYCRR Section 617.5](#)).

For example, if an agency must make a legislative decision, such as rezoning or extending a water system, and the agency determines that the action will not be considered at that particular time, SEQR need not be applied to that legislative decision process. However, if at a later date, the legislative body does take up consideration of any aspect of the proposal for full or conditional approval, the action would then be subject to SEQR.

C. When to Begin SEQR

In This Section You Will Learn:

- when must SEQR be started; and
- can agencies make decisions before completing SEQR

1. At what point in the decision-making process must SEQR be applied?

Review under SEQR should be started:

- as soon as an agency receives an application to fund or approve an action, or
- as early as possible in an agency's planning of an action it is proposing.

SEQR review should begin as soon as the principal features of a proposed action and its environmental impacts can be reasonably identified. SEQR must be completed before any final decision to proceed with an action is made.

2. When does SEQR begin if more than one agency is involved in making decisions about an action?

If more than one agency is involved in the action, the review process is started when the first involved agency either:

- receives a request for approval or funding, or
- begins to plan a direct action.

(See [Participation in the SEQR Process - C. Establishment of Lead Agency](#) for more information about involved agencies.)

3. Can agency decisions be made or acted on before completion of the SEQR process?

It may be possible to implement some non-physical aspects of an action which are not subject to SEQR, but it should be noted that [Subdivision 617.3\(a\)](#) provides that a project sponsor may not commence any physical alteration related to an action until all provisions of SEQR have been complied with (i.e. the lead agency has issued a Negative Declaration or Findings). The fact that some early activities on an overall action are not subject to review under SEQR does not remove the consequences of these decisions from consideration with respect to the whole action.

For example, a site should not be cleared and graded nor should any structural demolition occur until all aspects of the overall proposed project subject to SEQR have been examined. The only exception to this would be for minor disturbances necessary for information gathering about a project; e.g. property surveys, soil sampling, test wells or temporary installation of various types of environmental monitoring equipment.

Chapter 2: Review Required Under SEQR

A. SEQR Handbook: Type I Actions

In This Section You Will Learn:

- what is a Type I action;
- how do we treat Type I actions (EAF, EIS, hearings);
- what is an Unlisted action and how is it different than Type I and II.

ACTIONS REQUIRING REVIEW

1. What actions require review?

Classes of actions identified as "[Type I](#)" or "Unlisted" must be reviewed further under SEQR to determine the potential for significant adverse environmental impacts.

TYPE I ACTIONS

2. What is a "Type I" Action?

A Type I action means an action or class of actions that is more likely to have a significant adverse impact on the environment than other actions or classes of actions. Type I actions are listed in the statewide SEQR regulations ([617.4](#)), or listed in any involved agency's SEQR procedures. The Type I list in 617.4 contains numeric thresholds; any actions that will equal or exceed one or more of the thresholds would be classified as Type I.

3. Are there required procedures for the treatment of Type I actions?

Yes. A full Environmental Assessment Form (EAF) must be submitted to the lead agency for all Type I actions, and the lead agency must always coordinate the SEQR review process with other involved agencies.

4. May a short EAF ever be used in place of a full EAF for Type I actions?

No. The short EAF may never be used for Type I actions.

5. Can a lead agency waive or excuse the requirement of filing an EAF?

Yes. The lead agency may waive the requirement for an EAF if a project proposal is accompanied by a draft EIS instead. [see [617.6\(a\)\(4\)](#)].

6. What is the decision to prepare an Environmental Impact Statement (EIS) based on?

An EIS is warranted when the lead agency, after review of application documentation related to the proposed action, decides that the action as proposed is likely to cause at least one significant adverse impact to the environment.

7. How are determinations of significance documented for a Type I action?

Both the negative declaration (neg dec) [see [617.2\(y\)](#)] and positive declaration (pos dec) (see [617.2\(ac\)](#)) must be documented in the record, in writing, and maintained in files that are readily accessible to the public and made available upon request [see [617.12\(b\)\(3\)](#)]. A Type I neg dec and pos dec, as well as a conditional neg dec, Notice of Completion of an EIS, EIS and hearing notices must also be filed with the chief executive officer of the political subdivision where the action is located, the lead agency, all involved agencies and persons or parties who have requested a copy [see [617.12\(b\)\(1\)](#)]. A neg dec or pos dec for a Type I action must be published in the Environmental Notice Bulletin (ENB). Notice of a neg dec must also be incorporated into at least one other notice required by law [see [617.12\(c\)\(1\)](#) and [617.12\(c\)\(4\)](#)].

8. Is an Environmental Impact Statement (EIS) always required for Type I actions?

No. A Type I action carries with it a presumption that it is more likely than an Unlisted action to have a significant adverse impact on the environment and may require an EIS. However, the lead agency must evaluate information contained in the EAF, and additional applications, filings or materials, against the criteria in [617.7](#) to make a determination of significance for each Type I action. SEQR responsibilities for Type I actions may be met by a well-documented, well reasoned negative declaration.

9. Is a SEQR hearing required for a Type I action?

No. Hearings under SEQR are optional. SEQR hearings are conducted at the discretion of the lead agency after it has accepted a draft EIS for public review. Agencies may have their own requirements under the provisions of other state or local laws regarding when other types of hearings must be held, and a SEQR hearing may be combined with any of those required hearings. (See Environmental Impact Statements - E. SEQR Hearing.)

10. Can the statewide list of Type I actions be supplemented by an agency?

Yes. An agency may expand the statewide Type I list by including any Unlisted action as Type I in its own SEQR procedures under [617.14](#). Such lists must include the statewide Type I list, be no less environmentally protective than the statewide list, and be adopted consistent with [617.14 \(a\), \(b\) and \(f\)](#). In addition to including specific new items on their Type I lists, agencies may adjust thresholds for statewide Type I actions to make them more protective. These additional actions are Type I for the agency that listed them as such and any other agency involved with the listing agency in a specific action.

Note that Type II, Exempt or Excluded actions may not be placed on an agency's own Type I list.

11. Why can't an agency add statewide Type II actions from 6 NYCRR Part 617 to their list of Type I actions?

Individual agency Type I lists may not include actions from the adopted statewide Type II list [[617.5\(c\)](#)] because such actions have been defined on a statewide basis as never having a significant adverse impact on the environment, and therefore never requiring an EIS under SEQR.

12. What happens if an action is not on the statewide Type I list, but is on an agency's Type I list?

An action considered Type I by one involved agency, whether that agency serves in the role of lead agency or not, becomes a Type I action for all other agencies involved in that action [see [617.4\(a\)\(2\)](#)]. However, such action need not be treated as Type I when the agency that created the expanded list is not involved in the action.

For example:

- The Town Board of Foxborough may, on its list, reduce the Type I threshold for physical disturbance for a non-residential activity from 10 acres to 5 acres.
- A proposed light industrial park of 7.5 acres would be a Type I action under this scenario if the Town of Foxborough is an involved party or is lead agency. All other involved agencies or parties would likewise treat this action Type I action. It is the responsibility of Foxborough, the agency that reduced the threshold, to notify the other involved agencies (ie. Towns of Deer Haven and Otter Creek) of the change in classification.
- However, if Foxborough has no discretionary permit involvement for an action such as this, the Towns of Deer Haven and Otter Creek (if involved parties) do not have to use Foxborough's lower threshold of 5 acres. The statewide threshold of 10 acres for physical disturbance for a non-residential activity would apply, and the 7.5 acres would put the action in the Unlisted category, not the Type I category.

13. Do the stricter standards of an involved agency's expanded Type I list apply to the action only when the agency with the expanded list is the lead agency?

No. As stated above in Question 12, as long as the agency with the expanded Type I list is an involved agency, all the standards or thresholds on that local list apply to the action being assessed. Again, it is the responsibility of the agency that altered or reduced the threshold to notify the other involved agencies.

14. How does an agency know if an action is on another agency's Type I list?

The adoption or amendment of an agency's list of Type I actions requires hearing, filing and noticing pursuant to [617.14\(f\)](#). Prior to the required public hearing on such adoption or amendment, it would be wise for the agency to directly inform all other local or state agencies normally making discretionary decisions within its jurisdiction of its intent to expand the list of Type I actions. Such other agencies could then comment in writing, or at the public hearing, regarding the impact of the Type I list expansion upon their activities.

In addition to filing any new list with the Commissioner of Environmental Conservation for publication in the [Environmental Notice Bulletin \(ENB\)](#), it is both reasonable and prudent for the filing agency to directly inform all potentially affected local and state agencies when it adopts or amends its Type I list.

15. Can the physical location of an action cause an Unlisted action to become a Type I action?

Yes. Unlisted actions may become Type I actions if they are undertaken in, or adjacent to, particular locations specified on the statewide Type I list [see [617.4\(b\)\(8, 9, 10\)](#)]. These locations are:

- sites on, or eligible for listing on, the NYS or National Registers of Historic Places;
- publicly owned or operated parkland, recreation area or designated open space; and
- National Natural Landmarks.

In addition, any non-agricultural use that exceeds 25 percent of any Type I threshold in [617.4](#) also becomes a Type I action.

16. What do the items on the Type I list as presented in 617.4(b) really mean?

The following examples of Type I actions are based on DEC's experience and on court decisions:

617.4(b)(1)

"the adoption of a municipality's land use plan, the adoption by any agency of a comprehensive resource management plan or the initial adoption of a municipality's comprehensive zoning regulations;"

A municipality's or agency's land use, resource management or comprehensive zoning plans will affect the environment of the municipality for years to come. Examples of such plans are park, preserve or other state land master plans; state energy and solid waste management plans. Many potential conflicts between usage of the land and good stewardship can be avoided by applying SEQR analysis carefully at this early stage.

617.4(b)(2)

"the adoption of changes in the allowable uses within any zoning district, affecting 25 or more acres of the district;"

This item covers zoning changes that are initiated by a municipality without a petition by an applicant. For example:

- Town Zoning Board members in the Town of Maplewood have observed a dramatic rise in commercial business activities being run out of houses in residential neighborhoods in the adjacent Towns of Poplar Grove and Oakfield. This increase in-house cottage industries seems to be driven by an increase in costs related to establishing new business ventures where allowed by zoning Maplewood shares commercial zoning regulations and obstacles as Poplar Grove and Oakfield.
- After consulting with other members of the governing bodies of the Town of Maplewood, holding a public hearing on the acceptability of commercial business ventures being run from house in residentially zoned neighborhoods, and considering the information and public comment received at the hearing, the Zoning Board changed the zoning of all the districts in Maplewood to prohibit commercial business ventures operating from homes in residentially zoned neighborhoods.

617.4(b)(3)

"the granting of a zoning change, at the request of an applicant, for an action that meets or exceeds one or more of the thresholds given elsewhere in this list;"

This item covers zoning changes that are initiated by the submission of a petition by an applicant(s). For example, if an applicant requests a zoning change for a shopping center from residential to commercial, and proposes an additional 1200 new parking spaces, then the whole project would be Type I. The lead agency is responsible for checking all the items listed in [617.4\(b\)](#), and any additional items listed by a local involved agency, to determine if the applicant's request is greater than any of the thresholds listed.

617.4(b)(4)

"the acquisition, sale, lease, annexation or other transfer of 100 or more contiguous acres of land by a state or local agency;"

This includes trades or in-kind exchanges of land between the state or federal government and a municipality, one municipality and another, or between a private citizen, partnership school board or corporation and the municipality. For example:

- City "A" has an old high school, a middle school, sports fields, and a small nature preserve located along the city's riverfront. The area covers a total of 110 acres.
- A developer is eager to acquire the land to build a marina plus a large number of condominiums. The developer is willing to buy a large piece of suitable upland acreage, build the city a whole new combined high school and middle school with new sports facilities and whatever else is needed. In return, the developer would get the waterfront property and a contribution from the city that is equal to less than half what it would cost to do necessary rehabilitation of the old schools in their present location.
- This proposal would definitely be a Type I action.

617.4(b)(5)

"construction of new residential units that meet or exceed the following thresholds:

- 10 units in municipalities that have not adopted zoning or subdivision regulations;
- 50 units not to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works;
- in a city, town or village having a population of less than 150,000, 250 units to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works;
- in a city, town or village having a population of greater than 150,000 but less than 1,000,000, 1,000 units to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works; or
- in a city or town having a population of greater than 1,000,000, 2,500 units to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works;"

The phrase "to be connected at the commencement of habitation to existing community or public water and sewerage systems" means those utility distribution pipes and facilities must be either in place or have completed the environmental review and approval process prior to this proposed construction project. It does not include projects that have, as part of the proposal, the construction of a package sewage treatment facility, a community water system or both such facilities and systems.

Note that the first two items in this section are not tied to the population of the municipality. These two items apply to actions everywhere in the state.

617.4(b)(6)

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

- a project or action that involves the physical alteration of 10 acres;
- a project or action that would use ground or surface water in excess of 2,000,000 gallons per day;
- parking for 1,000 vehicles;
- in a city, town or village having a population of 150,000 persons or less, a facility with more than 100,000 square feet of gross floor area;
- in a city, town or village having a population of more than 150,000 persons, a facility with more than 240,000 square feet of gross floor area;"

This section deals with many of the most common large commercial actions. Note that only the items involving square footage of the facility are contingent upon the population of the municipality. The first three items apply everywhere in the state.

617.4(b)(7)

"any structure exceeding 100 feet above original ground level in a locality that has no zoning regulation pertaining to height;"

This would include, but not be limited to, buildings, signs, towers, power generating windmills, and ski jumps.

617.4(b)(8)

"any Unlisted action that includes a nonagricultural use occurring wholly or partially within an agricultural district (certified pursuant to Agriculture and Markets Law, article 25-AA, sections 303 and 304) and exceeds 25 percent of any threshold established in this section;"

This item does not take into account whether or not there is an actual farm on the land that is proposed to be used for the action. If the action is in the agricultural district as certified in the Ag and Markets Law, it is a Type I action.

Examples:

| Type I Threshold | Reduced Threshold | Project | Type I (Y/N) |
|------------------|-------------------|--------------|--------------|
| 10 acres | 2.5 | 3 acres | Y |
| 1,000 vehicles | 250 vehicles | 150 vehicles | N |

617.4(b)(9)

"any Unlisted action (unless the action is designed for the preservation of the facility or site) occurring wholly or partially within, or substantially contiguous to, any historic building, structure, facility, site or district or prehistoric site

- that is listed on the National Register of Historic Places, or
- that has been proposed by the New York State Board on Historic Preservation for a recommendation to the State Historic Preservation Officer for nomination for inclusion in 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 [617.17](#)];"

617.4(b)(10)

"any Unlisted action, that exceeds 25 percent of any threshold in this section, occurring wholly or partially within or substantially contiguous to any publicly owned or operated parkland, recreation area or designated open space, including any site on the Register of National Natural Landmarks pursuant to 36 CFR Part 62, 1994 [see [617.17](#)]; or"

617.4(b)(11)

"any Unlisted action that exceeds a Type I threshold established by an involved agency pursuant to section [617.14](#) of this Part."

If an agency adds a particular threshold to its Type I list, and that agency is an involved agency, the new threshold applies to all involved agencies. It is not necessary for the agency with the expanded Type I list to be the lead agency when reviewing the action.

17. What is meant by the term "substantially contiguous?"

The term "substantially contiguous" as used in both sections 617.4(b)(9) and (10), is intended to cover situations where a proposed activity is not directly adjacent to a sensitive resource, but is in close enough proximity that it could potentially have an impact. Although the term can be difficult to define, the following examples may provide some guidance.

- Construction of a structure across a residential or downtown two to four-lane street from a building listed on the National Register of Historic Places would be substantially contiguous. However, if the street were a six lane limited access highway with a 100 foot median it would not be substantially contiguous.

- Construction of a structure on a site that is separated from a City Park by a 50 foot right-of-way would be substantially contiguous.
- Construction of a residential development overlooking a historically designated bay would be substantially contiguous.
- Construction of a boat launch ramp 100 feet away from a prehistoric Native American encampment site proposed for designation on the National Register of Historic places would be substantially contiguous.

When considering the issue of what is substantially contiguous, it is important to realize that you are only determining if the action will be classified as Type I or Unlisted, and not determining its significance. If there is question whether an action is substantially contiguous, it is best to treat it as Type I and proceed with the review.

18. Can you illustrate how the threshold reduction requirements in the Type I list are applied to Unlisted actions?

617.4(b)(3), (6) and (10)

A project sponsor requires a zoning variance to build a Go-Kart racetrack across a two-lane road from Oak Orchard Creek Marsh, which is on the Register of National Natural Landmarks (see photo below). The project involves grading of 8 acres and will have parking for 150 cars.

| Type I Threshold | Reduced Threshold | Project | Type I (Y/N) |
|------------------------|-------------------|----------|--------------|
| 10 acres | 2.5 | 8 acres | Yes |
| Parking for 1,000 cars | 250 | 150 cars | No |

This project is substantially contiguous to a National Natural Landmark and therefore the thresholds described in 617.4(b)(10) apply. Since this project exceeds the reduced threshold for physical alteration of 10 acres, it must be classified as a Type I action. This is true even though other thresholds are not exceeded, such as the parking for 150 cars which falls below the reduced threshold of 617.4(b)(6). **If any part of the action is found to be Type I, the whole action must be classified as Type I.**

Had the property not been substantially contiguous to a National Natural Landmark, the action would not have been classified as Type 1. This is because the 8 acres falls below the 10 acre threshold and must therefore be considered an Unlisted action.

In addition to the above, the request for zoning change also triggers Type I treatment for this action [617.4(b)(3)] since a threshold under 617(b) has been exceeded.

617.4(b)(3), (6) and (10)

In a town with a population of 18,000, a project sponsor has submitted a petition to rezone a 7 acre parcel of land adjacent to a county park from residential to commercial to allow the construction of a 30,000 sq. ft. office building with parking for 125 cars.

| Type I Threshold | Reduced Threshold | Project | Type I (Y/N) |
|------------------|-------------------|----------------|--------------|
| 100,000 sq. ft | 25,000 sq. ft. | 30,000 sq. ft. | Yes |
| 1000 cars | 250 cars | 125 cars | No |

The fact that the site is adjacent to publicly owned or operated parkland means that all numeric thresholds on the Type I list are reduced by 75 percent [617.4(b)(10)]. Therefore, the gross leasable area of 30,000 sq. ft. exceeds the reduced threshold for square footage of gross leasable area and it should be classified as a Type I action. Again, this is true even if another factor such as parking for a certain number of cars does not trigger the Type I threshold. If any part of the action is found to be Type I, the whole action must be classified as Type I.

In addition, the request for zoning change also triggers Type I treatment for this action [617.4(b)(3)] since a threshold under 617(b) has been exceeded.

617.4(b)(5) and (10)

Sponsor proposes construction of a 17 unit subdivision with individual wells and septic systems. The site is located across a two lane county road from the Tollgate Tavern, a structure that is listed on the National Register of Historic Places.

| Type I Threshold | Reduced Threshold | Project | Type I (Y/N) |
|---------------------------|-------------------|-----------------------------|--------------|
| Contiguous to NR Property | none | Across from Tollgate Tavern | Yes |
| 50 Units | none | 17 Units | No |

This is a case where the size of the project (17 units) does not exceed the threshold of 50 units [as discussed in 617.4(b)(5)(ii)]. However, because the project is substantially contiguous to the National Register property, the action becomes a Type I in accordance with 617.4(b).

If the proposed project had been 62 residential units, the threshold in 617.4(b)(5)(ii) would apply, and the agency would consider the action a Type I, (with or without the proximity to the National Register property).

Regarding nationally recognized properties, do not to confuse properties included, or eligible for inclusion, on the National Register of Historic Places with properties on the Register of National Natural Landmarks. Properties listed on, and eligible for, the National Register of Historic Places triggers the treatment of certain actions as Type I rather than Unlisted (617.4(b)(9)). However, inclusion on the Register of National Natural Landmarks triggers a threshold reduction of 75% when actions are adjacent to such properties (discussed in 617.4(b)(10)).

617.4(b)(6)

A private school has purchased an adjacent parcel of land and wishes to enlarge its existing campus to repair and enlarge its track, and expand the number of ball fields and soccer fields that are available for the students. The project will more than double the size of the facility, will involve the regrading of 6.7 acres, and will require additional fill to level some of this acreage.

| Type I Threshold | Reduced Threshold | Project | Type I (Y/N) |
|------------------|-------------------|---------|--------------|
| 10 acres | 5 | 6.7 | Yes |

The fact that this is an expansion of an existing, non-residential facility, means that we must reduce the standard threshold by 50% [see [617.4\(b\)\(6\)](#)]. The proposed 6.7 acre alteration is greater than 50% of the 10 acres identified in 617.4(b)(6)(I), so this example would be treated as a Type I action.

617.4(b)(6)

In a town with a population of 172,000, an existing shopping mall is to be expanded by 112,000 sq. ft. with the addition of parking for 280 cars involving the physical disturbance of 4.4 acres of land.

| Type I Threshold | Reduced Threshold | Project | Type I (Y/N) |
|------------------|-------------------|-----------------|--------------|
| 240,000 sq. ft. | 120,000 sq. ft. | 112,000 sq. ft. | No |
| 1000 cars | 500 cars | 280 cars | No |
| 10 acres | 5 acres | 4.4 acres | No |

This project is the expansion of an existing, non-residential facility which means that the thresholds contained in 617.4(b)(6) are reduced by 50 percent. Since this project does not exceed any of the reduced thresholds, it must be classified as an Unlisted action.

617.4(b)(6) and (8)

In a town with a population of 32,000, construction of a 15,000 sq. ft. office building with parking for 120 cars involving the physical disturbance of 2.8 acres of land is proposed in a certified agricultural district.

| Type I Threshold | Reduced Threshold | Project | Type I (Y/N) |
|------------------|-------------------|----------------|--------------|
| 100,000 sq. ft. | 25,000 sq. ft. | 15,000 sq. ft. | No |
| 1000 cars | 250 cars | 120 cars | No |
| 10 acres | 2.5 acres | 2.8 acres | Yes |

This is a nonagricultural use proposed for a site located in a certified agricultural district, which means that all numeric thresholds on the Type I list are reduced by 75 percent [617.4(b)(8)].

Since this project exceeds the reduced 25% threshold for physical disturbance, it must be classified as a Type I action [per 617.4(b)(6)(I)]. As previously stated, the fact that other thresholds are not triggered does not keep this action Unlisted. Passing only one threshold is sufficient to consider the action a Type I.

UNLISTED ACTIONS

19. What is an "Unlisted" action?

An Unlisted action is one that is not included in statewide or individual agency lists of Type I or Type II actions.

Unlisted actions are the largest category of actions subject to review under SEQR. As may be implied from their name, no list has been made of them, in part because it is impossible to anticipate in advance every potential discretionary decision of government. Unlisted actions may range from very minor zoning variances to complex construction activities falling just below the thresholds for Type I actions, or from the granting of minor permits to the adoption of major regulations. For example:

- Using the 10 acre physical disturbance threshold for activities other than residential construction [617.4(b)(6)(I)] - a project that would disturb 9.9 acres of land would be an Unlisted action, as would a project that would disturb 0.1 acre of land.
- Using the 100 acre threshold for acquisition, sale, lease, annexation or other transfer of land [617.4(b)(4)] - the acquisition of 95 acres of land and the acquisition of 1 acre of land would both be Unlisted actions.
- Using the 25 acre threshold for a change in the allowable uses within a zoning district [617.4(b)(2)] - construction of a private school on a 3 acre site within a zoning district that does not list the construction as an allowable use would be an Unlisted action.

20. Can an Unlisted action involve more than one agency?

Yes. The number of agencies involved has no bearing on whether an action is classified as Type I or Unlisted. SEQR review by all involved agencies does not change just because the action type (I, II or Unlisted) is different. The classification of an action is a requisite component of each agency's SEQR responsibility.

21. How do SEQR review procedures differ between Unlisted and Type I actions?

Many of the same basic procedures generally apply to Unlisted actions in conducting SEQR as apply to Type I actions.

- An environmental assessment must be conducted for both Unlisted and Type I actions and a determination of significance made.
- Both types of actions require an assessment of possible environmental concerns. A short Environmental Assessment Form (EAF) may be used as the basis for a determination of significance for Unlisted actions. A Full EAF is required for a Type I action and may be used for Unlisted actions at the discretion of the Lead Agency;
- Coordinated review is not required for an Unlisted action. The lead agency must always coordinate the SEQR review process with other involved agencies when considering a Type I action;

22. Are there ever reasons that an agency may treat Unlisted actions as Type I actions?

Yes. Type I procedures can be used for the review of an Unlisted action at any time, at the discretion of the lead agency. Examples of when this might occur are:

- there are potential adverse impacts that could be more thoroughly investigated by using a Full EAF and coordinating review; or
- an agency has special concerns regarding a sensitive resource within its jurisdiction; or
- an agency is uncertain about the concerns of other involved agencies and decides to coordinate review; or
- the action falls just below the applicable Type I threshold; or
- anytime the agency judges that the Type I procedures would be more helpful.

If an agency finds that it is frequently using the Type I procedures for particular types of Unlisted actions, the agency should consider adding these actions to its own Type I list as provided for in [617.4\(a\)\(2\)](#).

23. How do Unlisted and Type I actions differ if a negative declaration is reached?

If the determination is that there will not be significant adverse environmental impacts, for either an Unlisted or Type I action, and a negative declaration is written, the review process terminates and the decision on the action may be made.

Notice requirements for negative declarations are less extensive for Unlisted action than for Type I actions (see [617.12](#) and the questions on Notification and Filing; in the section on SEQR Housekeeping):

- Unlisted negative declarations are not required to be published or noticed.
- Type I negative declarations are required to be noticed, filed and published.

Notice, filing and publication requirements for Type I actions are listed in section [617.12](#).

24. How do Unlisted and Type I actions differ if a positive declaration is reached?

If the review of either an Unlisted or Type I action determines that there may be one or more significant adverse environmental impacts, a positive declaration is required, and an EIS may be necessary.

Unlisted actions do not carry with them the same likelihood of requiring an EIS that is associated with Type I actions. A somewhat less rigorous, and possibly quicker, review option may be followed.

A Conditioned Negative Declaration (CND) procedure may be applied in some situations to Unlisted actions involving applicants [See [617.7\(d\)](#) and the section on CNDs in the chapter on the Determining Significance Process], or, if an EIS is required, it must be completed and accepted by the lead agency before agency findings can be made and decisions on the actions taken.

B. SEQR Handbook: Type II Actions

In This Section You Will Learn:

- what are Type II actions;
- what major changes were made to SEQR in 1996;
- what are emergency actions;
- what is "grandfathering".

TYPE II ACTIONS - ACTIONS REQUIRING NO REVIEW

1. Are there actions that, once classified, require no further agency review under SEQR?

Yes, there are, and they are called "Type II." (See also the definition of "action" in the [Decisions Subject to SEQR](#) section of this Handbook). Actions that can be classified "Type II" actions under the SEQR regulations do not require any further SEQR review, not even an EAF. The list of actions identified as Type II is found in [6 NYCRR Part 617.5](#)

2. What is a Type II Action?

Type II actions are those actions, or classes of actions, which have been found categorically to not have significant adverse impacts on the environment, or actions that have been statutorily exempted from SEQR review. They do not require preparation of an EAF, a negative or positive declaration, or an EIS. Any action or class of actions listed as Type II in [617.5](#) requires no further processing under SEQR. There is no documentation requirement for these actions, although it is recommended that a note be added to the project file indicating that the project was considered under SEQR and met the requirements for a Type II action.

The agency classifying the action must make sure that all aspects of the whole action are included when determining that an action is Type II. Additionally, the applicant or agency working with the action must keep in mind that, although an action is classified as Type II under SEQR, it must still comply with all relevant local laws and ordinances and meet all the criteria or standards for approvals.

3. What do the items on the Type II list mean?

Based on DEC's experience, and on court decisions, the following additional examples are offered to illustrate Type II actions as discussed under [617.5\(c\)](#).

617.5(c)(1)

"maintenance or repair involving no substantial changes in an existing structure or facility;"

This allows for the normal cleaning, upkeep and minor repairs to a structure or facility. Painting, repair of damaged wood around a window, retiling a ceiling, repairing a hole in an existing fence, sealing an asphalt parking lot, installing vinyl siding on a house in a historic district, or reshingling a roof would be examples of actions that would fit in this category.

Ordinary home repair, business repair, in-place, in-kind remodeling, or upgrading to meet fire or plumbing codes are not substantial changes, unless the repairs are extensive enough to trigger any of the Type I thresholds. Even if a building is damaged or destroyed by fire, if it is rebuilt in the same footprint, and is comparable in size, scale and intended use to the old structure, it is still not subject to SEQR.

Examples of repair and remodeling that would not exceed a Type II threshold and examples of actions that would be considered a "substantial change" that does exceed the Type II threshold are given below:

- If a school district decided to pave a narrow walkway denuded of vegetation and beaten into the ground by children running for the school bus, the action would not be considered a substantial change. However, paving a 12,000 square foot play area for handball, tennis, or basketball courts **would** be considered a substantial change.
- A commercial building located in a town with a population of 150,000 or fewer was damaged by a tornado. The owner decided to take advantage of a bad situation and knock out the side of the structure that was damaged and build a whole new wing on the building. The plan submitted to the town for approval is for a warehouse area that exceeds 50,000 square feet. This action **would** be a substantial change, and thus subject to SEQR.
- If a waterfront was bulkheaded, and the old wood was rotting, replacing the bulkhead with new wood, of the same length and as close to the old location as possible, would **not** be considered a substantial change. Placing the new bulkhead a sizeable distance from the old bulkhead (for example, several feet seaward), and filling in the area between the old and new bulkheads, **would be** considered a substantial change. Bulkheading an area that had never been bulkheaded before **would** also be considered a substantial change.

617.5(c)(2)

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

Replacement in kind refers to function, size and footprint. Stick for stick replacement is not needed to qualify as replacement in kind, especially where the changes are required by

current engineering, fire and building codes. Actions such as building ramps as required by the Americans with Disabilities Act, installing new or improved fire escapes, or removal of asbestos shingles would be Type II.

After over twenty years of use, the Alfred E. Smith state office building in Albany needed to be rehabilitated and brought up to current codes. It was initially thought that this action would be classified as Type II because the action included repairs, upgrades and in-kind replacement. However, when the project manager for the New York State Office of General Services looked more closely at the wording of 617.5(c)(2), he realized that the action did not satisfy the final provision in the item ". . . unless such action meets or exceeds any of the thresholds in section 617.4 of this part." The scope of the work on this multi-story building far exceeded the threshold in 617.4(b)(6)(v):

"(6) activities, other than the construction of residential facilities, that meet or exceed any of the following thresholds; . . .

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

Clearly the wording of 617.5(c)(2), combined with 617.4(b)(6)(v), leads us to the conclusion that the action was properly classified as Type I, instead of Type II.

617.5(c)(3)

"agricultural farm management practices, including construction, maintenance and repair of farm buildings and structures, and land use changes consistent with generally accepted principles of farming;"

Clearing a field to plant crops; construction, maintenance and repair of farm buildings and structures; building of dikes, ditching, or installing drainage piping; or erecting a farm stand would not require SEQR review. However, subdivision of land to sell off as lots would be subject to SEQR.

If a farmer decides to build a home for his son and the son's family, the action is not agricultural in nature, but would be Type II anyway pursuant to [617.5\(c\)\(9\)](#), **provided that** local laws did not require a subdivision approval for the new house. If some sort of discretionary approval was needed before the house could be built, the action would no longer be Type II.

617.5(c)(4)

"re-paving of existing highways not involving the addition of new travel lanes;"

This runs parallel to the "in place, in-kind" replacement of structures. Routine maintenance and paving is not subject to SEQR, but changes or expansions such as the addition of lanes for traffic, a new interchange, or the building of a rest area would need SEQR review.

617.5(c)(5)

"street openings and right-of-way openings for the purpose of repair or maintenance of existing utility facilities;"

Again, this distinguishes routine recurring actions from new projects. In contrast to routine repair or maintenance, opening streets to install new utility distribution lines SEQR unless the action falls under the description in **617.5(c)(11)** below.

617.5(c)(6)

"maintenance of existing landscaping or natural growth;"

In a municipal park, routine trimming of trees or replacement of shrubbery that has died would be Type II under this section. In contrast, clear-cutting of a forested area of the park would not fit under the heading of maintenance.

617.5(c)(7)

"construction or expansion of a primary or accessory/appurtenant, non-residential structure or facility involving less than 4,000 square feet of gross floor area and not involving a change in zoning or a use variance and consistent with local land use controls, but not radio communication or microwave transmission facilities;"

The first place to look for a specific definition of gross floor area is your local code book (town/city/village). **If these local codes have no definition**, DEC provides this clarification: cellar or basement space not used for the main purpose of a non-residential facility is not considered part of the gross square foot area of the facility. However, a basement used as a sales floor, or for office space would be included as part of the gross floor area. The same logic also applies to attic space. Unless explicitly included by local codes, the footprints of structures such as gas pumps and canopies are not included in the definition of gross floor area. The calculations are for the floor area of the building itself.

The primary environmental impacts associated with these types of actions are usually infrastructure-related concerns such as traffic, storm water drainage and sewage disposal; or nuisance issues such as noise, lighting and littering. In communities with site plan review or special use permit requirements, these routine concerns can be managed well under those local review standards, without the need for the additional analysis or authority which an EIS could provide. For communities that have no land use controls, such as zoning or site plan review, these types of small commercial projects usually require only a building permit, which is a ministerial act and already exempt from SEQR.

Another issue with some such applications is the compatibility of the proposed use with existing uses (e.g., whether this fast food facility be constructed adjacent to an existing residential community). This issue should generally be addressed prospectively, under zoning, before an application is received. However, in communities which have not updated their local land use controls to reflect current development patterns, care must be taken to not overextend the SEQR process in an attempt to make up for out-of-date zoning.

Examples that fall in the Type II non-residential construction category are:

- Expansion of a local Elks Lodge facility by 3500 square feet, in a manner and location consistent with local zoning;
- Expansion, in a commercial zone, of a restaurant where the project involves less than 4,000 square feet, exclusive of an outdoor patio for serving patrons in good weather; and the final building meets setback requirements.

Radio and microwave transmission towers or other stand-alone facilities constructed specifically for radio or microwave transmission are specifically **not** included in the exemption for construction of small non-residential structures. However, if a small dish antenna or repeater box is mounted on an existing structure such as a building, radio tower, or tall silo, the action would be Type II.

617.5(c)(8)

"routine activities of educational institutions, including expansion of existing facilities by less than 10,000 square feet of gross floor area and school closings, but not changes in use related to such closings;"

This section includes changing transportation schedules or policies, changes in curriculum, developing or changing after school activities, changing the school calendar, or transferring students from one school to another. It also includes an expansion of less than 10,000 square feet. This includes construction of new, elevators or storage space; or expansions for new classrooms (typically eight rooms or less), elevators, special facilities for handicapped access, libraries, lunch rooms, special education facilities, computer laboratories, garages, caretaker residences, teacher centers, child-care centers, storage buildings, pole barns, press boxes and greenhouses, etc.

The closure of a school is also included as a Type II action under this item. However, refitting an elementary school building to become a senior center or town hall administration building would not fit under this category. In addition, a school closing with the intention of leasing the building for non-school purposes would not be classified as Type II.

Educational institutions include all schools and libraries chartered and/or registered by the New York State Board of Regents.

617.5(c)(9)

"construction or expansion of a single-family, a two-family or a three-family residence on an approved lot including provision of necessary utility connections as provided in section [617.5\(c\)\(11\)](#) and the installation, maintenance and/or upgrade of a drinking water well and a septic system;"

Note that this item is specific to one, two and three-family dwellings on approved lots only. While the size of the project is an important factor in determining applicability of this item, approval of the lot is equally important. This provision does not apply where one or more new lots are being created but are not yet approved. SEQR review is still warranted in those instances.

Where a building lot has already been approved, then even when a single-family, two-family or a three-family residence requires one or more additional approvals, such as site plan approval or zoning variances from a local board, or other permits such as a DEC natural resources permit (freshwater wetlands, tidal wetlands, stream protection, etc.), **no further review under SEQR is required**. This does not mean that the permit or approval(s) can be ignored, nor does it mean that the governmental authority must issue the permit(s). The project must still meet all regulatory standards and be issued the approval(s) or permit(s).

Examples of actions that are classified as Type II by this item are:

- demolition of a small seasonal camp and its replacement by a large permanent home;
- building one, two or three-family homes on a few remaining lots in an older approved subdivision; or
- replacement of a single-family home destroyed by fire with a two-family home of similar dimensions in an area zoned for one or two-family residences.

This provision was added in the 1996 amendments to the SEQR regulations. Over twenty years of experience has shown that these kinds of actions do not have a significant adverse effect on the environment, and the preparation of an EIS will not provide better explanation or understanding of impacts nor provide the reviewing agency with significant additional authority.

The typical impacts associated with the construction of single, two or three family residences are limited to clearing, grading and filling of the site, noise, dust and runoff. These impacts are minor in nature and easily controlled by standard construction techniques. Additional impacts from occupancy of the structure can be from use of pesticides and herbicides for lawn and garden care; and the construction and operation of water supply wells and onsite sanitary systems. These activities for one-, two- and three-family homes seldom create a significant adverse environmental impact. Any of the non-significant impacts that result from the construction of a house are subject to review under other existing local, state and federal regulatory programs, and they can be controlled through these jurisdictions. Proper local land use planning, zoning and subdivision regulations can and do protect readily identifiable unique features from the impacts of inappropriate development.

There have been very few court cases in which an EIS was required for a one, two or three-family dwelling. In reviewing those cases, Department staff found that the decisions turned on whether the proposed projects met DEC, Department of Health or local permit issuance standards; whether the projects complied with local zoning; or a combination of the two. The broader environmental questions were not part of the decision to require an EIS. Additionally, the EISs that were reviewed did not substantively contribute information that added to the lead agency's decision.

617.5(c)(10)

"construction, expansion or placement of minor accessory/appurtenant residential structures, including garages, carports, patios, decks, swimming pools, tennis courts, satellite dishes, fences, barns, storage sheds or other buildings not changing land use or density;"

The key to this item is that accessory/appurtenant structures must be "minor" ones having a "secondary" use, or facilities adjunct to, or supporting some main use of the facility. The list of appurtenant structures contains examples and is not intended to be complete or exclusive. Other examples of structures within this category are: catwalks, gazebos, swing sets, permanent basketball hoops on poles, hot tubs, skateboard ramps, dog kennels, and cabanas.

617.5(c)(11)

"extension of utility distribution facilities, including gas, electric, telephone, cable, water and sewer connections to render service in approved subdivisions or in connection with any action on this list;"

If the extension of utility service is functionally dependent on an action on the Type II list, then all parts of the action constitute the whole action and are not subject to SEQR. If the destination of the utility line is a Type II action, it is reasonable that extending utility lines to the structure or facility is also Type II.

This item would not, however, apply to the extension of utility service to larger projects such as a new subdivision undergoing review by a planning board. In these cases, the SEQR review would include all phases or components of the activity consistent with the "whole action" concept of review. Separating the utility extension from the review for the rest of the project would constitute segmentation. If any component of an action being evaluated for applicability of this subsection has aspects that are Type I or unlisted actions, it should be reviewed as a Type I or unlisted action and not classified as Type II under this item.

In addition, this item covers only distribution lines, not transmission lines. High voltage transmission lines (defined as an electric transmission line of a design capacity of 125 kV or more extending a distance of one mile or more, or of 100 kV or more and less than 125 kV, extending a distance of ten miles or more) and gas transmission lines (defined as a gas transmission line extending a distance of 1,000 feet or more to be used to transport fuel gas at pressures of 125 pounds per square inch or more) are reviewed under Article 7 of the Public Service Law, and therefore are not subject to SEQR review. Transmission lines below those thresholds may be subject to SEQR if they require discretionary approvals from any agencies.

617.5(c)(12)

"granting of individual setback and lot line variances;"

This section covers all variances for setback and lot line requirements including front, side, back, width and depth. In this item, "individual" denotes one project on one lot.

This section does not include use or area variances. A use variance is defined by the New York Planning Federation as "the authorization consistent with New York State Town Law Section 267-b (www.dos.state.ny.us/lgss/townlaw.html#267b) and by the zoning board of appeals for the use of land for a purpose which is otherwise not allowed or is prohibited by the applicable zoning regulations." For example, a variance to allow a driveway or parking area closer to a side property line than normally allowed would be a Type II. However, a use variance to allow a new business to locate in a residential district would not be allowable.

Area variance is defined in the discussion of section 617.5(c)(13) directly below.

617.5(c)(13)

"granting of an area variance(s) for a single-family, two-family or three-family residence;"

Area variances for single-family dwellings, including lot coverage are defined by the New York Planning Federation as the "authorization consistent with New York State Town Law Section 267-b (www.dos.state.ny.us/lgss/townlaw.html#267b) and by the zoning boards of appeal for the use of land in a manner that is not allowed by the dimensional or physical requirements of the applicable zoning regulations." The reasons for including these actions in the Type II list are essentially the same as those for construction of one, two or three-family residences. That is, long term experience has shown that this kind of action rarely results in adverse environmental impacts.

Further, an EIS will not provide the decision-making board with any information that it doesn't already have regarding the requested relief from dimensional requirements. Including granting of area variances in the Type II list allows boards to issue or deny variances solely based on the standards and criteria established by the zoning code.

617.5(c)(14)

"public or private best forest management (silvicultural) practices on less than 10 acres of land, but not including waste disposal, land clearing not directly related to forest management, clear-cutting or the application of herbicides or pesticides;"

This section includes activities such as:

- pruning or shaping of trees,
- removal of slash and downed trees,
- removal of undergrowth, and
- controlled burning of vegetation involving less than 10 acres,
- selective cutting of trees.

Some local governments now require tree cutting or tree removal permits. If the permits are for activities listed here, then granting or denying them would not trigger an environmental review under SEQR.

Controlled burning of vegetation can be a useful forest management tool to: prevent accumulation of dry dead underbrush and thus prevent dangerous large fires; to revitalize the forest by returning nutrients to the soil; or to permit natural reforestation of trees requiring the heat of a fire to release seeds. While controlled burning is a useful tool, burning of areas larger than 10 acres would be a Type I action and so must be evaluated to identify potential adverse environmental impacts. Any agency reviewing or participating in a controlled burning must take care to evaluate the impacts of the whole controlled burn program, and avoid segmentation of the project into 10 acre parcels in an attempt to avoid SEQR analysis. (See the Handbook chapter on [Segmentation](#).)

617.5(c)(15)

"minor temporary uses of land having negligible or no permanent impact on the environment;"

This section includes activities such as:

- allowing use of state lands for public gatherings,

- allowing use of a parking lot in a public park as a temporary leaf collection station while a permanent facility is being located, and
- the conversion of a small portion of a public park to parking for 18 months to allow renovation of a hospital.

617.5(c)(16)

"installation of traffic control devices on existing streets, roads and highways;"

This section includes installation of:

- signs,
- signals,
- rumble strips on road shoulders, and
- lane restriction devices such as jersey barriers.

It also includes:

- restriping of lanes,
- reconfiguring of traffic lanes within the existing paved area in a manner that does not require expansion of the paved roadbed; for example, lane shifts between the morning and evening rush hours.

617.5(c)(17)

"mapping of existing roads, streets, highways, natural resources, land uses and ownership patterns;"

This section does **not** include the planning process that involves creation of new zones or land use restrictions in a municipality. It does include land surveys, deed searches, interviews or questionnaires, and any other method used to gather or interpret data for mapping purposes. This also includes the use of any technology to record, capture or display data.

617.5(c)(18)

"information collection including basic data collection and research, water quality and pollution studies, traffic counts, engineering studies, surveys, subsurface investigations and soils studies that do not commit the agency to undertake, fund or approve any Type I or Unlisted action;"

Systematic collection of information is necessary to allow informed decisions to be made regarding the environmental impact of an action. This data gathering is an important preliminary tool for environmental analysis.

Examples of allowable tests and equipment are:

- perk tests,
- test wells to check for groundwater contamination,
- water supply investigations, or
- meteorological towers to gather atmospheric data.

A very large example of this item is the plan by the New York State Office for Technology (OFT) to establish a statewide wireless network. Intended primarily for emergency response purposes; OFT initially examined what kind of technology is best, where antennas must be placed to facilitate complete coverage of the state, and how to install these antennas to minimize disturbance to the area in which each is located. The preliminary investigations to obtain data to make decisions on the various considerations for the action were deemed to fit into this Type II category. The actions that are subject to additional SEQR review include the actual creation of the plan for the network, including the decision making process for the siting and design of individual towers.

In another recent example, the DEC classified a one-time, two-week test burn of tire-derived fuel in an existing boiler as Type II under this item, and the classification was upheld in court.

617.5(c)(19)

"official acts of a ministerial nature involving no exercise of discretion, including building permits and historic preservation permits where issuance is predicated solely on the applicant's compliance or noncompliance with the relevant local building or preservation code(s);"

A ministerial act is an action performed as prescribed by law or regulation and based on a specific set of facts without the use of judgment or discretion. It is also called a non-discretionary decision. There is a longer discussion of this topic in the [Decisions Subject to SEQR](#) section of this Handbook.

By definition, SEQR applies to discretionary decisions only. For decisions where a permit or license must be issued if a given set of circumstances have been met, SEQR does not apply. In addition to the examples in the regulations, there are many others: dog licenses, resident permits to use a town swimming pool or other town facility, and voter registration.

A few municipalities have building permits that include some discretionary approvals. For a discussion of ministerial versus the less commonly occurring discretionary building permit see *Atlantic Beach v. Gavalas*, 1993.

617.5(c)(20)

"routine or continuing agency administration and management, not including new programs or major reordering of priorities that may affect the environment;"

SEQR does not apply to the ordinary administration and continuing management of a governmental agency. It is when new actions are taken, or new programs are begun, that the environmental assessment must be done.

This section includes activities such as:

- decisions to relocate an office from one building to another,
- entering into a contract to operate an existing facility,
- setting tipping fees at a landfill,
- providing funding for an existing agency to allow it to conduct current programs,
- revising application/registration fees,

- changing the operating hours of a public facility, and
- the designation of a structure as a historic landmark.

617.5(c)(21)

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

This parallels the considerations in item [617.5\(c\)\(18\)](#) of this section. Investigative studies are vital to making appropriate analytic decisions when choosing whether or not to undertake an action, deciding what scale of development is possible, or where to site a project. However, if the studies were commenced after the agency was committed to the action for which the studies were being conducted, SEQR would apply.

As an example, the New York State Office for Technology (OFT) is in the process of creating a Statewide Wireless Network. OFT's goal is to construct the network using the fewest new towers possible. To that end, there were discussions with various municipalities and counties to try to come to agreement on sharing towers. Tompkins County had a tower under construction, and had only one site left uncommitted for a repeater. The Office for Technology agreed to hold an "option" on that site, but was not permanently committed to locating its facility there. This kept the action as Type II under this section because the Office had made no final commitment regarding the actual construction of the network hardware. When design plans were completed, another site could have been used, and the "option" given up.

617.5(c)(22)

"collective bargaining activities;"

Labor-management bargaining in and of itself is not considered as having an adverse environmental impact. However, actions taken as a result of such bargaining, such as improvements to a workplace, changes due to safety concerns, different parking facilities, or construction necessary to accommodate larger maintenance equipment may be subject to SEQR review.

617.5(c)(23)

" investments by or on behalf of agencies or pension or retirement systems, or refinancing existing debt;"

Again, these are primarily management decisions that do not have adverse environmental impacts. Note that re-financing is distinguished from an initial grant or loan, and that initial funding decisions by government entities remain subject to review under SEQR.

617.5(c)(24)

" inspections and licensing activities relating to the qualifications of individuals or businesses to engage in their business or profession;"

This section includes activities such as:

- the conduct of inspections for compliance with environmental, health, or construction standards;
- issuance of peddler permits and
- issuance of professional licenses.

617.5(c)(25)

"purchase or sale of furnishings, equipment or supplies, including surplus government property, other than the following: land, radioactive material, pesticides, herbicides, or other hazardous materials;"

This section does include the purchase or sale of all:

- interior furnishings;
- fire trucks;
- garbage and recycling hauling trucks;
- school busses;
- maintenance vehicles,
- construction equipment such as bulldozers, backhoes, dump trucks;
- police cars,
- computers, scanners, and related equipment,
- firearms, protective vests, communications equipment, fuel, tools and office supplies.

As with investments and bargaining activities, the simple purchase or sale of materials does not create an adverse environmental impact. Also note that land transactions involving one or more government entities are not exempt from SEQR; this means that tax sales as well as other dispositions of excess property are subject to review under SEQR. In addition, note that government transactions involving specific hazardous materials also remain subject to review under SEQR.

617.5(c)(26)

"license, lease and permit renewals, or transfers of ownership thereof, where there will be no material change in permit conditions or the scope of permitted activities;"

In its elemental form, each activity described in this section consists of a name or date change on a permit form. There is no environmental impact.

If the action does involve a material change, then it is no longer Type II. An example of material changes in a permit condition would be allowing a mine operator to excavate a mine to a greater depth than the previous permit allowed. Another example would be the redesign of access points to a shopping mall so that the shoppers would enter the highway at a different location.

617.5(c)(27)

"adoption of regulations, policies, procedures and local legislative decisions in connection with any action on this list;"

This paragraph refers to enacting an ordinance or resolution to implement activities such as those in 617.5(c)(20) of this section.

Legislative decisions can only be made by bodies composed of members elected by voters from within a political jurisdiction. Thus the provision that allows agencies to refuse to consider legislative actions without applying SEQR pertains only to county, city, town and village legislative bodies and elected school boards [also see the discussion of actions of the Legislature under 617.5(c)(37)]. Appointed boards such as planning commissions and zoning boards of appeal **must** apply SEQR even though their members may agree in advance they are likely to disapprove a proposal before them.

617.5(c)(28)

" engaging in review of any part of an application to determine compliance with technical requirements, provided that no such determination entitles or permits the project sponsor to commence the action unless and until all requirements of this Part have been fulfilled;"

This section refers to the identification of deficiencies and sufficiency of applications and the fact that these efforts need to be done before the action (application) can be further processed under SEQR or the underlying state or municipal law. These activities are designed to protect the environment and maintain compliance with state or municipal laws and ordinances. By definition there would be no adverse environmental impact. Early review conducted prior to SEQR may inform agencies of issues (for example, identification of a wetland on a project site).

617.5(c)(29)

"civil or criminal enforcement proceedings, whether administrative or judicial, including a particular course of action specifically required to be undertaken pursuant to a judgment or order, or the exercise of prosecutorial discretion;"

Examples of law enforcement actions exempt from SEQR include:

- local enforcement of zoning code violations,
- replacement of pollution control equipment with better technology pursuant to administrative or judicial order,
- closure of landfills pursuant to administrative or judicial order,
- remediation of wetland violations or hazardous waste sites under administrative or judicial order; and
- construction of a new water filtration plant, as ordered by an "administrative tribunal", because the old one was failing. Because the action was to be undertaken to satisfy the mandate specified by an administrative determination issued by an agency, the town had no discretion as far as initiating the construction, and so that element of the project can be classified as Type II. However, if the order does not explicitly specify the location of the new plant, then that siting decision may still be subject to SEQR.

When such court or administrative orders are explicit with regard to a component of this activity, the action is entirely exempt from SEQR. If, however, the orders have left some

discretion as to the methods of implementing the order, those discretionary aspects of the action may still be subject to SEQR review. For example:

- A respondent was found to have an illegal dump of construction debris. If he is merely ordered to apply for a permit to construct a disposal site, but DEC is not ordered to approve the application, SEQR would apply.
- A developer has begun construction on a subdivision, and his crew bulldozes a 15 acre wetland and small pond. A DEC Environmental Conservation Police Officer catches the crew in the process of this destruction, stops the work and gives the developer a summons. The developer and DEC enforcement attorneys agree to settle the case civilly rather than criminally. In addition to paying a fine, the developer is mandated to obtain a DEC wetlands permit before he proceeds with any work for his subdivision. He is also required to reestablish the wetland and pond that he destroyed. Again, SEQR would apply to the actions covered by the wetlands permit application. However, the restoration of the wetland to its former state would be a Type II action because it was directly required by the terms of the settlement.

617.5(c)(30)

"adoption of a moratorium on land development or construction;"

By its very nature, something that stops people from altering or reconfiguring the landscape, is protective of the environment.

Often a town or village will place a temporary moratorium on development while a master plan for the municipality can be finalized. This allows the enactment of desired zoning rather than allowing the potential patchwork of uses that might occur without the plan.

A temporary moratorium on construction might also be adopted while the citizens of the town decide whether they wish to allow a project such as a "big box store," which may cause some hardship for small local businesses; or a large stadium, which may have adverse effects on the surrounding neighborhoods.

617.5(c)(31)

"interpreting an existing code, rule or regulation;"

This item involves the understanding that local governments often act separately on the interpretation of an action and the action itself; acting on fundamental laws or regulations in balancing their decisions, not always SEQR (for example, a ZBA in deciding what zoning rules apply to a proposed new use not specifically named in their ordinances). Still, actions proposed as a result of an interpretation of the provisions of the law may not always be Type II and may qualify as Type I, or Unlisted actions, under SEQR.

617.5(c)(32)

"designation of local landmarks or their inclusion within historic districts;"

This is comparable to the explanation in **617.5(c)31** above. The **designation** has no effect on the environment. However, actions proposed as a result of the designation, or courses of actions changed as a result of this designation, may still be subject to SEQR.

617.5(c)(33)

" emergency actions that are immediately necessary on a limited and temporary basis for the protection or preservation of life, health, property or natural resources, provided that such actions are directly related to the emergency and are performed to cause the least change or disturbance, practicable under the circumstances, to the environment. Any decision to fund, approve or directly undertake other activities after the emergency has expired is fully subject to the review procedures of this Part;"

This paragraph is very specific. An emergency action must do the least environmental harm possible, and the duration of the "emergency action" does not extend beyond the immediate crisis.

Emergency actions can include, but are not limited to:

- Agency responses to natural disasters such as wild fires in a forest, floods, ice storms, tornadoes, harmful insect infestations, etc.
- Agency responses to man-made disasters such as building fires, demolition of dangerously deteriorated buildings, chemical spills, transportation accidents or acts of terrorism.

Some real world examples:

- Restoration of utilities and clearing of trees, wires and other debris from roads after a huge ice storm.
- Immediate stabilization or repair of roads, culverts and bridges to prevent further damage or danger to human life after significant damage from flooding. The restoration of these roads, culverts and bridges would also be covered under the emergency action because of the necessity of restoring routine access to the affected areas and the potential need for quick access for police, fire or rescue purposes. Ancillary activities such as necessary traffic rerouting are generally considered part of the emergency action and are therefore Type II.
- Restoring electric power to an area after an outage caused by either natural materials breaking the lines or shorting out switches (ice, tree branches, lightning, animals) or human intervention (human error or deliberate disruptions at power stations, vehicle accidents).
- Controlling wild fires in forested or brushy areas is, of course, also considered an emergency response. Any reasonable response by firefighters in an attempt to control and extinguish the blaze is included in the Type II designation. These activities include, but are not limited to:
 - bulldozing of a fire break,
 - cutting of trees,
 - creating of access roads for fire equipment,
 - spraying of or aerial dumping of fire retardants,
 - damaging of wetlands, and
 - damaging of the bed or banks of regulated waterways, lakes or ponds in the process of gaining access to the fire or for siphoning off water to fight the fire.

Emergency actions are also further discussed in Questions 14 and 15 of this section of the Handbook.

617.5(c)(34)

"actions undertaken, funded or approved prior to the effective dates set forth in SEQR (see chapters 228 of the Laws of 1976, 253 of the Laws of 1977 and 460 of the Laws of 1978), except in the case of an action where it is still practicable either to modify the action in such a way as to mitigate potentially adverse environmental impacts, or to choose a feasible or less environmentally damaging alternative, the commissioner may, at the request of any person, or on his own motion, require the preparation of an environmental impact statement; or, in the case of an action where the responsible agency proposed a modification of the action and the modification may result in a significant adverse impact on the environment, an environmental impact statement must be prepared with respect to such modification;"

Such previously-approved or undertaken activities are referred to as "grandfathered". Some examples of grandfathered actions are these:

- Development of individual lots in a subdivision where all approvals had been obtained before SEQR was enacted; or
- Continuation of mining within the original property lines in a quarry that was in operation before SEQR was enacted, using basically the same methods and procedures for the entire time.

For example, a rock crushing and cement manufacturing company that has continually operated in the same manner as it did before the effective date of SEQR in 1976 may be considered a grandfathered facility. However, if an individual or the Commissioner determines that it is still practicable either to modify the action to mitigate potentially adverse environmental impacts or to choose a feasible or less environmentally damaging alternative; or if the facility began to modify its working methods and appeared to be more likely to cause significant adverse environmental effect, the facility could also become "ungrandfathered". This would mean that the cement company may be required to draft an environmental impact statement (EIS) for the project or related action.

Grandfathering is further discussed in Questions 16 and 17 of this section of the Handbook.

617.5(c)(35)

"actions requiring a certificate of environmental compatibility and public need under articles VII, VIII or X of the Public Service Law and the consideration of, granting or denial of any such certificate;"

The Public Service Commission (PSC) has sole approval authority over actions involving electric power transmission lines, power plants, high pressure natural gas pipelines, and related actions. While DEC and other agencies can have input into the review of the application for an action, the ultimate decision is made by the PSC. The PSC's authority, created in statute, has its own "SEQR-like" review, record, and decision standards that apply to major gas and electric transmission lines (Public Service Law Article VII). The PSC review process has also applied to new generating facilities (under former Public Service Law Articles VIII and X), but those have now both expired, which means that SEQR does apply to new generating facilities at this time [October 2007].

Question 13 in this section of the Handbook includes additional related information.

617.5(c)(36)

"actions subject to the class A or class B regional project jurisdiction of the Adirondack Park Agency or a local government pursuant to section 807, 808 and 809 of the Executive Law, except class B regional projects subject to review by local government pursuant to section 807 of the Executive Law located within the Lake George Park as defined by subdivision one of section 43-0103 of the Environmental Conservation Law;"

Within the cited sections of NYS Executive Law, the Adirondack Park Agency Act establishes "SEQR-like" review, record and decision standards for the Adirondack Park Agency (APA) and for local governments with APA-approved local land use programs, and all decisions made under that authority are exempt from SEQR.

The Lake George Park and Lake George Park Commission were established later, under separate authority of Article 43 of NYS Environmental Conservation Law. Although the Lake George Park is within the Adirondack Park, the legislature specifically excepted local land use decisions within the Lake George Park from the general Adirondack Park Agency Act exemption; the practical effect is that all land use decisions by local governments within the Lake George Park as well as decisions by the Lake George Park Commission itself, are subject to review under SEQR.

[See also **Question 13]**

and

617.5(c)(37)

"actions of the Legislature and the Governor of the State of New York or of any court, but not actions of local legislative bodies except those local legislative decisions such as re-zoning where the local legislative body determines the action will not be entertained"

Until the 1995 lower court decision in Hudson River Sloop Clearwater et. al. v. Cuomo et. al. NYLJ 01/12/95 (see the section Landmark Court Decisions on SEQR), the DEC believed the conclusion that the Governor was exempt from SEQR was so obvious that it did not need to be added to the regulations. The DEC's position on the matter was upheld by the court. However, since the arguments of that case involved the absence of a specific exemption for the Governor in the regulations, the DEC explicitly clarified that the Governor is not a state agency as defined in ECL §8-0105(1) or [617.2\(c\) and \(ah\)](#).

As a rule, the Governor does not directly approve, fund or undertake any actions subject to SEQR. The only direct actions the Governor takes involve emergencies such as dealing with disasters or calling out the National Guard, which are already exempt from SEQR review. The Governor will direct one of the Executive Agencies to take an action. These actions are subject to SEQR review and it is at this level that the SEQR process will be applied.

The National Environmental Policy Act (NEPA) upon which SEQRA is modeled similarly does not include the President as an agency subject to its requirements (40 CFR §1508.12; Alaska v Carter, 462 F. Supp. 1155, 1159-60 (1978)).

Although no explicit statutory exemptions have existed for the State Legislature and the Judiciary, the regulations have always exempted these branches of government from

compliance with SEQR [see [617.5\(37\)](#)]. The reasoning is the same as that for excluding the Governor. The **Legislature** does not directly take actions. Various state agencies must promulgate regulations to execute laws, and these regulations are subject to SEQR. The **Courts** adjudicate proceedings and may direct a party involved in the court proceedings to take an action that may be subject to SEQR, but it is not the court itself that will take the action.

4. Does the list of Type II actions in Part 617 apply to all agencies subject to SEQR?

Yes. All agencies that are subject to SEQR are bound by the Type II classifications contained in the statewide list found in Part [617.5](#).

5. What are the procedural requirements under SEQR for a Type II action?

There are no procedural requirements of any kind for a Type II action. No environmental assessments or determinations of significance are required.

However, a prudent agency should maintain, in its own files, a brief record showing that the proposed action had been considered under SEQR and had met the requirements for a Type II action. Those local agencies that use resolutions should simply note as a clause that the action has been considered under SEQR and classified as a Type II action. It is also good practice to cite the appropriate subdivision or paragraph of section [617.5](#).

6. If an agency has identified an action as requiring no review under SEQR, may the agency proceed with the action?

Yes. Once the agency has determined that no aspect of the action requires SEQR review, the agency may proceed in accordance with the criteria or standards for approval under other relevant laws, regulations and ordinances.

7. Can any agency add to the statewide Type II list?

Yes. As stated in sections [617.5\(b\)](#) and [617.14\(e\)](#), any agency may expand, for its own use, the statewide Type II list by adopting a list of additional Type II actions, provided that the list is not less protective of the environment than the statewide Type II list. Such additions do not apply to any agencies other than the one that added the action. Also, an agency that has listed an action as Type II cannot be an involved agency in the SEQR review of such action by other agencies.

8. Can an agency identify a statewide Type I action on its Type II list?

No. The regulations specifically prohibit an agency from designating as Type II any action on the statewide Type I list [see [617.4\(a\)\(2\)](#)].

9. What happened to the Exempt and Excluded Categories of Actions?

All the actions once separately listed as "Excluded" actions, "Exempt" actions and "Type II" actions under pre-1996 versions of 617 have now been combined into the category of Type II. The aggregation of all these actions under the heading of Type II maintains the statutory intent of indicating that once the action is classified and found to be Type II, the SEQR

process is concluded for that action. This aggregation simplifies the number of places a lead agency must look to make this determination.

Since an important first step in the environmental review process is to ascertain whether SEQR applies to an action, the public is well-served by having to refer to only one section to determine if SEQR applies. As a result, an agency's staff time, efforts and resources will be focused on reviewing those actions that may have potentially significant adverse impacts on the environment.

10. What commonly occurring actions were added to the Type II list in the 1996 SEQR regulation amendments?

In 1996, DEC added these items to the Type II list in Section [617.5](#).

- "granting of an area variance(s) for a single-family, two-family or three-family residence"
- "construction or expansion of a primary or accessory/appurtenant, non-residential structure or facility involving less than 4,000 square feet of gross floor area and not involving a change in zoning or a use variance and consistent with local land use controls, but not radio communication or microwave transmission facilities"
- "adoption of a moratorium on land development or construction"
- "construction or expansion of a single-family, a two-family or a three-family residence on an approved lot including provision of necessary utility connections and the installation, maintenance and/or upgrade of a drinking water well and a septic system;"

11. Didn't a court case nullify the "construction or expansion of a single-family, two-family, or three-family residence on an approved lot..." and small non-residential use provisions?

Yes, briefly, in a ruling that was ultimately overturned. The challenge to the Type II list was met and defeated, so the Type II list remains as adopted.

DEC was sued over the 1996 additions to the Type II list, primarily the addition of the small commercial exemption as well as construction of one, two, or three family dwellings on approved lots. The State Supreme Court ruled in favor of the challengers, however, DEC appealed that ruling and prevailed in the Appellate Division. Then, early in 2001, the Court of Appeals declined to hear and effectively refused to reverse the Appellate Division's ruling. Therefore, because the higher court upheld the inclusion of the new items in the Type II list, and affirmed reinstatement of that language in Part 617, these types of actions remain Type II statewide.

(See *West Village Committee, Inc. et al. v. Zagata*, 1998)

12. What other major change was made to the Type II list in the 1996 SEQR rulemaking?

One additional provision was also codified by its addition to the Type II list. This exemption was always a generally accepted unwritten provision of SEQR, but was added in the 1996 amendments to clarify the concept and make it clear to the public.

"actions of the Legislature and the Governor of the State of New York or of any court, but not actions of local legislative bodies except those local legislative decisions such as rezoning where the local legislative body determines the action will not be entertained"

13. What kinds of actions are specifically named by statute as exempt or excluded from review under SEQR?

The Legislature has specifically exempted or excluded the actions of certain agencies from review under SEQR. These agency actions were exempted by the Legislature because they already had SEQR-like analysis processes incorporated into their review. The requirement of an additional SEQR review would therefore be redundant.

Exemptions listed under ECL Article 8, SEQR:

- The Adirondack Park Agency (APA) or local governments to whom the APA has that are delegated specified APA review functions, for actions on private land within the Adirondack Park pursuant to Executive Law sections 807–809, are exempt for these actions.
- The Public Service Commission is exempt for actions requiring a permit certificate of environmental compatibility and public need pursuant to Articles VII, VIII and X of the Public Service Law (e.g. high pressure natural gas pipelines, transmission lines and power plants). However, the Article X statute expired January 1, 2003, and to date, has not been reinstated in law by the legislature; so SEQR does apply at this time to the review of power plants. **Question 3 (617.5(c)(35))** of this section of the Handbook further discusses these PSC actions.
- Grandfathered actions - **Question 3 617.5(c)(34)** and **Questions 16 and 17** in this section of the Handbook further discuss these actions.

In addition, there are a few narrowly focused exemptions enacted in laws other than the ECL:

- **The Metropolitan Transit Authority (MTA)**. Prior to 1981 the (MTA) was fully subject to SEQR. However, in 1981 section 1266 of the Public Authorities Law was amended to exempt certain activities of the MTA from SEQR review. Section 1266-3 states that establishing, among other things, tolls, rates and fees are not "actions" under SEQR.

In addition, 1266-11 provides that: "[n]o project to be constructed upon real property theretofore used for a transportation purpose, or on an insubstantial addition to such property contiguous thereto, which will not change in a material respect the general character of such prior transportation use, shall be subject to the provisions of [SEQR]."

This subdivision also excludes from SEQR review the planning, design, acquisition, improvement, construction, reconstruction or rehabilitation of a transportation facility, other than a marine or aviation facility, if a federal environmental impact statement has been required pursuant to the National Environmental Policy Act (NEPA). This exemption applies even if the federal EIS is not sufficient to make findings under SEQR.

- **The New York Power Authority (NYPA)**, established pursuant to section 1002 of the Public Authorities Law, has the potential to be excluded from the provisions of SEQR only to the extent that compliance with SEQR is inconsistent with the terms

and purposes of Section 1014 of the Public Authorities Law. Specifically, section 1014 provides that SEQR, as well as all provisions of the ECL and "every other law relating to the Conservation Department . . ." may be superseded under certain circumstances. Specifically, any such law may be "superseded, modified or repealed as the case may require 'when its provisions shall be found in conflict with the provisions of this title or inconsistent with the purposes thereof.'" However, this exemption is permitted only to the extent "necessary to make this title effective in accordance with its terms and purposes." Thus, SEQR (or any other environmental law) may be superseded only to the extent that full compliance with it prevents NYPA from carrying out its responsibilities.

- **The Long Island Power Authority (LIPA)**, established by the Public Authorities Law, was directed to close and decommission the Shoreham Nuclear Power Plant on Long Island. The statute specifically exempted from SEQR requirements, the LIPA acquisition of securities or assets of the Long Island Lighting Company, which included the transfer of the Shoreham facility as a separate asset.
- **The Thruway Authority** was granted an exclusion from SEQR in 1990 for the acquisition of Interstate Route 287 which connects the Tappan Zee Bridge to the New England Section of the Thruway.
- In 1990 **The Hudson River Waterfront Area** was similarly excluded from SEQR requirements. The exclusion only applied to those portions of the Hudson River shoreline in Manhattan that were removed from the West Side Roadway Construction Area, and subsequently designated as The Hudson River Waterfront area. The exclusion did not apply to individual projects within the designated area, only the change of designation.
- **The New York State Department of Transportation (NYSDOT)**. Also in 1990, an amendment to section 14(i) of the Transportation Law granted NYSDOT a narrow exemption from SEQR for certain actions involving addition of travel lanes between exits 30 and 64, and construction between exits 49 and 57 of the Long Island Expressway. The exemption also spelled out when environmental impact statements were required, where segmentation of the action was appropriate, and allows commencement of design work concurrent with the environmental review process.
- In 2001 the Legislature created a new revenue bond financing program. The statute stated "the authorization, sale and issuance of revenue bonds pursuant to this section shall not be deemed an action as such is termed in [SEQR]. These bonds will be issued by the Dormitory Authority, the Empire State Development Corporation, the Thruway Authority, the Environmental Facilities Corporation, and the Housing Finance Agency.
- Occasionally there are exemptions created by statutory language (another category of statutory exemption). The Legislature can create exemptions from the provisions of any law, not just SEQR, and has in fact created SEQR exemptions. Some legislative enactments specifically name SEQR as the exempt law, while at other times there is generalized language to authorize activities with the phrase "notwithstanding any other provision of law to the contrary." This phrase has been construed by judicial decision as providing a legislative exemption from SEQR (for example, see *Nature's Trees Inc. v County of Nassau* in *Landmark Court Decisions on SEQR*).

14. What is an "emergency action"?

"Emergency actions" are actions taken in response to an urgent situation. These are actions "which are immediately necessary, on a limited and temporary basis, for the protection or preservation of life, health, property or natural resources" [see [617.5\(c\)\(33\)](#).] Classification of something as an emergency action should be done only in extreme cases for true,

unforeseeable emergencies, not to justify proceeding with an action despite poor planning by an agency or an applicant.

15. Is there any documentation required for emergency actions?

No. There are no formal requirements in Part 617 for documentation regarding emergency actions. However, any agency classifying an action as an emergency is advised to keep on file a brief statement of pertinent facts concerning the action and its classification. It is recommended that emergency action documentation contain the following:

- date and time when the need for the action was first identified,
- a description of the emergency situation,
- a description of the action including the location and date the action was undertaken,
- a description of how the action will be or has been performed, in the most environmentally sound way practicable under the circumstances, to ensure the least change or disturbance to the environment,
- when the emergency situation ended.

16. If an action was undertaken, funded or approved, or if substantial time, effort or money was expended prior to the effective dates of SEQR, is it Type II?

Yes. These sorts of actions are commonly called "grandfathered" actions and are included as Type II actions. However, because SEQR has been in effect for over 25 years, these actions are becoming increasingly rare. There are some examples of grandfathered actions in **Question 3 (617.5(c)(34))** of this section of the Handbook.

17. Can a "grandfathered" action be made subject to SEQR?

Yes. Under specific conditions, a project may be "ungrandfathered", or formally determined to be made subject to SEQR, by the Commissioner of DEC at the written request of any person, or on the Commissioner's own motion. To reach the decision to ungrandfather an action, the Commissioner must determine that it is still practicable either to modify the action to mitigate potentially adverse environmental impacts, or to choose a feasible or less environmentally damaging alternative.

18. If an elected local legislative body decides that an action will not be considered, is it necessary to take the action through the SEQR process?

No. If an elected local legislative body, such as a town, city or village board, is presented with a legislative decision such as an application for a zoning change, and the legislative body determines the action will not even be considered, SEQR need not apply. However, if the lead agency wishes to consider any aspect of the proposal for full or conditional approval or denial, SEQR must be applied. If the item is tabled and not considered at a given time, and then later is brought back for a decision, SEQR must be applied at that later time before a final decision is rendered. Note that this exemption is limited to actions of an elected local legislative body.

See also the explanation of **Question 3 617.5(c)(27)** in this handbook.

19. If an elected local legislative body begins to consider an action, and then decides not to consider it, must the local legislative body complete the SEQR process?

No. A local legislative body faced with an action involving a legislative decision does not have to complete the SEQR process if it has the authority to stop its consideration of the action. This is explained by the fact it would not be making a final decision on the action and therefore the application of SEQR is not required.

C. Critical Environmental Areas (CEAs)

In This Section You Will Learn:

- What are Critical Environmental Areas (CEAs) and how they are designated;
- How CEAs affect various actions under SEQR; and,
- How CEAs affect the determination of action Type under SEQR.

1. What are "Critical Environmental Areas"?

"Critical Environmental Areas" (CEAs) are areas in the state which have been designated by a local or state agency to recognize a specific geographical area with one or more of the following characteristics:

- A feature that is a **benefit** or **threat** to human health;
- An exceptional or unique natural setting;
- Exceptional or unique social, historic, archaeological, recreational or educational values; or
- An inherent ecological, geological or hydrological sensitivity to change that may be adversely affected by any physical disturbance.

2. Who may designate a CEA?

Local or state agencies may designate a CEA under subdivision 6 NYCRR [617.14\(g\)](#) of the SEQR regulations. Local agencies may designate specific geographic areas within their boundaries as CEAs. State agencies may also designate specific geographic areas which they own, manage or regulate, as CEAs.

3. What advantages does CEA designation offer?

A CEA designation serves to alert project sponsors to the agency's concern for the resources or dangers contained within the CEA. Once a CEA has been designated, potential impacts on the characteristics of that CEA become relevant areas of concern that warrant specific, articulated consideration in determining the significance of any Type I or Unlisted actions that may affect the CEA [see [617.7\(c\)\(1\)\(iii\)](#) and 617.14 (g)(4)].

Often CEAs are recognized and designated because a locality sees this as an avenue to protect or ensure consideration of the resource in land use decisions.

4. What is the process for designating a CEA?

Part 617.14 (g) provides the specific procedures for designating a CEA. These include public notice, hearing and filing the designation and maps with the Commissioner and others. The designation will take effect 30 days after these filings have taken place.

It should be noted that the act of designating a CEA is a discretionary decision by the designating agency and is, therefore, subject to SEQOR. The action of designating a CEA should be processed as an Unlisted action unless the area proposed for designation in some way triggers a Type I review [e.g. a designated historic site (see [617.4\(b\)\(9\)](#))].

5. Are there alternative procedures to consider for use to meet the analysis, notice and hearing requirements when designating a CEA?

Yes. Here are a couple of options.

- Prior to the required public meeting, an agency may **hold an informational meeting** with affected land-owners, other interested agencies and the public to consider the following:
 - The characteristics of the potential CEA that make it worth considering for designation;
 - The kind of actions that would require environmental review under SEQOR by the proponent agency and by other likely involved agencies;
 - The alternatives for boundaries;
 - Any important community values which could be affected by the designation;
 - Adverse impacts likely to be incurred if the area is not designated as a CEA;
 - Management plans for the CEA. (Determine the compatible activities within and adjacent to the proposed CEA and propose special mitigation measures, acceptable impact thresholds, or compatible future actions.)
- **Prepare a Generic EIS** on the proposed CEA. Although a particular CEA designation may warrant a negative determination of significance, a concise Generic EIS on a proposed CEA could provide an effective tool to adequately inform landowners, the general public, and the decision-makers reviewing the CEA proposal.

6. What are some alternatives to CEA designation?

Some alternatives to designating an area as a CEA might be:

- Adoption of direct controls, such as local wetland, steep slope, aquifer protection districts, or ordinances;
- Acquisition of an area by a public or not-for-profit entity, plus adoption and implementation of a management plan; and,
- Identification of an area for which an individual agency establishes a policy to require a Full EAF and coordinated review for all or certain kinds of Unlisted actions.

7. What are examples of CEAs designated because of potential threats to human health?

A CEA designated because of a threat would be something that the municipality or agency would want people to be aware of so that harm to people or inappropriate use of the affected area could be avoided. Examples might be:

- An inactive hazardous waste site;
- A steep slope area with the potential for landslides;
- A high river bank or cliff area with dangerously high erosion potential; or
- An area that is often prone to dangerous flash floods.

8. Does designating an area as a CEA ensure long term protection or maintenance comparable to that afforded by land use controls?

No. Designation of a CEA does not substitute for, nor does it provide, governmental protection afforded by land use controls such as zoning, or acquisition of restrictive easements, or purchase and direct management. Thus, CEAs cannot be considered as a type of development control. In fact, when an agency lacks a specific jurisdiction over an action within a CEA (for example, a local government without zoning or subdivision regulations) it cannot act as an involved agency in any environmental review for that action, even if it is the local government that actually designated the CEA.

9. Does the designation of a CEA create a new jurisdiction for the designating agency?

No. The designation of a CEA **does not** create a new jurisdiction for the designating agency. The designation of a CEA gives the sponsor of any action in or **substantially contiguous** to the area a heightened sense of awareness of the importance of the area. It raises a red flag that there are significant concerns that should be taken into account when any agency is reviewing that action. As discussed in #6 above, it does not grant any agency permitting authority, zoning restrictions, or other jurisdictions that did not already exist before the designation of the CEA.

10. Are Type II actions changed to Type I or Unlisted if they are in a CEA?

No. Type II actions never require environmental review under SEQR. The fact that such actions may occur in or proximal to a CEA does not change their classification.

11. Are Unlisted actions occurring within or substantially contiguous to a CEA automatically considered Type I actions?

No. A CEA does not affect the type classification of an action. In fact, the 1996 changes in SEQR eliminated this previous automatic "elevation" of SEQR actions to Type 1. As now written, only those actions within or contiguous to a CEA that would normally be Type I anywhere else, as per 617.4, are considered Type 1.

12. Will every action in a CEA result in an EIS?

No. Not every action in a CEA requires an EIS. However, potential impacts on attributes or resources which led to the special designation of the area must be addressed in a determination of significance.

13. How can a reviewer determine whether a particular action may impact the environmental characteristics for which a CEA was designated?

Once you know that a proposed action is in, or substantially contiguous to, a CEA, it is a good idea to reach out to the agency that made the CEA designation to understand why the

CEA was designated and its characteristics. Once you know why an area became a CEA, it is much easier to determine if your proposed action will have a significant adverse environmental impact.

A link to a listing of all the designated CEAs in the state, by county, is available on the SEQR pages of the [DEC website](#). Where available, a link to a map of the designated CEA has also been provided. The Division of Environmental Permits, DEC, 625 Broadway, Albany, NY 12233-1750, also maintains a listing of all designated CEAs.

Additionally, [information on CEAs](#) is also available in the offices of each DEC Region. For CEAs filed after June 1, 1987, the DEC regions may have copies of general maps of these CEAs. These maps may be viewed in DEC offices, however, they often are not reproducible. Note that several CEAs have no maps associated with them, but do have boundary descriptions. Detailed information about any CEA, and additional copies of maps, should be obtained from the agency which designated the CEA.

14. Can reviews of actions involving CEAs be managed to avoid creating undue hardships?

The designation as a CEA should not overly burden the review and consideration of actions in or contiguous to it. The existence or creation of a CEA does not alter the classification of an action in terms of SEQR Type. However, all actions of any state and local agency that affect a designated CEA area do require careful reasoned documentation and explanations regarding the impact on an area of important environmental concern. Coordinated review during a SEQR review, while not absolutely required, may be a good course of action to assess all potential negative impacts.

A community or agency can help reduce hardships that may be associated with the existence of a CEA if they critically evaluate the size and boundaries of the CEA when it is being drafted.

D. Segmentation

In This Section You Will Learn:

- what is meant by segmentation;
- how to deal with phases; and
- how to deal with different funding sources for the same overall project.

1. What is Segmentation?

In Part [617.2\(ag\)](#), segmentation is defined as the division of the environmental review of an action so that various activities or stages are addressed as though they were independent, unrelated activities needing individual determinations of significance. Except in special circumstances, considering only a part, or segment, of an overall action is contrary to the intent of SEQR.

There are two types of situations where segmentation typically occurs. One is where a project sponsor attempts to avoid a thorough environmental review (often an EIS) of a whole action by splitting a project into two or more smaller projects. The second is where activities that may be occurring at different times or places are excluded from the scope of

the environmental review. By excluding subsequent phases or associated project components from the environmental review, the project may appear more acceptable to the reviewing agencies and the public.

2. What is meant by reviewing a "whole action"?

Agencies are often faced with the problem of how to address a complex action involving a number of related components that may not be presented or applied for at the same time. Typically, this may involve a series of **applications** for the same project (zone change, extension of sewer service, subdivision approval) or **phases** (residential or mixed use development to be constructed over a number of years). It also may involve separate project sites (for example, a resource recovery facility with bypass disposal at another location). Proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action should be evaluated as one whole action.

Reviewing the "whole action" is an important principal in SEQR; interrelated or phased decisions should not be made without consideration of their consequences for the whole action, even if several agencies are involved in such decisions. Each agency should consider the environmental impacts of the entire action before approving, funding or undertaking any specific element of the action [see subdivision [617.3\(g\)](#) regarding "Actions"].

3. What is the basic test for segmentation?

When trying to determine if segmentation is occurring agencies should consider the following factors. If the answer to one or more of these questions is yes, an agency should be concerned that segmentation is taking place.

- Purpose: Is there a common purpose or goal for each segment?
- Time: Is there a common reason for each segment being completed at or about the same time?
- Location: Is there a common geographic location involved?
- Impacts: Do any of the activities being considered for segmentation share a common impact that may, if the activities are reviewed as one project, result in a potentially significant adverse impact, even if the impacts of single activities are not necessarily significant by themselves.
- Ownership: Are the different segments under the same or common ownership or control?
- Common Plan: Is a given segment a component of an identifiable overall plan? Will the initial phase direct the development of subsequent phases or will it preclude or limit the consideration of alternatives in subsequent phases?
- Utility: Can any of the interrelated phases of various projects be considered functionally dependent on each other?
- Inducement: Does the approval of one phase or segment commit the agency to approve other phases?

4. Is segmented review ever acceptable under SEQR?

There are some limited circumstances where a segmented review may be justified. For example, the following circumstances, **when considered together**, may warrant segmentation when a project has several phases:

- information on future project phase(s) is too speculative;
- future phase(s) may not occur;
- future phase(s) are functionally independent of current phase(s).

If circumstances suggest that a segmented review is appropriate, such justification must be clearly noted in the determination of significance and in any subsequent EIS by providing supporting reasons and demonstrating that such review will be no less protective of the environment. For example, functionally independent projects might be capable of segmented review.

5. Who is responsible for making the decision on proceeding with a segmented review?

The lead agency is responsible for making this decision. The project sponsor and other involved agencies may supply information to assist the lead agency, but ultimately it is the responsibility of the lead agency to make an independent assessment of the actual extent scope of the project and to document the decision to undertake a segmented review. Documentation is important because segmented reviews are susceptible to challenge.

6. Is an agency required to segment a review if the project sponsor shows that segmentation would be possible?

No. Segmentation is contrary to the intent of SEQR. The decision to segment a review is at the discretion of the lead agency. The decision to segment a review must be supported by documentation that justifies the decision and must demonstrate that such a review will be no less protective of the environment [see Question 5 of this section for additional details]. However, the “separate” actions that a project sponsor may cite as being independent, unrelated activities needing individual determinations of significance, more often than not are linked either through application or proximity and therefore may be subject to legal challenge if a segmented review was to proceed.

7. How might an agency address uncertainty about later phases?

All known or reasonable anticipated phases of a project should be considered in the determination of significance. If later phases are uncertain as to design or timing, their likely environmental significance can still be examined as part of the whole action by considering the potential impacts of total build-out (for example, based on sketch plans or existing zoning). If, after completion of the review, it can be determined that the subsequent phases will cause no significant adverse impacts or that the impacts can be mitigated, initial phases can be approved and no further analysis under SEQR will be necessary.

If substantial changes to the project are proposed later, such changes should be evaluated and a new determination of significance made. If an EIS was produced for earlier phases, either a supplemental impact statement or revised SEQR findings statement may be needed.

8. If projects are linked but will have separate sources of funding can they be reviewed separately?

No. It is common in many projects to have a mix of funding sources (for example, local highway construction, affordable housing or economic development). If the various funding sources support the same project, or a group of projects that are part of the same overall action, then they should be examined in a single environmental review.

9. How does an agency determine if the proposed project is part of a larger plan?

Sometimes the project sponsor has a definite plan for future development, and other times the future projects are merely wishful thinking. It is up to the lead agency to determine if the project is the “whole action” or merely a part or segment of the action that should be reviewed. If there is evidence of a plan, then there is a strong presumption that the larger project is the “whole action” and should therefore be the subject of the environmental review. Some examples where the larger project is the “whole action” are: a proposed industrial park of which the instant project is just the initial tenant, a commercial strip mall development that allows for future expansion, a residential subdivision that provides for internal road connections to additional lands under the control of the project sponsor, or a mining project that will prepare the site for a subsequent development proposal.

10. Why is the claim of segmentation frequently raised?

In promoting a project, sponsors frequently provide information and make claims regarding subsequent phases or related development that may follow the initial project. The sponsor’s goal may be to convince the reviewing agency that their project will serve as an engine for further economic development in the area or municipality, or that it will be only the first of several proposed developments that the sponsor will be constructing in the same area.

When it comes time for the project to be formally submitted to the reviewing agencies for approval, however, the project may not reflect the scope and scale of the initial public disclosures. The general public, especially project opponents, quickly pick up on this issue if the lead agency chooses to review the reduced proposal. The public may also want to know about plans for the expansion of the initial proposal, even though plans for expansion have never been discussed. An example of when this might happen would be when a proposal depicts the development of a 60 acre site and it is discovered that the applicant actually owns the adjoining 300 acres. In such cases, it is not unreasonable to question the plans for the adjoining acreage.

11. How have courts treated segmentation claims?

Court decisions on this topic are very dependent on the specific facts in each case, resulting in a “mixed bag” of outcomes. Numerous decisions have required, or at least allowed, lead agencies to consider related projects in one environmental review process. However, there are also several court cases that have upheld agency decisions to perform separate reviews of related projects. For some key cases, see the [Segmentation](#) section in Chapter 9: Notable Court Decisions.

Chapter 3: Participation in the SEQR Process

A. Coordinated Review

In This Section You Will Learn:

- coordinated review under SEQR.

1. What is coordinated review?

Coordinated review is the process by which all involved agencies cooperate in one integrated environmental review. Coordinated review has two major elements: establishing a lead agency and determining the interests and concerns of involved agencies so these interests and concerns may be considered by the lead agency in the determination of significance and in scoping an environmental impact statement.

2. When is review coordinated under SEQR?

Coordinated review is required for all Type I actions, for all actions that require an EIS, and for all Unlisted actions subject to a Conditioned Negative Declaration. It is an option for all other Unlisted actions. Coordinated review should be considered as soon as an agency is faced with a decision subject to SEQR and recognizes that another agency will be involved in the action. 3. Which agency starts the coordination process? The agency responsible for undertaking the action or the first agency to receive an application from the project sponsor for a Type I action must start the coordination process. Any agency that believes an Unlisted action should be coordinated may start coordination.

4. How are involved agencies identified to start a review?

The project sponsor is responsible for identifying all agencies which have any discretionary decisions to make with respect to the action. This identification must be provided in Part I of the EAF. The agency circulating the coordination request also has the responsibility to check the list and to identify any other agencies that it believes may be part of the decision-making for the proposed action. There is no harm in contacting agencies that may turn out to have no jurisdiction regarding the action. They still may have an interest and be able to provide information for consideration in the lead agency's determination of significance.

5. Is there a penalty for failing to identify an involved agency?

If the lead agency can show that it made a reasonable effort to identify all potential involved agencies, there is no penalty [see [617.3\(d\)](#)]. But, if a known involved agency is not given an opportunity to participate, there may be grounds to nullify any approvals subsequently made regarding the action because of failure to comply with SEQR procedures.

6. What if an agency is contacted as part of the coordination process but does not respond?

If an agency does not respond, it must be presumed that agency has no interest in lead agency selection and has no comments on the action at that time. An agency has no obligation to respond to a coordination request. However, failure to respond may result in that agency's concerns being omitted from the environmental review. An agency which fails to respond is still considered an involved agency.

7. What if an agency isn't contacted, but learns of the action through other means and realizes that it is involved?

After it has recognized its own involvement, an agency should make its involvement and concerns known to the lead agency as soon as possible. From then on it must be treated in the same manner as any other involved agency in the SEQOR process.

8. Is it necessary for an agency to have an application before it to be considered as an involved agency?

No. An agency is an involved agency if it will ultimately make a discretionary decision with respect to some aspect of the whole action. The agency must be consulted in the initial coordinated review procedure under SEQOR, and is eligible to be considered as lead agency. This is true even if such decision will not occur until some later phase of a project.

9. Is an agency considered an involved agency if it has previously placed the action on its Type II list?

No. By placing the action on its Type II list, the agency has already made its decision regarding the environmental non-significance of the action. It cannot be an involved or lead agency in coordinated review. [see [617.5\(b\)](#)]

10. Is an agency considered an involved agency if it has previously adopted a law, regulation or ordinance prohibiting the action?

No. Unless the prohibiting ordinance allows the agency to grant special exceptions, the agency has no discretionary decision on the action and has eliminated its ability to be considered as an involved or lead agency for coordinated review.

11. Is coordination required when there is only one involved agency?

No. That agency must assume the responsibilities of lead agency.

B. Uncoordinated Review

In This Section You Will Learn:

- uncoordinated review under SEQOR

1. What is uncoordinated review under SEQOR?

Uncoordinated review is the process by which involved agencies review the impacts of a proposed action, independently, issue a negative declaration, and make a decision to fund, undertake or approve the action. Uncoordinated review applies only to certain Unlisted actions. Unlisted actions that may have a significant adverse environmental impact and Unlisted actions that will receive a conditioned negative declaration require coordinated review.

2. What are the advantages and disadvantages of uncoordinated review procedures for Unlisted actions?

Advantages:

Uncoordinated review can save time because there is no delay in establishing a lead agency. Each agency involved in the action may proceed to make its own separate determination of significance and decision about the action. In uncoordinated review, there are no filing requirements for negative declarations except that they be available in the agency's own files for public reference [see [617.12\(b\)](#)].

Disadvantages:

Without coordination, the decisions of the various involved agencies may conflict. This may cause confusion and delay in the processing of some of the approvals for the proposed action, and even interruption in construction activity. At any time prior to an agency's final decision, that agency's negative declaration may be superseded by a positive declaration by any other involved agency. For larger, more complex Unlisted actions, uncoordinated review may not be appropriate.

3. What happens during uncoordinated review if another involved agency determines the action may have a significant adverse impact?

Coordinated review is triggered. The agency proposing the positive declaration must circulate Part 1 of the EAF to all involved agencies, noting its intent to serve as lead agency and to issue a positive declaration. Lead agency inquiry and response procedures as described in Participation in the SEQ R Process - C. Establishment of Lead Agency must then be followed. If an involved agency has issued a negative declaration following uncoordinated review but has not made its final decision on the action that negative declaration is superseded by the positive declaration.

4. What happens when an agency has made its final decision under uncoordinated review and another agency calls for coordination?

Any agency which has proceeded through the uncoordinated review process to the point of making a negative declaration and a final decision is no longer considered an involved agency.

C. Establishment of Lead Agency

In This Section You Will Learn:

- how the lead agency is established.

1. What is the purpose of a lead agency for SEQ R?

The purpose of having a lead agency is to coordinate the SEQ R process so that when an action is to be carried out, funded or approved by two or more agencies, a single integrated environmental review is conducted. This lead agency is responsible for making key SEQ R determinations during the review process.

2. Is designation of a lead agency always required for a Type I action?

Yes. There must be a lead agency for all Type I actions. If there is only one involved agency that agency is the lead agency.

3. Is lead agency designation optional for Unlisted actions?

Yes. For Unlisted actions, establishing a lead agency is optional unless one of the involved agencies determines that an EIS or a conditioned negative declaration must be prepared. Without coordination, each involved agency must make its own determination of non-significance.

4. Which agency should be lead?

The lead agency is normally the involved agency principally responsible for carrying out, funding or approving an action.

5. How is the lead agency chosen?

The agency undertaking a direct action or the first agency to receive a request for funding or approval should circulate a letter, Part I of the EAF and a copy of the application, including a site map, to other potentially involved agencies. That agency may choose to indicate its desire to serve as lead or may point out that its jurisdiction may be minimal compared to other agencies. If it has indicated a desire to become lead agency, it may also note its intended determination of significance. The letter should request all other involved agencies to state their interests and concerns regarding selection of lead agency and potential impacts of the overall action. The letter should also note that an agency's failure to respond within 30 days of the date of the letter will be interpreted as having no interest in the choice of lead agency and having no comments on the action at this time.

If an involved agency desires to be lead or objects to another involved agency being lead or has comments that could influence selection of the lead agency, it should advise the other involved agencies as soon as possible. Although written comments should be provided for reference purposes, initial communication by phone or direct meetings may resolve lead agency questions more quickly, avoiding delays and impasses. If the initial agency is not the one finally established as lead, then that agency has a responsibility to forward to the lead agency all comments that it may have received regarding the action which could influence a determination of significance.

6. What are the responsibilities of the involved agency initiating the establishment of lead agency?

The involved agency initiating lead agency establishment must preliminarily classify the action (i.e., Type I or Unlisted) and, if Type I, must follow the procedures described in question number 5 above so that a lead agency is established. For Unlisted actions, it may do the same or opt to proceed under uncoordinated review to process the application independently.

7. Must the first agency to receive an application serve as lead agency?

No. Although it is responsible for starting the process, the first involved agency receiving an application has no obligation to serve as lead agency, unless there are no other involved agencies.

8. Are there time frames for establishing lead agency?

Yes. The selection of lead agency must be accomplished within 30 calendar days of the date that the completed Part I of the EAF and other application materials were sent to the other involved agencies.

9. Can a lead agency be established in less than 30 days?

Yes. The time period allowed for establishing lead agency is a maximum. If all of the involved agencies can agree on lead agency in a shorter period of time, then it is not necessary to wait for the 30-day period to expire before going on to the next step in the process. However, the full 30-day period must be provided if there is no response or if an involved agency requests that it be allowed 30 days in order to make its decision (also see the section on Time Frames to be posted soon).

10. What if two or more of the involved agencies cannot agree on which one will serve as lead?

If, at the end of the 30-day period, the involved agencies cannot agree on the lead agency, any one of the involved agencies or the applicant may, in accord with [617.6\(b\)\(5\)](#), request the Commissioner of DEC to designate a lead agency.

11. What if no involved agency expresses a desire to take the lead role?

If no lead agency can be established during the 30-calendar day lead agency solicitation period, the matter should be treated as a lead agency dispute in the same manner as the situation where two or more involved agencies desire to serve as lead. The Commissioner of DEC must be called upon to resolve the dispute.

12. Can one involved agency designate another involved agency to serve as lead?

No. Only the Commissioner of DEC, in resolving a lead agency dispute may "designate" a lead agency. In all other cases, lead agency is "established" by mutual agreement among involved agencies.

13. Can a lead agency be pre-established?

Similar actions that routinely involve the same group of involved agencies are suited for the pre-designation of a lead agency. For recurring actions, [617.14\(d\)](#) encourages agencies to enter into cooperative agreements (such as memoranda of understanding) to identify the appropriate lead agency. Each time an action covered by the agreement is presented for approval, the pre-identified agency will automatically assume lead agency status as agreed to by the involved agencies. This eliminates the need for repetitive lead agency determinations and thus expedites future significance determinations.

14. Can an applicant select the lead agency?

No. Lead agency can only be established by agreement of the involved agencies or, in case of disagreement, through designation by the Commissioner of DEC.

15. Can an applicant cause a lead agency to be designated?

Yes. If no agency has agreed to become lead by the end of 30-day establishment period, the applicant can petition the Commissioner under 617.6(b)(5) to designate a lead agency.

16. Is a formal resolution of a board necessary in order to be recognized as lead agency?

Not necessarily; it depends on the nature of the agency. Many agencies of the executive branches of government may operate through their executive officers or delegated staffs to undertake the lead agency role. In the case of legislative bodies or agencies which function through boards or commissions in their decision making, it may be necessary for them to make some type of formal resolution regarding their assumption of lead agency role if they have not delegated such function to an officer or support staff.

17. Are Co-Lead Agencies allowed under SEQR?

The concept of co-lead agency is not specifically authorized by 6 NYCRR 617 nor is it expressly prohibited. DEC has used this approach for direct actions that involve another state agency. However, other agencies have found the co-lead agency procedure less desirable. It seems that when the two agencies are in agreement concerning decisions, the co-lead agency approach can work. But, when there are differences of opinion between the two agencies the resolution of the disagreement becomes a problem usually resulting in a delay in decision-making. When the action involves an applicant, the delay and the uncertainty regarding resolution of the dispute is unfair to the applicant.

The use of co-lead agencies should be avoided unless the two agencies can devise a formal mechanism for resolution of disputes. This mechanism should not result in a delay in timely decision-making. Absent a formal dispute resolution process, it is suggested that a single lead agency be established with the other agency actively involved in the process but not as a co-lead agency.

18. Can a Lead agency ever change during the SEQR process?

Yes. The role of Lead agency can be re-established under certain circumstances where:

a supplement to a Final EIS or a generic EIS is required;
the original lead agency's jurisdiction has been eliminated by a project change; or
upon the agreement of the applicant and the involved agencies prior to the acceptance of the draft EIS.

19. Who can request that lead agency be re-established?

Depending on the circumstances, any involved agency, including the lead agency, or the project sponsor can request that lead agency be re-established.

20. How are disputes regarding the re-establishment of lead agency resolved?

Disputes over the re-establishment of lead agency are subject to the same procedures as all other lead agency disputes (see [Participation in the SEQR Process - H. Lead Agency Disputes](#)).

D. Lead Agency Responsibilities

In This Section You Will Learn:

- lead agency responsibilities.

1. What are the responsibilities of a lead agency?

In conducting the SEQR process, the lead agency must coordinate review by doing the following:

- Asking all other involved agencies about their concerns for the proposed action, and consider these concerns in making its determination of significance;
- Completing the environmental assessment form by reviewing the submitted Part 1 and other relevant information, and by preparing Part 2 and, if necessary, Part 3;
- Determining whether any aspect of the overall action may have or will not have a significant adverse impact upon the environment. (In its consideration of a proposal's impacts, the lead agency should not limit its review only to those impacts affecting its own jurisdiction.);
- Preparing a legally sufficient determination of significance (positive or negative declaration) that meets the standards of [617.7](#);
- If an applicant has chosen not to prepare the draft EIS, deciding whether to prepare the document itself, hire a consultant to prepare it, or terminate review;
- If scoping is used, determining the scope and content of the draft EIS, including considering the relevant concerns of the involved agencies and the public;
- Determining the adequacy of a submitted draft EIS; if inadequate, providing a written identification of all deficiencies or, if adequate, commencing public review in accordance with [617.11\(a\)](#);
- Deciding whether or not to hold a SEQR public hearing concerning the draft EIS;
- Preparing, or causing to be prepared, the final EIS, including response to all substantive questions and comments;
- As one of the involved agencies, preparing its own SEQR findings prior to making its final decisions on the action; and
- Submitting all appropriate notices and filings of the SEQR process, as required in [617.12](#).

2. Can a lead agency delegate its responsibilities to any other agency?

No. A lead agency cannot delegate its lead agency determinations to another agency. However, it may delegate activities such as the gathering of data or the review of material prepared for determinations of significance or EISs to other involved or interested agencies or staffs or consultants. The lead agency may rely on the specific expertise of another involved or interested agency.

3. Why should agencies compete for lead agency?

The ability to decide whether an EIS will be required and to decide the scope and acceptability of an EIS can be very important to agencies. Even though a lead agency has an obligation to consider the concerns of the other involved agencies, some involved agencies may feel strongly that they are best qualified to do so themselves. Lead agencies have the authority under SEQR to impose mitigation measures on actions through a CND or in Findings that are otherwise outside its jurisdiction, or the jurisdiction of any other agency. Involved agencies do not have this authority.

4. Is the lead agency required to provide a copy of its negative declaration to other involved agencies when review has been coordinated for an Unlisted Action?

Although the regulations do not require this, it is a good practice and it ensures that the involved agencies know when they may proceed with their final decisions.

E. Involved Agency Responsibilities

In This Section You Will Learn:

- role of an involved agency; and
- the responsibilities of an involved agency.

1. What is an involved agency?

For SEQR purposes, an agency is "involved" when the determination is made that the agency has or will have a discretionary decision to make regarding some aspect of the action. Normally an agency becomes aware of its involvement when it receives an application or is contacted by another involved agency as part of a coordinated review.

2. What if an agency cannot be certain of its involvement until later?

An agency should be treated as an involved agency unless there is reasonable certainty that it will have no jurisdiction (i.e., no discretionary decisions to make) in the particular action. If an agency's jurisdiction is questionable it would be unwise for that agency to serve as lead agency. If the potential for a future discretionary decision is too speculative, the agency may be considered as non-involved.

3. What are the responsibilities of an involved agency under SEQR?

Depending on how an agency first becomes involved in an action, initial responsibilities will vary. Participation in the SEQR Process - A. Coordinated Review describes various involved agency roles and options in the coordination process. Questions 5, 6 and 7 in [Participation in the SEQR Process - C. Establishment of Lead Agency](#) address lead agency establishment and responsibilities, if an agency is the first one contacted by an applicant. Once the determination that an involved agency is not serving as lead or is not proceeding alone with an uncoordinated review, that agency's responsibilities in a coordinated review are as follows:

Before the lead agency has made a determination of significance, all remaining involved agencies should:

- Make certain the lead agency understands the extent of the involved agency's jurisdiction; and
- Provide the lead agency with observations and concerns about the proposed action and its potential environmental impact so the lead agency may consider them in making a determination of significance.

When a lead agency has made a negative determination of significance (negative declaration) each remaining involved agency may make its final decision on the action after completing any other required procedures.

When a lead agency has made a positive declaration each involved agency should:

- Participate in scoping, making the lead agency aware of that agency's concerns and technical requirements identify potential significant environmental impacts and suggest alternatives and mitigation;
- Assist the lead agency in reviewing a draft EIS for adequacy, if requested;
- Participate in any hearings, as appropriate;
- Provide formal agency comments during the public review period;
- Assist the lead agency in responding to substantive comments on the final EIS, if requested; and
- Prepare the involved agency's own separate SEQR findings before making its final decision.

4. Can an involved agency influence the determination of significance by the lead agency?

Yes. All involved agencies are encouraged to submit comments during the coordination period. Comments that deal with an agency's specific area of interest or jurisdiction are especially appropriate. However, there is no provision in SEQR that guarantees that the lead agency will make a particular determination of significance.

5. Does an agency lose its decision making authority with respect to an action if it is not the lead agency?

No. All underlying jurisdictions of each involved agency with respect to an action remain unchanged.

6. If an involved agency has no concern about the impacts of the action, must it respond during the coordination process?

If an agency does not respond to a request for coordination, the agency will be assumed to have no comments. However, it is recommended that all solicited agencies acknowledge receipt of a coordination inquiry.

7. If an involved agency has no concerns about an action, may it proceed to its final decision during the coordination period?

NO! All involved agencies are prohibited from making final decisions or commitments before the SEQR process is completed. [see [617.3\(a\)](#)] Agencies making such decisions and applicants accepting such decisions do so at their own risk, because such decisions may be declared null and void through court action, on the grounds that they are procedurally flawed.

8. If an involved agency has the opportunity, but does not participate in the public comment period, must it still consider the draft and final EIS in its decision making?

Yes. If the involved agency fails to participate in the EIS process, it must still consider the EIS as the basis for its written SEQR findings.

9. What recourse does an involved agency have if it has participated in the EIS process but its concerns have been ignored or inadequately addressed?

It is important for an involved agency which has substantive concerns regarding the adequacy of the draft EIS to make this known to the lead agency. If the involved agency's comments are then disregarded or responded to unsatisfactorily, it may take such deficiencies into account in making its own decision regarding the action which could result in negative SEQR Findings and a denial. Alternatively, the involved agency could commence litigation challenging the sufficiency of the Final EIS.

F. Project Sponsor/Applicant

In This Section You Will Learn:

- the responsibilities of the project sponsor/applicant.

Note: For purposes of SEQR, the term "project sponsor" and the term "applicant" are the same.

1. What steps in the SEQR process are the responsibility of the project sponsor?

Project sponsors are responsible for:

- Completing Part 1 of the appropriate EAF when an action is first proposed or an application is submitted. (Parts 2 and 3 are the responsibility of the lead agency.) A proposed draft EIS may be submitted by an applicant in lieu of an EAF Part 1, but it may be treated as an expanded EAF;
- Identifying the other involved agencies;
(Optional) Requesting the Commissioner of DEC to designate a lead agency if two or more involved agencies have not agreed on lead agency after 30 days;
- Providing additional information if requested to assist the lead agency in making its determination of significance;
(Optional) If the lead agency has issued a positive declaration, requesting formal scoping of the draft EIS and participating in scoping process;
- Preparing a draft EIS; alternatively, the applicant may:
Request the lead agency, at the expense of the applicant, to prepare the draft EIS (but the lead agency has no obligation to do so); or
Withdraw the application. (If the applicant does not withdraw, the lead agency may

consider the project abandoned.)

Submitting and revising, as needed, a draft EIS for acceptance by the lead agency for public review;

- Providing additional information during public review if required by the lead agency. (This may, in limited circumstances, require preparation of a supplemental EIS)
- Participating, as appropriate, in a SEQR hearing on the draft EIS, if one is held;
- Assisting the lead agency in answering substantive questions raised during the public review period which must be responded to in the final EIS;
- Preparing additional elements of the final EIS, as may be required by the lead agency; and
- Paying all SEQR fees properly charged by the lead agency in accord with Section [617.13](#).

2. Can an applicant require a lead agency to prepare the draft EIS for a proposed action?

No.

3. Can a lead agency insist on preparing a draft EIS?

No. In accord with subdivision [617.9\(a\)](#), the applicant or the lead agency, at the applicant's option, must prepare the draft EIS. If the applicant does not exercise the option to prepare the draft EIS, the lead agency can prepare it, cause it to be prepared, or pursuant to Article 8 of the Environmental Law (the SEQR statute), terminate the agency's review of the action.

4. What is meant in 617.9(a) by "...terminating the review of the action"?

Article 8 of the Environmental Conservation Law (the SEQR statute) requires agencies to review the environmental consequences of a proposed action before making a final decision. Agency decisions cannot be made on action that have been given positive determinations of significance until an EIS is produced and the SEQR process can proceed to a conclusion. If neither the project sponsor nor the agency chooses to prepare the EIS, then all applications before the lead and involved agencies for the overall action remain incomplete. Further review of these applications is suspended until completion of the SEQR process. If it is clear that no draft EIS will be produced, the project itself as well as the review is terminated. Although not required, a notice of such termination from the lead agency to the project sponsor and involved agencies is good practice.

5. Who is responsible for the completeness, authenticity and accuracy of an applicant's statements in both EAFs and EISs?

Project sponsors are responsible for the accuracy of the information they provide for EAFs and EISs. Presentation of misleading or knowingly false information by an applicant may lead to rejection of his proposal, or to subsequent litigation. Presentation of a misleading or knowingly false statement on such a document could also result in criminal prosecution of the person making the statement. This action would be considered "Filing a false instrument," a "D" felony in New York.

G. Interested Agency and Public Involvement

In This Section You Will Learn:

- how the public can participate in the SEQR process; and
- at what point in the SEQR process can the general public participate.

1. How is the public made aware of proposed actions that may be subject to SEQR?

Individuals, interest groups and public agencies which are interested but not involved may become aware of proposed actions through:

- The electronic media. Local and regional press, along with TV and radio, frequently cover proposed development activities and related agency decisions. Such early reports by the media often trigger inquiries by individuals and interest groups to local officials;
- Public notices. Official notification of the application of SEQR to a proposed action may occur through:
[Environmental Notice Bulletin](#) (ENB). The ENB is a DEC publication, which lists all SEQR notices that are filed with the Commissioner of DEC. This includes notices of availability and completion of draft and final EISs and hearing notices.
- Newspapers. Notice of a SEQR hearing on a draft EIS must be published in a local newspaper of general circulation at least 14 days prior to the hearing. A lead agency may also announce a scoping meeting in a local newspaper and request written comments from those unable to attend. SEQR regulations also require that notices of the filing of negative declarations be incorporated into any other subsequent notice regarding the action otherwise required by law.
- Public files. Required SEQR notices, EAFs, EISs and other documents are considered public documents, and as such, must be made available for inspection at each involved agency.
- Meeting minutes and notices may also be posted on bulletin boards in the city, town or village hall where the project is located.

2. If an agency has an interest or possible concern about a proposed action, may it participate in the SEQR process, even if it has no jurisdiction over the action?

An agency that does not have a discretionary decision to fund, approve or directly undertake some aspect of a proposed action cannot formally be an involved agency as defined under [617.2\(s\)](#), nor can it be considered for lead agency. There is no obligation for the lead agency to coordinate review with interested agencies (although it may do so). Nevertheless, interested agencies, as defined by [617.2\(t\)](#), still may participate in many ways, as described below.

3. If an interested agency is required to make recommendations about a proposed action to an involved agency, could it then be considered an involved agency?

No. Various public advisory boards and councils and any agencies which participate in an advisory capacity, such as planning boards during zoning actions, may be legally obligated to make recommendations on particular kinds of actions. So long as these are only recommendations and can be taken under advisement, but not necessarily followed, they are not discretionary decisions. Such agencies cannot have status as involved agencies but may still participate in the SEQR process as interested agencies.

4. Is an interested agency likely to be contacted during the initial coordination process?

Yes. This may happen in order to determine which potentially involved agencies are actually involved. In addition, interested agencies may be contacted as a courtesy to keep them informed of actions which may affect them.

5. May the general public, including private organizations, interest groups and individuals be considered as interested agencies?

No. The term "agency" is defined in 617.2(c) to mean a state or local agency. However, private organizations, interest groups and individuals all have an ability to participate in the SEQR process.

6. When and how may the general public begin to participate in review of specific actions under SEQR?

There are several key points in the SEQR process when interest groups and agencies and individuals may participate.

If such groups, agencies or individuals are aware that a proposed action is under consideration and will require a determination of significance, they should communicate their environmental concerns and questions to the lead agency or one of the involved agencies.

If a positive determination of significance (positive declaration) is made, interested agencies, organizations and individuals may participate by:

- contributing relevant scoping topics, either through written communication to the lead agency or at public scoping sessions, if such sessions are called for by the lead agency;
- submitting written comments during the draft EIS comment period; and
- commenting on the draft EIS at public hearings.

If a conditioned negative declaration (CND) is made, interested agencies, organizations and individuals may comment during the 30-day public review period.

7. How can interested parties who are not involved agencies be most effective in presenting their concerns about a proposed action?

Interested agencies, organizations and individuals should try to develop on-going communication with agencies which have regulatory authority over the resources or geographic areas which concern them. Interested parties should identify their interests and request that they be informed when an action is proposed that will potentially affect such resources or geographic areas. In addition, interested agencies, organizations and individuals should:

Know the procedures for complying with SEQR, including the terminology, timetables and decision-making requirements;

Request access to and study EAFs, positive and negative declarations, draft EISs and other information on proposed actions. If needed, request clarification of scientific terms, concepts, or data interpretation;

Focus on major issues, not minor discrepancies or problems with wording. Remember, the lead agency is required to consider only substantive comments. Avoid making speculative comments or unsupported assertions;

Organize the comments by placing the most important concerns first;

Identify reasonable alternatives or ways to reduce impacts that may have been overlooked; and

Highlight the effects the project may have on the local community or region or upon specific agency programs. This could include effects on community services, housing, land use, transportation, aesthetics, cultural values, or historic resources. These are subjects about which the public often has substantive information.

H. Lead Agency Disputes

In This Section You Will Learn:

- about lead agency disputes
- the lead agency resolution process.

1. What is a lead agency dispute?

A lead agency dispute occurs when, at the end of the 30-calendar day period allotted for lead agency establishment, there is failure among involved agencies to agree on which one should conduct the SEQR process for a particular action. Lead agency disputes may only occur over the selection of the lead agency, prior to a determination of significance.

2. Who may request resolution of a lead agency dispute, and how is this done?

Any involved agency, or the applicant may request, in accord with [617.6\(b\)\(5\)](#), that the Commissioner designate a lead agency when a dispute exists.

3. What is the process for requesting resolution of a lead agency dispute?

The request to the Commissioner must be in writing and copies must be sent to all involved agencies and the applicant, noting that within ten days of the date of the request, any involved agency or the applicant may submit to the Commissioner its comments on the dispute. Certified mail or other form of receipted delivery must be used in submitting the request and in circulating copies. The request, and any comments from other involved agencies, must identify each agency's jurisdiction over the action and all information relevant to the Commissioner's consideration of the criteria for determining lead agency noted in #6 below. The Commissioner may also require supplemental information to make the decision.

4. If an involved agency raises a lead agency dispute, is it a candidate to be lead agency?

Yes, any agency raising a dispute must be ready to assume the lead agency functions if such agency is designated by the Commissioner.

5. Can an applicant or interested agency raise a lead agency dispute if dissatisfied with the established lead agency?

No. An applicant or interested agency may not dispute a lead agency that was established by mutual agreement of the involved agencies.

6. What steps does the Commissioner take in resolving a lead agency dispute?

The Commissioner will confirm the jurisdiction of the involved agencies and that a dispute actually exists. The Commissioner will then apply the three criteria specified in 617.(5)(v), in order of importance, for resolution of lead agency disputes. The criteria are:

the primary location of an action's impacts, i.e. statewide, regional or local (If the impacts are of primarily local significance, all other considerations being equal, the local agency involved will be lead agency);
the agency that has the broadest governmental powers for investigating the impacts; and
the agency that has the greatest capability for the most thorough environmental assessment of the action.

7. How much time is required for a lead agency dispute to be resolved?

From the time of receipt of all pertinent information, the Commissioner of DEC has 20 calendar days to resolve a lead agency dispute.

8. How can I get a copy of the Commissioner's decisions on past lead agency disputes?

All of the Commissioner's decisions on lead agency disputes are available [online](#).

Chapter 4: Determining Significance

A. Environmental Assessments

In This Section You Will Learn:

- what is involved in the preparation of an environmental assessment form;
- what is the role of the lead agency in preparing the EAF;
- the need for professional sign-offs on materials represented for review in an EAF; and,
- the application of the revised model EAFs, workbooks and mapper.

1. What is an environmental assessment?

An environmental assessment is an evaluation of the known or potential environmental consequences of a proposed action. During an environmental assessment, involved and interested agencies have the opportunity to identify their concerns about an action, provide guidance to the lead agency in making its determination of significance, and help determine whether additional relevant information about potential impacts is needed.

2. What is an environmental assessment form (EAF)?

An environmental assessment form (EAF) is a document developed specifically for SEQR that provides an organized approach to identifying and assessing the information needed by the lead agency as it makes its determination of significance. A properly completed EAF describes the proposed action, its location, its purpose and its potential impacts on the environment.

3. Who prepares an EAF?

Agencies undertaking direct actions and applicants for funding or approval complete Part 1 of the environmental assessment form (EAF). Completion of Parts 2 and 3 of the EAF is the responsibility of the lead agency.

4. How is the EAF organized?

There are two versions of EAF which are used during SEQR review - the short EAF and full (long) EAF. For Unlisted actions, either a short or full EAF may be used [see [617.6\(a\)\(3\)](#)]. For Type I actions, a full EAF must be used [see [617.6\(a\)\(2\)](#)]. Both forms contain three parts. Part 1 is intended to provide a concise description of the whole action and basic data about the project and its site. Part 2 examines the range of possible impacts and their magnitude in order to assess their significance. Part 3 evaluates the importance of such impact(s). Instructions included on each form should be read and carefully followed. For on-line copies of these forms go to the [State Environmental Review Act \(SEQR\) Forms](#) web page.

5. What is the short environmental assessment form (short EAF)?

The short EAF is intended exclusively for use in evaluating Unlisted actions. Unlisted actions may require a less detailed level of review before a determination of significance is made.

6. What is the full environmental assessment form (full EAF)?

The full EAF is an expanded form intended for use primarily, but not exclusively, for Type I actions. The full EAF may also be used for Unlisted actions when a greater level of documentation and analysis is appropriate.

7. How are the EAFs structured?

An EAF consists of three parts:

- Part 1 of the EAF provides baseline information about a proposed action and its setting. It is expected that applicants or project sponsors will complete Part 1 since they are most familiar with the proposed action or project site. The information provided in Part 1 will serve as the basis for the completion of Parts 2 and 3 by the lead agency. For this reason, it is important that the lead agency carefully check the information submitted in Part 1. The lead agency may require the applicant to clarify or expand upon information provided in Part 1 and ask for additional information (maps for example) needed for review of the project.

- Part 2 of the EAF helps to identify the major categories of impacts and identifies the magnitude of each impact. The lead agency must complete its own analysis and is responsible for all decisions made during preparation of Part 2.
- Part 3 of the EAF provides the opportunity to assess the importance of each potentially moderate to large impact. If one or more impacts identified in Part 2 are potentially moderate to large, the lead agency is required to address their importance in Part 3. If there is a special concern for a particular small adverse impact, it should also be considered in this Part of the EAF. The lead agency must complete its own analysis and is responsible for all decisions made during preparation of Part 3.

8. When should the lead agency prepare Part 3 of an EAF?

The instructions for Part 3 of the EAF require that it be prepared if one or more impact(s) is considered to be potentially moderate to large. However, some agencies will complete Part 3 even for impacts that have been identified as being small in magnitude. Using Part 3 in this fashion allows agencies to explain why the impact was determined not to be potentially large.

9. My board or agency prefers to use the Full-EAF for all applications. Can we continue that practice?

The Department strongly urges lead agencies to use the Short EAF for all Unlisted actions except for activities that fall just below a numeric threshold that if exceeded would have resulted in the activity being classified as a Type I action. Examples of Unlisted actions that fall just under the Type I threshold (where use of the Full EAF may be more appropriate) would include the construction of a commercial structure with 225,000 square feet of gross floor area in a city, town or village with more than 150,000 persons. Since the numeric threshold for this activity is 240,000 square feet of gross floor area, the project falls just below the Type I threshold. In general, the new Short EAF is adequate for all but the most large-scale Unlisted actions. Lead agencies should reasonably exercise their discretion when asking a project sponsor of an Unlisted action to complete the Full EAF. In exercising their discretion, lead agencies should ask whether it needs all of the information and analysis that is called for in the full form.

10. Can the lead agency request additional information after receiving Part 1 of the EAF?

Yes. If an EAF provides insufficient information to make a well supported determination of significance, the lead agency may make a request for any additional information **reasonably** necessary to make its determination. The lead agency may also request technical assistance from the applicant in completion of Parts 2 and 3 of the EAF, but the final completed EAF is the responsibility of the lead agency.

11. Is an EAF always required?

No. The lead agency may waive the requirement for an EAF if an application is accompanied by a draft EIS in lieu of an EAF. However, this pre-filed draft should be reviewed as if it were an EAF for purposes of coordinating review, establishing the lead agency and determining significance. If the lead agency determines that the action is, in fact, significant, it should evaluate the pre-filed draft EIS to determine if it is adequate in content and detail to serve as the public review document. If information needed for environmental assessment or final determination are missing, the lead agency should request this material from the applicant. All necessary modifications should be made by the preparer before its acceptance by the lead agency as a draft EIS for public review.

12. Can the public review a “pre-filed” EIS?

Yes. The pre-filed draft of the EIS must be released to the public, if it is requested. This is true even if the EIS is expected to be modified before being officially filed and accepted as a Draft EIS. Courts have ruled that when submitted to the lead agency, this document enters the public domain and, as such, is subject to Freedom of Information requests. Any proprietary information or trade secrets that might be submitted with the EIS would not be “FOILable, however.

Although the public may read the pre-filed draft EIS, the lead agency does not have to accept any comments on this document. Once the Draft EIS is officially filed and accepted, the comment period will begin. Only comments on the officially filed DEIS will be accepted.

13. Can agencies create their own EAF?

Yes. Under 617.2(m) of the SEQR regulations, the model full and short EAF's may be modified by an agency provided the form remains at least as comprehensive as the model.

14. Must an EAF be signed and certified by licensed professionals?

No. ECL Article 8 makes no special provision for any professional sign-off on material presented for review under SEQR.

15. Why were the EAFs revised?

The short and full EAF had not been substantively changed in over 25 years, and were seriously out of date. Neither form addressed many of the current impact issues that have become a standard part of an environmental assessment. This required the completion of additional studies and many rounds of back & forth between the project sponsor and the reviewing agencies. The revised EAFs along with the EAF Workbooks and EAF Mapper should provide agencies with the tools needed to conduct a thorough environmental assessment.

16. When should we start using the new EAFs?

The new model environmental assessment forms (EAFs) took effect on Monday, October 7, 2013. Project sponsors that submit an EAF in support of an application for funding or a discretionary approval from a state or local agency on or after October 7, 2013 must use the new model EAF forms. If the project sponsor has submitted Part I of the EAF before October 7, 2013 then the lead agency should complete parts 2 and 3 using the pre-October 7, 2013 EAF.

17. Can an agency continue to use the pre-October 7, 2013 EAFs after October 7, 2013?

No. On or after October 7, 2013, agencies must use the new EAF forms except in individual cases where Part I was submitted by the project sponsor to an agency before October 7, 2013.

18. Where can I find more information about the use of the new EAFs?

The EAF Workbooks contain ample information that will assist both project sponsors and agencies to use the new EAFs. They were developed in conjunction with the new EAFs and are available on the Department's website for the Revised Model EAF Forms and Draft Workbook.

19. Can the revised model EAFs that became effective on October 7, 2013 also serve as the determination of significance?

Yes. The revised model EAFs were designed to also serve as the determination of significance. If adequately completed, the new model EAFs will meet the test for a legally sufficient determination of significance. Adequate completion means that: Part 1 must contain a description of the proposed action that identifies the whole action being reviewed; Part 2 must identify the relevant environmental impacts; and Part 3 must contain a discussion of why the relevant impacts identified in Part 2 may, or will not have, a significant adverse environmental impact.

20. Now that the forms are designed to be completed electronically are lead agencies required to accept e-filing of the forms?

No. Agencies are not required to accept electronic versions of the new forms. However, the new EAFs have been designed to accommodate e-submission should a local or state agency have the capability and desire to accept application forms via an electronic submission.

21. Can our board or agency still require paper submission of forms?

Yes.

22. Can the new forms be completed without the use of a computer with internet access?

Yes. The new forms can be completed without the use of a computer or internet access. However, the new forms, workbooks and mapper software were designed to work best when used together. Using the new EAFs without these tools will add to the time needed to complete the forms.

23. Can my community adopt its own forms?

Yes. While the Legislature directed the DEC to prepare model EAF forms (which are used by almost all agencies in the State with one notable exception being the City of New York) the SEQR regulations provide that "[t]he model full and short EAFs contained in Appendices A and C of section 617.20 of this Part [changed to appendices A and B] may be modified by an agency to better serve it in implementing SEQR, provided the scope of the modified form is as comprehensive as the model." The downside of an agency adopting its own forms is that such forms may not be sufficiently comprehensive, and not have the benefits of the new model forms which are designed to work with the EAF workbooks and new EAF Mapper software.

24. Does my board or agency need to review the workbook or rely on it when completing the new forms?

No. However, the workbooks are an invaluable resource in completing the new EAFs. The workbooks explain the background behind each question and provide additional sources of information that can be consulted if the project sponsor or the agency would like to get additional information on a topic. The workbooks also make generous use of examples to illustrate typical situations that project sponsors and agencies encounter when conducting an environmental assessment.

25. What is the EAF Mapper software program and how does it help project sponsors and lead agencies to complete the new forms?

Using the EAF Mapper, a project sponsor can obtain answers to certain spatial information questions contained in Part I simply by identifying the proposed project location. Six questions on Part 1 of the Short EAF and up to 20 questions in Part 1 of the Full EAF will be completed by the EAF Mapping software. The EAF, as completed by the Mapper program, can then be electronically saved to allow for completion of remaining questions on the form. This should reduce the time and effort spent by project sponsors in the preparation of Part I of the EAF.

26. How complete is the spatial data used to answer questions for the new forms?

The spatial data used by the EAF mapping program to complete the new EAFs is based on the GIS data sets used and maintained by DEC, or actively maintained by various agencies and shared with DEC. The spatial data on the EAF Mapper will be updated on the same schedule as the DEC internal GIS. The only difference between the EAF mapping program data and the mapping information used by DEC staff is the inclusion of buffers in the mapping program. These buffers have been added to account for the different scales used for preparing the resource maps and the base maps, to insure that all resources are identified in the initial screen of a project, and in some cases to protect resources such as species that are classified as threatened or endangered and archaeological sites where disclosing the exact location of the resource may be detrimental to the protection of the species or artifact.

27. Can an applicant disagree with the answers provided by the EAF Mapper software?

Yes. The use of buffers will mean that some projects will receive an answer that the site may be close to a mapped resource. If the project sponsor believes that a project location is within the buffer area but sufficiently far enough away from the resource to render the issue not relevant or non-significant they may need to provide more specific supporting information to the reviewing agency as part of its EAF submission. A project sponsor, involved agency or the public can confirm the information provided by the spatial data platform through site visits and the use of consulting services if technical assistance is needed.

28. Does the lead agency have to confirm the answer provided by the EAF Mapper software if the program determines that a resource is not present on, or adjacent to, the proposed project site?

No. Given the incorporation of a buffer into the spatial data there should not be any need to confirm the data provided by the EAF Mapper software when it determines that the project site does not contain or is not located in proximity to a mapped resource.

29. Will a project sponsor need to hire a consultant to complete the new EAFs?

The short EAF was designed to be completed without the need for consultant services. If a project sponsor uses the EAF Mapper it will provide an answer to the 6 place-based questions contained in Part 1 of the short EAF. The remaining 14 questions depend on the project sponsor's specific knowledge of the site and the proposed activity. Also, the short EAF Workbook will provide background information and guidance, including illustrative

examples, should the project sponsor needs any assistance. A project sponsor can always obtain the services of a consultant but many project sponsors for Unlisted actions will find that using the short EAF Workbook and the EAF Mapper are sufficient to answer the Part 1 questions.

The full EAF which is required for all Type I actions may require the services of a consultant depending on the size and nature of the proposed project. The EAF Mapper software will provide the answer to approximately 20 of the place-based questions contained in Part 1 of the full EAF and the workbook will provide background information and guidance, including illustrative examples. However, depending on the technical capability of the project sponsor there may be questions that will require the services of a consultant. Currently, many project sponsors for Type I actions hire consultants to assist in the completion of the full EAF and the supporting materials needed for an application for local and state permits. We expect that this will continue.

30. If I hire a professional consultant, will they have to follow the workbooks?

No. Project sponsors and agencies are free to use or not use the workbooks. The workbooks are intended to serve as a resource tool on how to complete the EAFs.

31. Can the workbooks be used to challenge the information contained in EAFs?

If a project sponsor or agency has consulted the workbooks and used them to help in the completion of an EAF and in the conduct of an environmental assessment, they should have a solid record in support of their actions. The public (who has always played a major role in the review of projects) could consult the workbooks as they submit questions or comments on an environmental assessment.

B. Determining Significance

In This Section You Will Learn:

- what is involved in making a determination of significance;
- how to assess direct impacts, related impacts, primary and secondary impacts, shortterm and long term impacts, and cumulative impacts; and,
- options to address non quantitative impacts such as visual, community character, growth inducement, economic cost and social impact.

A. General

1. What is a determination of significance?

A determination of significance is the most critical step in the SEQR process. This is the step in which the lead agency must decide whether or not a proposed Type I or Unlisted action is likely to have a significant adverse impact upon the environment. If the lead agency finds one or more significant adverse environmental impacts, it must prepare a positive declaration identifying the significant adverse impact(s) and requiring the preparation of an Environmental Impact Statement (EIS). If the lead agency finds that the action will have no significant adverse impacts on the environment, no EIS is necessary and the lead agency must prepare a negative declaration.

2. What is "significance"?

The SEQR regulations recognize the subjectivity of the term "significance".

Two key characteristics of possible impacts that should be considered in determining significance are "**magnitude**" and "**importance**". Magnitude assesses factors such as severity, size or extent of an impact. Importance relates to how many people are going to be impacted or affected by the project; the geographic scope of the project; duration and probability of occurrence of each impact; and any additional social or environmental consequences if the project proceeds (or doesn't proceed). Each impact of an action must be judged by these two characteristics. Generally, bigger impact (larger "magnitude") projects are more likely to need more detailed analysis. The characteristic of "importance" requires us to look at an impact in relation to the whole action. The short or long term or cumulative nature of the impacts also need to be considered.

For example, a bridge is proposed to cross a river. Potential erosion during construction could be large in magnitude. If the stream into which the eroded soil would fall is presently a relatively "muddy" stream, already carrying large quantities of sediment, the addition of such a temporary load during construction would likely not be important. However, if the same amount of material were to wash into a clear trout stream, particularly during or immediately following spawning, or to settle downstream in a productive wetland, this impact should be viewed as more important because of the high value of the wetland and trout stream resources.

The SEQR regulations provide an orderly, comprehensive process for identifying those actions that may be significant. However, SEQR allows implementing agencies the flexibility to accommodate differing community settings and perceptions in assigning importance. SEQR thus recognizes that different lead agencies in different locations in the state, using the same techniques and information, may arrive at different determinations about the environmental significance of a proposed action.

For example, a two hundred unit apartment project which may be environmentally significant in a small town, may be insignificant if it were to be built in a large urban center. Similarly, traffic, sewer, water and waste disposal issues may be of little concern in a city, but may be major problems in a small town.

3. What factors must a lead agency consider in making a legally sufficient determination of significance?

In making a legally sufficient determination regarding significance, the lead agency must:

- identify all relevant environmental impacts,
- thoroughly analyze these potential impacts, and
- provide a written explanation of its reasoning in concluding that the proposed action may cause, or will not cause, significant adverse environmental impacts (see [617.7](#)).

The information and reasoning in a determination of significance should be presented in a logical, comprehensive, understandable manner. A legally sufficient determination of significance implies that a lead agency has in its possession, and can demonstrate that it has considered at least the following:

- the entire action (see [Segmentation](#));
- the environmental assessment form (EAF);
- any other information provided by the applicant, including the underlying application;
- the criteria for determining significance found in [617.7\(c\)](#) ; and
- any input from involved and interested agencies, interested organizations or other groups of people and the general public.

Furthermore, the reasoning used by the lead agency in concluding that no significant adverse impacts will be caused is essential in justifying a negative declaration. Also note that “sufficiency” is distinct from the term adequate, which is found later in SEQR ([617.9\(a\)\(2\)](#)) in the discussion of assessing whether or not a DEIS is ready for public review.

In addition, the lead agency is encouraged to review its files on previous significance determinations involving similar projects or geographic locations. It is important to remember that each determination of significance an agency makes may provide guidance for future determinations. To some degree these determinations set precedents and reflect community values. Also, existing resource inventories that provide information about significant environmental factors should be considered.

4. Are there specific criteria for determining the significance of an action?

Yes. The criteria are listed in 617.7. These criteria assist the lead agency by focusing attention on a wide range of important environmental considerations.

5. May other criteria than those listed in 617.7 be used to determine significance?

Yes. The list in 617.7(c) is illustrative, not exhaustive. Agencies may develop additional criteria to those listed in 617.7(c), especially if past experience has indicated the importance of particular considerations with respect to actions frequently encountered by an agency. Such additional criteria should be developed and adopted in accordance with rules governing individual agency implementation of SEQR, see [617.14\(e\)](#).

6. May an action with one or more significant adverse environmental impacts receive a negative declaration if there are balancing social and economic benefits?

No. The determination of significance is a threshold determination which should not balance benefits against harm, but rather should consider whether a proposal has any probable significant adverse impacts. Such balancing may only be done in Findings following an EIS.

For example, a sewage treatment plant designed to improve the environment may also have significant adverse impacts due to its proposed location. In this circumstance, the lead agency should not consider the benefits of the plant in making a determination of significance, but should make a positive declaration on the action. However, any mitigation measures proposed by the applicant as part of the action should be considered by the lead agency in seeking ways to reduce or eliminate environmental impacts.

7. Can regulatory permitting conditions and normal administrative procedures (such as a Town Engineer reviewing construction plans for adequacy) be considered mitigation and thereby affect the determining of significance?

No. There may be situations where a developer agrees to make certain modifications to a project while it is being reviewed and this should not be construed as mitigation. In such cases, however, the need for mitigation may be lessened. Likewise, these modifications should not be construed to be a substitute for a thorough assessment of the project for significance of impact.

In [Shawangunk Mountain Environmental Association v. Planning Board of the Town of Gardiner \(1990\)](#), the court found that certain project conditions, agreed to by the developer, which the planning board used as a basis for a negative declaration did not justify the negative declaration that was issued. While the Court found that changes to the project eliminated some impacts, the overall scope of the project was not substantially reduced and the conditions did not clearly eliminate the issues of environmental concern.

8. Can an involved agency supersede the lead agency's determination of significance in coordinated review?

No. When coordinated review has occurred for Type I or Unlisted actions, the determination of significance by the lead agency is binding on all involved agencies.

9. Can a negative declaration issued during uncoordinated review be superseded by another agency determination that an adverse impact may occur?

Yes. In uncoordinated review, if one agency issues a negative declaration, another involved agency also conducting uncoordinated review may supersede it by making a positive declaration. As provided in [617.6\(b\)\(4\)\(ii\)](#), if an agency conducting an uncoordinated review determines that an action may have a significant adverse impact, it must then coordinate review with other involved parties. At this point, the uncoordinated review ceases and coordinated review is initiated. All agencies that have not yet made a final decision on the proposed action must wait until completion of the SEQOR process.

10. How much time does the lead agency have to make a determination of significance?

In cases involving applicants for funding or approvals, the lead agency must make a determination of significance within twenty calendar days of its receipt of an EAF and application and other reasonably necessary information, or within twenty calendar days of its establishment as lead agency, whichever comes last. For direct actions by an agency, where there are no other parties involved and no "triggering" of the time clock by submission, circulation or receipt of an EAF, a determination of significance should be made as early as possible in the formulation of plans for an action, and before any authorization is granted which commits an agency to a particular action.

11. Must an EIS be prepared for all Type 1 actions?

No. Type I actions do not automatically require an EIS. Conversely, Unlisted actions are not automatically non-significant. The lead agency must determine the environmental significance of Type I and Unlisted actions on a case-by-case basis.

B. Types of Impacts

12. Are the immediate impacts of an action all that must be considered in determining significance?

No. An environmental assessment and a determination of significance must include consideration of the potential for primary (direct) and secondary (indirect) impacts, long and short term impacts and cumulative impacts of an action.

13. What is meant by primary and secondary impacts?

A primary (direct) impact is one that occurs at the same place and time as the proposed action and that is likely to occur as an immediate result of the action. For example, the construction and operation of an office building may create traffic impacts from heavy equipment operation, as well as additional commuting traffic.

A secondary (indirect) impact is one which is reasonably foreseeable, occurs at a later time or at a greater distance, and is likely the result of the action. There should be a reasonably close causal relationship between the action and the environmental impacts. Secondary impacts can be of a wide variety and may include growth inducing effects and other effects related to changes in the pattern of land use, population density or growth rate, and air and water and other natural systems, including ecosystems. For example, the construction and operation of an office building may result in off-site construction of service facilities or related businesses. Widening, crowning and paving of a narrow secondary road that is a local "short cut," may result in increased development of the lands along the road. Changes in population patterns or community character likely to be induced by a project have been held by the courts to be relevant concerns in environmental review (see [Chinese Staff and Workers Association et al., v. City of New York et al, 1986](#)).

14. What are short and long term impacts?

Short term impacts are the immediate and temporary result of an action, for example, noise, dust and truck traffic during construction of a building. Long term impacts are the

continuing impacts from an action over time, for example, impacts to community health from the long term operation of an industrial plant with substantial air emissions or the commuting traffic resulting from the completion of a new office building.

In identifying and evaluating long term impacts, it is important to understand that some impacts may have to be assessed in terms of significance over time. For example, while local water supply may be adequate to support the initial stages of a residential development, the supply may be inadequate to support that development at full build out

15. How far into the future must a lead agency look in making a determination of significance?

There are no prescribed standards, but an environmental assessment must be limited to impacts that are probable, not speculative. Any long term impact of an action which is reasonably foreseeable must be considered. Potential for re-occurrence, frequency and duration of occurrence may also be factors for determining significance over time. Also, if the reasonably foreseeable potential impacts could be severe, even a low probability impact should be considered.

- For example, if a developer is planning to build a subdivision in two phases, it is reasonable for the lead agency to assume that the second phase will be built to consider the impacts of full build out of both phases on stormwater runoff, traffic patterns, water and sewer capacity, and nearby wetlands or protected streams.
- On the other hand, if a developer owns a large parcel of land, but applies for approval to develop only a small portion of the property and asserts they have no additional plans for the remainder of the property, it may not be reasonable for the lead agency to require plans for a full build out. However, a lead agency may generally address impacts as if the land were to be fully developed per local zoning.

16. What are cumulative impacts?

Cumulative impacts occur when multiple actions affect the same resource(s). These impacts can occur when the incremental or increased impacts of an action, or actions, are added to other past, present and reasonably foreseeable future actions. Cumulative impacts can result from a single action or from a number of individually minor but collectively significant actions taking place over a period of time. Cumulative impacts do not have to all be associated with one sponsor or applicant. They may include indirect or secondary impacts, long term impacts and synergistic effects.

17. When must cumulative impacts be assessed?

Cumulative impacts must be assessed when actions are proposed, or can be foreseen as likely, to take place simultaneously or sequentially in a way that the combined impacts may be significant. As with direct impacts, assessment of cumulative impacts should be limited to consideration of reasonably foreseeable impacts, not speculative ones.

Assessment of potential cumulative impact assessment should be done under the following circumstances:

- If two or more simultaneous or subsequent actions themselves are related because

- one action is an interdependent part of a larger action or included as part of any long range plan;
- one action is likely to be undertaken as a result of the proposed action or will likely be triggered by the proposed action;
- one action cannot or will not proceed unless another action is taken or one action is dependent on another; or
- If the impacts of related or unrelated actions may be incrementally significant and the impacts themselves are related.

Another factor in examining whether two or more actions should be considered as contributing to cumulative impacts, is whether the two actions are in close enough proximity to affect the same resources. Examples include construction along a single road segment, hydrological connections, or demands on the same water or sewer system.

18. What are some examples where cumulative impacts should be considered?

- A single action carried out in steps or phases, such as the construction of an industrial park that will gradually add separate businesses that discharge to a single receiving water, the construction of a residential subdivision in phases (each increasing the traffic impacts at a common access point), or the rebuilding of a highway including road widening and interchange reconfiguration.
- A single action inducing one or more secondary actions, e.g., the expansion of a public water system inducing residential subdivision of an area previously constrained from growth due to the unavailability of potable water.
- Two or more different actions occurring simultaneously e.g., placing of fill in a wetland and discharging wastewater to the same wetland.
- Two or more different types of actions carried out in a planned sequence, e.g., the expansion of a sewage treatment facility in preparation for, and followed by the development of a new residential area;
- Repetition of the same type of impact, e.g., placing of fill in a wetland by several different entities, or the construction of several residential developments that will obtain water from the same source.
- It is reasonable to assume that vacant lots in a growing development will be filled in. This may be important in an area subject to severe erosion, an area with tidal or freshwater wetlands, or an area not served by a public water system that has an overtaxed aquifer below it.

19. Is there a threshold for, limitations to, or boundaries on the number of actions for which cumulative impacts must be considered?

There is no minimum or maximum number. If two or more actions affecting the same resource(s) are proposed at about the same time, or one after the other, their cumulative impact may be significant. If a third action is subsequently proposed, the need to examine cumulative impact may be even more important. For example, multiple developments using the same road segment, sewage treatment plant or water supply may incrementally increase existing impacts to a significant level.

Courts, however, have set some limits and standards for when a lead agency may consider cumulative impacts. The lead agency must clearly articulate one or more specific basis for requiring cumulative impact assessment:

- the actions themselves can be demonstrated to be clearly related;

- two or more separate actions can be demonstrated to be likely to cause specific impacts on a specific, single resource; or
- two or more actions are proposed within a designated protected resource area for which an adopted management plan exists.

Note that in all such cases, the lead agency must clearly articulate the functional connections of potential impacts to resources, as courts have generally not accepted proximity alone as a basis for requiring cumulative impact analysis.

20. Are there any other limitations on the consideration of cumulative impacts?

Some court cases have ruled on situations that appeared to be candidates for cumulative impact analysis, but which were found not so due to lack of an adopted governmental long-range plan. In *Long Island Pine Barrens Society, Inc. v. Brookhaven* (1992), for example, the petitioners commenced a proceeding to require that 224 discrete development projects spread across three Long Island towns be made to consider their cumulative environmental impact on the Long Island Pine Barrens. The court held that the adoption of various protective laws, policies and directions to prepare a long-range plan for the Pine Barrens was not a sufficient basis to tie the 224 developments together. The Court stated that the existence of a broadly conceived policy regarding land use in a particular locale is simply not a sufficiently unifying ground for tying otherwise unrelated projects together and requiring them to be considered in tandem as 'related' proposals...". Also, in another instance, the Appellate Division, Second Department, citing the Long Island Pine Barrens case, held that just because various projects were proposed in the same critical environmental area that fact did not by itself mandate the Town of Riverhead to evaluate and consider the cumulative impacts of the projects together. See [North Fork Environmental Council, Inc. v. Janoski \(1993\)](#).

21. Does a Lead Agency have any other mechanism to help it address cumulative impacts?

Yes. Within SEQR, a lead agency may use a Generic Environmental Impact Statement (GEIS) to address impacts of multiple actions within a defined geographic area. ([See 617.10](#)).

In addition, preparation of a municipal comprehensive plan plus adoption of local zoning consistent with that plan, allows a municipality to anticipate potential cumulative impacts and design local land use rules to avoid those impacts.

22. What is a synergistic effect and how must it be treated for SEQR purposes?

Synergistic environmental impacts are caused by an interaction between two or more direct adverse environmental impacts, where the combined impacts are more severe than the sum of the individual effects. For example, nitrogen oxides and sulfur dioxide air contaminants have been demonstrated to have a more severe combined effect, as "acid rain", on certain vegetation than either of these contaminants individually. When synergistic effects are likely to be of environmental importance, they must be considered in a determination of significance.

23. Are there impacts on non-physical resources that should be considered when determining significance?

Yes. There may be environmental impacts related to various community or regional values not necessarily associated with physical resources. Examples would include visual impacts, impairment of community character, growth inducement and social and economic conditions which are discussed below.

24. Why should the significance of visual impacts be considered under SEQR?

The courts have upheld inclusion of effects on scenic views as an element of the SEQR review process, for example, in the case of a new radio transmission tower proposed to be constructed near the F.D. Roosevelt estate on the Hudson River (see [WEOK Broadcasting Corp. V. Planning Board of Town of Lloyd 1992](#)).

25. What methods or resources may a lead agency use in assessing potential visual and aesthetic impacts?

Because the quality of an aesthetic resource cannot be determined by a precise formula and because opinions may vary concerning the evaluation of visual impacts, there exists a widespread, but erroneous, notion that aesthetics analysis is hopelessly subjective. Instead, research has clearly established that landscape preference and perception are not arbitrary or random, so that along with some variability there is substantial regularity in the perceptions of significant adverse and beneficial visual impacts. It is upon this regularity of human judgement concerning aesthetics that objective decision-making depends.

Developing an objective process for considering visual impacts is most effective if undertaken before controversial projects appear. To establish or clarify values, policies and priorities related to existing visual resources, agencies or municipalities should conduct an inventory of visual resources within their jurisdictions. Such surveys need not be elaborate, but are a recommended feature of any comprehensive planning process that the agencies or municipalities may undertake. The prime objective is to be proactive and identify visual resources that are significant within that jurisdiction and could be adversely affected by potential development.

To evaluate potential visual impacts likely to result from individual proposed projects, the [Visual EAF Addendum](#) [(Appendix B of 617.20) (pdf, 936 kb)] may be used by the lead agency to supplement the EAF. The Visual EAF Addendum form highlights the objective components of visual impact analysis, such as:

- Whether the value of the aesthetic resource has been established by designation? For example: State Park, designated scenic vista, designated open space, etc.
- How many people could observe the potential impacts?
- Under what circumstances or contexts would the impacts be visible?
- How far away from the aesthetic resource is the viewer?

When the responses to these and other pertinent questions are compiled about potential impacts to aesthetic resources, the lead agency will know, for example, whether the resource is designated as important, is viewed by thousands of people annually when they use the resource (e.g. park), or if the potential impact is adjacent to that resource. Based

on this systematic assessment, the lead agency will then be able to consider visual impacts in developing its determination of significance.

26. Has DEC developed any additional resources for assessing visual impacts?

The DEC guidance policy "[Assessing and Mitigating Visual Impacts](#)" (pdf, 302 kb) was developed to provide direction to Department staff for evaluating visual and aesthetic impacts generated from proposed facilities. The policy and guidance defines what visual and aesthetic impacts are; describes when a visual assessment is necessary; provides guidelines on how to review a visual impact assessment; differentiates State from local concerns; and defines avoidance, mitigation and offset measures that eliminate, reduce, or compensate for negative visual effects.

The cornerstone of the DEC guidance document is its inventory of aesthetic resources of statewide or national significance. The scenic and aesthetic resources identified in the guidance have all been protected by law or regulation, and are therefore special places that the public has deemed worthy of protection due to the inherent aesthetic value associated with the resource. For example, one category is [state](#) and [national parks](#), which have been established by government to protect unique resources, and are accessible for use and appreciation by the public.

The DEC guidance defines State regulatory concerns, and separates them from local concerns. However, the DEC guidance may be used as a model by other agencies or municipalities. Once local authorities have officially identified locally important visual resources, the guidance may be used to assist a lead agency in systematically evaluating potential visual and aesthetic impacts from a proposed development.

27. How do visual impacts differ from community character impacts?

Visual impact assessment considers a single class of resource. While visual resources may contribute to a community's perception of its character, a number of other resources should also be assessed or evaluated to enable a more thorough description of a community's character.

28. Why is "community character" an environmental issue?

The Legislature has defined "environment" to include, among other things, "...existing patterns of population concentration, distribution or growth, and existing community or neighborhood character" (see [ECL 8-0105.6](#)). Court decisions have held that impacts upon community character must be considered in making determinations of significance even if there are no other impacts on the physical environment.

29. How can you determine whether an impact upon community character may be significant?

Community character relates not only to the built and natural environments of a community, but also to how people function within, and perceive, that community. Evaluation of potential impacts upon community or neighborhood character is often difficult to define by quantitative measures. Courts have supported reliance upon a municipality's comprehensive plan and zoning as expressions of the community's desired future state or character. (See [Village of Chestnut Ridge v. Town of Ramapo, 2007](#).) In addition, if other

resource-focused plans such as Local Waterfront Revitalization Plans (LWRP), Greenway plans or Heritage Area plans have been adopted, those plans may further articulate desired future uses within the planning area.

In the absence of a current, adopted comprehensive plan, a lead agency has little formal basis for determining whether a significant impact upon community character may occur.

- Examples of actions affecting community character that have been found to be significant include: the introduction of luxury housing into a working-class ethnic community, and construction of a prison in a rural community.
- Examples of actions found not to be significant include low income housing and shelters for the homeless proposed to be located within existing residential areas.

30. What is growth-inducement?

Some activities will encourage or lead to further increases in population or business activity. This type of secondary impact is called growth inducement. When conducting an environmental assessment, it is important to recognize activities which may induce growth because a consideration of the whole action must examine likely impacts of such growth, such as the need for additional sewer, water and other services; increased traffic congestion; or accelerated loss of open space.

31. What are some examples of growth inducement?

The following are examples of how actions may induce growth-related impacts:

- The extension of public utilities such as sewer and water into an agricultural area, previously not serviced by these utilities, may encourage non-farm development and undermine the area's agricultural base.
- The construction of a new prison in a rural community may result in the construction of single family homes and support industries or businesses to serve the prison staff.
- The construction of a new interchange on a limited access highway may cause the construction of fast food establishments, motels and gasoline stations catering to highway travelers.
- The expansion of an existing sewage treatment plant may result in the construction of additional single family homes and businesses within the plant's service area.
- The stocking of a species of game fish in a particular water body may increase the number of anglers using that water body, which may lead to the construction of businesses catering to those anglers.

32. How do you assess the significance of growth inducement?

The method for determining the significance of an induced impact is the same as for any other impact. First, consider the likelihood that the proposed action may induce further development. Then, identify the type of activities and the impacts that would result and determine whether any of them may have a significant environmental effect. When discussing potential growth inducement, it is desirable to quantify or at least estimate the anticipated growth, and to document predictions and data.

33. Is growth inducement always an adverse impact?

No. Growth in and of itself is not always negative. If the growth induced by a project is consistent with the applicable zoning and the community's comprehensive plan, it may be viewed as a positive impact that has been planned for and beneficial to the community.

34. May determinations of significance be based on economic costs and social impacts?

No. A determination of significance is based on the regulatory criteria relating to environmental significance. If an EIS is required, its primary purpose is to analyze environmental impacts and to identify alternatives and mitigation measures to avoid or lessen those impacts. Since the definition of "environment" includes community character, these impacts are considered environmental. However, potential impacts relating to lowered real estate values, or net jobs created, would be considered economic, not environmental. Social and economic benefits of, and need for, an action must be included in an EIS. Further, in the findings which must be issued after a final EIS is completed, environmental impacts or benefits may be balanced with social and economic considerations.

C. Positive Declarations

In This Section You Will Learn about:

- what is involved in the preparation and issuance of a positive declaration; and,
- information on rescinding a positive declaration.

1. What is a positive declaration?

A positive declaration, or "pos dec", is a determination by the lead agency that an action may result in one or more significant environmental impacts and so will require the preparation of an EIS before agency decisions may be made regarding the action. The positive declaration starts the EIS process.

2. Are there standards or thresholds for a positive declaration?

Yes. A lead agency must prepare a positive declaration if it finds, based on comparing the information in the EAF to the criteria in the SEQR regulations (see [617.7\(c\)](#)), that one or more adverse environmental impacts may be significant. The following are also considerations:

- The significant impact(s) must relate to an environmental effect. Economic or social factors do not constitute a basis for a positive declaration.
- The lead agency has taken a hard look at the relevant impacts in assessing the potential for significance.
- The basis for the positive declaration is reasonably consistent with other determinations of significance by the same agency, given similar facts.
- Whether the project, as proposed, includes mitigation measures that would eliminate one or more of the potentially significant adverse impacts, or reduce one or more impacts to a level of non-significance.

3. What information must be contained in a written positive declaration?

The regulations discuss the contents of a positive declaration in [617.12\(a\)](#). A positive declaration must contain:

- A statement that it is a positive declaration for purposes of Article 8 of the Environmental Conservation Law;
- The name and address of the lead agency;
- The name, address and telephone number of a person who can provide further information;
- The SEQR classification of the project (action);
- A brief and precise description of the nature, extent and location of the action;
- A brief description of potential significant environmental impacts that have been identified to support the positive declaration, and a statement that these impacts will require the preparation of an Environmental Impact Statement (EIS);
- A statement as to whether or not scoping will be conducted in preparation for the EIS;

4. Where can I find the filing requirements for positive declarations?

Filing requirements for a positive declaration are contained in [617.12\(b\)](#).

5. Must a positive declaration be made if conditions of approval for the action would eliminate or adequately mitigate the potential significant impacts?

If the agency's jurisdiction contains objective standards that eliminate or adequately mitigate all identified significant adverse environmental impacts, the agency would have a basis for concluding that the action, as ultimately approved, would have no adverse impacts, and could therefore issue a negative declaration. If only some of the identified adverse environmental impacts are addressed by the jurisdictional standards, a positive declaration would still be required.

6. May a positive declaration ever be issued after an action has been initially determined to not have any significant adverse environmental impacts?

Yes, under either of two circumstances:

- If a negative declaration has been issued by an agency with regard to an Unlisted action during uncoordinated review, but a second agency subsequently determines there may be significant adverse environmental impacts from the action, then the second agency may issue a positive declaration after initiating coordinated review. If the first agency has not yet directly undertaken, funded or approved its aspect of the action, it must wait until the EIS process has been completed before making its final decision(s).
- If, after a lead agency has prepared and filed a negative declaration, it is presented with significant new information, a project modification, or other changes in circumstances which lead the agency to conclude that the action may result in one or more significant adverse environmental impacts, the agency must rescind the negative declaration and issue a positive declaration.

7. May a positive declaration be rescinded in favor of a negative declaration?

There are no specific provisions in SEQR for rescission of a positive declaration. Modifications to a proposed action should be treated as alternatives within the EIS. However, it would be reasonable for a lead agency which discovers that its positive declaration was issued in error (eg. based on wrong information) to withdraw the positive declaration and issue a negative declaration that includes an explanation as to why the positive declaration was withdrawn.

8. Must a positive declaration be issued if a draft EIS was submitted in lieu of an EAF?

When a draft EIS is submitted in lieu of an EAF, it must be treated as an expanded EAF for the purpose of determining significance. While a sponsor and other agencies generally anticipate issuance of a positive declaration following submission of a draft EIS rather than an EAF, the lead agency must still evaluate the proposed action relative to the criteria for the determination of significance, and, based on identification of one or more potentially significant adverse environmental impacts, issue a positive declaration. The lead agency will then also need to determine whether the scope of the submitted draft EIS is adequate, and may even conduct formal scoping. (See [617.8](#).)

D. Negative Declarations

In This Section You Will Learn about:

- what is a negative declaration;
- how to reach the conclusion that a project should be given a negative declaration; and,
- circumstances under which a negative declaration can be amended or rescinded.

1. What is a negative declaration?

A negative declaration or "neg dec", is a determination by the lead agency that an action will not result in a significant adverse environmental impact and consequently no EIS will be prepared.

2. Are there standards or thresholds for a negative declaration?

Yes. In order for a lead agency to issue a negative declaration, it must be able to demonstrate that the action will not have a significant adverse environmental impact. In making decisions on significance, the lead agency must take a hard look at all relevant impacts of the whole action, not just those within its immediate jurisdiction, and document its reasoning in writing.

3. Can a negative declaration be based on results of future studies about potential impacts?

No. A negative declaration must be based on the facts available to the lead agency at the time of the determination. Issuing a negative declaration and then requiring the project sponsor to conduct studies to determine the magnitude of an impact is improper. At the

time the lead agency makes its negative declaration, the lead agency must have sufficient information to show that no impacts will be significant.

4. Can you balance benefits against adverse impacts to make a negative declaration?

No. A negative declaration cannot balance whether the beneficial aspects of a proposed action will outweigh its adverse impacts. Rather, the determination of significance for an action must consider whether the proposal has any probable significant adverse environmental impacts.

5. What information must be contained in a negative declaration?

As discussed in [617.12\(a\)](#), a negative declaration must contain:

- A statement that it is a negative declaration for purposes of Article 8 of the Environmental Conservation Law;
- The name and address of the lead agency;
- The name, address and telephone number of a person who can provide further information;
- The SEQR classification for the action;
- A brief and precise description of the nature, extent and location of the action; and
- A brief statement of the reasoning that supports the determination.

It is essential that negative declarations for both Type I and Unlisted actions include the description and rationale called for in the last two bulleted items above. Simply stating that the lead agency believes that the action will have no significant impact is insufficient.

6. Can a negative declaration be amended?

Yes. Subdivision [617.7\(e\)](#) provides that a lead agency may amend its negative declaration at any time prior to undertaking, funding or approving an action, if it concludes that it must consider project modification, or a change in circumstances compared to what was previously addressed, while still concluding that the action will have no significant adverse environmental impacts. The amended negative declaration must be prepared, filed and published in the same manner as the original negative declaration.

7. Can a Negative Declaration be rescinded?

Yes. Subdivision [617.7\(f\)](#) provides that, if a lead agency determines at any time prior to undertaking, funding or approving an action that a significant environmental impact may result from a project modification or from a change of circumstances which was not previously addressed, the lead agency must rescind its original negative declaration. The lead agency must inform other involved agencies and the applicant of its intent to rescind the negative declaration, and must allow the applicant a reasonable opportunity to respond before the rescission takes effect. The lead agency must issue its new determination of significance after considering the applicant's comments. The new determination of significance must be prepared, filed and published according to the rules in 617.12.

A negative declaration cannot be rescinded after the lead agency has issued its final decision on the action. However, should the final decision be revoked or overturned, a new determination of significance would be needed for any reconsideration of the action.

8. Can a project be denied after a negative declaration?

Yes, but the basis for denial must generally be based on the failure of the project to meet specific numerical or technical standards not relating to the environmental significance of the project, or for reasons other than general environmental impacts.

Example: The action proposed is the construction of a convenience store on a small lot in an area that has been zoned as residential. While there may be no significant adverse environmental impacts because the lot is in an already-developed area, the project does not meet lot line setback requirements, and is obviously not a residential use of the land. The applicant requests lot line and use variances citing the relatively small number of cars that will be parked at the store at any one time, the fact that fences are proposed to screen the store from the immediate neighbors, and the service to the community in providing a store within walking distance of many homes.

Landowners of the adjacent properties complain that the location of the store so close to the lot lines will lessen their ability to enjoy their property, and may reduce their property values. Almost all the area residents are vehemently opposed to the granting of the use variance which will intrude on the residential nature of the neighborhood. They also worry about the more "transient" traffic endangering small children, and the increasing probability for litter and noise degrading their neighborhood. Also, there are two existing convenience stores, relatively close by, in a commercially zoned area.

A negative declaration would be a logical conclusion to the SEQR review of this project based on its lack of significant adverse environmental effects, but the Zoning Board of the town would be well within its authority to deny the requests for variances based on the failure of the variance requests to meet the tests for variance issuance.

9. Is there a public comment period required on a negative declaration?

No comment period is required after a negative declaration. However, a comment period is required in the case of a conditioned negative declaration. See [617.7\(d\)\(1\)\(iv\)](#).

10. May an agency issue a draft negative declaration?

The concept of preparing a draft negative declaration and circulating it for public review is not addressed in Part 617. Some agencies have used this approach as a way of obtaining public input prior to the agency's final determination of significance. The use of a draft negative declaration is not prohibited and, for certain actions, it may provide an additional mechanism for public input.

11. May a lead agency rely on the expertise of an involved or interested agency in making its negative declaration?

Yes. If an involved or interested agency with expertise on an issue has stated that there will be no significant impact from part of an action on resource factors in its area of expertise, the lead agency may reasonably rely on those statements to support its negative

declaration. Example: when the Department of Health has determined that the quality and quantity of a water supply for a residential property is adequate, the lead agency may use that conclusion in support of the negative declaration.

12. May a lead agency consider project changes offered by the applicant in reaching a negative declaration?

Yes, as long as the changes are developed as part of an open review process, and those changes are incorporated by the applicant into the ultimate design submitted for approval. See [Merson v. McNally](#) (1997).

E. Conditioned Negative Declarations (CNDs)

In This Section You Will Learn about:

- circumstances when a CND is most appropriate;
- how public comment on a CND should be considered;
- time deadlines and filing requirements for a CND; and
- information on amending and rescinding a CND.

1. What is a Conditioned Negative Declaration?

A conditioned negative declaration (CND) is a form of negative declaration which may be used for Unlisted actions only, and only in limited circumstances. Use of a CND can be appropriate when a lead agency concludes that a proposed action may have a potentially significant adverse impact on the environment, but the impact can be eliminated or adequately mitigated by conditions imposed by the lead agency, without the need for additional environmental studies. Use of the CND acknowledges that without imposition of conditions by the lead agency, the action may have potentially significant impacts. In situations where those impacts are readily mitigated or avoided, use of the CND allows an agency to issue an approval with enforceable conditions. When a lead agency uses the CND process it must consider the whole action and all relevant impacts in identifying appropriate conditions.

2. Must a CND meet the conditions of legal sufficiency expressed in [617.6\(g\)\(2\)](#) in the same fashion as other determinations of significance?

Yes. A CND must show, in written form, that the whole action was considered and that all relevant areas of environmental concern were identified and thoroughly analyzed. A reasoned elaboration must be given as to why any areas of concern would not constitute significant adverse environmental impacts. The lead agency must document its conclusion that any potential impacts are not significant, or that any potentially significant impacts would be adequately mitigated through either the standards within the jurisdictions of the lead and other involved agencies, or through the special conditions of the CND.

3. Are there specific procedural requirements when a lead agency uses a CND?

Yes. A lead agency must meet certain requirements to issue a CND:

- A CND may only be used for Unlisted actions that are initiated by applicants and that require agency approval or a decision to provide funding. A CND may not be used for projects where the lead agency is the applicant, nor for Type I actions;
- Issuance of a CND must be based on coordinated review (see [617.6\(b\)\(3\)](#)), thereby providing opportunity for full consideration of the concerns of other involved agencies;
- A lead agency must use the full Environmental Assessment Form (EAF), rather than the short EAF otherwise allowed for Unlisted Actions;
- The conditions imposed must be explicitly set forth in the CND
- The lead agency must publish notice of the CND, including a summary of proposed conditions in the [Environmental Notice Bulletin](#) (ENB), a weekly publication of the NYS Department of Environmental Conservation. An agency may also use its own notice and review procedures;
- The lead agency must allow a minimum of 30 days for public comment on the CND and proposed conditions;
- The lead agency must meet all notice and filing requirements of [617.12](#), in the same manner as for Type I actions;
- The lead agency must consider all comments received; and
- Based on its initial assessment and all substantive comments received, the lead agency must decide whether to finalize the CND, or rescind the CND and issue a positive declaration.

4. What is an agency required to do in response to comments received during the public comment period?

The lead agency is required to review all comments received during the public comment period to determine if they raise substantive issues and are relevant to the adequacy of the CND. This review may result in a lead agency taking one of the following options:

- If the comments received are not relevant to the adequacy of the mitigation or they raise issues which are determined to be non-substantive, the lead agency is not required to take any further procedural action. The lead agency may, in order to provide for a legally sufficient record, choose to respond to the comments explaining why they were determined to be not substantive.
- If comments are received that suggest improvements to an already adequate mitigation measure or a better way to mitigate the impact, the lead agency has the discretion to make a minor adjustment to the CND. This type of minor revision to address comments that will strengthen an already adequate mitigation measure would not require that the lead agency go through the CND process again or require the preparation of a draft EIS. The lead agency may, as indicated in the first option above, choose to respond to the comment stating the revision that was made to the CND.
- If comments are received that, in the lead agency's judgment, identify potentially significant environmental impacts that were not considered in the CND or were inadequately considered or provide substantive information regarding the inadequacy of the proposed mitigation measures, but the impacts can be adequately mitigated or eliminated, the lead agency may revise the CND and renotice for another minimum 30-day public review period.
- If comments are received that, in the lead agency's judgement, would support the preparation of a draft EIS because they
 - identify potentially significant environmental impacts that were not considered in the CND or were inadequately considered or

- provide substantive information regarding the inadequacy of the proposed mitigation measures which cannot be adequately mitigated or eliminated;

the lead agency must rescind the CND and proceed with the preparation of a draft EIS as provided in [617.7\(b\)\(2\)](#). The lead agency would notify the applicant and prepare and file a positive declaration. In the positive declaration, reference should be made to the CND and indicate that it has been rescinded by the issuance of the positive declaration.

5. Can an agency be required to use a CND?

No. A lead agency has the discretion to decide whether or not to use a CND.

6. If an agency applies conditions to an approval that are within its authority to impose, must the agency use the CND process?

No. A lead agency need not rely on a CND to attach conditions which are explicitly-articulated standards (either numerical or narrative) within that lead agency's underlying jurisdiction, or conditions that an applicant is otherwise legally obligated to meet in order to obtain a permit or approval. Under these circumstances, the lead agency could issue a Negative Declaration, not a CND, if the effects of the action will not be significant when such conditions are imposed.

Typical examples of conditions that may be imposed based on the lead agency's underlying authority, and thus not require a CND, are:

- Requiring relocation of a building footprint during site plan approval;
- Requiring conformance to a municipality's standards for setback from lot lines;
- Meeting emission or discharge standards as required by law;
- Locating septic tanks above seasonal groundwater levels;
- Requiring erosion and runoff controls during construction; and
- Requiring a detention or retention basin for stormwater control.

7. When using a CND, must a lead agency only issue conditions that are within its specifically granted legal authority?

No. SEQR requires agencies to protect the environment and to incorporate consideration of environmental factors into the decision-making process. SEQR adds to the legal authority that agencies already have for decision making on an action when that action may affect the environment. The courts have recognized that SEQR has an "action forcing" aspect which may include the imposition of conditions to mitigate significant environmental impacts so long as the conditions are practicable and reasonably related to those impacts identified in the record. The conditions included within a CND cannot intrude on another agency's jurisdiction, however, a lead agency may include mitigation for impacts of concern to other involved agencies, based upon comments from those agencies.

8. What are some examples of situations where a CND was used?

- The proposed action was to construct a cell phone microwave tower. A number of citizens were concerned about the maintenance of the tower or the abandonment of

the structure if technology changed. The lead agency chose to issue a CND with the condition that only one tower be built as proposed and that on or before 20 years had gone by, the tower had to be removed.

- A developer proposed to construct a shopping mall on some vacant property between two other commercial businesses on a very busy highway. A high school was located directly across from the proposed mall. The lead agency issued a CND with the requirement that the applicant build a pedestrian bridge over the highway to allow the students to cross the highway safely.

9. What other types of conditions have been attached to a CND?

Other mitigating conditions which have been included in CNDs include the addition of a turning lane, location of curb cuts, addition of landscaping to screen an unsightly intrusion, or installation of an effective noise buffer.

10. Can a lead agency expedite project approvals by requiring, as a condition of a CND, that an applicant investigate and mitigate potential significant impacts which were identified during the initial review of the EAF for the proposed action?

No. It is contrary to the SEQR process to issue a permit or other approval for a project when potential significant impacts that have been identified remain un-investigated. As in the case of negative declarations without conditions, a CND is a formal determination by a lead agency that there will be no significant environmental impacts from undertaking any part of an action. If there is a potential that there may be significant environmental impacts, this should be investigated by requiring an EIS. Mitigation through a CND should only occur when the nature and extent of an impact are known, and the means of mitigating it have been decided by the lead agency. A CND should never rely on a future investigation to develop conditions of mitigation. The mitigating conditions must be explicitly defined when the CND is issued.

11. If a CND has been issued, and information is received during the comment period that indicates there are significant adverse impacts that have not been mitigated, can the applicant then modify the project, have the lead agency rescind the CND and issue a negative declaration?

No. If information or comments are received which indicate that there may be significant adverse environmental impacts which were not mitigated by the conditions of the CND, the lead agency must rescind the CND and instead issue a positive declaration. Thereafter, the lead agency must follow all the procedures for preparation and acceptance of an EIS.

12. Is there a mechanism by which an applicant can withdraw its application, incorporate the agency's conditions, resubmit the application and receive a negative declaration?

Yes. If an application, as initially submitted, incorporates mitigation measures as part of the project design to satisfy the agency's concerns about potential adverse impacts, that application would receive a negative declaration rather than a CND. Therefore, if applicants become aware of the additional mitigation measures to be imposed by the agency, they can withdraw the application prior to issuance of a CND, incorporate the appropriate mitigation measures into the project design, resubmit the application and receive a negative

declaration rather than a CND, because the action, as resubmitted, will not result in any significant adverse environmental impacts.

13. Can an applicant avoid receiving a CND for their proposed action?

Yes. An applicant may avoid the use of a CND by an agency in three ways:

- By initially proposing an action that, in the judgement of the lead agency, will not have any significant adverse environmental impacts;
- By withdrawing and resubmitting an application incorporating mitigation into the project design as in question 9 above; or
- By agreeing to prepare an EIS for the action.

14. Can an agency use the CND process for direct actions it will undertake itself?

No. The CND option is restricted to Unlisted actions proposed by an applicant which require agency approval or funding. In some circumstances, one agency may be an applicant and another agency, acting as lead agency, may choose to use the CND procedure.

15. Why can't CNDs be used for Type I actions?

The SEQR regulations distinguish between Type I and Unlisted actions to highlight those actions more likely to require preparation of an EIS. Projects categorized as Type I are typically larger and more complex actions, or actions involving sensitive areas that carry with them a greater presumption of significance. The ability of a CND to incorporate controls which readily mitigate impacts assumes smaller and less complex actions and impacts. Therefore, it is appropriate to limit CNDs to Unlisted actions.

16. When is the CND filed with the Commissioner of DEC?

The CND must be filed with the Commissioner of DEC prior to the beginning of the minimum 30 day public comment period. Submitting the CND to the Environmental Notice Bulletin for public comment satisfies this filing requirement. Typically, the CND would be filed as soon as the lead agency has developed or identified adequate special conditions.

17. When does the public comment period on the CND begin?

The public comment period on the CND begins on the date that the notice appears in the ENB. The lead agency may also use its own public notice procedures, although the ENB remains the official notification. If the lead agency uses its own public notice procedures, it must also allow at least 30 days for that notice.

18. Does an agency have to file a second copy of the CND at the conclusion of the public comment period?

If the public comment period does not raise issues that would support a positive declaration, the CND becomes effective as originally noticed, and a second notice does not have to be filed. However, if the CND is revised or amended in response to public comments, it must be renoticed for an additional 30 day public review period, in accordance with 617.12. If the CND must be rescinded and replaced by a positive declaration, the positive declaration must then be noticed and filed in accordance with 617.12.

19. What does the term "adequately mitigated" mean for a CND?

To be adequately mitigated, an impact must be reduced so that it is not significant. Depending on the impact, adequate mitigation may mean either elimination or reduction of the impact.

20. How do agencies enforce the conditions contained in a CND?

The CND, including all of the conditions with which the lead agency proposes to mitigate potential adverse environmental impacts becomes a part of the environmental review record for that project. These conditions also need to be incorporated into the lead agency's decision document within its underlying jurisdiction. As part of that decision, the mitigating conditions would then be subject to the same enforcement measures that the lead agency possesses for the underlying jurisdiction. The specific enforcement action would depend upon the remedies available in the underlying jurisdiction, but could include measures such as:

- Rescission of the permit or approval;
- Imposition of a fine;
- Compelling sponsor to remediate actions inconsistent with conditions; or
- Withdrawal of funding.

21. Can a lead agency use a CND when evaluating proposed zoning changes?

The answer depends on whether the zoning change is initiated by the municipality or a project sponsor.

If the municipality initiates the rezoning proposal, a CND may not be used because such a rezoning is a direct action. This conclusion applies whether the proposed rezoning is initiated by the municipality as part of a general rezoning, or is proposed to align the zoning of an area with its actual prevailing uses.

On the other hand, if the rezoning request is initiated by a project sponsor, a CND may be used as long as neither the proposed zoning change nor any associated project proposal exceed any Type 1 thresholds. If the change in zoning is requested by a project sponsor as part of a project proposal, the rezoning request and the proposed project should be considered as one action for purposes of the environmental review.

22. Do CNDs eliminate the need for EISs for Unlisted actions?

No. EISs will still be needed for those Unlisted actions for which:

- Significant adverse environmental impacts may occur, or an identified significant impact may not be adequately mitigated by the simple imposition of a condition;
- Alternatives to avoid the potential adverse environmental impact(s) must be explored;
- Issues raised during the public comment period support a positive declaration;
- The applicant wishes to prepare an EIS to avoid actual or perceived legal vulnerability or delay; or
- The proposed action is a direct action undertaken by an agency, and may result in significant adverse environmental impacts.

23. Is an involved agency bound by the lead agency's CND?

Yes, because CND procedures require coordination between agencies, including establishment of a lead agency to manage the environmental review of the project. As with all other coordinated reviews under SEQR, the lead agency's determination of significance is binding upon the other involved agencies. Each involved agency may still require additional conditions, consistent with its jurisdiction, when issuing its permit or approval. Additional conditions from an involved agency must be based on that agency's underlying jurisdiction and not be based solely on the lead agency's CND.

24. What can an involved agency do if it feels that a CND is not appropriate?

Depending on the stage of the review, an involved agency has several opportunities to avoid potential issuance of a CND. If a lead agency has not yet been established, the involved agency could still seek to become lead agency. If the CND has already been prepared and filed by the lead agency, the involved agency should provide, in writing, its concerns regarding the adequacy of the CND during the established public comment period. The lead agency would then have to address these concerns and either revise the CND or issue a positive declaration and call for the preparation of an EIS.

25. Can the lead agency include, as a condition in support of a CND, the requirement that the approval of another agency be obtained?

No. Conditions imposed through the CND process must be specifically designed to eliminate or minimize potential adverse environmental impacts that were identified by the lead agency based upon the full EAF and application materials. Requiring that the applicant obtain the approval of another agency, when that approval is already legally required, is not a mitigation measure. Further, a CND cannot be used to create an approval authority for an agency which has no established jurisdiction over the proposed action. Finally, the SEQR process cannot remove any underlying jurisdiction of any involved agency.

26. Does the CND process evade public review?

Compared to a conventional Negative Declaration, a CND actually provides more opportunity for public review and input because:

- A Notice of the CND must be published in the ENB and filed under the same procedures as a Type I action;
- A 30-day minimum public comment period must be provided by the lead agency; and
- The procedures mandated for CNDs require a full environmental assessment form.

27. How can a CND be challenged?

A CND is subject to challenge in the same manner as any negative declaration. The challenge would be directed at the underlying decision based on an alleged error in the CND. Some agencies may provide for an administrative appeal process, however, for most situations the challenge to a CND would require court action.

Chapter 5: Environmental Impact Statements

A. General Concepts

In This Section You Will Learn:

- contents of an Environmental Impact Statement (EIS);
- differences between specific and generic EISs;
- information on preparing stages of an EIS (draft, final and supplemental); and,
- general procedures to go from a draft EIS to a final EIS

ENVIRONMENTAL IMPACT STATEMENTS - GENERAL CONCEPTS

1. What is an Environmental Impact Statement (EIS)?

An Environmental Impact Statement (EIS) is a document that impartially analyzes the full range of potential significant adverse environmental impacts of a proposed action and how those impacts can be avoided or minimized. An EIS can be labeled as draft, final, supplemental or generic. A draft EIS is the version of the EIS which the lead agency makes available for public review and comment. In a final EIS, the lead agency responds to the substantive comments or issues identified during the public review period. A lead agency may, under specific circumstances, require a supplemental EIS to address issues that were not addressed or were inadequately addressed in either the draft or final EIS. Finally, a generic EIS may be used to address broad planning questions or multiple sites (see question 3 of this section).

2. What is the purpose of an EIS?

An EIS provides a means for agencies to give early consideration to environmental factors, and assists in the balancing of environmental issues with social and economic considerations in planning and decision making. The EIS systematically considers the full range of potential environmental impacts, along with other aspects of project planning and design. The EIS must identify and analyze significant adverse environmental impacts; evaluate alternatives to avoid one or more of those impacts; and discuss mitigation measures which could minimize identified impacts. EIS procedures also provide the means for public review and comment about a proposed action. SEQR is intended to be integrated into existing agency review procedures so that the preparation of an EIS occurs at the same time that underlying jurisdictional reviews are being undertaken.

3. What is the difference between a site specific or project specific EIS and a generic EIS?

A site or project specific EIS deals with the impacts of a particular action proposed for a specific location at a particular point in time. A site or project specific EIS is the most common type of EIS used during SEQR review.

A second type of EIS is a generic EIS (GEIS). A generic EIS may be appropriate if:

- a number of separate actions are proposed in a given geographic area and which, if considered singly, may have minor effects, but if considered together may have significant adverse environmental impacts;

- a sequence of related or contingent actions is planned by a single agency or individual;
- separate actions share common (generic) impacts; or
- a proposed program or plan would have wide application or restrict the range of future alternative policies or projects.

Information on the generic EIS can be found at [617.10](#).

4. How long must an EIS be?

There is no set length for an EIS. Accepted EISs have ranged from as little as ten pages to multiple volumes, depending on the scope and scale of the project and the level of detail needed to properly assess the impacts identified. An EIS should assemble relevant and material facts upon which an agency's decision is to be made. It should identify the essential issues to be decided and must evaluate the range of reasonable alternatives which could avoid one or more of the identified impacts.

EISs should be analytical, concise, and not encyclopedic. Lead agencies are looking for quality analyses, clear writing and comprehensive information. EISs should not contain more detail than is necessary to address the nature and magnitude of the proposed action and the significance of its potential impacts. EISs should address only those specific adverse or beneficial environmental impacts which:

- can be reasonably anticipated;
- have been identified in the scoping process;
- or both.

EISs should be written in plain language that can be read and understood by all. Highly technical material should be summarized in the text of the EIS and, if that technical material must be presented in its entirety, it should be included as an appendix. It is not necessary to include marginal information, or copies of all prior correspondence regarding the project, as a hedge against legal challenge. If an EIS contains much extraneous and unnecessary information, the impact discussion becomes diluted, and the EIS itself becomes less useful.

5. Who prepares an EIS?

A draft EIS may be prepared either by the project sponsor or applicant, or by the lead agency. It is most common for the applicant or project sponsor to prepare the draft EIS. The project sponsor or applicant has the option of preparing the draft EIS, or requesting that the lead agency do so. However, the lead agency has the right to decline to prepare the EIS, and may terminate its review of the proposed project if the applicant or sponsor still declines to prepare the EIS (see [617.9\(a\)\(1\)](#)).

A final EIS is the responsibility of the lead agency. The lead agency may prepare the final EIS itself, or request that the project sponsor respond to the substantive comments and submit a preliminary version of the final EIS. The lead agency must review a sponsor's proposed final EIS, and modify it however necessary to ensure that the final EIS represents the lead agency's assessment of the proposed project. A lead agency may also seek advice from other involved agencies and consultants in completing the final EIS.

Draft and final supplemental EISs, if needed, are also usually prepared by the project sponsor at the request of the lead agency. A generic EIS, both draft and final, is most often prepared by the lead agency itself. Under prescribed circumstances, the SEQR rules allow a lead agency to charge back costs of a GEIS to individual applicants within the studied area.

6. Would a draft or supplemental EIS contain more reliable information if it were prepared by the lead agency or an independent third party, rather than the applicant?

Draft and supplemental EISs would probably not be more reliable because applicants or sponsors know best what their original concepts are, and the draft EIS provides the opportunity to present their ideas in relation to identified potential impacts. Regardless of preparer, the draft EIS must meet the minimum content standards for an EIS, conform to the specific scope or content specified by the lead agency, and be accepted as adequate for public review by the lead agency.

During the required public review and comment period, all draft EISs are subject to public scrutiny. Involved agencies and interested parties, therefore, have the opportunity to use their comments on the draft EIS to raise questions about their specific environmental concerns, including their assessment as to whether those concerns were adequately dealt with in the draft EIS. Because responses to all substantive comments on the draft EIS must be included in the final EIS, this public scrutiny helps ensure that all relevant impacts will be adequately addressed during the EIS process. The final EIS is produced by the lead agency, and must provide guidance for all the underlying jurisdictional decisions which must be made by all involved agencies regarding the proposed project.

7. If an involved agency has no environmental concerns about an action for which an EIS is being prepared, may it make an immediate decision on the action?

No. Until a final EIS has been filed, no agency may issue a decision on an action when that agency is aware that any other involved agency has determined that the action may have a significant adverse impact on the environment.

8. Who pays for the preparation of an EIS?

If an applicant prepares an EIS, it is done at the applicant's cost. If there is more than one applicant involved in the overall action, they may share the cost of the EIS preparation. If the EIS relates to a direct agency action and no applicant is involved, the agency bears the cost of its preparation. If an agency agrees to prepare an EIS for an applicant, it may charge for such preparation, but may not charge for subsequent review activities. There is a limit on the amount that a lead agency may charge an applicant for preparation of an EIS (see [617.13](#) Fees and Costs).

9. Who determines the adequacy of a draft EIS?

The lead agency determines the adequacy of a draft EIS prior to its release for public review. (See section 5-D: Review of Draft EISs)

10. What requirements are there for attaching DEIS hearing transcripts to the FEIS?

While in all cases a summary of substantive comments from a DEIS hearing must be included in the main body of the FEIS, there is no absolute rule on how hearing transcripts should be included in the FEIS record. The hearing record can be made available for public review as part of the FEIS by either including the hearing transcript as an appendix to the FEIS, or by providing the transcript as a stand alone document, including information on where the full transcript is available. Hard copies of extremely long transcripts, for example, might be made available only with those copies of the FEIS which are filed in public repositories, while electronic copies of the hearing transcript could be provided with all other copies of the FEIS. Short transcripts may be hard copy appendices to all copies of an FEIS.

B. Scoping A Draft EIS

In This Section You Will Learn:

- what is scoping;
- purpose of scoping; and
- who participates in scoping.

1. What is scoping?

Scoping is a process that develops a written document ("scope") which outlines the topics and analyses of potential environmental impacts of an action that will be addressed in a draft environmental impact statement (DEIS, or draft EIS). The process for scoping is set out in 6 NYCRR [617.8](#).

2. What is the purpose of scoping?

The purpose of scoping is to narrow issues and ensure that the draft EIS will be a concise, accurate and complete document that is adequate for public review. The scoping process is intended to:

- ensure public participation in the EIS development process;
- allow open discussion of issues of public concern; and
- permit inclusion of relevant, substantive public issues in the final written scope.

The scoping process can also allow the lead agency and other involved agencies to reach agreement on relevant issues in order to minimize the inclusion of unnecessary issues. Finally, scoping should help the sponsor avoid the submission of an obviously deficient draft EIS.

3. Is formal scoping required for every EIS?

No. The regulations establish standards for scoping when it occurs, but they do not mandate formal scoping for all EISs.

4. What happens if formal scoping is not conducted?

In actual practice, some degree of scoping occurs in the development of every EIS. If a formal scoping process is not conducted, then scoping occurs by default with the project sponsor deciding what issues and information to include in the draft EIS. The lead agency must then assess adequacy of the draft EIS without having formally indicated to the sponsor what criteria it will use in making that assessment.

5. What are the objectives of scoping?

The scoping process has several objectives:

- Identify the significant environmental conditions and resources which may be affected by the project;
- Focus on the relevant environmental impacts to those environmental conditions and resources, thus providing the preparers with the specific issues to be addressed in the EIS;
- Eliminate irrelevant impacts or issues, and eliminate or de-emphasize non-significant impacts;
- Describe the extent and quality of information needed;
- List available sources of information;
- Specify study methods or models to be used to generate new information, including criteria or assumptions underlying any models, and define nature and presentation of the data to be generated by those studies and models;
- Define reasonable alternatives for avoiding specific impacts which must be included in the EIS, either as individual scenarios or a range of alternatives; and
- Specify possible measures for mitigating potential impacts which must be discussed in the EIS, to the extent that they can be identified at the time of scoping.

6. What are the advantages of conducting formal scoping?

Formal scoping is recommended because it provides several benefits, most importantly the "scope" itself. A scope is a written product in which the lead agency and project sponsor eliminate non-significant issues and focus the draft EIS on the most significant potential adverse environmental impacts.

A written scope of issues developed through a public scoping process benefits the lead agency and the sponsor by providing explicit guidance as to what criteria will be used to determine whether a submitted draft EIS is adequate. The written scope provides a means of ensuring that significant topics have not been missed and that the level of analysis in the EIS satisfies standards established during the scoping process.

Formal scoping can also give the lead agency and involved agencies greater control over the ultimate EIS product and ensure that the lead and involved agencies' environmental concerns are adequately addressed. Formal scoping can help reduce criticisms that an EIS is inadequate and reduce future challenges to EIS adequacy by involving the public in developing the specifications for the content of the EIS. An important component of those specifications can be agreements on specific methods, techniques, conditions or timing for new studies, which lets public comment on the DEIS focus on study results and implications for decisions.

Finally, when a scope enables the EIS to focus on just the significant adverse environmental impacts, there can be cost and time savings for all parties, including the public, because a smaller, more targeted document will need to be prepared and reviewed.

7. What are the disadvantages of not conducting formal scoping?

When there is no structured scoping process resulting in a written scope, a project sponsor prepares a draft EIS based on comments from the involved agencies and issues identified in the positive declaration but without further written submissions or public input. This limited input may be adequate for small, readily-defined actions with a relatively narrow range of clear-cut impacts or issues. In general, though, EIS's without scopes often attempt to discuss every topic conceivable, which takes focus away from significant and relevant issues. A lead agency also risks not discovering issues or resources of local importance, or overlooking sources of information and local or site history if it does not use public scoping. Finally, without public scoping, the lead agency may fail to meet all involved agency interests.

8. Is there a time period for scoping?

Yes, 60 days. Under 617.8, the scoping period starts when the project sponsor files a draft scope with the lead agency. The lead agency then circulates the draft scope, solicits public input, and provides a final written scope of issues to the applicant and all involved agencies within 60 calendar days of the filing of the draft scope. (See also sample timetable at the end of this section.)

9. What are the alternatives if the lead agency cannot provide the final written scope within sixty days?

The applicant and the lead agency may, by mutual agreement, agree to extend the 60-day time period to issue the final scope [\[617.3\(i\)\]](#). For particularly complex or sensitive projects, such an extended scoping timetable is frequently necessary to ensure that the final scope appropriately addresses all issues and study specifications.

Alternatively, if the lead agency fails to provide a written scope within 60 days, the applicant has the right to submit a draft EIS based on the draft scope. In this event, the lead agency must still determine that the draft EIS is adequate before it opens the public review period.

10. Who can start formal scoping?

Scoping may be initiated by the applicant or required by the lead agency. Once formal scoping is started, however, the lead agency controls the scoping process.

11. What is the lead agency's role in the scoping process?

The lead agency directs the scoping process and is responsible for developing the final written scope. Initially, the lead agency must promptly provide a copy of the draft scope to all involved agencies. It must also make the draft scope available to any interested agencies and to members of the public who have expressed interest in writing.

The lead agency must then provide some opportunity for public participation in review of the draft scope. Some methods for this public input include circulating the draft scope, holding meetings, requesting written comments, or some other means of collecting public input.

Finally, the lead agency must prepare and distribute the final written scope. To prepare the final scope, the lead agency must compile all comments from its own review, from involved or interested agencies, and from the public, and use those comments plus the draft scope to develop the final written scope. It must distribute that final scope to the project sponsor, to all involved agencies, and to interested agencies and members of the public who commented in writing on the draft scope.

12. Who else participates in scoping?

The project sponsor, involved agencies and the public also have roles in a formal scoping process.

- The **project sponsor** starts the formal scoping process by submitting a draft scope to the lead agency, either at the lead agency's request or on its own initiative. The sponsor should also participate if the lead agency conducts a public meeting on the draft scope.
- **Involved agencies** should provide the lead agency with timely written comments identifying their relevant jurisdictions and any concerns, issues or questions which they feel should be addressed in the EIS. If an involved agency needs specific studies, models, or analyses included in the EIS, they should also identify those during review of the draft scope. They may also participate if public scoping meetings are held.
- **The public** must have an opportunity to comment on a draft scope, in writing or by some other means provided by the lead agency. Public comments on a draft scope must be received by the lead agency prior to its issuance of the final scope to ensure that they will be considered in developing that final scope.

13. Can staff of a lead agency prepare a final scope without involving the public?

No. If formal scoping occurs, Part 617 requires public participation in review of a draft scope.

14. What can the public contribute to the scoping process?

In many situations, individuals living adjacent to a project site or individuals familiar with it can identify site characteristics or potential adverse impacts not readily apparent to the project sponsor or lead agency. For example, long-time local residents may be familiar with seasonal patterns of intermittent drainage systems, or past uses of the site.

15. Why should involved agencies participate in scoping?

All involved agencies are required to make their own findings based upon the final EIS before issuing their individual decisions or approvals. An involved agency which fails to participate in scoping may find that the EIS record which is developed is not adequate to support its findings.

16. How can involved agencies participate during scoping?

Involved agencies should provide input to the lead agency on what they see as significant potential environmental impacts of a project. Involved agencies should provide timely written comments reflecting their agency's concerns, permit jurisdictions, and information needs. Where appropriate, involved agencies should identify any specific techniques or models which they believe must be used in studies or analysis for the EIS.

Additionally, involved agencies should identify reasonable alternatives to be addressed in the EIS, where those alternatives would avoid or reduce impacts within their jurisdictions. Finally, they may also participate in a scoping meeting if one is held.

17. What if an involved agency fails to provide its comments on time?

The lead agency cannot delay the completion of the written scope due to the failure of any involved agency to provide its written input. An involved agency which does not participate in scoping may, however, find itself at a disadvantage after the final EIS has been completed, when each involved agency is required to make its own findings based upon that EIS record. An involved agency which failed to participate in scoping may find that the EIS record lacks information to support some of the findings it must make.

18. What sources should be used in developing the draft EIS scope?

The project sponsor or EIS preparer should consider agency input, existing information and publicly-available sources in developing a draft scope for an EIS. Such information may include:

- The positive declaration itself, especially its identification of potentially significant adverse environmental impacts;
- Supporting information contained in the Environmental Assessment Form (EAF), any applications, and site maps and plans;
- Any previous EIS's which considered:
 - the project site,
 - the surrounding area,
 - the same type of project, affecting comparable resources, or
 - other projects generating similar impacts.
- Any local or regional plans that indicate the community's intentions for the project site and the surrounding area, such as a comprehensive plan or local waterfront revitalization plan;
- Any state or federal plans for the area or its resources, such as water resource management plans, unit management plans, the New York State Open Space Plan, or a federal endangered species recovery plan;
- Natural and/or cultural resource inventories or maps that identify the important and sensitive resources affected by the proposed action;
- Any area-wide traffic or other similar studies;
- Existing relevant scientific literature; and
- Formal and available guidance or thresholds which the project sponsor will use as references in evaluating significance of impacts, particularly where the lead agency has no specific regulatory criteria.

The use of existing comprehensive plans, prior EIS's and natural resource inventories expedites scoping and reduces the need to develop extensive new data for the current EIS.

Local agencies should consider preparing these documents to aid in their environmental decision-making.

19. What must a written scope of issues address?

Basic standards for the content of the final written scope are set out in 617.8(f). Whenever possible, the final scope should prescribe the form and extent of analysis for identified impacts and issues. Final scope requirements include the following:

- Provide a brief description of the proposed action, including location, size, timing and duration, and any individual project characteristics which cause or result in identified potential significant adverse environmental impacts.

For example, a component of a project description which would set up a later impact description could be as simple as, "During construction, truck traffic entering and leaving the public highway at the project site will increase from current levels."

- Describe all potentially significant adverse environmental impacts identified in the positive declaration and during agency and public review of the draft scope. Identify specific aspects of impacts, not just general topic areas, including what elements of the environmental setting may be impacted.

Following the example above, "Heavy truck traffic during construction could track large quantities of mud onto the public highway."

Or if "groundwater" is an issue, identify whether quantity, quality or both are relevant, and what specific attributes of each or both need to be discussed.

- Define the extent and quality of information needed to adequately address identified impacts:

For each impact:

- cite available scientific literature that is pertinent to the issues;
- identify other existing and relevant data which should be used; and
- specify any new information which must be developed.

For example, will existing data from nearby wells be sufficient for groundwater quality analysis, or will new samples be needed?

- Identify methods to be used to assess the project's impacts. Define any thresholds in addition to regulatory standards to be used in evaluating significance of studied impacts. Where existing data will be relied on, cite the sources and summarize the findings. Where new information must be developed, applicant should include study plans with details like descriptions of field work techniques, locations of control and sampling points, methods for analysis of data, and any models to be used.

Examples include

- mathematical models proposed to predict air, traffic or water quality impacts;
- wildlife population studies;
- visual resource impact analysis techniques; or
- noise or vibration analyses.

The lead agency should ensure that all proposed models and studies are appropriate for the issues and technically acceptable to staff experts. The lead agency should

consider obtaining explicit concurrence of involved agencies and key affected parties for proposed studies and models.

For example, in a case where views from a ridgetop trail were at issue, the lead agency, sponsor, and a regional hiking group agreed on vantage points and methods for a visual analysis.

- Provide an initial list of potential mitigation measures to be discussed in the EIS, to the extent that they can be identified at the time of scoping, plus an explicit requirement to include and address additional mitigation measures which may be identified during EIS studies and analyses.
- Include a list of reasonable alternatives for avoiding or reducing identified impacts to be specifically addressed in the EIS, (size, sites, alternative technologies, or others), including any relevant thresholds. The lead agency may prescribe some or all of the range of alternatives to be included, and should identify which impact(s) a specified alternative would eliminate or minimize.

For example, specify, "alternatives shall include one or more alternative footprints which avoid the wetland intrusion", rather than, "consider alternative footprints".

Additional alternatives to avoid or mitigate specific impacts may be developed in the course of EIS studies and analyses. The lead agency may also specify criteria or rationale to be used to determine whether additional alternatives which emerge during studies or agency and public review would help balance environmental and sponsor's concerns.

For example:

- are the alternatives permitted under existing zoning?
- would the alternatives require the applicant to involve or rely on an otherwise-uninvolved third party?
- would the proposed alternative(s) change the target market, or eliminate the project's economic return or viability?

List information and data to be included in appendices rather than the body of the EIS as well as any information or analyses to be presented graphically. The lead agency should specify how summaries and conclusions from all appendices will be represented in the body of the EIS and may wish to require advance review and approval of any graphics (or samples thereof).

For example, if a traffic study will be a component of an EIS, the methods and detailed data could be placed in an appendix with summary maps and narrative conclusions included in the body of the EIS.

- Include an explicit list of any prominent issues raised during agency and public scoping review which will not be included in the EIS. For each, explain the lead agency's specific basis and reasoning for eliminating it, such as:
 - existing studies may show that some potential environmental impacts are not significant for the proposed project or site;
 - a potential impact may have been adequately addressed in a prior environmental review;
 - an identified issue may not be a relevant environmental impact; or

- parties raising an issue failed to provide substantive information to support consideration of that issue.
- By including this reasoning in the EIS record early in the process, the lead agency can maintain and readily defend the resulting EIS's focus on only the significant, potential adverse environmental impacts.

For example, in a region where timber rattlesnake populations were known to exist, they were excluded as an issue on one project site based on previous detailed DEC surveys which had shown no use of that specific site by the snakes.

20. Can issues be added after scoping has been completed?

Yes, but only based on the standards at 617.8(g) and (h). Any agency or member of the public raising such issues must provide the lead agency and the sponsor with a written statement that:

- identifies the additional information;
- explains the need to include this information in the draft EIS due to its relevance or significance; and
- tells why the information was not identified during scoping but should still be included in the EIS. The project sponsor then has the discretion to incorporate any such issues into the draft EIS or to consider them as comments on the draft EIS.

21. When is it appropriate to add issues to a scope after formal scoping has ended?

There are valid circumstances in which issues may be added after scoping has been completed, for example:

- unforeseen issues may come to light that could not have been known when scoping was completed;
- issues may be overlooked or remain undiscovered until the field work and research for the draft EIS is conducted; or
- project modifications may raise additional issues.

22. Must issues raised late be included in the draft EIS?

There is a strong presumption that a final scope acts essentially as a "contract" between the lead agency and the sponsor, to give both certainty and reliance as to expectations for the actual EIS that is to be produced. Therefore, the regulations give the project sponsor discretion whether to include a late-raised issue in a draft EIS. Any late issues will still be relevant concerns for the lead agency when it evaluates the adequacy of the draft EIS. The lead agency should take care to identify and narrow issues early in the process by developing a thorough scoping process.

Although the project sponsor decides whether any late issues are significant enough to add to the draft EIS or if it will treat them as comments on the draft, the lead agency must still in all cases determine whether a draft EIS is adequate before opening public comment on that draft. If a lead agency believes that a late issue is so important enough that the draft EIS must address it to be deemed adequate, then the lead agency should advise the project sponsor of that conclusion.

23. Why must the public be involved in scoping?

The regulations require public involvement in scoping to reduce the likelihood that unaddressed issues will arise during public review of the draft EIS. Early public review and input can ultimately shorten the SEQR review process by surfacing potentially contentious issues early on, allowing the lead agency and project sponsor to address them in a timely manner.

Even if the lead agency later determines that some issues raised by the public do not constitute "potentially significant impacts" and does not include them in the final scope for the EIS, the record will show that they were raised as well as explain why they are not being considered further. Additionally, early public involvement can limit rumors and inaccurate stories regarding the proposed project which can be generated when project information is unknown or only partially available.

24. How can a lead agency effectively include the public in scoping?

There are two key aspects to effective public participation in scoping: timely, sufficient and accurate notice about the project and scoping to interested and potentially affected parties; and effective means for the public to provide timely comments to the lead agency. For the public to productively participate in scoping, they should receive sufficient notice to understand the proposed project, the scoping process, and the overall SEQR EIS and application review processes.

The second element of effective public participation is getting public comment # the lead agency. The lead agency may choose to accept only written comments on the draft scope; may call for a public scoping meeting; or may combine the two. Even when a meeting is held, requiring interested parties to provide their comments in writing helps create a clearer record for the lead agency to use in developing the final scope.

In all cases, the lead agency should make sure that commentors understand the specific purpose of the current round of comments, that is, to develop the scope for the draft EIS. The lead agency may want to explicitly state that scoping comments are not the appropriate forum to argue the merits of the project proposal. Similarly, while scoping comments are an appropriate forum to raise potential issues or suggest specific studies, protocols, and alternatives, scoping comments are also not an appropriate forum to advocate for or against any specific decision.

25. How can the public be advised of scoping?

Since there is no specific notice method for scoping prescribed in the regulations, each lead agency should carefully consider the nature of the proposed project and its surroundings, and then develop a scoping outreach and notice program specifically for that situation. Several possible methods that lead agencies could use include but are not limited to:

- Include a note that the lead agency intends to require formal scoping in the summary of the positive declaration published in the Environmental Notice Bulletin (ENB).
- Supplement the required filing and publication of the positive declaration by announcing availability of the draft scope and opportunity to comment on it in local media, by letters to interested entities, or even by electronic means.

- Look at using the media creatively to provide notice of the application and scoping process. Especially in smaller markets and more rural areas, DEC as lead agency has been able to receive news coverage of upcoming EIS scoping by issuing a press release. In larger markets, local circulation weeklies or paid advertisements (preferably not legal notices) in larger newspapers can provide similar coverage. Be sure any release includes specific instructions on how members of the public can obtain draft scopes and other project information; a deadline for comments; and the name, address and telephone number of a contact person for additional information.
- If a small group or a few individuals have already expressed interest in the project, offer to meet with them individually or mail them copies of the draft scope and invite them to comment. Be sure any mailings include deadlines for comments.
- Especially when a project is likely to be highly contentious, consider mailing individual notice to adjoining and nearby landowners as well as to involved and interested agencies. This notice can be sent even before the draft scope is received and should be used to advise potentially interested parties about how to participate as well as alerting them to the project or application. Landowner names and addresses can be determined using tax maps; obtaining names and addresses of non-landowner residents is more difficult and may have to be done in cooperation with local interests.

How to define "nearby" will vary depending on the size of the project and the density of surrounding human population. Some criteria which have actually been used include:

- all residents or owners within the first ring of roads outside the project area;
 - all owners of record within 1/4 mile of the project site; or
 - all parties between the project site and the next major confluence downstream.
- Post signs at or around the proposed project site.
- It is advisable to provide background information on the overall New York State Environmental Quality Review (SEQR) process within the scoping notice. Particularly when a project requires approvals from more than one agency, include a summary of the standards for whatever underlying approvals the applicant is seeking and explain how all of those reviews and approvals relate to each other and to the SEQR process.

26. How can the lead agency make the draft scope available to the public?

The notice announcing formal scoping should also include information on how the public can obtain copies of the draft scope and related application materials as well as on how to provide comments on the proposed scope. The lead agency has great flexibility in how it makes the draft scope available to the public. **Examples include** but are not limited to:

- Provide individual copies of the draft scope to interested parties.
- Make copies of the draft scope available for review at its offices.
- If sponsor or lead agency have the necessary technical support, post the draft scope on a Web site during the review and comment period.
- If interest in a project occurs over a large area, or if the lead agency's files are some distance from the project site, set up auxiliary file repositories to make copies of the scope as well as essential project documents more readily accessible to the affected public. Facilities which have been used as such repositories include public libraries, local government offices, and offices of involved agencies. If this option is used, the lead agency should choose a location open after normal business hours to allow

members of the public who work during the day access to the files during the evening.

27. Is a public scoping meeting required?

No, Part 617 does not require a public meeting for formal scoping. Because Part 617 does not require any specific method of public involvement during scoping, a lead agency may in its discretion use any method which advises the public of the scope's availability and offers an opportunity to comment. A scoping meeting may be part of the comment effort, alone or in combination with other outreach efforts. Public scoping meetings can be effective forums to educate potential commentors, including advising them of the value of submitting followup written comments. Additionally, a public meeting can give the lead agency some sense of the "hottest" issues and potentially most involved publics for a given project.

28. Must a separate meeting, in addition to other required meetings, be scheduled just for scoping?

No. If lead agency chooses to hold a meeting as part of its public scoping, the scoping meeting may be coordinated with other preliminary meetings on the project. Keep in mind that certain boards which may develop EIS scopes during their regular meetings may be obliged by their own rules or by the State Open Meetings Law to allow public attendance during the scoping process. Whether input from attendees must be taken orally during such meetings would be governed by those boards' own rules.

If allowed under the lead agency's open meeting rules, an informal early meeting including the project sponsor, key staff or members of the lead agency, and representatives of active involved agencies may be useful to the project sponsor in developing a draft scope.

29. How can a lead agency make public scoping meetings more effective?

Lead agencies are often wary of public scoping meetings due to the perception that these meetings are unproductive and often confrontational. The lead agency can help make public scoping meetings more effective by using some or all of the following techniques:

- Prepare thoroughly. Distribute the draft scope prior to the public scoping meeting, and make sure potential participants understand the purpose of the meeting beforehand. This will tend to focus the public review and reduce the number of redundant or irrelevant comments.
- Set rules of conduct. Since the lead agency is running the meeting, it is reasonable to establish certain ground rules for participation:
 - explain at the beginning of the meeting that the purpose of scoping is to identify the relevant issues that need to be discussed in the EIS, not to resolve any issues;
 - require that the project sponsor present a brief description of the project at the start of the meeting;
 - encourage submission of written comments, along with or in place of oral comments;
 - require that all potential speakers sign up; encourage large groups with a limited interest to designate a single spokesperson;
 - allow 5 or 10 minutes per speaker;
 - allow all speakers the opportunity for comment before allowing questions;

- if any speakers want additional time, allow all others an initial opportunity and then go back for the additional comments;
- use a stenographer or tape recorder to create a record of the meeting; and
- if the meeting will be controversial, obtain the services of an impartial moderator.
- Don't make instant decisions. If a new topic is identified at a scoping meeting, resist the urge to incorporate it or dismiss it at the meeting. A topic which sounds good and is received with enthusiasm by the public may, after review, not be a valid topic for the EIS. Dismissing a proposed topic without a thorough assessment is equally dangerous.
- Follow through with a final scope that stands on its own. Because the lead agency must distribute the final scope to all involved agencies and all those individuals who participated at the meeting as well as to the project sponsor, the final scope should clearly contain all reasoning for included and excluded issues as well as specifying all thresholds and criteria to be used in evaluating those impacts which are to be included in the draft EIS.

30. What can the lead agency do if a project sponsor submits an inadequate draft scope?

The regulations do not allow the lead agency to reject a draft scope, so the lead agency should simply proceed with the scoping process and offer the draft scope for public comment as received. The lead agency can state in any notices and cover letters that the draft scope is, "as received", and that the lead agency anticipates making substantial changes before issuing its final scope. This approach may well require the lead agency to devote additional effort to developing or soliciting specifications for sections of the EIS (for example, criteria for a traffic study or designating sensitive receptors for a visual impacts analysis). In any event, the final scope is the lead agency's responsibility, so it must include all elements that the lead agency believes are necessary to thoroughly analyze all identified potential adverse environmental impacts of the proposed project.

Alternatively, if there is reasonably good communication otherwise with the project sponsor, lead agency staff may wish to informally advise the project sponsor of the weaknesses in the draft scope, explain that these could create confusion or added effort for all involved during the public review, and offer the sponsor an opportunity to resubmit a revised draft. For this approach to be feasible and effective, the project sponsor and lead agency would also need to develop a mutually-agreeable revised schedule for public comment and completion of the final scope. Should the sponsor choose to resubmit, the lead agency may wish to provide the project sponsor with informal comments or other direction in preparing a revised draft scope.

In deciding which course to take in handling an inadequate draft scope, the lead agency should evaluate all aspects of the project. In the case of a highly contentious proposal or sponsor where the lead agency believes that any resubmitted draft would not be a significant improvement over the original draft, proceeding straight to public comment and developing an explicit and prescriptive scope may be the lead agency's most effective choice.

31. What can the lead agency do if a project sponsor refuses to prepare a draft scope?

If a lead agency had decided to require scoping, failure by the sponsor to provide the scope is essentially refusal to prepare the draft EIS. Under 617.9(a)(1), the lead agency may terminate its review of the proposal or application if a sponsor refuses to provide a draft scope. To support this decision, the lead agency would need to explicitly find that the application is incomplete due to lack of the draft scope, then deny or disapprove the application "without prejudice", that is, leaving the sponsor an opportunity to reapply. Alternatively, a lead agency may be able to formally "suspend" its own processing of the entire application until the project sponsor files a draft scope. Exact procedures for lead agencies to follow to terminate or suspend a review would be governed by each agency or board's own rules of procedure, so a lead agency should consult its own counsel for direction if it chooses either of these options. The lead agency should explicitly advise all involved agencies as well as the project sponsor of any termination or suspension of SEQR review.

Outside the possibility of denial or suspension, there are no enforcement tools to compel a sponsor to submit a draft scope. A lead agency may be tempted to simply prepare its own draft scope, but the regulations clearly place responsibility for preparation of the draft scope on the project sponsor. In a case where the sponsor refuses to submit a scope but the lead agency wants the review to proceed, the lead agency could prepare (or contract for) the scope and charge the sponsor under 617.3(a).

32. Can the project sponsor prepare the final written scope?

There is nothing in the regulations to prevent a project sponsor from preparing and submitting a proposed final written scope. Indeed, because some sections of the final scope may be included as sections or appendices of the EIS, the sponsor may prefer to prepare the final scope in the format it intends to use for the EIS. This is comparable to a lead agency asking a project sponsor to draft some responses to comments on a DEIS.

As with responses for an FEIS, however, the lead agency is still responsible for the content as well as the issuance and distribution of the final written scope. Accordingly, the lead agency must make sure it will be able to review and, if necessary, modify the sponsor's proposed final scope. Remember that the quality of the final scope as issued will reflect on the lead agency.

33. Must the final scope be approved by the involved agencies?

No. The lead agency is solely responsible for preparing and issuing the final scope. It may, at its discretion, solicit comments from involved agencies on all or portions of a proposed final scope. This may be particularly appropriate where an involved agency's technical requirements are the basis for incorporating particular study methods or models.

34. What does DEC consider a reasonable scoping timetable?

The 60-day clock in Part 617 to go from draft to final scope can be tight, but good advance coordination with the project sponsor and involved agencies can help manage it. There is much room for agency discretion, but a reasonable sample timetable could be similar to the following:

- Day 1
Sponsor files draft scope with lead agency; AND
Lead agency
 - begins internal review of draft scope; d
 - distributes draft scope to involved agencies and interested parties; and
 - provides public notice of availability of scope (including announcing scoping meeting, if any).
- Days 2 - 19
Lead and involved agencies, interested parties and the public review draft scope.
- Day 20
(Optional) Lead agency conducts scoping meeting with project sponsor, involved agencies, interested parties, and the public.
- Day 30
Involved agencies', interested parties', and general public's written comments due to lead agency.
- Days 31 - 59
Lead agency prepares final scope (which may involve additional consultations with the project sponsor, involved agencies, or key interested parties).
- Day 60
Lead agency distributes final scope to project sponsor, involved agencies, and interested parties.

A key factor in a lead agency achieving a sixty-day turnaround with sufficient working time to prepare the final scope is early public notice of the availability of the draft scope. Other advance coordination steps can also help meet the 60-day turnaround, including:

- If a scoping meeting will be incorporated into some other regular meeting of the lead agency, and that other meeting has a longer mandatory advance notice than provided by this timetable, the lead agency can issue an announcement "anticipating" discussion of the scope even before the draft scope is received.
- If the lead agency will be making the scope available at multiple locations, arrangements with those other locations should be set up even before the draft scope is filed.
- When the project sponsor has sufficient resources and an interest in doing so, the sponsor preparing the final scope with input and guidance from the lead agency can result in a shorter timetable with fewer exchanges of paper.

C. Contents of a Draft EIS

In This Section You Will Learn about:

- the content and acceptance of a draft EIS.

1. What is the purpose of a draft EIS?

The draft EIS is the primary source of environmental information to help involved agencies consider environmental concerns in making decisions about a proposed action. The draft also provides a basis for public review of, and comment on, an action's potential environmental effects. The draft EIS accomplishes those goals by examining the nature and extent of identified potential environmental impacts of an action, as well as steps that could be taken to avoid or minimize adverse impacts.

A close relationship should exist between project planning and the draft EIS for projects that have been planned with environmental goals as integral considerations. This concept of "good planning" was one of the objectives contemplated by the legislature when it passed SEQR. A well-scoped draft EIS is evidence of this planning.

2. What information should a draft EIS contain?

The requirements for the general content of a draft EIS are provided in statewide SEQR regulations at [617.9\(b\)](#). The EIS should focus on the potential adverse environmental impacts of the proposed action, plus alternatives or mitigation which could avoid or minimize the identified adverse impacts. The EIS therefore needs to contain sufficient descriptions of the proposed action and its setting to provide appropriate context for a reader to understand the analyses of impacts, alternatives, and mitigation, but should not be an "encyclopedic" or overly technical document.

3. Are there specific requirements for the cover sheet of an EIS?

Yes. The standards are found in 617.9(b)(3). See also section 5D of this handbook for information on how to establish the dates which the cover sheet must contain.

4. Must every draft EIS follow the format as described in 617.9(b)?

No. The content of the document is much more important than the format. As long as all of the elements identified in 617.9(b) are contained somewhere in the EIS, it is acceptable to deviate from the sequence identified in the regulations. Many preparers find that placing all of the impact and mitigation analyses in one section improves the EIS continuity, and makes the document easier to understand. Remember, impacts include irreversible or irretrievable effects of the action, growth inducement, effects on the use and conservation of energy, impacts on solid waste and coastal zone consistency, along with impacts on individual resources.

An example of this format would be:

- Cover Sheet
- Table of Contents
- Summary
- Description of the proposed action
- Environmental setting
- Impacts/Mitigation
- Alternatives.

5. How extensive should the draft EIS Summary be?

The Summary may be a narrative statement, or a substantial outline. It should contain a brief description of the overall proposed action, and list the following:

- i. significant beneficial and adverse impacts;
- ii. mitigation measures proposed;
- iii. alternatives considered;
- iv. issues of controversy (if any); and

- v. matters to be decided, including a listing of each permit or approval required from every involved agency

6. What should be included in the description of the proposed action in the main body of the EIS?

The description of the proposed action should contain:

- i. The purpose or objective of the action, including any public need for, or public benefits from the action, including social and economic considerations;
- ii. The location and physical dimensions of the action;
- iii. The background and history of the action, or site, where related to item i. above;
- iv. Timing and schedule for implementing the action, including construction and operations phases, to the extent the information is available, or can reasonably be estimated;
- v. Relationship of the action to land use plans, zoning restrictions, and other adopted plans and programs at the local, regional or state level; and
- vi. Identification of authorizations, permits and approvals required.

7. What are the distinctions among purpose, needs and benefits of an action?

Purpose is a goal or objective to be achieved. The purpose of most private project sponsors is to make a profit from some development activity on their property. The purpose of many public actions is to meet a perceived public need and may include assisting in economic development. Other public actions relating to laws and regulations may be for the purpose of protecting public health or safety, or enhancing general welfare.

Need is a lack of something required, desirable or useful. The need for an action may be public, private, or a combination of both. Public need may apply to publicly or privately sponsored projects that satisfy a societal need, such as health care facilities, housing for the elderly, or new industry in an area of high unemployment.

Benefit is something that promotes well-being. The benefits of an action relate to satisfaction of need. An action may not always satisfy all identified needs. For example, a new shopping plaza near residential development may provide the benefit of a convenience food store, but still not provide a needed supermarket. Benefits may also exceed perceived needs and satisfy additional ones. For example, the extension of a public water supply to a new affordable housing development may also benefit nearby residents who may be able to connect to that new supply.

8. Why are social and economic considerations required in an EIS?

In reaching a decision whether to approve, approve with conditions, or deny, applications for an action which is the subject of an EIS, each involved agency is required to weigh and balance the public need and other social, economic and environmental benefits of the project against identified environmental harm. Thus, for an agency to approve an action with potential to create significant environmental damage, or to adversely affect important environmental resources, the agency must be able to conclude that the action which the agency will approve, including any conditions attached to that approval, avoids or minimizes anticipated impacts to the maximum extent practicable, or that public needs and benefits outweigh the identified environmental harm. Where public needs and benefits cannot be

shown to outweigh the environmental risks of a project, the agency may be compelled to deny approvals for the action.

Each involved agency must conduct this balancing process for itself, in the context of its underlying jurisdiction. This balancing process must be documented in the written SEQR findings that each involved agency is required to make for a project that has been the subject of an EIS (see [Chapter 5-I Findings, Question 14](#), Why is consideration of social and economic factors included within SEQR findings?).

9. Are there economic or social factors which are inappropriate for inclusion in an EIS?

Purely economic arguments have been disallowed by the courts as a basis for agency conclusions when concluding a SEQR review by developing Findings. Therefore, potential effects that a proposed project may have in drawing customers and profits away from established enterprises, possible reduction of property values in a community, or potential economic disadvantage caused by competition or speculative economic loss, are not environmental factors. See [East Coast Development Company v. Kay and Wal-Mart Stores v. Planning Board of the Town of North Elba](#).

Some social factors may be considered arbitrary, discriminatory, or speculative, and consequently are inappropriate for inclusion in an EIS. Such factors may include, but are not limited to, potential for crime, drug problems or psychological stress. These kinds of social concerns may be raised by the public during the comment period or hearing on an EIS. In such cases, they may be acknowledged, but given limited weight, when SEQR findings are developed during the agency's final decision-making.

10. Is "need" weighed differently for privately-sponsored actions than for government sponsored actions?

Yes. Government sponsored actions are typically designed to address a public need, consistent with the concept of government accountability. Private actions, in a free market economy, may legitimately be intended only for the purpose of making a profit. This difference between public and private actions is reflected in the level and nature of discussion about need in an EIS.

For example, if a municipality proposes to build a new road to provide better commuting access to a downtown office district, the municipality must demonstrate that the public need exists and that the project adequately responds to that need. For privately sponsored actions, however, the required discussion of need depends on the project's potential for adverse environmental impacts. If the EIS shows that the project's adverse impacts can all be adequately mitigated, then a limited discussion of the applicant's need would be sufficient.

There can be cases in which proposed privately sponsored projects would result in unavoidable or unmitigatable adverse environmental impacts. Agencies must then balance those adverse environmental impacts against social, economic and other essential considerations in order to make their SEQR findings. In such cases, the EIS must document any public need or benefits that may be associated with the project, so that agencies making Findings may base their conclusions on information contained in the SEQR record.

11. How can public need be documented?

The EIS should show how the proposed action is capable of serving a public use, benefit, or purpose. For example, certain privately sponsored actions, such as a housing project for the elderly, or a new industry in an area with high unemployment, are capable of meeting definable public needs. Other potential components of public need which are frequently cited include increased tax revenues through additions to the local taxable base, or a fulfillment of shopping, recreation or other service demands. Public surveys can be useful tools for identifying whether a need presently exists for a particular project, or to gauge public acceptance of induced need.

The discussion of public need should be given a greater level of detail when there are potential adverse impacts that cannot be reduced or eliminated. This is essential because it is usually the public who will bear the burden of environmental impacts caused by the action.

12. If a proposed action is compatible with local zoning, is this evidence of public need?

While local zoning is generally considered to reflect a community's goals, compatibility with zoning should not be confused with public need. Sponsors of many privately proposed actions may be able to demonstrate their compatibility with such indicators of public development intent as locally adopted land-use plans, zoning ordinances, historic districts and agricultural districts. To demonstrate public need, however, the sponsor must also show what element of need a proposed project will satisfy. For example, the sponsor of a proposed residential subdivision could demonstrate public need for additional housing if a community with high housing occupancy has recently gained a major new employer.

13. Must the final plans for a proposed action be created for, and included within, an EIS?

No. One of the basic purposes of SEQR is to incorporate the consideration of environmental factors at an early stage of project development. This often means that the EIS will be prepared before final plans are available. Many applicants will be unwilling to prepare final site plans, subdivision plats and stormwater management plans during EIS preparation due to the costs of those designs, and the possibility that changes will be required as a result of the EIS review. While final plans are not necessary, the EIS should contain enough detail on size, location and elements of the proposal to allow a reader to understand the proposed action, the associated impacts, and to determine the effectiveness of any proposed alternatives or mitigation.

As a general rule, the amount of detail regarding a specific impact in an EIS should depend on the magnitude and importance of the impact. For example, if onsite stormwater management is an impact of concern, the EIS should determine the quantity of runoff using accepted methods for calculating runoff, identify the structural and nonstructural measures to be used for stormwater management, and identify the approximate location and size of those structures.

14. Must an EIS contain a detailed discussion of site history?

The discussion need not be lengthy. However, a summary of the background or history of a site with respect to previous activities there, or past proposals for its use, may have a

bearing on what is presently proposed. Similarly, the background of a legislative or regulatory proposal may provide substantive arguments favoring its adoption. Thus, the nature and location of the proposed action will determine whether detailed historical elaboration is necessary. In particular, omission of facts about earlier environmental problems or issues at a site could be a fatal defect with respect to the adequacy of an EIS.

15. What information is necessary in an EIS regarding the timing and scheduling of a proposed action?

For proposed physical development activities, the description should recognize four major project stages: (1) planning and design, (2) construction, (3) operation and maintenance, and, where appropriate, (4) termination. Schedules for individual phases of overall projects, and for separate development of individual elements, should be covered to the extent information is available. Each project stage or phase may have different types of potential impacts. In some instances, knowledge of the timing of certain construction activities could be instrumental in mitigating potential impacts. For example, impacts on fish spawning in a particular stream might be totally avoided by scheduling construction at a different time of year.

With proposed actions which do not involve direct physical development (e.g., the adoption of a zoning ordinance, the establishment of an historic district, or the granting of a permit for a temporary use or activity), the discussion of timing should address such elements as the effective date of the proposed ordinance or the duration of the approved activity.

16. In an EIS, how should one treat uncertainties associated with the timing of subsequent phases of a proposed action?

Precise dates are not necessary, but general duration and sequencing of phases should be indicated.

17. How should an EIS relate state and local plans and programs to a proposed action?

The relevance of existing state or local plans or programs will depend on the proposed action. If the action involves the adoption of ordinances, laws, rules or regulations, it is appropriate to show how these relate to existing programs or plans at state, regional, county, or municipal levels. If the action involves a physical development, its relationship to local and regional comprehensive plans for issues such as land use, water supply, sewage collection and treatment, and solid waste disposal are likely to be important considerations with respect to the environmental impacts of the action.

18. Why must a discussion of all likely approvals for an action be included in an EIS?

The primary purpose of such a discussion in an EIS is to establish the roles of the various involved agencies in the action. The EIS should show the extent of the various authorizations, permits and approvals required, so that all involved and interested parties will be aware of the potential means by which identified impacts may be avoided or mitigated. While this information would have been included in the EAF, not all reviewers of the draft EIS will have seen the EAF.

19. How should the environmental setting of an action be described in an EIS?

The environmental setting of an action includes the existing environment, any existing uses of the project site, and a general characterization of adjoining areas. If the proposed action is a non-physical action, such as adoption of an ordinance or regulation, a description of the present circumstances in the area affected by the action must be included.

Within the EIS, the description of the environmental setting may be qualitative but should be supported by quantitative information whenever relevant and reasonably available (for example, the number of existing residential units adjacent to a project site). The components of the environmental setting that relate to potential relevant impacts should receive most attention in the description.

Where the action involves the expansion of an existing facility, the existing facility should be included and described as part of the environmental setting. Only the expansion should be considered and analyzed as the proposed action under SEQR.

20. How should potentially significant environmental impacts be discussed in a draft EIS?

This section of the draft EIS should focus on the potential environmental impacts and issues which were identified in the EIS scoping process. The description and analysis of potential impacts should use the discussion of the environmental setting as a basis for comparison. The discussion of potential impacts must be as objective as possible. Specifically, the discussion of impacts may include quantitative or qualitative information as long as it is sufficient to determine:

- how likely it is that an impact will occur;
- how large the impact will be;
- how important the impact will be; and
- the time frame during which the impact is likely to occur.

21. If a potential impact is beneficial rather than adverse, must it be covered in the EIS?

While the main purpose of identifying and mitigating impacts is to limit or control adverse impacts, it is relevant to also identify likely beneficial effects of the proposed action. These considerations will be used by decision makers in balancing positive and negative effects in the findings statement.

22. Why must alternatives be considered when the project sponsor has already decided what is the best project?

An EIS has been required because potentially significant adverse impacts of the sponsor's proposed project have been identified. An analysis of alternative project configurations or designs will enable the lead agency to determine if there are reasonable, feasible alternatives which would allow some or all of the adverse impacts to be avoided while generally satisfying the sponsor's goals. A project sponsor generally develops its project proposal based solely on its own goals and objectives. These goals and objectives may not include maximum protection of environmental factors, and are not always shared by the reviewing agencies or the public. Requiring that reasonable alternatives be discussed allows

a reviewer to independently determine if the proposed action is, in fact, the best alternative for that project when all environmental factors have been considered.

23. How should the lead agency determine which alternatives should be discussed in the EIS?

The goal of the alternatives discussion in an EIS is to investigate means to avoid or reduce one or more identified potentially adverse environmental impacts. Part 617 further requires that the alternatives discussion include a range of reasonable alternatives which are feasible considering the objectives and capabilities of the project sponsor. In general, the need to discuss alternatives will depend on the significance of the environmental impacts associated with the proposed action. The greater the impacts, the greater the need to discuss alternatives. The discussion of each alternative should specifically include an assessment of its likely effectiveness in reducing or avoiding specific impacts.

For projects such as the construction of a residential subdivision or an office building, it is not necessary for every possible alternative density or size to be discussed. A range such as the density or size permitted under the existing zoning, the density or size after taking into consideration environmental constraints (wetlands, steep slopes, etc.), and the density or size if clustering were to be used, may be reasonable alternatives.

24. Are there specific kinds of alternatives that should be considered?

This will depend on the nature of the proposed action. Paragraph 617.9(b)(5)(v) of the statewide SEQR regulations suggests that, in addition to the "no action" alternative, it may be appropriate in a draft EIS to consider alternative:

- sites;
- technologies;
- scale or magnitude of action;
- project designs;
- timing or phasing of action;
- uses; and
- types of actions.

25. When is an alternative "reasonable"?

What constitutes a "reasonable" alternative will depend on the nature of the proposed action, the nature and range of potential adverse impacts, the sponsor of the action, and the general nature or class of the possible alternative. For example, government sponsors have a greater obligation to consider alternative locations than do private sponsors; and not all technological alternatives will be relevant to all classes of proposed actions.

26. Under what circumstances should a discussion of alternative sites be included in the EIS?

Paragraph 617.9(b)(5)(v) ('g') specifically states that for private applicants, alternatives may be limited to sites which the sponsors own or have under a purchase option. For direct government actions, however, there is no parallel limitation, because governments are presumed to have ability under eminent domain to acquire any appropriate site.

Examples of situations where a discussion of alternative sites for a proposed action would be reasonable include:

- A project which is a direct action of an agency;
- A project sponsor who has already evaluated alternative sites in developing the proposal for a private action, and desires to include that analysis in the draft EIS; or
- Any case where the suitability of the site for the type of action proposed is a critical issue, in which case a conceptual discussion of siting should be required.

27. When is it appropriate to include a discussion of alternative technologies in the EIS?

A discussion of alternative technologies is appropriate when:

- The alternative technology has the ability to avoid or significantly reduce potential environmental impacts;
- The cost of the alternative technology is not prohibitive, where prohibitive does not mean merely less profitable; or
- The alternative technology has been proven effective in comparable situations.

28. When is it appropriate to include a discussion of alternative scales or magnitudes of action in an EIS?

Consideration of alternative scales or magnitudes may be reasonable under the following circumstances:

- Some or all potential impacts of the action can be avoided or reduced by a change in project size;
- The change in project size does not reduce the project to the point where it will no longer serve its intended function. For example, a communication tower may require a minimum height for effective operation; or
- The reduction in project size may decrease potential profit but does not make the project infeasible.

29. When is it appropriate to include a discussion of alternative project designs in an EIS?

Consideration of alternative project designs may be reasonable under the following circumstances:

- Some or all potential impacts of the action can be avoided or reduced by a change in project design, such as a change in traffic ingress/egress to direct traffic away from a quiet residential street to a county road, or a change in the facade of a structure to make it more compatible with its surroundings; or
- The alternative design may increase the overall project costs but the increase is not prohibitive.

30. When is it appropriate to include a discussion of alternative timing or phasing in an EIS?

Consideration of timing or phasing alternatives may be reasonable in the following circumstances:

- The timing or phasing are necessary to avoid impacts to seasonal or temporary aspects of environmental resources, such as spawning or nesting seasons for certain fish and wildlife; or
- The timing or phasing alternative would not delay the start or extend the overall schedule of a proposed action to the point that project feasibility would be threatened.

31. When is it appropriate to include a discussion of alternative uses or types of actions in an EIS?

Consideration of an entirely different use or action may be reasonable in the following circumstances:

- The proposed action does not conform to the current zoning of the site, in which case comparison to the use allowed under the existing zoning may be informative;
- The alternative action being considered may produce significantly fewer impacts while not significantly compromising the overall objective of the proposed action. For example, adding an anchor store to a mix of businesses in a shopping mall may have fewer noise and traffic impacts than would a theater or nightclub; or
- The project sponsor has a diverse range of development experience and has demonstrated capability to manage a number of different types of development.

32. What is the "no action" alternative?

The "no action" alternative must always be discussed to provide a baseline for evaluation of impacts and comparisons of other impacts. The substance of the "no action" discussion should be a description of the likely circumstances at the project site if the project does not proceed. For many private actions, the no action alternative may be simply and adequately addressed by identifying the direct financial effects of not undertaking the action, or by describing the likely future conditions of the property if developed to the maximum allowed under the existing zoning.

The discussion of the "no action" alternative can be particularly relevant for agency direct actions where the expenditure of public funds must be justified. In addition to impacts that are purely environmental in nature, government actions can affect setting, community character, and even local demographic or economic trends.

33. Is there a way to limit the amount of detail in the EIS while still allowing an adequate comparative assessment of alternatives?

Yes. For most actions, it is sufficient to use existing information to create reasonably comparable assessments of alternatives. This information may consist of references to existing documents or other studies; projections based on explicitly stated, reasonable assumptions; or evidence that clearly excludes an alternative from consideration.

On the other hand, for projects with many significant impacts, or projects likely to significantly affect public health and safety, it may be reasonable to develop a full discussion of each alternative. This is especially true when comparing alternative technologies, for which fully detailed modeling is often the minimum level of information necessary for a comparative assessment.

In general, a reasonable test of the adequacy of the discussion of an alternative, is to ask if the information provided is sufficient for a decision-maker to identify the alternative that minimizes or avoids adverse environmental impacts to the maximum extent practicable.

34. If one or more alternatives which require no agency discretionary decisions or approvals are available, must these be included among the alternatives in a draft EIS?

Actions requiring no discretionary decisions by any agency are not subject to SEQR. However, such "as-of-right" alternatives may be analyzed in a draft EIS to provide additional bases for comparison with other alternatives. There can be cases where "as-of-right" alternatives are more likely to cause significant adverse environmental impacts than would the action requiring agency approvals.

35. If an adverse environmental impact cannot be avoided or fully mitigated, how must the EIS discuss that impact?

Certain adverse environmental impacts can be expected to occur regardless of the mitigation measures employed; for example, there is typically permanent loss of vegetation when building a new facility and any related parking. Because such unavoidable impacts must be factored into final agency decision making, the [SEQR regulations](#) provide that an EIS must contain an identification and assessment of impacts that cannot be avoided or adequately mitigated. The discussion of unavoidable impacts must meet the same substantive requirements as all other discussions of impacts and alternatives.

36. How should the EIS address irreversible and irretrievable commitments of resources?

The extent to which a proposed action may cause permanent loss of one or more environmental resources should be identified as specifically as possible based upon available information. Resources which should be considered include natural and man-made resources that would be consumed, converted or made unavailable for further uses due to construction, operation, or use of the proposed project, whether those losses would occur in the immediate future, or over the long term. Examples include the filling of wetlands; paving over or construction on valuable agricultural soils; use of non-renewable, or non-recyclable materials in new structures; and use of fossil fuels in construction or operation of the project.

37. What is "mitigation"?

To mitigate means to make something less severe, or to alleviate a harsh or hostile condition. For SEQR purposes, mitigation may be defined even more broadly; in addition to considering measures which could reduce or minimize adverse environmental impacts, measures which could produce beneficial impacts may also be considered.

38. How should mitigation relate to impacts identified in the EIS?

A discussion of feasible mitigation measures which could address specific identified impacts is a fundamental component of every EIS. The mitigation discussion can allow a project sponsor to offer constructive ways to reduce one or more identified environmental impacts associated with the proposed action. Mitigation may include measures offered voluntarily by the project sponsor. It is important that any mitigation offers should be practical preventative, remedial, or compensatory procedures that the sponsor can actually accomplish.

Mitigation measures may also be required by any involved agency with appropriate jurisdiction as conditions which are incorporated as part of its final decision on the action. When mitigation measures are made part of the enforceable standards within an agency's final approval, that agency creates a means to ensure that environmental impacts will be reduced to the maximum extent practicable, as SEQR requires. This aids the decision making agencies in balancing positive and negative aspects of a proposed action.

39. What are some common mitigation measures?

Some common mitigation measures include:

- Modifying project footprint, such as clustering of structures, to reduce the area impacted and preserve open space;
- Screening and landscaping, such as earthen berms, hedgerows, or plantings to protect existing sensitive views or vistas;
- Use of alternative landscaping in place of lawns to improve recharge to aquifers and reduce fertilizer needs;
- Reclamation and restoration, such as pond dredging, reseeding of excavated or graded sites, and use of project wastes for land reclamation;
- Careful timing, such as dredging during winter months to minimize plankton blooms, conducting stream disturbances to avoid fish spawning seasons, and scheduling daily construction/operation hours to minimize noise impacts on local receptors;
- Monitoring actual levels of predicted impacts, for example, air emissions, quality of water discharges, or noise generation, during construction and during a defined initial period of operation, to ensure effectiveness of control measures;
- Requiring construction-phase precautions, such as erosion and sedimentation control (siltation ponds, silt fencing, or mulching), dust control and minimization of land clearing for construction; or
- Adding turning lanes, modifying traffic flows or providing access to public transit to reduce predicted traffic impacts.

40. Must mitigation of non-significant impacts be addressed?

Sometimes. Where potentially significant cumulative impacts have been identified, even though individual component impacts may be non-significant, mitigation measures should be considered in the EIS, along with mitigation for other impacts of the proposed action or impacts of other projects. In addition, it may be in the interests of a project sponsor to offer mitigation for lesser impacts, in order that they may be taken into consideration in the balancing of the positive and negative aspects of the proposed action. [See also [Determination of Significance](#), beginning with Question 16].

41. Must all identified significant impacts be mitigated?

No. Mitigation of impacts must occur to the fullest extent practicable. Each agency must balance the need for particular mitigation on an individual project taking into account social, economic and other essential considerations. However, to support the balancing, the EIS must discuss the full range of potential mitigation measures.

42. Is off-site mitigation permissible?

In some cases, mitigation on the project site may not be feasible or would not adequately address an identified impact. In such circumstances, some form of off-site (or compensatory) mitigation may be offered. Off-site mitigation may address a shared impact, or may be an environmental benefit not directly associated with the proposed project that serves as a trade-off for unavoidable impacts on-site. Off-site mitigation should be explored only after all other reasonable means of reducing an impact have been considered. Some examples include the purchase of an off-site wetland, or creation of a new wetland; restoration of a degraded parcel within the general area of the project; or donation of land for recreation or park purposes.

43. How should growth-inducement be covered in an EIS?

Growth-inducing effects of an action may not be perceived as environmental issues, and may even be seen by project supporters as economic or social benefits. However, induced growth may be the prime source or cause of secondary environmental impacts. [See also [Determination of Significance](#), beginning with Question 30). The growth inducement section of an EIS should thus describe any further development which the proposed action may support or encourage, such as:

- i. attracting significant increases in local population by creating or relocating employment, or by providing support facilities or services (stores, public services, etc.), or
- ii. increasing the development potential of a local area, for example, by the extension of roads, sewers, water mains, or other utilities.

When discussing growth inducement in the EIS, it is important to quantify growth effects to the extent possible given available information, and to document sources of data and growth predictions. The purpose of the discussion of growth inducement in the EIS is to enable involved agencies to reach findings concerning both positive and negative effects of induced growth in the area of the proposed project.

44. What must be covered in an EIS regarding the use and conservation of energy resources?

The EIS should contain a description of energy sources to be used during both construction and operational phases of the proposed project. Anticipated levels of demand or consumption should be quantified or estimated as accurately as possible given available information. In addition, the EIS should also discuss alternatives and mitigation which could reduce energy and fuel demands during construction and long-term operation.

DEC has recently developed a policy to guide its own staff in assessing energy use and related greenhouse gas (GHG) impacts of proposed projects which are subject to EISs.

Guidance provided includes methods for quantification of energy demands and resulting GHG emissions plus a range of possible measures to reduce energy demands from proposed projects.

45. Why must GHG be included in the energy use and conservation discussion?

There is a broad international scientific consensus that human activity-generated GHG emissions are driving global climate changes. These climate change impacts are the collective result of past and ongoing GHG emissions from industrial, transportation, commercial and domestic energy use as well as emissions from facilities like landfills, wastewater treatment plants, and very large livestock operations. Because global climate change impacts are becoming increasingly severe, dramatic reductions in GHG emissions are needed to minimize additional future impacts. GHG emissions sources are dispersed across economic, geographic, and demographic sectors, therefore, controls must be implemented across a similarly wide range of activities. Analysis and comparison of energy demands, including means to reduce energy use, within an EIS will enable involved agencies to identify reasonable energy conservation measures in their SEQR findings; by doing so, individual project contributions to GHG emissions can be minimized.

Furthermore, federal case law has repeatedly supported requiring GHG analyses in federal EISs, while several New York academic legal articles have argued strongly that SEQR's basic mandate demands that GHG emissions be addressed in NYS EISs. [See also [Notable Court Decisions on SEQR](#)].

46. Are there specific energy conservation measures which should be addressed in an EIS?

No, there are not measures that must be considered in every case. However, based on the specific energy demands of a proposed project, measures such as those on the following partial list should be included as alternatives or mitigation in the energy use and conservation discussion of an EIS:

- i. Modify overall project layout to minimize internal travel distances and optimize ability to use structure orientation and design to minimize energy demands;
- ii. Incorporate methods to reduce fuel costs for structural heating or cooling; for example, insulation, heat pumps, or high-efficiency insulated windows;
- iii. Include on-site energy sources not requiring fossil fuels, such as solar or wind generation, in project designs;
- iv. Implement energy-efficient interior layouts and designs, including use of low-wattage lights, strategic layout of lighting, use of reflective materials and re-circulation of heat produced by lights;
- v. Investigate opportunities for recycling, such as use of construction products fabricated from recycled materials (such as recycled carpet squares, reprocessed glass tiling, or rubber floor coverings produced from waste tires), or using waste heat from an industrial plant to heat nearby facilities; and
- vi. Optimize indirect energy conservation benefits, such as locating and designing a facility to accommodate mass transit, using shuttle buses to serve a facility, or designing a new development to minimize commuting and shopping travel distances while improving "walkability" within the development.

Proposed energy conservation measures which go beyond the minimum requirements of the State Energy Conservation Construction Code (9NYCRR Parts 7810 through 7816) should be specifically identified, such as [LEED](#) or [Energy Star](#).

47. What must be addressed in an EIS regarding impacts on solid waste management?

Although some solid waste management issues may have been discussed elsewhere in the EIS in conjunction with development infrastructure or public service needs, explicit requirements added to the SEQRA statute by the 1990 Legislature require that an EIS include a discussion of the impacts of a proposed action on solid waste management, where applicable and significant.

The draft EIS should note whether or not any aspect of the proposed action would generate any classes of solid waste, or would involve the transport or disposal of any solid waste. If so, the nature and amount of potential wastes should be identified along with the proposed methods of disposal. Further, when solid waste will be produced or handled as part of the proposed project, the draft EIS should analyze whether these activities would result in significant impacts based on the quantity or type of waste involved, or related to difficulties in handling those wastes. Where significant impacts are identified, alternative methods of handling and disposal, including waste minimization and re-use, should be addressed, as should mitigation of impacts. Time frames for both production of waste and the use of various disposal methods should be provided where applicable, and secondary impacts due to transport and disposal off-site should be discussed.

48. What is a "reasonably foreseeable catastrophic impact", and must it be covered in an EIS?

A "catastrophic impact" is one which is life threatening to a number of individuals; would cause extreme hardship to their physical well-being; or would cause widespread destruction of natural resources as a result of a proposed action. An impact is "reasonably foreseeable" if it could occur as a result of the action, even if the probability of such an occurrence is small. Note that the potential extreme hazards are inherent in the nature of the proposed activities, and can often be exacerbated by the large scale of the proposed action. Such actions as the development and operation of oil supertanker ports, liquid propane or liquid natural gas storage facilities, or hazardous waste treatment facilities may have such catastrophic impacts, whereas large shopping malls, residential developments or office complexes will not.

Reasonably foreseeable catastrophic impacts must be acknowledged and identified in an EIS. The discussion should include descriptions of areas, populations or resources potentially affected; a general discussion of the likelihood that the catastrophic impacts would actually occur; and a discussion of alternatives and mitigation measures intended to prevent such catastrophic impacts, including measures which have been incorporated into the proposed project design.

49. What if insufficient information is available about the chances for or consequences of reasonably foreseeable catastrophic impacts?

Section [617.9\(b\)\(6\)](#) provides that when information about a reasonably foreseeable catastrophic impact to the environment is unavailable because the cost to obtain it is

exorbitant, or the means to obtain it are unknown, or there is uncertainty about its validity, and such information is essential to an agency's SEQR findings, the EIS must:

- i. identify the nature and relevance of unavailable or uncertain information;
- ii. provide a summary of existing credible scientific evidence, if available; and
- iii. assess the likelihood of occurrence, even if the probability of occurrence is low, and the consequences of the potential impact, using theoretical approaches or research methods generally accepted in the scientific community.

50. What must be discussed in an EIS about consistency with state coastal management policies and local waterfront development programs approved under Article 42 of the Executive Law?

If a state agency is involved in an action for which an EIS will be prepared and the proposed action will occur within the New York State coastal area along the Great Lakes or the Atlantic Ocean and its estuaries as defined in Article 42 of the Executive Law, the EIS must contain a discussion of the effects of the proposed action on, and its consistency with, applicable state coastal management policies. Within any portions of the New York State coastal area where local waterfront revitalization programs have been approved, the EIS must contain a comparable discussion of the effects of the proposed action on applicable policies of the local revitalization program. [See [617.9\(b\)\(5\)\(vi\)](#)]. See also Chapter 8c of this Handbook, Waterfront Revitalization and Coastal Areas Programs.

51. Must coastal or LWRP policies be considered only when a state agency is lead agency?

No. Even when a local agency is serving as lead agency, the state agency must still comply with the consistency review requirements of Article 42. Accordingly, the involved state agency should work closely with the local lead agency to ensure that an adequate discussion of coastal issues is incorporated into the EIS.

52. Must local agencies address coastal program consistency in an EIS if no state agencies are involved in the action?

No. There is no requirement for local governments to address coastal program consistency under Article 42 unless a state agency is involved in the overall action. However, if the local government has an approved local waterfront revitalization program, it has an obligation to discuss the relationship of the proposed action to such program as part of its description of the overall action in the EIS.

53. What appendices and supplemental documentation should be included in a draft EIS?

The following are typically included as appendices to the draft EIS:

- i. list of studies, reports and information considered and relied on in preparing the statement;
- ii. list of all federal, state, regional, or local agencies, organizations, consultants and private persons consulted in preparing the statement;
- iii. technical exhibits;
- iv. relevant correspondence regarding the projects.

54. Must lengthy technical exhibits be included in every copy of the draft EIS?

When long or graphically elaborate technical exhibits must be made public, it is not necessary that they be distributed to every party requesting a copy of the draft EIS. Summaries of such technical exhibits should be included in all copies of the draft EIS. Sufficient copies of the detailed exhibit, as a separate document, should be provided to the involved agencies and made available in public locations, such as local libraries.

D. Review of the Draft EIS (DEIS)

In This Section You Will Learn:

- how completeness and adequacy are assessed in a review;
- the role of lead agency and involved agencies in the review of a DEIS; and,
- how the public is involved in the review of the DEIS.

1. Who determines the completeness and adequacy of a draft EIS for public review and comment?

The lead agency must decide whether a draft EIS is complete and adequate for public review and comment, keeping in mind that the purpose of the public comment period is to allow all involved agencies and the public to review the draft EIS and comment on its merits.

2. What is the basis for determining the adequacy of a draft EIS?

The lead agency should rely on the standards in [617.9](#), which describe the required content of EISs. Additionally, a written scope, if one was prepared, provides a detailed catalogue of the materials which the lead agency identified as necessary for inclusion in the EIS. The lead agency should ensure that all relevant information has been presented and analyzed, but should neither expect nor require a "perfect" or exhaustive document. The degree of detail should reflect the complexity of the action and the magnitude and importance of likely impacts.

A draft EIS that is adequate to be accepted for public review should describe the proposed action, alternatives to the action, and various means of mitigating impacts of the action. The draft EIS should identify and discuss all significant environmental issues related to the action, however, the draft EIS will not necessarily provide a final resolution of any issues. Since one of the major purposes of a draft EIS is to give the public an opportunity to comment on the environmental issues raised, as well as the possible alternatives and mitigation offered to address those issues, settling on a resolution of one or more issues prior to public review would actually be counter to the intent of SEQR.

3. What must the lead agency do if it finds a draft EIS, as submitted by the project sponsor, to be inadequate for public review?

If the submitted draft EIS is determined to be inadequate for public review and comment, the lead agency must identify all deficiencies in writing, and provide this information to the project sponsor.

4. Is there a time frame for the lead agency to determine the completeness and adequacy of a draft EIS submitted by an applicant?

Yes. The lead agency has forty five (45) days to determine completeness and adequacy of a draft EIS for public review, or to specify the reasons for its unacceptability. However, for an unusually complex or extensive EIS, a lead agency may negotiate with the project sponsor to establish a longer review period.

5. If a draft EIS is found deficient, is there a time frame for the sponsor to provide a revised document?

No. As with the initial draft EIS, there is no time frame for the project sponsor to make revisions to remedy the deficiencies in the first version of the draft EIS.

6. What is the time frame for a lead agency to review a resubmitted EIS?

The lead agency has thirty days to review the resubmitted draft EIS. The lead agency must then either accept the resubmitted draft EIS as adequate for public review and comment, or again provide the project sponsor with a written list of all deficiencies in the resubmitted draft EIS.

7. Is there a limit on the number of times a lead agency may reject a submitted draft EIS?

The SEQR regulations place no limit on rejections of a submitted draft EIS, other than requiring that the lead agency must identify the deficiencies in writing to the project sponsor. It is the lead agency's responsibility to clearly define major, substantive deficiencies so that the sponsor is able to make revisions responding to those comments. The goal of the lead agency in its review of the submitted draft EIS should be to advance the review of the proposed project to the public review phase. Therefore, a lead agency should provide sufficient guidance in the initial description of deficiencies to enable the project sponsor to develop an acceptable draft EIS with one revision effort, and only reject a resubmission if that resubmitted draft EIS still contains errors or omissions which are essential to the public's understanding of the proposed project.

8. What may a lead agency do if a project sponsor refuses to make requested changes?

If a lead agency's request for the inclusion of necessary information is ignored or refused, the agency may continue to reject the resubmitted draft EIS.

Alternatively, as long as the draft EIS contains an accurate description of the proposed action, plus reasonably supported discussions of significant impacts, alternatives and mitigation measures requested by the lead agency, the lead agency may choose to release that draft EIS for public review, even though the lead agency believes that the draft EIS still contains deficiencies. When there is this kind of fundamental disagreement between the lead agency and the preparer of the draft EIS, the lead agency may explain the disagreement in its Notice of Completion and invite public comment related to the disagreement, in addition to comments on the draft EIS itself. Additionally, the lead agency should repeat its criticisms of the draft EIS as written comments during the public review

and comment period. This process will allow the disagreement concerning EIS content to be resolved via the lead agency's responses to comments in the final EIS.

9. Must differences between the project sponsor's and lead agency's experts regarding interpretation of a technical issue be resolved prior to the lead agency determining to accept a draft EIS as complete?

No. It is not necessary to resolve these types of disputes before accepting the draft EIS as complete. In cases where there are valid differences in the interpretation of a technical issue, the lead agency should include both interpretations in the draft EIS. Providing both positions allows a reviewer to reach an independent determination regarding the impact.

10. May an involved agency participate in the determination of the adequacy of a draft EIS?

The lead agency must make the final decision regarding adequacy of a draft EIS. However, the lead agency may consult with other involved or interested agencies, particularly when an involved or interested agency possesses unique expertise related to significant impacts, or if a particular study or analysis was required in the EIS based on input from that involved or interested agency.

11. How must the public be informed that the lead agency has accepted a draft EIS for public review?

The lead agency must prepare and file a Notice of Completion consistent with [617.12](#) to announce that it has accepted the draft EIS and opened the public review and comment period. The Notice of Completion, with a copy of the draft EIS, must be filed with the appropriate DEC regional office, with the involved agencies, and with the chief executive of the political subdivision in which the action is principally located. If the action involves a project sponsor, it must receive a copy of the completion notice.

One of the required recipients of the Notice of Completion of a draft EIS is the "[Environmental Notice Bulletin](#)" ("ENB"), a weekly state wide publication by the DEC. Filing the Notice with the ENB provides publication in one weekly issue. It is good practice for a lead agency to also provide some local notification of availability of the draft EIS, such as through use of local publications or agency/municipal bulletin boards.

A [2005 amendment to SEQR](#) requires that draft and final EISs be posted on publicly accessible web sites. Additionally, it is good practice to place one or more review copies of the accepted draft EIS in accessible public venues such as libraries and municipal offices. Copies of the draft EIS should be provided to any person who has requested a copy, subject to a fee for copying costs, unless an unreasonable number of copies have been requested. The regulations allow a lead agency to place copies of the EIS in a public library instead of making a large number of individual copies.

12. How many copies of a draft EIS must be provided?

A project sponsor is required to provide sufficient copies of the draft EIS to meet the filing requirements of 617.12(b). Those interested agencies, organizations and individuals requesting copies prior to lead agency acceptance of the draft EIS should be included in this

initial count. Added to such figure should be an estimate of the number of copies which will be needed to satisfy requests made by the public, once a notice of completion of the draft EIS is released.

If the draft EIS is complex or voluminous, it may not be reasonable to make copies available to all persons requesting it. In addition, certain supplemental information such as large maps, statistical data and technical reports may be impractical to reproduce in quantity. Part 617 provides that where sufficient copies of a draft EIS are not available to meet public interest, the lead agency must provide additional copies to local public libraries. Such copies should include all supplemental information. A copy of all documents should also be available for public review in the office of the lead agency. Review copies of the draft EIS should be in place and available when the Notice of Completion is published.

13. How long is the public review period for a draft EIS?

The minimum public review period is thirty days, calculated from filing of the Notice of Completion. If the draft EIS is lengthy, there is delay in distribution of copies, or there is substantial public interest, the lead agency should extend the review period. In practice, the time allowed for draft EIS review is often considerably longer than the minimum. The lead agency may wish to negotiate a mutually acceptable extension with the project sponsor. If a hearing is held to receive comments on the draft EIS, the SEQR regulations require that the review period must remain open for 10 days following the close of the hearing, for the receipt of additional written public comments.

14. How should the lead agency calculate the public comment period?

The draft EIS cover sheet is required to show the actual date on which the lead agency decided to accept the draft EIS as adequate for public review, however, the lead agency should establish the public comment period based on when the Notice of Completion will actually be published and the draft EIS will be available to the public.

15. Should an involved agency comment during the public review period?

Yes, because the involved agency must make its own findings in support of its jurisdictional decision following the lead agency's issuance of the final EIS. By commenting on the draft EIS, the involved agency can ensure that its concerns will be officially recognized and responded to in the final EIS. If an involved agency has participated in scoping a draft EIS, it is especially important that the agency review the draft EIS and specifically comment on those sections responsive to its scoping comments.

16. Is it appropriate for the lead agency to comment during the public review period?

Yes. Although the lead agency has played an important role in preparation of the draft EIS, there is no guarantee that the lead agency's concerns have all been addressed satisfactorily. The lead agency may use comments on the draft EIS to raise issues which it anticipates will need to be addressed in its findings statement. Lead agency comments on a draft EIS may be an essential step if the preparation of the draft EIS has been contentious, because these comments can provide the lead agency with a means to address issues or analyses which the sponsor refused to include.

17. How can an agency or member of the public comment effectively on a draft EIS?

Commenting on the draft EIS is a valuable way for state or local agencies and the public to have direct input into the decision making process. This agency and public input can be particularly helpful to the lead agency in determining whether impacts on resources outside the lead agency's fundamental jurisdictions and expertise have been adequately addressed. Agencies should focus their comments on topics which relate to their functions or expertise.

The following guidelines are good practice by anyone making comments:

- Focus on major issues, not on problems with wording or minor discrepancies.
- If oral comments are made at a hearing, back them up with written comments covering at least the main points made at the hearing. (Remember that the record must remain open for at least ten days after the close of a hearing for submission of additional written comments.)
- Consider whether studies conducted and other sources cited are adequate to support the analyses and conclusions reported in the draft EIS. If there are deficiencies in the discussions of potential impacts, alternatives or mitigation, the commenter should identify those, and may suggest additional or more appropriate studies or sources to augment the deficient discussions.
- Give careful attention to the comparative assessment of alternatives presented in the draft EIS, and offer additional reasonable alternatives, if they can be identified by the commenter.
- Review all mitigation measures which are analyzed, and suggest additional reasonable measures to reduce adverse environmental impacts, if they can be identified by the commenter.

18. May individuals comment on a draft EIS after the close of the official comment period?

Yes, although the lead agency is not obligated to respond to late comments in the final EIS, even if the comments are substantive. However, the lead agency may choose to consider those late comments in the final EIS if the late comments identify new concerns of significant adverse environmental impacts not addressed in the draft EIS or discussed in timely comments by others.

In general, late comments which only reiterate comments already expressed by others will not be addressed by the lead agency.

E. SEQR Hearings

In This Section You Will Learn:

- when hearings are held;
- types of hearings;
- who may participate in hearings; and,
- notice requirements of hearings.

1. Must a hearing be held on a draft EIS?

No. Hearings are optional under SEQR. The decision whether or not to hold a hearing must be made by the lead agency for each EIS. Frequently, however, other laws related to decisions on the action, such as a local rezoning or subdivision plat approval, may require that a public hearing be held. SEQR regulations encourage combining such mandatory hearings with a SEQR hearing.

2. Is a SEQR hearing required for a Type I action?

No. Even when a draft EIS has been prepared for a Type I action, the lead agency must still decide whether to hold a hearing on that particular EIS.

3. When are hearings held during the EIS process?

Hearings are held after the notice of completion of a draft EIS, during the public comment period.

4. How should a lead agency determine whether to hold a SEQR hearing on a draft EIS?

In determining whether or not to hold a SEQR hearing, the SEQR regulations at [617.9\(a\)\(4\)](#) direct the lead agency to consider:

- The degree of interest in the action shown by the public or involved agencies;
- Whether substantive or significant environmental issues have been raised;
- The adequacy of the mitigation measures proposed;
- The extent of alternatives considered; and
- The degree to which a public hearing can aid the agency decision making process by providing an efficient mechanism for the collection of public comments.

In addition, in determining whether to hold a SEQR hearing, the lead agency should consider if there is a need for:

- An opportunity for broader public disclosure;
- Solicitation of important and informative comment by certain interest groups, technical specialists, or community representatives; or
- An opportunity for a project sponsor to briefly discuss the project and draft EIS.

5. What type of hearing is required under SEQR?

SEQR does not dictate the type or form of public hearing to be held. The lead agency must decide, for each case, how formal or informal the hearing will be. Whenever possible, SEQR hearings should be incorporated into an agency's existing hearing procedures.

In general, the two classes of administrative hearings are "legislative" and "adjudicatory". A legislative hearing is a less formal proceeding which typically involves unsworn oral statements, submission of unsworn written comments, and informal record-keeping and chairing of the hearing. An adjudicatory hearing is a formal proceeding involving rules of evidence, sworn testimony, cross examination, and a stenographic record, and may be held when agency procedures so require.

6. What is the status of comments made on a draft EIS at a SEQR hearing?

Substantive comments received at a SEQR hearing become part of the official record. They must be responded to by the lead agency in the final EIS, and thus may affect agency findings and decisions on a project. If a stenographic record of the hearing is made, it becomes part of the official record of comments received on the EIS, and either the transcript or a summary must become part of the final EIS.

7. Is there a relationship between the review period and the hearings held on a draft EIS?

Yes. If a hearing is held, the review period must remain open at least 10 days after the close of the hearing to receive additional written comments. The total review period begins at the time of filing of the draft EIS and must be no less than 30 days long, whether or not a SEQR hearing is held.

8. May a SEQR hearing be held on a final EIS?

There is no requirement in the SEQR regulations for a hearing on a final EIS. A hearing on a final EIS would actually run counter to the intent of SEQR, in that a final EIS is intended to serve as the conclusion of the lead agency's environmental review of the proposed project.

9. Can involved agencies hold a SEQR hearing if the lead agency chooses not to?

No. The lead agency has the sole responsibility for determining the need for, and conducting, a SEQR hearing on a draft EIS.

10. What are the notice requirements for a SEQR hearing?

When a lead agency determines that a public hearing on an EIS is necessary, the lead agency must file a notice of such hearing with all parties identified in [617.12](#). The lead agency must also publish notice of the hearing at least 14 days before the hearing will begin. Publication must generally be in one local newspaper of general circulation. However, for projects of regional or statewide extent, the lead agency may instead publish the notice in the ENB and in the New York State Register. Note that hearing notice requirements in underlying jurisdictions may require different lengths of notice periods, so the lead agency should ensure that its notice of hearing satisfies the notice period requirements of SEQR, as well as those of the underlying jurisdictions.

A hearing notice must contain, at a minimum:

- the time and place of the hearing;
- purpose of the hearing; and
- a summary of the notice of completion of the draft EIS.

Since the hearing notice contains a summary of the notice of completion of the draft EIS and must be circulated to the same parties as the notice of completion of the EIS, it is good practice to combine the two notices when possible.

11. How can a SEQR hearing be made more effective?

To be effective, a hearing must be well organized. Therefore, it is good practice for the lead agency, the project sponsor and any involved agencies which have indicated an intent to participate in the hearing meet prior to the hearing to resolve ground rules for the conduct of the hearing. Key interested parties may be included in such a meeting, at the discretion of the lead agency. Issues to be resolved at the pre-hearing meeting include the following:

- identification of the participants and their role(s) in the hearing;
- hearing schedule (dates, times, places, order of issues or speakers);
- specific environmental issues to be discussed; and
- the extent, if any, of a presentation by the project sponsor.

12. If an agency complies with the "open meetings" law during its consideration of an action under SEQR, isn't this a hearing?

No. The Open Meetings Law provides for public attendance at, and observation of, a board's deliberations, but makes no provision for public participation or comments.

F. Final EISs

In This Section You Will Learn:

- the content and processing of a final EIS.

1. What is a final EIS (FEIS)?

A final EIS consists of:

- the draft EIS;
- any necessary corrections or revisions to the draft EIS;
- copies or a summary of all substantive comments received, indicating their source (correspondence, hearing, etc.); and
- the lead agency's responses to substantive comments.

2. How may the lead agency incorporate the draft EIS into the final EIS?

The lead agency may either directly include the full draft EIS, or may incorporate the draft EIS by reference. In either case, however, the lead agency should include any necessary changes or additions to the draft EIS, with the reasons for these changes. Where changes are relatively few, and do not involve substantive changes to the draft EIS, an errata sheet listing changes to be made to the draft will suffice as the summary of changes. Where major substantive changes will be made to the draft EIS, revised text sections may be more practical.

3. Should the full hearing record on the draft EIS be included in the final EIS?

No. The hearing record should not be included in the main text of the final EIS, however, a summary of hearing comments must be part of the final EIS, and the full hearing record should be attached as an appendix to the final EIS and must be made available for public review along with any other reference material.

4. Who receives the final EIS?

The final EIS must be sent to all involved agencies, and to everyone who received a copy of the draft EIS. If the final EIS is lengthy, or the number of documents available is limited, the lead agency may provide copies for review in local public libraries. In such cases, the lead agency must provide notice to any recipients of the draft EIS who will not be receiving a final EIS to advise them where copies are available for review.

Additionally, under a [2005 amendment to SEQR](#), lead agencies are required to post all final, as well as draft EISs, on a publicly accessible website.

5. Must the lead agency respond to all comments raised in the review of the draft EIS, either in writing or at public hearings?

The lead agency must respond to substantive comments. General statements of objection or support should be noted in the comment summary, but need no response. The lead agency may choose to group comments by topic, and respond only once for each topic, so that responses in the final EIS are not repetitive. Comments do not need to be responded to individually or in order of their receipt.

6. Who decides what comments are "substantive," requiring response in the final EIS?

The lead agency decides which comments on a draft EIS constitute "substantive" comments and must, therefore, be responded to in the final EIS.

7. How does the lead agency decide which comments are substantive?

In determining whether comments received are "substantive", the lead agency should assess the relevance of the comments to identified impacts, alternatives and mitigation, or whether the comments raise important, new environmental issues, not previously addressed. The lead agency may also choose to use its responses to comments as an opportunity to explain why an impact is not significant, why a particular topic is not included in the final EIS, or how an alternative or proposed mitigation would work. Clarification of scientific terms, concepts or data interpretation may also be necessary in a final EIS.

When a subject has been raised frequently, even if the issue is not relevant to the proposed action, it is good practice to address that topic at least briefly. Speculative comments, or assertions that are not supported by reasonable observations or data, need no response. Where comments identify minor discrepancies in wording, or typographical errors, the lead agency should make those corrections, but no other response is needed.

8. What should the lead agency do if it receives no substantive comments on a draft EIS?

In the final EIS, the lead agency should acknowledge any comments that were received, and make note of any minor revisions made to the draft EIS.

9. Who is responsible for the preparation of the final EIS?

The lead agency is responsible for the adequacy and accuracy of the final EIS. A project sponsor may be requested to prepare draft responses to some or all of the substantive comments received on a draft EIS. However, the lead agency must still review any responses prepared by the sponsor to ensure that the analyses and conclusions accurately represent the lead agency's assessment. The lead agency may need to edit a sponsor's draft responses. The lead agency may also consult with other involved agencies, or with outside consultants, but this in no way reduces the responsibility of the lead agency for the final product.

10. Are there times when a draft EIS is produced but no FEIS is required?

Yes, under either of two circumstances. First, if the lead agency determines, on the basis of the draft EIS and public comment period, that the proposed action will not have a significant adverse impact on the environment, a negative declaration may be prepared and filed in lieu of a final EIS. In most cases, however, proceeding to a final EIS will create a more coherent, defensible record.

Second, if a project sponsor withdraws its application after a draft EIS has been prepared, no final EIS need be prepared.

11. How soon after acceptance of a draft EIS must a final EIS be accepted and filed?

Where the EIS involves a project for which applications are under review by the lead agency, and if no hearing was held, the lead agency has 60 days from the filing of the draft EIS to produce the final EIS. If a hearing was held, the lead agency has 45 calendar days from close of the hearing record to file its accepted final EIS.

The lead agency may extend the time for filing if it needs more time to adequately prepare the final EIS. Further, the lead agency may extend its time for filing if it concludes that it must materially reconsider or modify the EIS because review of the draft revealed additional significant adverse environmental impacts related to the proposed action. When a lead agency concludes that it must extend the time for preparation of a final EIS, it is good practice to advise the applicant in writing, including an estimated date for completing the final EIS.

If a lead agency concludes that review of the draft EIS revealed such significant issues that preparation of a supplemental EIS is necessary, then the [rules](#) governing preparation of that supplemental EIS would apply.

12. Does SEQR require a hearing on a final EIS?

No. Neither the SEQR statute, nor the regulations, provide for a hearing on a final EIS.

13. Is there a comment period for final EISs?

No. SEQR requires that the lead agency, and all other involved agencies must wait for at least ten days after the filing of the final EIS before making their findings and final decisions on the action. This period is not a comment period, but instead allows time for the involved

agencies and any interested parties to consider the final EIS. While concerned parties, or other agencies, may comment in writing to the lead agency on the final EIS, the lead agency has no obligation to respond to comments on a final EIS.

14. Is there any value in commenting on a final EIS?

Interested parties or agencies may choose to submit comments on a final EIS to clarify points made earlier, or to identify comments that have not been satisfactorily responded to in the final EIS. These comments could influence the lead agency, or other involved agencies, in making findings and taking final actions.

15. Is a final EIS the last step in the SEQR EIS process?

No. The final step in SEQR is the preparation of findings by the lead agency and each involved agency at the time each makes its final decision regarding the proposed action. Findings are made after the final EIS has been accepted.

G. Supplemental EISs

In This Section You Will Learn

- what is a supplemental EIS; and,
- when is a supplemental EIS required.

1. What is a supplemental EIS?

A supplemental EIS provides an analysis of one or more significant adverse environment impacts which were not addressed, or inadequately addressed, in a draft or final EIS. A supplemental EIS may also be required to analyze the site-specific effects of an action previously discussed in a generic EIS.

2. When is a supplemental EIS needed?

A supplemental EIS may be required if:

- the project sponsor proposes project changes which may result in one or more significant adverse environmental impacts not addressed in the original EIS;
- the lead agency discovers new information, not previously available, concerning significant adverse impacts;
- a change in circumstances arises which may result in a significant adverse environmental impact(s); or
- site-specific or project-specific analysis of potential significant adverse environmental impact(s) is needed for actions following a generic EIS.

3. Are there criteria for determining if newly discovered information warrants preparation of a Supplemental EIS?

Yes. The lead agency is directed to consider:

- the importance and relevance of the information; and
- the present state of the information provided in the original EIS.

The information must be relevant to the discussion of significant adverse environmental impacts, and important for the accuracy of the assessment of those impacts. The information should be genuinely new, that is, the lead agency would have had no reasonable means of knowing that information sooner. The lead agency should evaluate the existing EIS in light of the new information, to be certain that relevant issues have not already been covered in sufficient detail. Further, the scope of the supplemental EIS should be limited to a re-assessment of the relevant significant adverse environmental impacts based on the new information identified.

4. What constitutes a “change in circumstances” as applied to a supplemental EIS?

A “change in circumstances” means any change in the physical setting of, or regulatory standards applicable to, the proposed project. For example, if nearby land uses have changed since the original site assessment was conducted, or the municipality has enacted new land use rules, and these changes are relevant to significant adverse environmental impacts, then a supplemental EIS may be warranted.

5. At what time in the SEQR process may a supplemental EIS be required?

A lead agency may require a supplemental EIS at any time during review of an EIS. For example, the lead agency may determine, based on comments received from involved agencies or the public, to require a supplemental EIS prior to preparing a final EIS. Alternatively, if a project sponsor proposes major project changes which could change the lead agency’s identification and assessment of likely significant adverse environmental impacts, a supplemental EIS may be required after the lead agency has accepted the final EIS and issued its finding statement.

For generic EISs, supplements after findings are typical. Potential need for future site-specific or project-specific analysis is inherent in the concept of generic EISs.

6. May a supplemental EIS be required by an agency other than the original lead agency?

As long as the original lead agency retains decision-making power, no other involved agency can force the preparation of a supplemental EIS. This would extend through the lead agency’s filing of its findings statement and issuance of its final decision.

After the lead agency has issued its findings statement and final decision, however, any project modification which was not addressed in the EIS but which may have significant adverse environmental impacts, may be subject to a supplemental EIS (or a new EIS, if the modification is so substantial as to be essentially a new project). The original lead agency may continue in its role if it will have regulatory jurisdiction over the modification, or another involved agency which must approve the modification may be established as lead. Any such re-establishment of lead agency requires the concurrence of all involved agencies.

In the case of a generic EIS, the involved agencies may agree in advance that a second involved agency will conduct a site-specific SEQR analysis, once the original lead agency has made its initial decision based on its generic EIS findings. An example of this would be the preparation of a generic EIS for a countywide solid waste management plan, based on which the county-level lead agency selects a specific site and waste disposal method, and following which the state regulatory agency must conduct a project-specific environmental review.

7. How should an agency proceed if it concludes that a final EIS must be supplemented?

The SEQR regulations require that a supplemental EIS be subject to the full procedures required for any other EIS. Thus, when a supplemental EIS is required after a draft or final EIS, the following steps apply:

- the lead agency should document its assessment of the impacts which are the basis for requiring the supplemental EIS, preferably using a full EAF;
- the lead agency must prepare and file a notice of intent to prepare a supplemental EIS, that is, a positive declaration;
- the lead agency may choose to conduct scoping;
- the lead agency must prepare or review the draft supplemental EIS to determine whether the document is adequate for public review;
- once the draft supplemental EIS is accepted, the lead agency must notice and conduct a public review period;
- the lead agency may choose to conduct a hearing on the supplement;
- the lead agency must respond to comments, prepare a final supplemental EIS including comments plus responses, and file notice of the completion of the document; and
- the lead agency and all other involved agencies must then make their findings.

8. Who is responsible for preparing a supplemental EIS?

For projects involving applications for governmental approvals, supplemental EISs are typically prepared by the project sponsor. However, as with all EISs, a supplemental EIS must be reviewed and accepted by the lead agency, and the content of a final supplemental EIS remains the responsibility of the lead agency.

H. Generic EISs

In This Section You Will Learn:

- what is a generic EIS;
- when is a generic EIS required; and,
- how is the content of a generic EIS different from the content of a site specific EIS.

1. What is a Generic EIS?

A [generic EIS](#) is a type of EIS that is typically used to consider broad-based actions or related groups of actions that agencies may approve, fund, or directly undertake. A generic EIS can examine the environmental impacts of:

- A number of separate actions in a geographic area, such as several petitions to rezone residential areas to commercial;
- A sequence of actions by an agency or project sponsor, such as a zoning change, followed by road improvement, followed by the construction of a shopping mall;
- Separate actions having common impacts, such as several separate projects impacting the same groundwater aquifer; or

- Programs or plans that have wide application or restrict the range of future alternative policies, such as comprehensive plans, resource management plans, local land use laws and ordinances, or agency regulations and permit programs.

2. How does a generic EIS differ from a site or project-specific EIS?

A generic EIS differs from a site or project specific EIS by being more general or conceptual in nature. The broader focus of a generic EIS may aid the lead agency in identifying and broadly analyzing the cumulative impacts of a group of actions, or a combination of impacts from a single action. Generic EISs may identify information gaps to be assessed on a site- or project-specific basis, or may address some issues through hypothetical scenarios.

3. What are some characteristics of a generic EIS?

A generic EIS typically has one or more of the following characteristics:

- It may be a short, broad, or generalized discussion of the setting, background and rationale for the proposed action;
- It may provide a conceptual basis for general projections concerning future activity;
- It may identify important elements of the natural resource base of the study area, as well as significant features, patterns or character relating to human use of the study area;
- It may present and analyze, in general terms, a few hypothetical scenarios that are likely to occur as a result of a planning or zoning action;
- It may discuss, in general terms, the constraints and consequences of narrowing future options; or
- It may provide supporting background documentation for sound environmental planning.

4. Are there specific analyses for which a generic EIS may be appropriate?

A generic EIS may be useful to:

- Account for cumulative impacts, regional influences, or secondary effects of an overall program or group of actions;
- Allow evaluation of actions being proposed by unrelated project sponsors which may have similar impacts on the same resources (such as multiple new homes adjoining the same wetland);
- Enable early consideration of mitigation and alternatives, at a stage in the planning process when there is greater flexibility;
- Provide public disclosure of agency considerations used in environmental decision-making;
- Limit extent of future project reviews by providing early guidance on significance determinations;
- Set forth conditions, criteria or thresholds to guide future site-specific actions that may be undertaken; or
- Establish baseline data for reference and scoping of supplemental site-specific EISs, thus avoiding duplication, reducing costs and paperwork.

5. Are there specific types of actions for which generic EISs are more typically prepared?

Generic EISs are more typically prepared for the following types of activities:

- comprehensive plans;
- resource management plans;
- area wide zoning;
- changes to, or adoption of, regulations or local laws and ordinances;
- planned unit developments or planned development districts;
- phased development of residential subdivisions, or industrial and commercial parks;
- or
- development of a broad geographic area.

6. Who prepares a generic EIS?

When a generic EIS applies to one or more direct actions undertaken by an agency, then that agency would prepare the generic EIS. For actions such as zoning changes, the reviewing agency may also be the best entity to prepare the generic EIS. However, single applicants, multiple project sponsors, or representative organizations proposing an entire group of related projects or project phases, could be responsible for generic EIS preparation.

7. When may a generic EIS be preferable to a site or project-specific EIS?

Agencies that frequently undertake, fund or approve actions that are essentially similar in nature and effect may find that a generic EIS, which addresses those repetitive actions, may save work by reducing the need for individual EISs or negative declarations. Similarly, a generic EIS may be appropriate when an agency is considering a new, or substantially revised plan, program or policy, that will affect a wide range of resources or geographic areas, and for which an exploration of a range of mitigation measures that would work in various circumstances is needed. A generic EIS may also be the most effective way for an agency to assess potential significant cumulative impacts from a number of small projects that individually do not have a significant impact on the environment.

For project sponsors, a generic EIS may be helpful to discuss important preliminary issues prior to the investment of money and time in engineering plans or detail. For example, if rezoning is required for a specific project and the result of that decision could reshape the project, a generic EIS addressing issues and impacts related to alternative site uses, may allow decisions about appropriate uses of the site to be made early enough so that it is still feasible for the sponsor to modify the initial plans.

8. Do generic EISs require different procedures than other EISs?

The basic procedures are the same for all EISs. After the lead agency has issued a positive declaration to require a generic EIS, it may conduct scoping. The lead agency must then prepare and accept the draft generic EIS; allow a public review period, possibly including a hearing; prepare and accept the final generic EIS; and, finally, issue findings based on the final generic EIS. [Noticing and filing requirements](#) for generic EISs are the same as for other types of EISs.

9. Should generic EISs include elements not typically found in a site or project specific EIS?

Yes. Consideration of three additional factors may be appropriate when preparing a generic EIS. These additional factors are:

- Hypothetical scenarios as alternatives that could occur under the proposed generic action, including evaluation of all reasonable alternatives that could achieve the objectives of the project sponsor.
- Thresholds and conditions that would trigger the need for supplemental determinations of significance or site-specific EISs.
- A preliminary scope of the environmental issues which would need to be addressed in any supplemental EISs prepared after the original generic EIS.

10. How should a generic EIS address required content differently than a site or project specific EIS?

The [fundamental elements](#) of a generic EIS are basically the same as for a site or project-specific EIS. However, several of the standard elements should be treated somewhat differently than in a conventional EIS:

- **Environmental Setting**

The generic EIS typically considers a broader geographic area than a site specific EIS. Thus, elements such as geologic, atmospheric, and man-made resources, that tend to be very broad in their scope, can be effectively addressed in a generic EIS. Where the lead agency anticipates preparation of future site or project specific EISs, these discussions in the generic EIS provide an "umbrella" reference document, thus eliminating the necessity to discuss them in detail in future supplemental EISs.

- **Significant Environmental Impacts** (including short-term, long-term, cumulative and secondary)

While primary (direct) impacts are usually too dependent on site-specific conditions to be discussed adequately at the generic level, secondary (indirect) impacts should receive particular attention in a generic EIS. An example of secondary impacts would be the changes in population growth, land use patterns or traffic, and the need for more public services as a result of increased employment opportunities generated by construction of a Planned Unit Development (PUD). Similarly, a generic EIS which examines actions that will occur over a long period of time, sequentially, in phases, or under a proposed master plan or program, should emphasize long term over short-term impacts. Finally, a generic EIS allows an agency to examine cumulative impacts of multiple potential projects on a particular resource, even if none of the projects considered individually would lead to significant impacts.

- **Alternatives to Proposed Action**

A generic EIS often addresses actions at the conceptual stage, so, therefore, there is flexibility when developing and analyzing alternatives. The consideration of alternatives at the conceptual stage should be sufficiently broad ranging that the resulting generic EIS will support a range of future agency choices and decisions. Because potential future site-

specific actions following a generic EIS are often speculative or unknown, potential impacts of those future uses are often best discussed in terms of hypothetical scenarios. For example, alternatives that could be examined in a generic EIS for a comprehensive plan update and zoning revisions, might include:

- different patterns or mixes of zoning within the study area; and
- a range of uses within a zone, including the most likely course of development as well as the most intensive use.

- **Proposed Mitigation**

The following are examples of routine mitigation measures that should be considered in a generic EIS:

- The establishment of performance standards, conditions or impact thresholds which could apply to future site or project specific reviews. An agency could require submission of stormwater management plans with site-specific project applications, including criteria relating to run-off, retention or disposal. Similarly, in an area where public water supply and waste water treatment are not available, an agency could consider maximum allowable residential densities to control cumulative impacts on a groundwater aquifer.
- Careful timing or phasing of development. For projects involving stream disturbances, the agency should consider timing of in-water work so as to avoid critical fish migration periods. Where future development will require substantial land clearing, the agency should consider work sequences and schedules that would minimize acreage cleared at any one time and ensure construction of stormwater management features in advance of other construction activities.
- Monitoring. An agency may require monitoring of specific impacts (air, water, traffic, etc.) during construction or operation of the multiple projects or phases addressed by the generic EIS, to ensure that cumulative thresholds established in the generic EIS are not exceeded.

- **Growth-Inducing Aspects of the Action**

The generic EIS should describe any potential that proposed actions may have for "triggering" further development, such as:

- attracting significant increases in the local population by creating or relocating employment, with attendant increase in the demands for support services and facilities, which may be necessary to serve the working population (housing, stores, public services, etc.); or
- increasing the development potential for a local area by installing or upgrading sewers, water mains, or other utilities.

If such a "triggering" potential is identified, the anticipated pattern and sequence of actions resulting from the initial proposal should be assessed. The generic EIS should identify upper limits of acceptable growth inducement in order to provide guidance to the decision maker.

11. Should hearings be held on draft generic EISs?

While not required under SEQR, public hearings may be an important part of the generic EIS process for the following reasons:

- The proposal being evaluated by a generic EIS may affect a broad geographic area or a wide range of people;
- Members of the public can be a primary source for identifying the community service and human resource impacts of a generic action; and
- Public participation is often a required component of review of the kinds of direct actions by public agencies which are typically addressed by generic EISs.

It is important that the lead agency clarify the intent of a generic EIS to the public before receiving comments. This will avoid inappropriate requests for site-specific information on a conceptual document.

12. What content should be included in a final generic EIS?

As with any other final EIS, a final generic EIS must include the draft generic EIS, with any revisions; all comments received on the draft; and the lead agency's responses to all substantive comments raised during the review of the draft. The final generic EIS should identify those environmental issues for which supplemental determinations of significance or supplemental EISs will be required. While a final generic EIS should not be expected to resolve all site-specific issues, some may be discussed and concluded to be non-significant in specific situations.

13. Are supplemental EISs always required following generic EISs?

The course of action following a final generic EIS will depend on the level of detail within the generic EIS, as well as the specific follow up actions being considered. A lead agency considering a subsequent action must evaluate the generic EIS to determine whether the subsequently proposed action was not addressed, or inadequately addressed, in the generic EIS, and whether the subsequent action is likely to have one or more significant adverse environmental impacts. If significant adverse impacts of the subsequent action are identified, and they were not adequately addressed in the generic EIS, then a site- or project-specific supplemental EIS must be prepared. Many generic EISs and Findings identify the environmental issues or thresholds that would trigger the need for such a supplement.

However, if the lead agency determines that the final generic EIS adequately addresses all potential significant adverse impacts of the subsequently proposed action, then no supplemental EIS is necessary.

14. How should an agency document its decision whether or not to supplement a final generic EIS?

If an agency determines that a supplemental EIS should be required, it must issue a positive declaration identifying the significant adverse environmental impacts not adequately addressed in the generic EIS. If, however, an agency determines that no supplemental EIS is necessary, it may still need to make supplemental findings, based on the generic EIS, to address the subsequently proposed action. Even if the agency concludes

that no supplemental findings are necessary, it is still good practice to document the consideration in the agency's files.

15. What should be considered in preparing supplements to generic EISs?

When developing a supplement to a generic EIS, the lead agency for the supplemental EIS should:

- Reference the generic EIS, summarize its relevant sections, and indicate where an interested entity can find a copy of the generic EIS;
- Incorporate mitigation and alternatives recommended in the generic EIS as requirements for the supplemental action, and, in addition, specify any additional mitigation measures or alternatives to be analyzed by the supplemental EIS; and
- Relate analyses in the supplemental EIS to conditions, criteria and thresholds established in the generic EIS and adopted in findings.

16. How should a lead agency treat public comments received on a supplement to a generic EISs?

Comments made on supplements to generic EISs should be restricted to the new issues identified and discussed in the supplement, and the lead agency must respond to those comments in the final supplemental EIS. However, the lead agency need not respond to comments received in regard to the underlying final generic EIS, or to simple statements in support of, or in opposition to, the proposed action analyzed by the supplemental EIS.

I. Findings

In This Section You Will Learn:

- what are SEQR findings;
- who prepares SEQR findings; and,
- time frames and filing requirements for SEQR findings.

1. What are SEQR findings?

A [findings statement](#) is a written document, prepared following acceptance of a final EIS, which declares that all SEQR requirements for making decisions on an action have been met. The findings statement identifies the social and economic, as well as environmental, considerations that have been weighed in making a decision to approve or disapprove an action. A positive findings statement means that, after consideration of the final EIS, the project or action can be approved, and the action chosen is the one that minimizes or avoids environmental impacts to the maximum extent practicable. For an action which can be approved, an agency's findings statement must articulate that agency's balancing of adverse environmental impacts against the needs for and benefits of the action. If the action cannot be approved based on analyses in the final EIS, a negative findings statement must be prepared, documenting the reasons for the denial.

Each involved agency, not only the lead agency, must prepare its own SEQR findings following acceptance of a final EIS. Findings provide "the teeth" in the SEQR process because they articulate the basis for substantive aspects of each agency's decision, including supporting any conditions to be imposed by the agency. Whether findings support

approval or denial of an action, the agency's reasoning must be stated in the form of facts and conclusions that are derived from the final EIS.

2. Are SEQR findings mandatory?

Yes. The preparation of written SEQR findings is required by the SEQR regulations for any action that has been the subject of a final EIS.

3. What is the role of findings in the decision-making process?

Findings provide a rationale for agency decisions, including any conditions to be attached to the agency's approval. Should an agency decision be challenged, findings also provide a record to help explain the agency's decision-making. The findings procedure allows each involved agency to consider the relevant environmental factors presented in the final EIS, and balance and weigh essential considerations, including the economic and social factors, in reaching its decision on its underlying jurisdiction.

4. May SEQR findings ever be made before a final EIS is completed?

No. SEQR findings are only made after a final EIS. Determinations of significance, made as a result of EAF review, may resemble findings in style and assessment of potential impacts; however, SEQR findings, which provide a basis for specific conditions or limitations included in an agency's decision, may only be issued after a final EIS.

5. Are "findings" unique to SEQR?

Some other local government review procedures, such as the granting of zoning variances, also require the decision-making agency to make "findings". These other "findings" are specific to those jurisdictions and are not the same as, nor may they substitute for, SEQR findings.

6. Who makes SEQR findings?

All involved agencies must make findings.

7. May an involved agency rely on the lead agency to make the required findings?

No. Each involved agency is responsible for preparing its own findings. However, if an involved agency concurs with the completed findings of the lead agency, and those findings respond fully to the environmental concerns of the involved agency, then the involved agency may adopt all or a portion of the lead agency's findings within the involved agency's findings.

8. Are SEQR findings the same as an agency's decision on an action?

No. The SEQR findings are the basis for decisions on an action. An agency may choose to include the findings statement as part of its decision; however, a findings statement by itself does not constitute a decision. Also, a decision alone will not satisfy the SEQR requirement for findings.

9. Can findings differ among involved agencies?

Agencies involved in the same action may have entirely different findings. This can result from agencies' differing balancing of environmental with social and economic factors, as well as from fundamental differences among agencies' underlying jurisdictions. An involved agency is not obligated to make the same findings as the lead agency or any other involved agency. However, findings must be based on, and related to, information in the EIS record. If one agency prepares positive findings, and another prepares negative findings, the action cannot go forward unless the conflict is resolved.

10. What if an agency cannot make findings to approve?

An agency must not undertake, approve or fund any part of an action, if it cannot support positive findings and demonstrate, consistent with social, economic and other essential considerations from among the reasonable alternatives, that the action:

- minimizes or avoids adverse environmental impacts to the maximum extent practicable, and,
- incorporates into the decision those mitigation measures identified in the SEQR process as practicable.

An agency decision to disapprove an action on environmental grounds must be accompanied by negative findings. If one agency issues positive findings, but another issues negative findings, the action cannot go forward unless the conflict is resolved.

11. Are there time frames for making findings?

Yes. Each agency involved in an action, including the lead agency, must wait a minimum of 10 calendar days after the lead agency has filed the final EIS before any can make findings. The purpose of the waiting period is to allow agencies and the public reasonable time to consider the final EIS.

When an action involves an applicant, the lead agency must make its findings no more than 30 calendar days after the final EIS is filed, or longer with agreement of the project sponsor. Other involved agencies may make their findings whenever they make their final decisions.

12. Are there filing requirements for SEQR findings?

Yes. Section [617.12\(b\)](#) requires that involved agencies file copies of their SEQR findings with the applicant, and with all other agencies involved in the action. Each involved agency must also retain copies in its files, available for public inspection. No publication is required.

13. Why must all involved agencies receive copies of the others' SEQR findings?

The sharing of findings among involved agencies allows agencies making subsequent decisions to benefit from the thinking processes, represented in the SEQR findings statements, as the agencies make their discretionary decisions related to the action analyzed by the final EIS. Where any involved agency imposes conditions or mitigation measures on an action, it is important for other agencies to know what has been required. This can help avoid conflicts and assist in SEQR compliance.

14. Why is consideration of social and economic factors included within SEQR findings?

It is not the intention of SEQR for environmental factors to be the sole consideration in agency decision-making. The purpose of SEQR is to ensure that the environmental impacts of an action are weighed and balanced with social, economic and other considerations so that a suitable balance of social, economic and environmental factors may be incorporated in the planning and decision-making processes of state, regional and local agencies.

15. How should an agency balance environmental harm against social and economic benefits in order to approve an action?

SEQR gives considerable discretion to agencies to make decisions consistent with social, economic and other essential considerations. This allows agencies to approve actions providing social or economic benefits even if all environmental impacts cannot be totally avoided or mitigated. However, the underlying requirements that adverse environmental impacts must be avoided or minimized, and mitigation measures applied, remain. Thus, the more a project provides important, public, social and economic needs or benefits, the more an agency may conclude that it can accept certain adverse environmental impacts.

16. Can conditions and mitigation measures outside the scope of an agency's jurisdiction be incorporated into that agency's SEQR findings?

Yes. Based on the draft and final EISs, and any related application material, a lead agency should incorporate all appropriate mitigation measures as conditions to its decision making, even if such conditions do not specifically fall within the agency's jurisdictional authority. However, conditions imposed by a lead or involved agency cannot infringe upon the jurisdiction of any other involved agency. In order for an agency to incorporate mitigation measures as conditions for its approval, the agency must identify the supporting reasons in its SEQR findings statement, based on specific information from the final EIS.

17. Must all mitigation be limited to the project site?

No. Because of the substantive nature of the SEQR process, reasonable mitigation justified in the findings statement should be applied, even when such mitigation may be off the project site. The offsite mitigation must be reasonably related to the impacts from the action, and both achievable and deliverable by the project sponsor.

18. What is the basis for imposing conditions outside of an agency's basic authority?

The core substantive requirement for SEQR findings is the conclusion that all significant adverse environmental impacts have been avoided, minimized, or mitigated, to the maximum extent practicable. This gives agencies the authority, following the filing of a final EIS, to use the written SEQR findings as the basis for requiring substantive conditions, that fully or partially mitigate identified adverse impacts, within the approval for an action (see [Town of Henrietta v. DEC, 1980](#)). Using SEQR findings as a basis for conditions ensures that SEQR is not just a procedure, but instead, that the information gathered by the environmental review process will affect agency decisions. The agency may even impose conditions that are beyond the agency's jurisdiction, unless those conditions would intrude upon another agency's jurisdiction.

19. What are some examples of an agency imposing conditions outside its basic authority, based on its SEQR findings?

- As a condition of granting a rezoning, a town board could require the developer of commercial property, which would generate significant traffic, to install traffic control devices at an intersection several blocks away, as long as no other agency has dedicated traffic control jurisdiction.
- An agency may require fencing or landscaping as a visual or sound barrier between commercial and residential property when granting a wetland or discharge permit, as long as no other agency with jurisdiction over that project has the authority to mitigate the identified impacts.

20. Is a supplemental findings statement ever appropriate?

Yes. An agency may choose to prepare a supplemental findings statement in at least two circumstances:

- A supplemental findings statement may be necessary if changes are proposed by a project sponsor after issuance of the FEIS and the agency's SEQR findings, and the agency will be required to issue an amended or modified approval. As long as the final EIS contains sufficient information for the agency to analyze the impacts of the sponsor's proposed changes, the agency may issue a supplemental findings statement to document and support its decision concerning the proposed project changes, including any new conditions the agency may attach to its decision.
- If a supplemental EIS is prepared after an agency has issued its SEQR findings, but that agency must issue one or more discretionary decisions, the agency may issue a supplemental findings statement taking into account the supplemental EIS.

J. Fees for EIS Preparation or Review

In This Section You Will Learn:

- about SEQR fees.

1. Does SEQR allow a lead agency to recover costs from an applicant for preparing or reviewing an EIS?

Yes. The SEQR statute and [regulations](#) allow a lead agency to recover its costs for either the preparation or the review of an environmental impact statement, but not both.

2. Can all involved agencies charge for their review of an EIS?

No. Only the lead agency may charge SEQR fees. However, because the lead agency's review must include the concerns of all other involved agencies, it may use SEQR fees to cover the costs of hiring expertise to address environmental issues raised by other agencies.

3. Must a lead agency always charge a SEQR fee for its EIS review?

No. SEQR fees are allowed, but a lead agency is not obligated to impose them.

4. Are there limits on allowable SEQR fees?

Yes. Only actual review or preparation costs may be charged. Additionally, the SEQR regulations specify maximum fees relative to total project value for three categories of projects. Such maximum fees may only be charged if review or preparation costs equal or exceed them. The limits are:

- a. For residential projects, two percent of the sum of land costs plus site improvement costs, not including costs for buildings or structures;
- b. For non-residential projects, one half of one percent of the total project cost, that is, costs for land, site preparation, utility connections, plus labor and materials; or
- c. For mineral extraction projects, one half of one percent of the cost of preparing the site for mining, that is, costs for clearing, grubbing, removal of overburden, utility services, access roads and structures.

5. How is the "cost of land" defined?

The regulations define land costs as the higher of either the actual cost paid to obtain the property, or the current fair market value of the land (based on current assessed valuation and considering the equalization rate).

6. In calculating the allowable SEQR fee for a residential subdivision, what is a "site improvement"?

The following are examples of site improvements:

- grading
- landscaping
- drainage
- electric service
- bridges
- water service
- roads
- sewage collection and treatment
- parking areas
- wells
- retaining walls
- golf course
- docks
- playgrounds

7. In calculating the allowable SEQR fee for a residential subdivision, what is a "building and/or structure"?

The following are examples of a building or structure:

- residences (includes single and multiple family, attached and detached);
- garages, carports and parking ramps;
- storage sheds;
- decks; or

- community buildings (clubhouses, mailrooms, pool area buildings, and picnic shelters).

8. In calculating the allowable SEQR fee for a non-residential construction project, what is included in "total project costs"?

Total project costs would include the costs for:

- supplying or installing utility services such as sewer, water, gas and electricity;
- site preparation which includes clearing, grubbing, grading and drainage; plus
- labor and materials for construction of the facility, not including equipment costs.

Equipment is anything that is removable or not integrally part of the structure.

9. May a lead agency charge SEQR fees to cover its expenses for all steps of the SEQR process?

No. SEQR fees may be charged only for the preparation or review of a draft EIS and final EIS. Lead agency expenses for environmental assessments and determinations of significance are not covered. Once a positive declaration has been made, SEQR fees may be charged for scoping as well as for preparation or all subsequent review of the draft and final EIS.

10. May preparation of lead agency findings be covered by SEQR fees?

No.

11. May a lead agency recover legal costs as part of their SEQR fees?

SEQR fees are intended to cover costs of scoping plus preparation or review of an EIS by the lead agency, including preparation of responses to questions and issues raised by others regarding the draft EIS. Most allowable review costs by a lead agency are likely to be incurred for technical reviews by engineering, planning and environmental consultants, but if a specific legal interpretation is needed to support discussion of some issues within the EIS (e.g. the legal status of land for an alternative development site), this legal expense could be allowed as part of a SEQR fee. SEQR fees, however, are not intended to cover a lead agency's legal defense of challenges to its acceptance of an EIS, or to its conduct of the SEQR process.

12. Can a lead agency apportion the cost of preparing and reviewing an EIS with multiple project sponsors?

Yes. When a lead agency has prepared a generic EIS, typically to address the cumulative impacts of several projects within a common geographic area, the regulations allow it to recover a reasonable share of its costs from project sponsors. Apportioning costs among project sponsors will be dependent on the type of projects, and the extent of impacts for which each applicant may be responsible. The apportionment can be based on project costs, project area, population or occupancy, or on measures of potential impacts, such as amount of traffic, road frontage, shoreline, wetland or vegetative coverage, number of school children, or any other reasonable methods. A formula combining several factors may be appropriate.

Alternatively, if all or most of the potential applicants are known in advance, they may be encouraged to directly contribute to the lead agency's costs of the EIS. The lead agency could also require individual project sponsors to prepare individual EISs. Project sponsors could also agree to jointly fund a single EIS, which could be less expensive than individual studies. Acting among themselves, private project sponsors may apply any apportionment formula they deem appropriate.

13. May a project sponsor request an estimate of potential SEQR fees for a specific project?

Yes. The SEQR regulations provide that a project sponsor who chooses to not prepare a draft EIS, may request the lead agency to provide an estimate of the costs which the lead agency would incur to prepare the EIS. However, in the case of lead agency review costs for a draft EIS submitted by the project sponsor, there is no such obligation. A lead agency is less likely to be able to provide an accurate estimate of review costs, since review costs are related to the type and extent of review necessary, which can only be determined during the process of such review. Although there is no obligation on the lead agency to provide estimates of review costs, it may do so, at its convenience.

14. May a project sponsor dispute the SEQR fees charged by a lead agency?

Yes. A project sponsor may make a written request to the lead agency setting forth reasons why it believes fees may be inequitable. The chief fiscal officer of the lead agency, or that officer's designee, must prepare a written response, after examining the agency's records, stating why the applicant's claims are valid or invalid. Thus, to avoid or minimize disputes, the lead agency should provide the project sponsor with reasonably detailed statements justifying review costs.

15. Will an applicant's appeal of SEQR fees delay the review process and decision?

The SEQR regulations direct that any SEQR fee appeal procedure may not interfere with or delay the conduct of the SEQR process, nor prohibit an action from being undertaken. However, while SEQR may be completed, provisions of other regulatory procedures may limit the lead agency's ability to issue approvals until payment of all fees has occurred.

16. How can a local lead agency ensure that it will be reimbursed for its review of an EIS?

There are several methods by which a local lead agency may recover its review costs. Regardless of the method chosen, a lead agency must be able to render an accounting of their actual costs.

- After scoping, a lead agency may require that an account be set up by the project sponsor, based on estimated costs of review.
- The lead agency may establish a pay-as-you-go review procedure, charging the applicant at established intervals during the review process for lead agency costs to date.
- If SEQR fees have been assessed in any of the above ways, and the applicant fails to pay such fees, the lead agency may choose to withhold its final decision.

17. Must a SEQR fee be paid even if a project application is denied after the EIS process has been completed?

Yes. Project denial or selection of an alternative not preferred by the project sponsor does not absolve a project sponsor from SEQR fee payment obligations.

Chapter 6: SEQR Housekeeping

A. Time Frames

In This Section You Will Learn:

- about SEQR time frames.

1. What time frames does SEQR prescribe?

Unless otherwise noted, the following time frames are maximums:

| SEQR Time Frame | | |
|---|--|-----------------|
| Steps | Calendar Days | Citation |
| Establish Lead Agency | 30 | 617.6(b)(3)(i) |
| Resolve a Lead Agency Dispute | 20 | 617.6(b)(5)(iv) |
| Determine Significance | 20 | 617.6(b)(3)(ii) |
| Scoping (optional) | 60 | 617.8(f) |
| Determine Adequacy of a Submitted DEIS | 45 | 617.9(a)(2) |
| Determine Adequacy of a Re-submitted DEIS | 30 | 617.9(a)(2)(ii) |
| DEIS Public Comment Period | 30 minimum | 617.9(a)(3) |
| SEQR Hearing (optional) | Minimum 15, maximum 60, after filing of DEIS | 617.9(a)(4)(ii) |
| Prepare FEIS | 60 after filing of DEIS | 617.9(a)(5) |

| SEQR Time Frame | | |
|--|--|------------------------|
| Steps | Calendar Days | Citation |
| (no SEQR hearing) | | |
| Prepare FEIS (SEQR hearing) | 45 after close of hearing | 617.9(a)(5) |
| Prepare Findings by Lead Agency (if the action involves an applicant) | Minimum 10, maximum 30, after the filing of FEIS | 617.11(a) 617.11(b) |
| Prepare Findings by Involved Agency | 10 minimum after the filing of FEIS | 617.11(c) |
| Conditioned Negative Declaration public comment period | 30 after date of publication in the ENB | 617.(d)(iv) |

For additional detail on any procedural step, refer to the appropriate section of the SEQR regulations, this Handbook, or the [SEQR time frames flowchart](#) (pdf, 77 kb).

2. Are the SEQR time frames mandatory?

No, with one exception. Courts have generally held that the time frames contained in SEQR are “directory”, not mandatory. This means that the time frames exist to provide guidance on what is a reasonable period of time necessary to complete a step of the review, but there is no provision for default if the time frames are exceeded.

The one exception is the time period for a lead agency to issue a final scope. In this case, there is a default provision if the lead agency misses the regulatory deadline, which is that the project sponsor may use its draft scope as the basis for the draft EIS.

3. If the time frames are not mandatory, why should an agency comply?

The time frames serve as a guide to project sponsors, agencies and the courts on what is a reasonable period of time for a step to occur. Agencies should make every effort to stay within the time periods in keeping with the statutory mandate that the terms and requirements of SEQR be carried out with minimum procedural and administrative delay. Failure to comply would leave an agency vulnerable to legal challenge.

Failure to comply with minimum time frames may be a more serious procedural error than exceeding maximum time frames. Most minimum time frames in SEQR apply to public notice or review steps, so failure to provide at least the minimum time specified by SEQR could limit public participation in the SEQR review. Courts have held that public participation is a vital component of SEQR review, so failing to meet minimums could leave a lead agency’s SEQR record vulnerable to challenge.

4. Can an agency vary the SEQR time frames?

Yes. Paragraph [617.14\(b\)](#) allows agencies to vary the time periods contained in Part 617 in order to coordinate the SEQR process with other procedures relating to the review and approval of actions. An agency would have to adopt a local law, code, ordinance, executive order, resolution or regulation in order to establish its own SEQR time frames.

Additionally, any time period contained in Part 617 can be extended by mutual agreement between an applicant and the lead agency, on a case by case basis. It is good practice to confirm any such extensions in writing. The lead agency must provide notice of the agreement to extend time periods to all other involved agencies.

5. Is there any SEQR time frame that a lead agency can extend without the agreement of the applicant?

Yes. The time period for the preparation of a final EIS can be extended by the lead agency if it concludes that additional time is needed to adequately prepare the statement, or if it has identified problems with the proposed action that require material reconsideration or modification.

6. How do the SEQR time frames relate to the time frames specified by the enabling statutes for municipal reviews?

Municipal reviews, such as site plan, subdivision or special use permit, are subject to a range of different time frames, as specified in the state enabling statute for each jurisdiction. Additionally, local ordinances or laws may also prescribe time frames. As a result, local reviewing bodies will need to consider all time frames applicable to a particular project in determining how to incorporate SEQR into their existing routines. Local agencies must incorporate SEQR into their decision making processes early enough that the results of the environmental reviews will have real influence on their decisions.

Since SEQR requires that either a negative declaration has been issued, or a draft EIS has been accepted, before any application can be [determined complete](#), a local board or agency may harmonize SEQR and other jurisdictional time frames by developing local ordinances which include this SEQR requirement as an element of a complete application under the local jurisdiction.

7. Must agencies use the full 30 days when establishing lead agency?

No. The time period allowed for establishing lead agency is a maximum. If all of the involved agencies can agree on which agency should act as lead agency in a shorter period of time, then it is not necessary to wait for the 30 day period to expire before going on to the next step in the process. However, the full 30 day period must be provided if an involved agency requests that it be allowed 30 days in order to make its decision, or if any involved agency does not respond before the 30 day period has expired.

8. What happens if an involved agency fails to respond within 30 days to a request to establish lead agency?

When an involved agency fails to respond within 30 days, that failure indicates that the involved agency has no interest in being lead agency and no concerns regarding the

proposed action. Failure to respond within 30 days will also eliminate an involved agency's ability to raise a lead agency dispute.

9. Can an involved agency request additional information within the 30 day period before making its decision on lead agency?

Yes, as long as the information requested by that involved agency is reasonable in scope and essential to the determination of lead agency. For example, if the agency which initiated coordination for lead agency did not provide a location map, a completed Part 1 of the EAF, or a copy of the underlying application, a request for this information before making a decision would be reasonable.

10. What happens if the lead agency concludes that it needs more information before it can reach a determination of significance?

If the lead agency concludes that it needs additional information before it can reach a determination of significance, it may request that information from the project sponsor. The request should be in writing, and the information requested must be reasonable and necessary. When a request for additional information has been made, the 20 day time clock is suspended, and a new 20 day period begins when the requested information is submitted by the project sponsor.

11. When does the 60 day time period begin for issuance of a final scope?

If either the lead agency or the applicant requires formal scoping, the final written scope for the draft EIS is due 60 days from submission of a draft scope by the applicant. The lead agency may find it easier to meet this deadline if it provides public notice of any scoping meetings at the same time that the positive declaration is issued and noticed. In practice, lead agencies frequently find it necessary to negotiate with applicants for extensions of scoping deadlines.

12. When does the 45 day time period begin for determining the adequacy of a submitted draft EIS?

The 45 day time period for determining adequacy begins on the day that the document is received by the lead agency.

13. Why are only 30 days allowed to determine the adequacy of a resubmitted draft EIS?

The review of a resubmitted draft EIS should be greatly reduced in scope compared to the initial review. During the review of a resubmitted draft EIS, the lead agency should only need to check the new information and the corrected material to see if the changes that were made adequately remedy the deficiencies which the lead agency identified in its written notification to the sponsor when the first submission was rejected.

14. When does the public comment period begin on a draft EIS?

The public comment period technically begins when the lead agency accepts the draft EIS as complete. However, since there is often a delay before notice of acceptance of the draft EIS is published, it is good practice to calculate the minimum public comment period based on the publication date.

15. Is an agency required to wait for the expiration of a time period before proceeding to the next step of the review?

When minimum time periods are specified in the SEQR regulations, such as the 30 day minimum comment period on a draft EIS, an agency must wait for the expiration of the applicable time period before proceeding to the next step of the process. However, where the time frame in the regulations is a maximum, such as the 30 days to establish lead agency, an agency may proceed to the next step in the SEQR review as long as it has satisfied the substantive requirements of the current step. For example, if all involved agencies reach agreement on a lead agency before the expiration of the 30 days allowed to establish lead agency, then the lead agency may proceed to the determination of significance.

As a practical matter, agencies use various techniques to encourage timely responses from involved agencies and interested parties before the end of the time period allowed for any step in the SEQR review. Such techniques include requesting an answer by telephone and then confirming the response with a letter, or using tear off sheets to be completed with the requested information and then returned to the initiating agency. Such practices can be especially useful in harmonizing SEQR time frames with other statutory or regulatory time frames as well as with local board meeting calendars.

16. What is a reasonable time period for the public review of a draft EIS?

There is no maximum length of time for the public comment period on an accepted draft EIS. Particularly for complex or large actions, a lead agency may reasonably extend the comment period beyond the minimum required 30 days. Such extended comment periods commonly range between 30 and 60 days. If a hearing has been held on the draft EIS, the public comment period must remain open for at least 10 days following the close of the hearing.

17. When is a SEQR hearing held?

While the decision to hold a hearing on a draft EIS is at the lead agency's discretion, if such a "SEQR hearing" is to be held, it must be held no sooner than 15 days and no later than 60 days following the acceptance of the draft EIS. These time frames are intended to allow reasonable notice to the public that the hearing is to be held, while not unreasonably delaying the lead agency's completion of the final EIS. Comments made during a hearing on a draft EIS are part of the public comment record on that draft EIS.

When a lead agency does hold a SEQR hearing, it must publish notice of the hearing at least 14 days prior to the hearing in a newspaper of general circulation in the area potentially affected by the proposed action. Thus, if a lead agency intends to start the hearing on a draft EIS on the first possible day (that is, on day 15 of the public comment period), that

lead agency must publish the hearing notice at the same time as the notice of acceptance of the draft EIS.

18. Is the 10 day period following the filing of a final EIS a public comment period?

No. The statutory 10 day period required before agencies can issue final decisions following a final EIS is not a comment period. Instead, the 10 days are provided to allow agencies and the public time to “consider” the final EIS, that is, to receive notice that the final EIS has been filed and to evaluate its contents. Agencies and the public may submit comments on the final EIS to the lead agency, but there is no requirement for the lead agency to respond to such comments.

19. Are all agencies required to make their SEQR findings within 30 days of the filing of a final EIS?

No. The lead agency, only, is required to make its SEQR findings within 30 days only when the action under review involves an applicant. Other involved agencies must make their SEQR findings prior to making a final decision on the action, but are not subject to this 30 day requirement. For direct actions, there is no requirement for the lead agency to make its SEQR findings within a set period of time.

20. When does the minimum 30 day public comment period on a conditioned negative declaration (CND) begin?

The public comment period on a CND begins on the date that the notice appears in the Environmental Notice Bulletin.

B. Required Notices and Filings

In This Section You Will Learn:

- when public notices or filings are required under SEQR.

1. What is meant by “filing” and “notice” within the SEQR process?

Filing simply means providing a copy of a specific document. Notice refers to a specific, relatively brief document that summarizes an agency’s decision at a step in the SEQR process, and is the method by which an agency advises other agencies and the public that a decision has been made during the SEQR process.

2. Are filing or notice requirements the same for all steps in the SEQR process?

No. See the individual discussions for each SEQR process step, and the “SEQR Filing and Distribution Summary” at the end of this chapter.

3. What filings or notices are required when classifying an action under SEQR?

For Type II actions, there are no filing or notice requirements. However, it is recommended practice to file a note or memo documenting the classification decision, since classification as Type II concludes the SEQR process.

For Unlisted actions, there are also no filing or notice requirements, as the classification must be noted in the agency's determination of significance.

For Type I actions, there are no formal filing requirements. However, the agency which initiates the required coordination for lead agency may indicate its proposed classification of the action in its coordination letter, and the lead agency must note the action's classification in the determination of significance. (This also applies to Unlisted actions being treated as Type I.)

4. What filings or notices are required to initiate coordination for lead agency under SEQR?

The agency which initiates coordinated review should send a coordination package to all potentially involved agencies. That package should include a cover letter indicating that the action has been proposed and that a lead agency must be established; a copy of Part 1 of the full environmental assessment form(EAF); a copy, or relevant sections, of the application received by the initiating agency; and location and plan maps showing the site and general layout of the proposed action. The initiating agency should send copies of enough application materials and maps that responding agencies can clearly understand the proposed action, but does not need to circulate full sets of voluminous applications.

5. When the Department of Environmental Conservation (DEC) is identified as a potentially involved agency, where should lead agency coordination requests be sent?

When DEC is, or may be, an involved agency, the SEQR regulations [[617.6\(a\)\(3\)\(i\)](#)] require that lead agency coordination requests be sent to the appropriate regional [DEC office](#).

6. What filings or notices are required for an agency to respond to a lead agency coordination request?

When another involved agency is willing to let the agency which initiates coordination serve as lead agency, the involved agency may reply simply that it agrees to let the initiating agency proceed. It is good practice, however, for the responding involved agency to describe its likely jurisdictions over the proposed action, and to articulate any issues or impacts which it believes need further study. Additionally, the responding agency should provide a copy of its letter to all other potentially involved agencies.

When another involved agency is unwilling to concur with the proposed lead agency, that agency may file a request that the DEC Commissioner designate the lead agency for the proposed action. The SEQR regulations [[617.6\(b\)\(5\)](#)] prescribe specific filings which must be made to request such a designation:

- Any involved agency, or the applicant, may initiate designation of a lead agency by filing a letter of request with the Commissioner;
- That letter must be copied to all involved agencies and the applicant;
- The letter to the Commissioner and all copies must be sent by certified mail, or other form of receipted delivery; and
- All responses to a request for lead agency designation must be copied to all other involved agencies.

7. What filings or notices are required for determinations of significance?

For negative declarations on Unlisted actions, the agency is only required to maintain a copy of the negative declaration in its own files. However, it is good practice to provide a copy of the negative declaration to the applicant and to any other involved agencies.

For a conditioned negative declaration (CND), the lead agency must publish a notice in the [Environmental Notice Bulletin](#) (ENB) which summarizes the conditions, and provide at least a 30 day public review period starting from the publication date.

For negative declarations on Type 1 actions, and for all positive declarations (including rescission of a negative declaration), the lead agency must retain a copy in its own files, and it must provide notice to, and file a copy of the declaration, with:

- The chief executive officer of the political subdivision in which the action will be principally located;
- Applicant, when there is one;
- All involved agencies; and
- Individuals or groups who have requested a copy.

The lead agency must also file the notice of that negative, or positive, declaration for publication in the ENB.

8. Since negative declarations for unlisted actions do not require any notice or publication, how can the public learn that these decisions have been made?

The SEQR regulations require that the SEQR classification and the agency's determination of significance must be incorporated, once, into any other subsequent notice required by law. Additionally, there are other means by which a concerned citizen or interest group can learn of decisions being made in their municipality. The most obvious is to attend the regular meetings of the municipal boards, or obtain copies of the meeting minutes of those boards. In the newspapers, legal notices are required for many board actions, plus many project sponsors will announce their plans for future development in the local papers, well in advance of the submission of formal applications. If a community group has concerns about particular types of projects, or areas within a municipality, that group can request to receive copies of notices or decisions related to those areas of concern.

For applications before the DEC or the Adirondack Park Agency (APA), "notices of complete application" for larger projects must be published in the ENB. [Status of all applications](#) before the DEC is available online.

9. Must notice of a negative declaration be incorporated in all subsequent notices about the action?

No. The SEQR regulations only require that notice of the filing of a negative declaration be published once, as long as there is some later notice required by law. This means that if the lead agency has a legal obligation to publish a notice about the proposed action after it issues its negative declaration, the notice should include a brief reference to the negative declaration. Only one subsequent notice needs to include this statement, not all subsequent notices.

10. What filings or notices are required for environmental impact statements (EISs)?

When a lead agency accepts a draft or final EIS, it must provide notice to, and file a copy of the EIS with the same parties that received the positive declaration:

- The chief executive officer of the political subdivision in which the action will be principally located;
- Applicant, when there is one;
- All involved agencies; and
- Individuals or groups who have requested a copy.

The lead agency must file a notice of acceptance of the draft or final EIS for publication in the ENB. The lead agency must also file a copy of the EIS with the DEC, [Division of Environmental Permits](#); a copy on cd is acceptable. If the lead agency is a state agency, and the project is located within any coastal area, a copy must be provided to the NYS Department of State, Division of Coastal Resources. Additionally, the lead agency must arrange to [post the EIS](#) on a publicly accessible web site, unless impracticable.

If a lead agency has received an unreasonably large number of requests for copies of the EIS, the SEQR regulations allow the lead agency to file a copy of the EIS in the local library instead of providing individual copies. In such cases, it is good practice to also provide review copies at other publicly accessible locations in or near the project area, such as town offices.

11. Why isn't the project sponsor required to provide a free copy of the draft or final EIS to everyone who has requested a copy?

Sometimes, due to the size of a draft or final EIS, or the number of requests, it is not feasible for each person to be provided with a free copy. When demand exceeds supply, the lead agency should make sufficient copies of the document available for review at public offices and local libraries. The lead agency may require the project sponsor to provide an adequate number of EISs to fulfill all required filings as well as provide a reasonable number of additional copies for review by the general public. Where review copies are provided in an electronic format, the lead agency may still require hard copies of large format materials such as map or plan sheets.

12. If a document is voluminous, may the lead agency file only a summary with DEC?

No. All SEQR documents which must be filed with the DEC Commissioner, regardless of their size, must be provided in their entirety. However, the copy may be provided in an electronic format (such as a CD or DVD).

13. Is publication in the ENB required before the public review period for a draft EIS can begin?

No. The public comment period technically begins when the lead agency accepts the draft EIS as complete. However, it is good practice to calculate the public comment period based on the publication date.

14. What filings or notices are required for a hearing on a draft EIS?

When a lead agency decides to hold a hearing on a draft EIS, it must publish notice of that hearing in a newspaper of general circulation in the area of the proposed action. The lead agency may also provide notice via the ENB, or by other methods routinely used in that municipality. The hearing notice must appear at least 14 days before the date of the hearing. The notice must contain the date, time, place and purpose of the hearing, as well as a summary of the information that was contained in the notice of completion of the draft EIS. The notice of hearing may be combined with the notice of completion of the draft EIS.

15. Who pays for the costs of newspaper publication of the hearing notice?

The project sponsor is responsible for the cost of publication in the newspaper.

16. What filings or notices are required for SEQR findings?

When the lead agency and each involved agency issue their SEQR findings, those findings must be filed with the same parties that received the positive declaration and copies of the draft and final EISs. There are no notice requirements for SEQR findings.

17. Do any other decisions under SEQR require notice or filing?

Yes, adoption of local SEQR procedures and designation of a Critical Environmental Area (CEA) both require [notice and filing](#).

To adopt or amend local SEQR procedures, an agency must first hold a public hearing on its proposed procedures, and then file its adopted procedures with the DEC Commissioner. DEC must provide notice of those adopted procedures in the ENB.

Before designating a CEA, an agency must first provide written public notice and conduct a hearing on the proposed designation. Once the agency has designated the CEA, it must file notice of that designation with the DEC Commissioner, the DEC office for the region in which the CEA is located, and with all other agencies which are routinely involved in SEQR reviews of actions in, or near, the CEA. DEC must provide notice of the designation in the ENB. The designation takes effect 30 days after filing with the DEC Commissioner.

18. Do all SEQR notices require publication in a local newspaper?

No. The only SEQR notice that requires publication in a newspaper is a notice of hearing. SEQR notices are not required to be published in the legal notice section unless the agency is otherwise required to publish them there.

19. What SEQR notices are published in the ENB?

The ENB publishes notices (that is, brief summaries) of:

- Conditioned negative declarations;
- Negative declarations for Type I actions;
- Positive declarations;
- Scoping notices;
- Notices of completion of draft and final EISs;

- Notices of hearings on draft EISs;
- Notices of adoption or rescission of individual agency SEQR procedures; and
- Notices of the adoption of critical environmental areas.

The [ENB](http://www.dec.ny.gov/enb/enb.html) is published weekly, on Wednesdays, on-line at <http://www.dec.ny.gov/enb/enb.html>. SEQR notices appear under the heading "SEQR and Other Notices". Notices are organized by DEC region, or statewide.

20. Is it possible to have other notices published in the ENB?

Only those notices that are legally required to appear in the ENB will be published.

21. How should notices be submitted to the ENB?

Notices for publication in the ENB must be filed with the DEC Division of Environmental Permits. Submission by e-mail is preferred, to enb@gw.dec.state.ny.us. Hard copy notices may be mailed by U. S. Mail, or other delivery services, to:

Environmental Notice Bulletin
 Division of Environmental Permits
 NYSDEC
 625 Broadway
 Albany, NY 12233-1750

Telecopier (fax) submissions are not accepted.

22. Is there a deadline for submitting SEQR notices to be published in the ENB?

Yes. Any SEQR notice received by close of business on a Wednesday will be published on the following Wednesday. For example, for a notice to appear in the Wednesday, January 15 issue of the ENB, it must be received no later than 5:00 p.m. on Wednesday, January 8.

23. Can I verify that my submission to the ENB was received?

Yes. If you e-mail your notice, you can verify its receipt by calling 518-402-9167. If you send hard copy by U. S. Mail, you can send the package "return receipt requested." Additionally, some delivery services can require a signature for delivery.

24. Must all SEQR documents be filed with the DEC Commissioner?

No. Only the following documents must be filed with the Commissioner:

- Request for designation of a lead agency;
- Individual agency SEQR procedures, when adopted or amended; and
- Designation of CEAs.

While all draft and final EISs must be filed with the DEC, they should be directed to the Division of Environmental Permits, not to the Commissioner. ENB notices should be directed to the ENB. Finally, when DEC is an involved agency and entitled to receive other notices and filings, those documents should generally be directed to the appropriate DEC regional office.

25. What happens if an agency fails to prepare, or file, or fails to both prepare and file, a required SEQR notice?

Should an agency fail to prepare or file any required SEQR notice, it would constitute a procedural error in that agency's SEQR process. Such a procedural error could leave an agency vulnerable to legal challenge.

26. Should all SEQR notices be sent by certified mail?

No. Delivery of notices by certified mail is not required by the SEQR regulations.

27. Can the lead agency require that the project sponsor be responsible for all filings?

No. The preparation and filing of SEQR notices is the responsibility of the lead agency. However, a project sponsor could prepare draft versions of the notices for the lead agency's review, or could distribute the notices at the request of the lead agency.

28. Who is required to retain copies of SEQR documents?

Because SEQR documents are a part of the legal record concerning the proposed action, the lead agency should retain a copy of all SEQR documents. Such a full SEQR file can document that the proper procedures were followed. In the absence of a full SEQR file, the agency could be vulnerable to lawsuits challenging its SEQR procedures, or its ultimate decision.

29. Can an agency refuse to allow public review of SEQR documents?

No. All SEQR notices and documents are public records, and must be made available for public review.

C. Record Keeping and Disclosure

In This Section You Will Learn:

- which SEQR records should be retained; and,
- which SEQR records should be made available for public review.

1. What SEQR records should an agency retain?

Because the SEQR record is part of the application review record, an agency should retain all EAFs, negative declarations, positive declarations, scoping documents, draft and final EISs, hearing records, and findings, in addition to all application materials and supporting documentation supplied by a project sponsor such as maps, plans and technical reports.

2. How long should SEQR records be retained?

SEQR does not prescribe any specific retention periods for SEQR records. SEQR documents relating to projects should be retained with, and for the same period of time as, the file for the underlying approval or action. Specific retention periods may apply based on the agency's underlying jurisdiction(s). Agencies may also choose to retain EISs as long term

references for similar actions, or for other proposals in the same general area as the original action.

3. Why might an agency keep an EIS even after the project has been completed?

In addition to project information, most EISs contain a great deal of resource inventory and other background data about the site and surrounding area that could be valuable to an agency for long term environmental planning. Additionally, an agency could compile such data and use it to determine the accuracy of past EISs in predicting impacts as well as to evaluate the effectiveness of any required mitigation. Further, agencies can use data from prior EISs to assist in scoping subsequent EISs.

4. Must SEQR documents be made available for public review?

Yes. All SEQR documents are public records and must be made available for public review. Court decisions made under the NYS Freedom of Information Law (FOIL) have ruled that any SEQR document received by an agency is a “public document” available to the public, pursuant to the requirements and restrictions of FOIL. This includes “pre-draft” EISs that may be sent to the lead agency by the project sponsor as a “working draft” for agency comment on one or more issues.

5. Can an agency require that all requests for SEQR records be made using the provisions of FOIL?

Agencies can require that individuals requesting records do so in accordance with the provisions of the FOIL. In practice, however, this should not be necessary for SEQR records, including SEQR notices, EAFs, negative declarations, draft or final EISs, and findings.

6. Can an agency charge for reproducing records?

Agencies can charge a fee to recover the costs of reproducing records, consistent with FOIL.

D. Challenges

In This Section You Will Learn:

- how is SEQR enforced; and,
- how SEQR decisions may be challenged.

1. How is SEQR enforced?

The SEQR statute (Article 8 of the NYS Environmental Conservation Law) did not provide DEC, or any other agency, with administrative or enforcement authority to review SEQR implementation or decisions by other agencies. DEC is charged with administration of SEQR, including promulgation of statewide regulations and model assessment forms pertaining to SEQR, but cannot force another agency to comply with SEQR. Therefore, actual oversight and enforcement of SEQR falls to interested citizens and groups.

To enable citizens to monitor and provide input to SEQR proceedings, specific notices and public comment periods are required at certain steps, primarily during the scoping and

review of environmental impact statements (EISs). The only mechanism by which SEQR decisions can be challenged is through a court proceeding, governed by Article 78 of the New York State Civil Practice Law and Rules (CPLR), brought in a NYS Supreme Court.

2. What is a CPLR Article 78 proceeding?

A CPLR Article 78 proceeding (commonly called an "Article 78") is a formal legal challenge to a final decision by an administrative agency, which can be a state agency or authority, or local board or agency. A challenge under Article 78 must be based on one or more of the following four grounds:

- The agency failed to perform a required duty;
- The agency exceeded its jurisdiction;
- The agency violated lawful procedure in making its determination, the determination was affected by an error of law, the determination was arbitrary and capricious, or the determination constituted an abuse of discretion; or
- The determination was not supported by substantial evidence contained in the hearing record.

3. When can a SEQR decision be challenged?

An agency's SEQR record is only one component of the agency's record in support of its final decision based on its underlying jurisdiction (such as a permit, site plan review, or subdivision approval). Therefore, a SEQR decision must generally be challenged based on the agency's final decision, and the challenge must be filed within the statute of limitations applicable to the agency's final decision.

The statute of limitations is the time period established by law during which the action of an agency is subject to challenge. A statute of limitations begins to run when the agency makes its final decision. The statute of limitations in NYS is typically four months, but periods as short as 30 days are prescribed by some NYS statutes (for example, site plan review and state freshwater wetlands permits). Where there are multiple approvals required for a single action, the shortest statute of limitations has generally been held to apply.

Be aware that this is an area of law for which several courts have recently issued decisions providing revised interpretations of what agency decisions are "final", in the context of challenges including agency application of SEQR, and of when the statute of limitations starts to run. Individuals or entities considering legal action, therefore, should consult with an attorney regarding their specific circumstances.

4. Is there a separate statute of limitations that applies to SEQR decisions?

No. The SEQR statute does not create a separate statute of limitations, because the SEQR review is considered a part of the record in an underlying jurisdiction. Thus, the statute of limitations for the underlying jurisdiction generally applies.

5. Who can challenge a decision under an Article 78 proceeding?

Individuals or groups who can demonstrate that they are sufficiently environmentally harmed by an agency's decision may seek judicial review under Article 78. If the party or

parties that bring an Article 78 proceeding against an agency cannot sufficiently demonstrate to the court that they suffered “harm” by the actions of the agency, the lawsuit may be dismissed before the subject of the agency’s conduct and decision is even discussed. There are a number of NYS court decisions which have interpreted “harm” fairly narrowly, although some recent cases have interpreted “harm” more broadly. Thus, as with questions of statute of limitations and final decisions, this matter should be discussed with an attorney if one may seek to challenge an agency decision under Article 78.

6. Since DEC issues the regulations, doesn’t it have the authority to at least notify a lead agency that they are not correctly meeting the requirements of SEQR?

No, because the SEQR statute did not provide any such oversight authority, to DEC or to any other entity. If an agency contacts DEC with questions regarding the SEQR process, staff can give them informal advice regarding the SEQR process in general, or informal interpretations related to their review of a particular action. However, DEC cannot intervene in any lead agency’s conduct of SEQR, nor stop any agency from conducting its SEQR review, even if the review is not following the correct procedures as set forth in ECL Article 8 or the SEQR regulations.

Affected citizens, interested groups and other involved agencies can monitor lead agencies’ application and implementation of SEQR, including active participation in SEQR proceedings to ensure that the SEQR record contains all relevant information. In fact, if a challenge is brought under Article 78, many courts will look to the SEQR record to see if the parties bringing the challenge did participate in the lead agency’s proceedings, and are less likely to be sympathetic to the challenge if those parties did not initially raise their concerns within the lead agency’s SEQR process.

E. Making SEQR More Efficient

In This Section You Will Learn:

- ways to make the SEQR process more efficient.

1. How can an agency efficiently incorporate SEQR into its existing administrative and review procedures?

There are several ways an agency can improve the coordination of SEQR with the agency’s existing review procedures. The most effective way is to integrate SEQR into the day-to-day operations of the agency decision making process. The following suggestions are examples of measures which could improve an agency’s ability to effectively and efficiently comply with the requirements of SEQR:

- Provide the intake officer or clerk with training, so that when a project sponsor is obtaining the needed application forms for an approval, the officer or clerk can make a preliminary determination regarding the SEQR classification of the action, and based on that preliminary classification, also provide the project sponsor with appropriate SEQR forms.
- Incorporate the EAF as part of the routine application materials, and direct project sponsors to complete Part I of the EAF. Agencies should require the full EAF if there is any question regarding the SEQR classification of the proposed action.
- Ensure that staff and board members are familiar with the lists of Type I and Type II actions contained in [6 NYCRR Part 617, Sections 4 and 5](#). When a board or agency is

able to quickly identify routine, smaller actions as Type II, and briefly document that classification in the project file or resolution, that agency or board will be able to more rapidly advance those routine applications, reserving SEQR review time for larger, more complex projects.

- Adopt an individual agency Type II list. The SEQR regulations give agencies the authority to add to the statewide Type II list. If an agency finds that it is frequently receiving applications for similar Unlisted actions, and those activities do not have significant environmental impacts, the agency should consider adopting local rules to classify those activities as Type II.
- Since it is not necessary to coordinate SEQR review for all Unlisted actions, an agency or board may reasonably use the uncoordinated review option for reviewing Unlisted actions that are likely to have minimal impacts. As long as no other involved agency's review is likely to result in substantial changes to project design, uncoordinated review can save the agency or board some processing time and allow the agency to proceed to its final decision.
- Develop intra- or inter-agency agreements for administering SEQR. Where there is good communication between agencies, prior agreement on the lead agency for specified, repetitive actions can substantially reduce the amount of time spent on the initial steps of a SEQR review by resolving the lead agency question in advance, when there are no other involved agencies. The [SEQR regulations](#) encourage agencies to enter into cooperative agreements for the purposes of coordinating their procedures. For example, a municipality's planning board and legislative board, and the county health department, could enter into an agreement that for residential projects where all three boards are involved agencies, the planning board will be the lead agency.
- Develop a routine internal procedure for reviewing information submitted by a project sponsor. For example, involving the municipal engineer or the code enforcement officer early in the SEQR review process will make the results of their reviews available to the lead agency prior to the determination of significance.
- Do not determine an application for an approval complete before either a negative declaration has been prepared, or a draft or final EIS has been accepted. For many approvals, the determination that an application is complete starts a time clock for the agency to issue its final decision. Inappropriately triggering such a time clock before complying with SEQR may result in the agency rushing the SEQR review in order to complete it in time, or suspending the time clock in order to perform the SEQR review. Both of these results are inefficient and could lead to litigation.

2. What can a local official do to efficiently participate in SEQR reviews?

There are several things that a local board member or agency official can do in order to effectively participate in a SEQR review.

- In many municipalities, there are typically some classes of projects which frequently come before one or more boards. If the individual board members are familiar with the SEQR classifications of those project types under Part 617, decisions such as classifying an action, determining the correct EAF, and deciding whether to coordinate become much simpler.
- By including the SEQR classification and status of the review as a routine component in board resolutions, the board can provide notice that the agency has considered SEQR for a particular project. Additionally, making SEQR status a routine component of resolutions can serve as a reminder that SEQR must be addressed prior to the board issuing its final decision on a project.

- Board members often find that reviewing the EAF, preparing a draft of Part 2 and Part 3, and even preparing a draft of the determination of significance ahead of time, leads to more productive discussion at the actual meeting, and can result in better decision making as well as improved quality of SEQR documentation. Particularly for contentious projects, it can be very difficult to complete an EAF or to prepare an adequate determination of significance during the heat of a board meeting.
- As an alternative to solo reviews, some boards use working groups to review or prepare drafts of documents. A working group comprised of some of the board members, with or without assistance from staff, can review material submitted by a project sponsor and draft material for the board's consideration. When draft material is submitted to the full board, it is important that all members review and understand the material before acting.
- Establish realistic timetables for SEQR review and decisions. It is good practice to meet with an applicant and lay out a probable time schedule, but it is rarely possible to guarantee that a final decision will be made by a certain date, or that a specific action will be taken at a specific board meeting. By providing realistic projections, and alerting the project sponsor to possible stumbling blocks, board members can avoid unrealistically raising the expectations of an applicant, or creating other difficulties for all parties if events cannot proceed exactly as projected.

3. What can a project sponsor do to efficiently participate in SEQR reviews?

There are several things that a project sponsor can do to make the SEQR review of its proposal more effective and efficient:

- Learn and understand SEQR procedures so that you can discuss them in a knowledgeable way with the involved agencies.
- If the action is large, multifaceted, controversial or in an area that is particularly sensitive environmentally; it may be advantageous to work with an environmental consultant before an application is submitted, to help avoid potential impacts or suggest reasonable mitigation measures which can be included in project design.
- Request a pre-application meeting with all agencies that may have an approval or permit to issue. At such a meeting, agencies can identify permit requirements, potential environmental issues, alternatives, mitigation measures and the likelihood for public controversy. Knowledge of these factors will allow you to incorporate environmental planning into your proposal before filing an application. Meetings with interested civic and environmental organizations may also be helpful.
- When completing Part 1 of the environmental assessment form (EAF), regardless of whether the short or full EAF, respond to all items thoroughly. This can save time by enabling reviewing agencies to identify potential environmental concerns early. Issues that are overlooked or initially avoided can become far more time consuming if not identified until later in the review process, such as when raised by a member of the public.
- When responding to agency inquiries, submit material in a timely manner. When a lead agency is facing a SEQR decision deadline, a sponsor may want to verify that the lead agency has all information necessary to make that decision.
- If a lead agency has required an EIS for your project, request the agency to conduct formal scoping. Scoping provides both an opportunity for early identification of all relevant environmental issues and impacts, and a written confirmation of the lead agency's expectations for the content of the draft EIS.
- Prepare a clear and precise draft EIS, written in plain language. Avoid including extraneous material in the document. It will speed up the review if the draft EIS

presents the information in a concise, objective and factually accurate manner. Where complex, highly technical models or studies are developed for an EIS, summarize the results in the main body of the EIS, and include the detailed supporting documentation only as appendices.

- Provide a sufficient number of copies of the EIS for public review. If the EIS is large and too expensive to provide everyone with his or her own copy, make the documents widely available at public libraries, offices of the lead and involved agencies, or any other publicly accessible facilities in the vicinity of the project site. In addition, cooperate with the lead agency in making arrangements for posting the EIS on a publicly accessible web site.
- If the lead agency requests assistance in developing responses to some or all comments received on the draft EIS, provide accurate and timely input.

4. How can interested citizens or groups participate effectively in SEQR reviews?

- To contribute productively to a SEQR review, interested citizens and groups need to understand the formal rules which govern SEQR as well as the rules which apply to the lead agency's general management of applications. For example, local boards must post their meeting dates and probable agendas, while state agencies typically rely on published notices.
- Ensure that any comments or other submissions to the lead agency focus on relevant potential environmental impacts of a project, and are not merely expressions of support or opposition.
- Be aware of the status of applications in your area of interest, so that you are able to provide early input to the lead agency.
- Additional information on citizen participation in the SEQR process is available in the pamphlet, "[A Citizens Guide to SEQR](#)" (pdf, 972 kb).

Chapter 7: SEQR and Local Government Development Decision

A. General Applicability of SEQR to Local Governments

In This Section You Will Learn:

- which local government decisions are subject to SEQR; and,
- how a municipality can integrate SEQR into its decision-making process.

1. Which local government actions must comply with SEQR?

All local governments, including county legislatures and county agencies, city councils, town boards, village board of trustees, planning boards, zoning boards of appeal, school boards, and industrial development agencies, must comply with SEQR.

2. Which local government decisions are subject to SEQR?

Most local government "actions" are subject to SEQR. Determining whether a governmental activity is an "action" under SEQR is the first step in deciding if SEQR applies. As defined by SEQR, the term "action" includes all discretionary decisions to fund, approve or directly undertake projects or physical activities that may affect the environment by changing the

use, appearance or condition of any natural resource or structure. The definition also includes adoption of local laws, ordinances, and resolutions that may affect the environment. Specific examples of local government actions are:

- Adoption or amendment of a comprehensive plan
- Adoption or amendment of zoning laws and ordinances and amendments to zoning laws and ordinances
- Special use permit approvals
- Site plan review approvals
- Subdivision approvals
- Bond resolutions for municipal development projects
- Capital improvements
- Annexations
- Acquisition or sale of public lands

3. What local government actions *do not* require SEQR review?

Activities that do not meet the definition of "action" or that are classified as Type II actions (see [Section 617.5](#)) do not require SEQR review. Type II actions include some typical local government activities such as:

- Construction or expansion of a single-family, a two-family or a three-family residence on an approved lot;
- Granting of individual setback and lot line variances, granting of area variance(s) for a single-family, two-family or three-family residence;
- Official acts of a ministerial nature involving no exercise of discretion, including building permits and historic preservation permits whose issuance is predicated solely on the applicant's compliance or noncompliance with the relevant building or preservation code(s);
- Collective bargaining activities;
- Adoption of a moratorium on land development or construction;
- Designation of local landmarks or their inclusion within historic districts.

4. If an action is classified as a Type II action, is SEQR review required of the municipal board before it undertakes, approves or funds the action?

No. The board should note the Type II classification of the action in the resolution approving the action or in a separate resolution prior to approving the action. The resolution should specify the item on the Type II list in Part 617.5 that applies to the action.

5. Is a municipality required to apply SEQR even if its present procedures incorporate environmental considerations (for example, a site plan review law containing performance standards for visual impacts)?

Yes. Though seemingly redundant or overlapping, SEQR review is still required for actions even though the local or state law governing the proposed action provides for the consideration of the environment. In fact, many zoning actions taken under the municipal enabling acts provide for varying consideration of environmental factors. As a practical matter, for example, the same information may form the basis for a SEQR decision to approve, reject, or approve a project with conditions and the basis for whether a project meets the locality's requirements for land use approval.

6. How does a municipality integrate SEQR into its decision-making processes?

If the action involves the review of a subdivision, General City Law §32, Town Law §276 and Village Law §7-728 (the State subdivision review enabling laws) incorporate SEQR directly into the overall subdivision review process. For other local government actions, there are a few basic rules to follow:

- First, the SEQR process should be started at the earliest practicable time in the review of a project or legislative decision.
- Second, an agency cannot fund, approve, or undertake an action until it has complied with SEQRA.
- Third, an application to fund or approve an action is not complete until a negative declaration has been issued or a draft EIS has been accepted by the lead agency as satisfactory with regard to scope, content and adequacy.

With regard to third rule, there are some caveats. Historically, municipal boards used the public hearing forum to do fact finding on whether to require a draft EIS. At the same time, the public hearing ordinarily follows the determination that an application is complete. Because no application is complete until a negative declaration has been issued or the municipal board has accepted a draft EIS, the public hearing must follow the determination on whether to require a draft EIS. To satisfy the rule here and to allow fact finding on whether to require a draft EIS, where necessary, municipal boards can hold a separate public hearing on whether to require a draft EIS or accept public comment on its determination to require or not require a draft EIS at the hearing held subsequent to determining that the application is complete. If public input reveals new information or indicates errors in the characterization of the action that call the issuance of a negative declaration into question, the negative declaration can be rescinded and an EIS required.

Finally, the third timing rule does not apply to the adoption of local laws and ordinances since neither involves an "application." However, SEQR must be satisfied before any law or ordinance goes into effect.

7. May a municipal board delegate its SEQR duties to another board?

No. A municipal board may not delegate SEQR to a separate board or agency. If the other board or agency does not have decision making authority for the action being reviewed. SEQR is intended to make boards that are responsible for approving, funding or undertaking an action consider the environmental effects of their decisions. Delegating SEQR-review to a non-involved agency is not permitted. A board may be assisted in its review by other agencies and staff with expertise on environmental issues. An example is where a planning board is assisted in its review of a subdivision by a municipal planner or a conservation advisory council. If an action involves the approval of more than one board, a lead agency may be picked from among the boards and thereby be primarily responsible for the SEQR review of that action.

8. If a proposed development will require approvals by agencies in two or more municipalities, how are these multiple reviews integrated?

Because SEQR requires agencies to look at the whole action and not to segment the review of actions, the involved agencies of each municipality must participate in the SEQR process and consider the whole action, including impacts in neighboring communities. If coordinated review is initiated or required by an involved agency, and the initial phases of a

development occur in only one of the municipalities, but one or more of the municipalities will be ultimately involved, then each agency should be treated as involved agency at the beginning of the process.

9. Does a municipal board have to consider extraterritorial environmental impacts, for example: impacts occurring in an adjoining municipality?

Yes. For example, a planning board reviewing a cellular communications tower visible from a neighboring community should consider the aesthetic impact of the tower on the neighboring community. A town planning board reviewing a big box development should consider the impact of the development on the community character of a neighboring village that might suffer business displacement as a result of the approval of the big box development. A third example would be a community reviewing a shopping plaza that generates traffic on an adjoining community's roadway system. In that case, the host community's review should consider the traffic on the adjoining community.

10. When a municipal board such as a conservation advisory council or planning board is acting in an advisory role only can it be designated as the lead agency?

No agency can serve as the lead agency or be considered an involved agency on the basis of an advisory role. The same would apply to the county planning agencies, though their recommendations trigger special voting requirements.

11. If my board is reviewing, for example, a special use permit application, or any other type of application, what difference does it make if the applicant prepares an EIS or just submits a long-form EAF with heavy documentation?

The EIS process establishes a formal process for the identification and assessment of impacts, consideration of alternatives to the proposed action, and identification of mitigation measures for adverse impacts revealed in the EIS process. Through the various notice provisions of the SEQR regulations, the public is given the opportunity for a greater role in the project review over that which may be required by the General City Law, Town Law or the Village Law (municipal enabling statutes). For an action (or project) that is the subject of a final EIS, the lead agency (or board) must make the SEQR findings required by Section 617.11 (of 6 NYCRR). Notably, the findings require, based on a balancing of social and economic considerations with environmental considerations, the alternative that avoids or minimizes adverse impacts to the maximum extent practicable. In a nutshell, while SEQR does not change the jurisdiction of an agency (or board), it overlays a formalized process for the consideration of environmental impacts onto an agency's (or board's) jurisdiction. It then imposes a findings requirement that forces the lead agency to consider alternatives and to then pick the alternative with the least impact while balancing social and economic considerations with environmental considerations.

B. SEQR and Land Use Decisions

In This Section You Will Learn about:

- SEQR and building permits
- SEQR and land use moratoria
- SEQR and comprehensive plans;
- SEQR and zoning, special use permits, variances and zoning board interpretations

SEQR and Building Permits

1. Does the building inspector's issuance of a building permit require SEQR review?

SEQR classifies as Type II actions official acts of a "ministerial" nature involving no exercise of discretion. (A "ministerial" act is one that involves direct adherence to a rule or standard with a compulsory result.) Issuance of building permits, where the issuance of the permit is determined solely on basis of the applicant's compliance with the building code would be included in this category. The building inspector's issuance of most building permits does not involve the exercise of discretion. In a typical situation, if an application meets the requirements of the New York State Uniform Fire Prevention and Building Code then the building permit must be issued. The building inspector does not have any discretion in the matter. (If a building permit is issued following site plan review approval or the issuance of a special use permit, or both, the building permit should have to meet the requirements of those approvals. However, the code enforcement officer or building inspector is merely enforcing conditions that have already been established by the planning or zoning board.)

2. When would the building inspector's or code enforcement officer's issuance of a building permit *not* be classified as a Type II action and therefore require review under SEQR?

There are instances where the issuance of building permit does involve the exercise of discretion by the building inspector. Some local laws give the building inspector some discretionary authority. For example, in some limited instances, building inspectors may have some authority to conduct site plan review. In that situation, the issuance of the building permit is no longer a ministerial action and SEQR review is required.

3. If issuance of a building permit for a project is ministerial and no local discretionary approvals are required, may SEQR be applied by the local government?

The local government has no opportunity to apply SEQR because it has no discretionary approvals to give. If SEQR review is conducted by a state or county agency, the local government may participate as an interested party, but not as an involved agency.

4. Can a ministerial permit be issued while SEQR review of an action is being conducted?

A ministerial permit can be issued while the SEQR review is ongoing if the permit can otherwise be issued. However, the activity allowed in the permit may not be undertaken because the SEQR regulations [6 NYCRR §617.3(a)] state that no physical alteration related to an action shall be commenced by a project sponsor until the provisions of SEQR have been complied with. The issuing official should notify the project sponsor of this prohibition. This would be particularly applicable to the issuance of demolition permits associated with a subsequent development action subject to review under SEQR.

SEQR and Land Use Moratoria

5. Are municipal land use moratoria subject to SEQR?

Land use moratoria are classified as Type II actions, which means that a municipality adopting a moratorium is not required to undertake any SEQR review with respect to the moratorium. A municipality adopting a moratorium should merely note the Type II classification in its resolution adopting a moratorium.

6. If a municipality adopts a moratorium on development projects and includes projects that are currently in the review process does the SEQR review also stop for those projects in the pipeline?

Yes. This answer is based on the rule that SEQR does not change the existing jurisdiction of agencies. SEQR only applies when a board is authorized by some other statute to fund, approve or undertake an action (e.g., site plan, special use permit, or subdivision review). If the underlying review has been stayed by the moratorium then the SEQR review is also stayed pending the end of the moratorium since the SEQR review does not have independent life. Therefore, a moratorium on development projects that are in the "pipeline" would stay the SEQR process.

SEQR and Comprehensive Plans (or land use "Master plans")

7. Does SEQR apply to the adoption of a comprehensive plan?

Yes. A municipality's adoption of a land use or "comprehensive plan" (as referred to in General City Law §28-a, Town Law §272-a, and Village Law §7-722) is not only subject to SEQR but is classified as a Type I action in the SEQR regulations. As a result, the adoption of a comprehensive plan is more likely to have a potentially significant, adverse impact on the environment, and, therefore, more likely to require the preparation of an EIS.

8. What is the best way for a municipality adopting a comprehensive plan to comply with SEQR?

While it is possible to issue a negative declaration in connection with the adoption of a comprehensive plan, the generic EIS is the most appropriate way to analyze the environmental impacts of a comprehensive plan. The generic EIS is specifically designed to analyze actions that call for a series of subsequent actions such as a comprehensive plan. In most cases, the comprehensive plan will set out a series of follow-up actions such as the amendment or writing of zoning laws or ordinances. Second, the adoption of a comprehensive plan can be one of the most significant land use actions taken by a municipality. General City Law §28-a, Town Law §272-a, and Village Law §7-722 each provide that all city, town and village land use regulations must be in accordance with the comprehensive plan. Therefore, underlying all local land use regulations should be the comprehensive plan. The preparation of a generic EIS allows for a more searching review of the range of possible land use actions proposed in a comprehensive plan. Third, SEQR provides an important incentive for preparing GEISs, namely, if a GEIS has been prepared, no further SEQR compliance is required if a subsequent proposed action is carried out in conformance with the conditions and thresholds established for such actions in the generic EIS or its findings statement. In other words, the generic EIS can be used as a tool for preplanning actions that involve more than one step such as the adoption of a

comprehensive plan which, in many cases, involves the re-drafting of zoning laws or ordinances.

If the municipality chooses to prepare a generic EIS for the comprehensive plan, the comprehensive plan and the generic EIS should be made available for public review as a joint document. Having both documents available at the same time provides for meaningful public review and assessment of the comprehensive plan along with consideration of the relevant environmental factors. Following public review and hearing, the final comprehensive plan and generic EIS and SEQR findings would be produced and the lead agency can proceed with implementing the plan.

9. Should a GEIS be prepared for all comprehensive plans?

As mentioned above, it is lawful to prepare a long-form EAF and then issue a negative declaration for a comprehensive plan if there are no potentially significant adverse environmental impacts as a result of the plan's adoption. If a municipality goes ahead and prepares a draft, generic EIS and then determines that there are no potentially significant, adverse environmental impacts as a result of the plan's adoption, the municipality can issue a negative declaration based on the draft GEIS. Despite these options, the comprehensive nature of comprehensive plans and the need to inform and gain input from the public on long-range plans make the comprehensive plan process very compatible with the GEIS. Additionally, the long-form EAF addresses itself more to analyzing projects than planning documents, which is another reason why both the Department of Environmental Conservation and the Department of State recommend the use of the generic EIS for comprehensive plans.

10. Are all municipal plans subject to SEQR?

No. Only those plans that may affect the environment and commit the municipality to a definite course of future decisions, such as a municipality's comprehensive plan. Sometimes municipalities engage in planning-like activities that affect the environment but do not commit the municipality to a definite course of conduct. For example, the establishment of a committee to do planning does not commit the municipality to a definite course of conduct.

SEQR and Zoning, Special Use Permits, Variances and Zoning Board Interpretations

a. Zoning (in general) and Rezoning

11. What zoning activities are subject to SEQR?

SEQR applies to local government decisions to adopt zoning laws and ordinances or to modify existing zoning laws and ordinances. Certain zoning actions receive special attention under SEQR. For example, zoning actions that change the allowable uses on twenty-five or more acres of land are classified as Type I actions. Special or conditional use permits also require SEQR review. Finally, variances are subject to SEQR, though, as mentioned below, certain types of variances are classified as Type II actions- making them exempt from SEQR review.

12. Which board is responsible for the conduct of SEQR when local zoning decisions are made?

The board with primary responsibility for making the zoning decision. Except with regard to subdivision regulations, which can only be administered by a planning board, there is significant variance among municipalities as to which of the various boards ordinarily established by a city, town or village will have primary responsibility for the various zoning decisions. If the zoning decision is legislative (such as a rezoning decision), then the board with primary responsibility, depending on whether the municipality is a city, town or village, will be the city council, the town board or the village board of trustees, respectively. If a municipality has zoning then it must have a zoning board of appeals. The statutory jurisdiction of the zoning board of appeals includes granting use and area variances as well as interpretations of the zoning law or ordinance. Thus, the zoning board of appeals will ordinarily be responsible for the conduct of SEQR with regard to variances (interpretations are classified as Type II actions). Jurisdiction to issue special or conditional use permits varies among municipalities. Typically, this function is usually given to either the zoning board of appeals or the planning board. Thus, for special or conditional use permits, the board with primary responsibility will usually be the zoning board of appeals or the planning board. Site plan review, which is a power given to municipalities separate and apart from zoning, is normally delegated to planning boards. Typically, planning boards have responsibility for making site plan review decisions. If more than one zoning-related decision is necessary for the same action and if the review is to be coordinated, then the boards must decide on which board is to be lead agency following SEQR procedures for establishing lead agency. These procedures are described in 6 NYCRR §617.6 (b).

13. In a community adopting zoning for the first time, what are the SEQR responsibilities of the zoning commission?

For towns and villages adopting zoning for the first time, Town Law §266 and Village Law §7-710 each require appointment of a zoning commission to formulate and recommend the law or ordinance. The zoning commission may be either a temporary, special board or the planning board - if one already exists. The town board or the village board of trustees, however, remains responsible for complying with SEQR since the legislative boards ultimately decide whether to adopt the zoning proposed by the zoning commission. Nonetheless, the legislative body may direct the zoning commission to assist it in preparing the environmental assessment form or the EIS.

14. Are there differences, for SEQR purposes, between a zoning change sought by a project sponsor and one initiated by the municipality?

When a zoning change is initiated by the municipality on its own recommendation or at the request of residents, but no specific development project is planned (e.g., the zoning is changed to be consistent with actual use), the rezoning itself is the whole action and is classified as a direct action of local government. The determination of significance must consider the consequences of such rezoning on the environment, but it is not necessary to speculate about specific projects (see the next question and answer). In contrast, if the zoning change is proposed by a project sponsor, in conjunction with a proposal, the impacts of both the rezoning and the specific development must be considered in determining environmental impacts.

15. When a zoning change is a direct action and no physical changes or projects are proposed, what should be considered in the SEQR review?

The SEQR review should consider the relative impacts based on the proposed changes. In other words, the analysis should compare the relative impacts of land use and development (based on the existing zoning) and the proposed zoning. For example, the rezoning of agricultural land to a commercial or residential use might significantly affect community character, aesthetics, traffic and stormwater runoff. A municipality should consider the most intensive uses allowable under the proposed zoning to judge potential impacts.

Keep in mind that rezoning itself may be more significant from the standpoint of SEQR than the individual permitting of projects since a zoning change triggers a change in the allowable use of land and ostensibly individual projects consistent with that change will be considered in the future in the rezoned area.

The use of a generic EIS is the best SEQR-tool to analyze the rezoning actions for large-scale or significant changes.

16. Can the environmental review of rezoning be segmented from the environmental review of any site specific projects that may come about as a result of the rezoning?

Segmentation is contrary to the intent of SEQR. (*See [citation] for discussion of segmentation.*) Under certain circumstances, however, certain forms of segmentation may be reasonable. For example, if a landowner is seeking to rezone a parcel of land to conform the parcel to changing uses in the surrounding area, segmentation may be justified if the owner has no present plan to develop the parcel for a particular use. Nonetheless, the lead agency should conceptually review the potential impacts for the maximum development that could be realized on the rezoned parcel of land. In general, segmented review should be justified in writing and used sparingly.

Project sponsors may be unwilling or financially unable to provide detailed information about a project until the zoning question is resolved. However, this does not justify a segmented review. For situations where there are uncertainties about the specifics of development projects, the following options are suggested:

- If the lead agency determines that neither the rezoning nor the project, taken together, may have a significant environmental impact, it can issue a negative declaration.
- If the project or the zoning may result in significant impacts, the project sponsor may be required by the lead agency to prepare a generic EIS that analyzes the impacts of the zoning change. The generic EIS should also conceptually analyze the impacts of the proposed development, based on current information and reasonable projections without the need for detailed engineering. If the zoning decision allows the proposed use, a supplemental EIS may be needed to discuss specific impacts of the project in detail.

b. Variances and Interpretations

17. What types of variances are classified as Type II actions, and, therefore, exempt from SEQR?

The granting of individual setback and lot line variances and area variances for a single-family, two-family or three-family residence.

18. Does a zoning board of appeals, when interpreting a zoning law or ordinance have to apply SEQR?

No. As part of their appellate jurisdiction, zoning boards are specifically authorized to render interpretations of local zoning laws. Interpretations of the local zoning law by zoning boards are classified as Type II actions, which are exempt from SEQR review.

19. Is a use variance that changes the allowable uses on 25 or more acres of land a Type I action?

No. The Type I classification for actions that change the uses allowable on 25 acres or more of land refers to legislative rezonings by either the city council, town board or the village board of trustees. Nonetheless, the practical effect of a variance that changes the allowable uses of land on 25 or more acres of land may be the same as a legislative rezoning that affected the allowable uses on 25 or more acres of land. Therefore, a zoning board would be prudent to scrutinize such a request to the same degree as if the action were classified as a Type I action. This can be done by, among other things, utilizing the long-form EAF and coordinating review with other involved agencies, if any.

20. Is a ZBA decision subject to SEQR when it is an interpretation of the zoning ordinance or the review of a decision of a zoning enforcement officer?

No. ZBA interpretations are classified as Type II actions. The rationale for classifying ZBA interpretations as Type II actions is that they are akin to judicial interpretations and do not directly result in a decision to approve, fund or undertake an action.

21. How should SEQR be applied to a zoning board's review of a use variance application?

SEQR applies to a ZBA's consideration of use variance requests. Unlike area variances, where in certain limited circumstances they are classified as Type II actions, there are no Type II categories corresponding to use variances. Use variances will be classified as either Type I or Unlisted actions.

There is an overlap between the criteria for granting use variances and SEQR considerations. To be eligible for a use variance under General City Law, Town Law and the Village Law, an applicant must demonstrate "unnecessary hardship." To prove unnecessary hardship the applicant must show, among other factors, that the variance, if granted, will not alter the essential character of the neighborhood. Also, under the General City Law, the Town Law and the Village Law, zoning boards, in granting use variances, are directed to preserve and protect the character of the neighborhood and the health, safety and welfare of the community. At the same time, closely akin to the use variance factors, SEQR factors include community character and aesthetics. Procedurally, however, the zoning board must still apply the use variance criteria factors even where it issues a negative declaration under SEQR.

Here is a suggested way to handle the overlap. The zoning board should determine based on the EAF and other information whether to require an EIS. This determination will come before the decision on the variance; in fact, this determination will be made as part of the determination on whether the application is complete for review purposes. Whether the variance, if granted, would alter the essential character of the neighborhood is something that the zoning board would consider in determining whether to require an EIS. If the zoning board were to determine that the variance, if granted, would *not* alter the essential character of the neighborhood, it would still have to determine whether based on the other SEQR criteria to require the preparation of an EIS. If an EIS is required based on impacts to the neighborhood or community character or for any other SEQR-relevant reason, the zoning board can proceed to consider the environmental related variance factors within the environmental impact statement process.

Another practical problem with variances is the potential for redundant SEQR reviews. Once a use variance is granted, most municipalities will provide for either site plan review or special use permit review, or both, of the project that has been granted the variance. This subsequent review often requires SEQR review unless the action is classified as a Type II action. This second review may result in needless repetition of the same SEQR issues that were addressed during the variance stage of the review. One solution is to coordinate SEQR review of the variance and the special use permit or site plan application, if coordinated is review is not otherwise required under the SEQR regulations. This approach may result in more immediate cost to the project applicant. However, coordinated review avoids segmented and repetitive review of the action.

22. How should SEQR be applied to area variance requests?

Certain area variances are classified as Type II actions, meaning that there is no SEQR review. Type II actions include granting of individual setback and lot line variances and granting of area variances for a single-family, two-family or three-family residence. All other area variances would either be classified as Type I or Unlisted actions. The comments on projects that require both area variances and special use or site plan review applications, mentioned in answer to the proceeding question, applies to area variances.

C. SEQR and Capital Improvements

In This Section You Will Learn about:

- SEQR and capital improvements.

1. How does SEQR apply to capital improvements and other infrastructure development undertaken by local governments?

Direct actions of local governments to acquire, construct, alter, remove or dispose of land or structures intended for public purposes require review under SEQR. Included would be capital projects such as public buildings and open space, streets and highways, sewer and water systems and maintenance facilities.

2. Are there capital improvement actions that are classified as Type II actions, which can be undertaken without SEQR review?

Yes. Prominent examples from the Type II list include:

- Maintenance or repair involving no substantial changes in an existing structure or facility;
- Replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site, including upgrading buildings to meet building or fire codes, unless such action meets or exceeds any of the thresholds for Type I actions; and
- Maintenance of existing landscaping or natural growth.

3. If a municipality makes a bond resolution for a capital project does the bond resolution have to undergo SEQR review and does the scope of such review cover the project that is being financed by the bond resolution?

The bond resolution requires SEQR review, if it comes within the definition of "action" and is not for an action classified as a Type II action. The scope of the review should include the project that is being financed by the indebtedness. As with any action that either may involve a series of actions or where the action may evolve over time, the generic environmental impact statement will most likely be the best SEQR tool to identify and assess the impacts of the action. As the action evolves, the municipality can prepare supplemental statements covering the changes.

4. Is a capital budget considered a sufficient commitment to the improvements listed within it to require a review under SEQR before its adoption?

The inclusion of capital improvements within a municipal budget is not an action subject to SEQR. The budgeting process merely sets aside funds without a commitment to their expenditure. Such budget items are usually not definitive enough with respect to design, and sometimes even location, to be reviewable at the time the budget is adopted. However, the adoption of a capital budget should alert public agencies that SEQR should be applied to such projects before they are initiated. Municipal or agency bonding of a particular capital project would be an action requiring SEQR compliance before it is undertaken.

5. Is the acquisition or disposal of land associated with a capital improvement covered by SEQR?

Land acquisition or disposal associated with a capital improvement should be reviewed as part of the whole action. Frequently the first commitment to a project will occur when a property transaction is made, and it is appropriate that SEQR be completed before such commitment is made.

6. Must SEQR be applied to budget items for purchase of equipment?

No. Purchase (or sale) of new or replacement furnishings, equipment or supplies, such as vehicles, waste handling equipment, traffic control devices and playground equipment (other than land, radioactive material, pesticides, herbicides or other hazardous materials) is considered a Type II action.

D. SEQR and Municipal Annexations

In This Section You Will Learn about:

- SEQR and municipal annexations.

1. Are municipal annexations subject to SEQR?

Yes. The determinations of public interest that must be made by municipalities pursuant to Article 7 of the General Municipal Law, prior to granting or denying an annexation petition, involves the weighing and balancing of social, economic and environmental factors. Municipal annexation decisions are, therefore, discretionary decisions requiring SEQR review. Annexations of 100 or more contiguous acres are classified as Type I actions; annexations involving less than 100 acres are classified as Unlisted actions, unless some other aspect of the action triggers Type I review.

Annexation is typically associated with potential changes in land use or need for public services that may be more readily available from one municipality than another. Municipal decisions on annexation are similar in their consequences to rezoning decisions; both decisions have the potential to change land use patterns and require a hard look at the consequences of the whole action. In the case of an annexation, only after examination of these SEQR concerns, among other factors, can the question of public interest be fully addressed.

2. At what point in the annexation process should SEQR be applied?

SEQR should be applied at the time the initial petitions for annexation are presented to the involved municipalities, and prior to the joint municipal public hearing required under General Municipal Law. If an EIS is required, it should be made available as a draft for public review prior to the joint public hearing. The joint hearing can also serve as a SEQR hearing.

3. Can annexations associated with development proposals be reviewed separately from such development?

No. Although annexation petitions often will be the first elements of an overall action presented, annexation considerations cannot be segmented from the SEQR analysis necessary for the whole action. Moreover, an annexation approved without considering the environmental impacts of the associated development may be unwise, if it turns out that the development is not feasible.

4. What if details of future development are not known?

If the annexation petitioners are not committed to a specific development proposal, or if several parts of the area have undefined development potential, a generic EIS may be appropriate. A generic EIS would allow both the petitioners and reviewers to evaluate potential impacts of a variety of project proposals.

5. What factors should be considered in establishing lead agency for an annexation?

Although state and county agencies occasionally have involvement with some aspect of specific projects associated with annexations, the most appropriate lead agency is likely to be from one of the involved municipalities. Major considerations are the agency's:

jurisdiction over activities in the proposed annexation; jurisdiction over environmental impacts which may occur outside the proposed annexation due to activities within it (e.g.,

traffic congestion and waste generation); and the municipal ability to assess and mitigate anticipated environmental impacts.

If no development activities requiring discretionary decisions by other agencies are anticipated within the proposed annexation, only the municipal legislative boards would be involved agencies and eligible to serve as lead. All other considerations being equal, the most logical choice for lead agency is the agency which has had the longest standing jurisdiction within the area. This is normally an agency of the municipality from which the annexed parcel may be taken.

E. SEQR and Municipal Development Incentives

In This Section You Will Learn about:

- SEQR and municipal incentives.

1. What forms of public financial support of development incentives by a municipality are subject to SEQR?

Local public agencies can encourage desired development by providing direct financing, financial or tax incentives, and land for development; by constructing infrastructure and by limiting certain regulatory constraints. The provision of such incentives is subject to review under SEQR. If the incentives are proposed broadly such as a local program to encourage senior citizen group housing, they may be examined under SEQR in generic fashion. If they involve one-of-a-kind proposals, site specific reviews would be appropriate. Agencies providing financial or other incentives are involved agencies.

2. Are actions of local or county Industrial Development Agencies (IDAs) subject to review under SEQR?

Yes. The approval to guarantee funds or loans is subject to SEQR, even when no other approvals are required. The exception of course is where the action is classified as a Type II action. If so, no further application under SEQR is required by the IDA. Also, if the funding proposal is part of a previously considered action covered by a negative declaration, no further SEQR review is necessary. If the action is consistent with a previously produced FEIS, the IDA should make SEQR findings about its approval or disapproval of the action, based on such FEIS. If the proposed funding or loan application is independent of any earlier review under SEQR, the IDA must make its own determination of significance.

Chapter 8: SEQR and Related Federal and State Review

A. SEQR and the National Environmental Policy Act (NEPA)

In This Section You Will Learn about:

- SEQR and the National Policy Act (NEPA)

1. What is the National Environmental Policy Act?

The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 et seq., is the federal mechanism for conducting an environmental review of federally funded, approved or directly undertaken actions. NEPA applies only to the decisions of federal agencies. NEPA also established the Council on Environmental Quality (CEQ) to promulgate and interpret the NEPA regulations.

Actual NEPA language and guidance can be found at <http://ceq.hss.doe.gov/nepa/nepanet.htm>.

2. How do the NEPA and SEQR processes compare?

Both NEPA and SEQR require an agency to determine whether a decision is subject to environmental review and, if so, whether an environmental impact statement should be prepared. Under NEPA, classes of actions which are by regulation exempt from environmental review, and so are equivalent to SEQR's Type II actions, are called "categorical exclusions" (Cat Ex). The tool used under NEPA to assess potential impacts is an "Environmental Assessment" (EA), which is subject to public notice and comment. If a federal agency concludes that an EIS is not required, it will issue a "Finding of No Significant Impact" (FONSI). If an EIS is required, scoping, a Draft EIS, public comment, and a Final EIS responding to comments, proceed similarly to the SEQR process.

The formal threshold for requiring an EIS under NEPA is, '.....**will** cause an adverse environmental impact', while the threshold under SEQR is, '.....**may** cause an adverse environmental impact'. Furthermore, under SEQR, the requirement to require avoidance or mitigation of identified impacts via the Findings after a Final EIS is included within the statute.

3. Can decisions by New York State and local agencies be subject to NEPA review?

Decisions by state and local agencies administering federal "pass through" programs (eg. Clean Water Revolving Fund, state and local highway assistance, or Community Development Block Grants) are subject to NEPA.

4. What responsibilities do state and local agencies have under SEQR when a project is subject to NEPA review?

In situations where federal as well as state or local governments are involved in a project, and the federal agency is reviewing the project under NEPA, the state and local agencies must still satisfy SEQR. State and local agencies may use documents produced during a NEPA review as support for their required determinations or findings under SEQR. See [617.15](#). A decision by a federal agency that a project or program is categorically excluded from NEPA review does not eliminate the responsibility of state and local agencies to appropriately classify and, if necessary, review the project or program under SEQR.

5. If an action has been the subject of a Draft and Final EIS under NEPA, are state and local agencies obligated to prepare a separate EIS under SEQR?

No. As discussed in 617.15, if an action has been the subject of a draft and final EIS under NEPA, state and local agencies have no obligation to prepare a separate EIS under SEQR, as

long as the federal Final EIS provides sufficient information for those state and local agencies to make SEQR findings. When one or more state or local agencies are using a federal Final EIS as the basis for SEQR findings, each involved agency must issue its own SEQR Findings based on the federal Final EIS before issuing its own decision on funding, approving or undertaking the action.

6. Does a Finding of No Significant Impact (FONSI) under NEPA automatically constitute compliance with SEQR?

No. A FONSI under NEPA does not automatically constitute compliance with SEQR. However, because a FONSI presents the basis for a federal agency's conclusion that an action will not have a significant impact on the human environment, the FONSI may be able to serve as the basis for a SEQR negative declaration. The FONSI may include a summary of the Environmental Assessment (EA) prepared for the project, or the entire EA may be attached to the FONSI.

7. Does a NEPA FONSI or EIS, prepared by a federal agency, limit or over-ride state and local authority under SEQR for the same project?

In general, no. While a NYS or local agency may use a federal FONSI or Final EIS to help it reach its required conclusions under SEQR, these final decisions by a federal agency do not limit local or state agency authority under SEQR (with some limited statutory exceptions, below). The SEQR regulations at 617.15 address how federal agency decisions under NEPA affect an agency's obligations under SEQR.

Certain federal statutes explicitly pre-empt or supercede state authorities, including SEQR. Examples are the Natural Gas Policy Act, federal regulation of hydropower facilities, many railroad-related activities, and national interest electric transmission corridors.

8. Are federal agencies subject to SEQR?

No. Federal agencies themselves are not subject to SEQR. However, state and local agencies who are operating with federal "pass through" type programs (i.e. certain water programs and local road programs) are not exempt from SEQR because of their federal connection.

9. Can a Federal agency be an involved agency under SEQR?

No. However, when an action is going to be the subject of a federal agency review and approval under NEPA, it is advisable to treat the federal agency as if they are an interested agency for the purposes of the SEQR process in order to retain consistency in overall review decisions. This means, for example, that copies of all notices and EISs should be shared with the federal agency and, if formal scoping is conducted, the comments of the federal agency should be requested and incorporated into the scope.

10. Is it possible to coordinate SEQR and NEPA reviews?

Yes. State and federal environmental review of an action may be coordinated. This is desirable to reduce duplication and potential conflict between the two levels of government. Specifically, a coordinated SEQR/NEPA review process may include joint procedures to satisfy both state and federal requirements, such as:

- environmental assessments;
- scoping and the preparation of EISs;
- conduct of public hearings; and
- preparation and publication of public notices.

In the case where a SEQR EIS is being prepared with the intent to satisfy NEPA requirements, it is important under NEPA that formal scoping occur before decisions are made on the content of the EIS. Federal, state and local agencies, as well as interested parties should be invited to a scoping meeting to identify important issues that need to be discussed in the EIS.

Note, however, that if state/local agencies and federal agency(s) wish to coordinate their SEQR and NEPA reviews, they should begin those joint efforts in the early stages of a project. The Federal NEPA compliance checklist [www.fws.gov/forms/3-2185.pdf] can be valuable in such coordinated efforts.

11. Are there any pitfalls to avoid if using a SEQR EAF and EIS to satisfy NEPA review requirements?

There are several procedural differences that must be accommodated when using a SEQR EAF and EIS to satisfy NEPA review requirements:

- Under NEPA, environmental assessments must discuss alternatives to the proposal under consideration. The SEQR model EAF should be modified to incorporate corresponding federal assessment requirements.
- Under NEPA, the discussion of adverse environmental impacts must include an analysis of relevant information that is either incomplete or unavailable at the time.
- A NEPA EIS cannot be prepared by a private project sponsor. This is a task obligated to the federal agency, although it is often done with outside assistance.
- A consultant hired by an agency for NEPA EIS preparation must not be involved in any other component of the project being reviewed.
- Qualifications of the preparers of any portion of the draft NEPA EIS must be given.
- The time frames for the comment period on the draft NEPA EIS must be extended from thirty to forty-five days.
- The minimum time interval between adoption of the NEPA Final EIS and final decisions by involved agencies, must be extended from ten to thirty days to allow sufficient time for public participation.

12. Can a NEPA EIS be used, without modification or change, as a SEQR EIS?

In theory, yes, but rarely in practice. A NEPA EIS often requires supplemental information before it can be used to satisfy SEQR. The following topics are required under SEQR but not under NEPA, and so must often be added to a NEPA EIS before the document will meet the minimum requirements for an EIS under SEQR:

- a description of any growth inducing aspects of the proposed action, if applicable and significant;
- a discussion of the effects of the proposed action on the use and conservation of energy, if applicable and significant;
- a discussion of the effects of the proposed action on state and local waterfront programs, for state agency actions in the coastal area; and

- a discussion of the effects of the proposed action on solid waste management, if applicable and significant.

A NYS or local agency may request that these topics be included in the NEPA EIS, or a SEQR lead agency may be established to prepare a supplemental EIS under SEQR to address these additional topics. See handbook section Supplemental EIS's.

13. Can a federal environmental assessment (EA) be accepted as a draft EIS under SEQR?

In some cases, yes. Many federal EAs can be accepted as a draft EIS under SEQR because they provide as thorough a review as a draft EIS under SEQR. When this occurs, a SEQR lead agency has the option of using the EA as a draft EIS for the purposes of SEQR, so long as the minimum procedural and substantive requirements of SEQR have been met. In those cases where a federal EA covers most, but not all, of the SEQR issues, additional information on specific issues may be added to the federal documentation. See question 12 above.

14. Can a separate SEQR review be started before the NEPA review begins?

Yes. At the option of the project sponsor, a state or local agency may commence the SEQR review of an action before the NEPA process commences. In the case of an agency direct action, the responsible state or local agency always has the option to proceed with the SEQR review before the NEPA process begins.

When a state or local agency proceeds with SEQR prior to the start of the NEPA process, however, there is a risk that agency time and public money will be spent on a project review whose outcome depends on federal government approval.

15. Can a state or local agency issue an approval following the completion of the SEQR review, but before the NEPA review has ended?

Yes. The SEQR review process can be concluded prior to the NEPA review ending. However, in such circumstances, state and local approvals and decisions which are made under SEQR must be considered contingent on the federal decision on the action.

16. Is there a threshold level of federal involvement in a project which triggers NEPA review?

Federal courts have issued a number of opinions on what level of federal agency authority or involvement is sufficient to "federalize" a project and so trigger NEPA. In general, where a federal approval applies to only an inconsequential component of a project, NEPA does not apply. Accordingly, NYS or local agencies cannot always presume that an action has been federalized just because there is some federal approval required. In all cases, the NYS or local agency is responsible for satisfying SEQR.

B. Archeological and Historic Resources

In This Section You Will Learn about:

- SEQR and archeological and historic resources.

1. What are archeological and historic resources?

The terms archeological and historic resources are also often referred to as cultural resources. These resources may be located above ground, underground or underwater, and have significance in the history, pre-history, architecture or culture of the nation, the State, or local or tribal communities. Examples include:

- buildings (houses, barns, factories, churches, hotels, etc.);
- structures (dams, bridges, canals, aqueducts, lighthouses, etc.);
- districts (group of buildings or structures that have a common basis in history or architecture);
- sites (battlefields, historic forts, prehistoric encampments, shipwrecks, etc.);
- objects (ships, etc.); and
- areas (gorges, parks, etc.).

2. Must archeological and historic resources be considered under SEQR?

Yes. The terms “archeological” and “historic” are specifically included in the definition of the “environment” at Part [617.2\(l\)](#) as physical conditions potentially affected by a project. The phrase “objects of historic significance” is included in the definition of “environment” at Environmental Conservation Law (ECL) §8-0105(6).

3. How do we evaluate archeological and historic resources under SEQR?

There are potentially five points during a SEQR review where the lead agency should consider archeological and historic resources.

The lead agency must first consider identified historic or archeological resources when classifying the proposed action. If an action would, based on its size and other basic attributes, be classified as Unlisted, but the action would be located, “...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 inclusion in the National Register, or that is listed on the State Register of Historic Places...”, it must instead be classified as a Type I action ([617.4\(b\)\(9\)](#)). Also, the action would not be classified as Type I if it is designed to preserve the facility or site.

Second, both Part 1 and Part 2 of the [Full EAF](#) include questions about existing site conditions and any known archeological or historical information relevant to the project area. Additionally, Part 2 of the Short EAF includes a question that asks the lead agency to evaluate potential adverse effects on archeological and cultural resources. The web site of the NYS Office of Parks, Recreation and Historic Preservation (OPRHP) includes maps showing sites listed on the National and State Register of Historic Places and areas of known archeological sensitivity, which can be used as reference material when responding to the archeological and historic questions on the EAF.

Third, as the lead agency develops its [determination of significance](#), that lead agency must assess whether a significant adverse impact may occur to environmental features surrounding the action, including archeological and historic resources ([617.7\(c\)\(1\)\(v\)](#)). The lead agency may conclude that additional studies need to be done to fully identify archeological and historic resources and evaluate potential threats to them from the action

under review, potentially supporting a positive declaration; or the lead agency may conclude that the proposed action will not adversely affect those archeological and historical resources.

Fourth, if the action receives a positive declaration and one of the environmental factors triggering the declaration is archeological and historic resources, the scope of the DEIS and the FEIS must address potentially significant adverse impacts to these resources, as well as alternatives and mitigation to avoid or minimize those potential impacts.

Finally, where an FEIS has investigated potential adverse impacts to archeological and historic resources, the lead agency must address those potential adverse impacts when developing its SEQR findings. Specifically, the lead agency must articulate how those impacts have been avoided or mitigated to the maximum extent practicable, when weighed and balanced with social, economic and other considerations. The lead agency may attach conditions to its final decision, where appropriate, to ensure that the identified mitigation is implemented.

4. Can a Type II action ever be classified as Unlisted, or elevated to a Type I action, because it contains or involves an archeological or historic resource?

No. When an action has been appropriately classified as Type II, based on its size and other basic attributes, that action cannot be elevated to Unlisted or Type I even if the action involves or adjoins an archeological or historic resource. For example, the repair or replacement of siding on a house within a historic district would be classified as Type II under SEQR because it meets the standard of maintenance and repair involving no substantial change in an existing structure under [617.5\(c\)\(1\)](#). Even without a review under

SEQR, however, the activities may still be regulated under local codes. Further, even if an action is classified as Type II, this does not mean that the action is consistent with the historical character of the district nor does it mean that the action is free from other State or local laws affecting archeological or historic sites. It only means that it is not subject to SEQR review.

A lead agency should exercise some caution when proposing to classify an action as Type II as "replacement, rehabilitation or reconstruction of a structure or facility, in kind on the same site" under 617.5(c)(2). Because that Type II item includes language elevating such activities to Type I if those activities meet or exceed any numeric Type I thresholds, the lead agency must compare the full extent of the proposed rehabilitation and reconstruction project to those Type I thresholds. If one or more Type I thresholds would be met or exceeded, then the action must be classified as Type I.

5. What does the phrase "unless the action is designed for the preservation of the facility or site" mean?

Actions designed for the preservation of an archeological or historical resource would include activities undertaken to protect or rehabilitate a historic structure or site, and conducted in accordance with adopted standards and guidelines for archeology and historic preservation.

6. Who makes the decision that the activity is for preservation purposes?

The lead agency makes the determination whether an action is intended for purposes of preservation. That decision should be supported by documentation from a professional in a field of study related to the preservation effort (historic building restoration for buildings, archeology for archeological site-related preservation, etc). A lead agency may also consult the appropriate Field Service Bureau of NYS OPRHP.

7. Must a cultural resources survey be prepared for every project to enable a lead agency to identify possible impacts to archeological and historic resources?

No. The examples that are contained in Part 2 of the Full EAF are intended to rely only on information that is available from existing sources. Before a lead agency requires the preparation of a cultural resources survey, it can search available existing public reports and data to determine if any resources are likely to be impacted. The OPRHP "Online Resources" web site contains maps and data bases which the lead agency can use to help it identify potentially significant resources or determine whether an archeological survey is needed. Additional existing sources of information include but are not limited to:

- NYS Historic Preservation Office (SHPO);
- New York State Museum;
- Department of Anthropology/Archeology at a local college or university;
- Local historical museums and societies; and
- Local historians.

After consulting these resources, the lead agency should be able to ascertain whether or not the project could affect archeological or historic resources. If potential significant adverse impacts to archeological or historic resources are identified during development of the determination of significance, cultural resource surveys may be required as part of the scope of a DEIS, to allow the lead agency to evaluate the importance of a resource, how it may be impacted by the proposed action, and means to avoid or mitigate the potential impacts.

8. Must a lead agency restrict its review of archeological and historic resources to those which have been designated by OPRHP?

No. Although OPRHP, and some other state agencies, have recorded many archeological and historic resources, there may still be resources known only to local collectors, landowners and historians. These local sources may report their findings to the lead agency conducting the SEQR review. In such cases, those archeological and historic resources not included in OPRHP data base should also be identified and evaluated by the lead agency and potential impact to these resources from the project should be evaluated under SEQR.

9. Does identification of potential impacts to an archeological or historic resource always require preparation of an EIS?

Not always. A potentially significant adverse impact to important archeological and historic resources may be sufficient to trigger an EIS. The evaluation of impacts to these resources is similar to the evaluation made for other factors of the environment when a lead agency reaches its determination of significance. When a lead agency completes its assessment of identified archeological or historic resources, it should be able to articulate in the

determination of significance whether or not the action as proposed is likely to impact those resources. An EIS would only be required if the lead agency identifies potentially significant unmitigated adverse impacts on the identified resources, and would use the EIS to develop alternatives and mitigation which would avoid or mitigate those impacts. Where the proposed design avoids the identified resources, or provides effective mitigation, no EIS would be required.

10. Do additional requirements apply to evaluation of archeological and historic resources when a state or federal agency is also involved in an action?

Any State agency that is involved in a project that may affect archeological or historic resources must comply with the New York State Historic Preservation Act of 1980 ("SHPA"; Chapter 354 of the New York State Office of Parks, Recreation and Historic Preservation Law, Section 14.09). In consultation with OPRHP, the State agency is required to identify cultural resources that may be impacted by an action and seek ways to avoid, minimize or mitigate these impacts.

The lead agency and involved State agencies should share information about impacts to archeological and historic resources, but the lead agency is responsible for determining impacts to these resources under SEQR. It cannot delay the SEQR review without consent of the applicant (project sponsor) and any other involved agencies. If the State agency completes the SHPA review before the lead agency completes the SEQR review, then the results of the state agency's SHPA consultation should be used by the lead agency in evaluating impacts under SEQR.

If a federal agency is reviewing, funding or undertaking the project, that federal agency must meet the requirements of Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470). Section 106 also requires a formal consultation with SHPA to identify measures that the federal agency must take to avoid or protect the identified cultural resources. While federal agencies are not formally involved in SEQR reviews, the results of a Section 106 consultation, if available, may be used by a SEQR lead agency to support its assessment of potential impacts to cultural resources.

11. Where can I get more information on the New York State Historic Preservation Act?

For more information contact:

New York State Office of Parks, Recreation and Historic Preservation (OPRHP)
New York State Historic Preservation Office
Peebles Island Resource Center
P.O. Box 189
Waterford, NY 12188-0189
(518) 237-8643

Additionally, OPRHP has advised, "We are pleased to announce that our data is now directly accessible to all users via the internet. Consequently, this office will discontinue the preparation of written responses to basic SEQR and NEPA data inquires, i.e. requests for information available on the Internet. We will, however, continue to respond to municipal officials requesting written evaluations of historic and archeological resources and recommendations for survey, treatment or mitigation in supplementing local environmental assessments."

C. Coastal and Inland Waterways Programs

In This Section You Will Learn About:

- SEQR and the coastal and inland waterways programs

1. What is the Coastal and Inland Waterways Program?

The State's Coastal and Inland Waterways Program was developed to ensure the protection and best use of New York State's coastal and inland water resources and to promote the revitalization of waterfront communities. The program is administered by the Department of State (DOS) and carried out in partnership with local governments and state and federal agencies.

For more information about the State's Coastal and Inland Waterways Program, contact the Department of State:

NYS Department of State
Office of Coastal, Local Government and Community Sustainability
99 Washington Avenue, Suite 1010
Albany, NY 12231-0001
Ph: (518) 474-6000
<http://www.nyswaterfronts.com>

2. What is the authority for the Coastal and Inland Waterways Program?

Following passage of the federal Coastal Zone Management Act (CZMA), New York State developed a Coastal Management Program (CMP) and enacted implementing legislation (Waterfront Revitalization and Coastal Resources Act) in 1981.

The statutory authority for the Coastal and Inland Waterways Program is contained in Article 42 of the Executive Law and the law is implemented by 19 NYCRR Part 600 (see offsite link in the right navigation panel).

3. What are the State's Coastal Policies?

The CMP is based on a set of 44 coastal policies that guide coastal management actions at all levels of government in the State and ensure the appropriate use and protection of coasts and waterways. The coastal policies are grouped into the following categories:

- Development Policies
- Fish and Wildlife Policies
- Flooding and Erosion Hazards Policies
- General Safeguards
- Public Access Policies
- Recreation Policies
- Historic and Scenic Resources Policies
- Agricultural Lands Policy
- Energy and Ice Management Policies
- Water and Air Resources Policies

The full text of the coastal policies can be found at:
http://nyswaterfronts.com/consistency_coastalpolices.asp

4. What is a Local Waterfront Revitalization Program?

Cities, towns, and villages along major coastal and inland waterways are encouraged to prepare a Local Waterfront Revitalization Program (LWRP) in cooperation with DOS. A LWRP is a locally prepared, comprehensive land and water use plan for a community's natural, public, working waterfront, and developed waterfront resources. It provides a comprehensive framework within which critical waterfront issues can be addressed.

LWRPs address a wide range of issues important to waterfront communities including: waterfront redevelopment; expansion of visual and physical public access to the water; coastal resource protection, including habitats, water quality, and historic and scenic resources; and provision for water dependent uses, including recreational boating, fishing, and swimming. As part of the preparation of a LWRP, a community identifies long term uses for its waterfront and an implementation strategy, including enacting or amending appropriate local development controls.

All LWRPs include a local consistency review law which is used to ensure that the actions of the community are consistent with the policies, uses and projects described in the LWRP.

Once approved by the New York Secretary of State and the federal Office of Coastal Resources Management, the LWRP serves to coordinate state and federal actions needed to achieve the community's goals for its waterfront.

5. What is Consistency Review?

Consistency review is the decision-making process through which proposed actions and activities are determined to be consistent or inconsistent with the coastal policies of the New York State Coastal Management Program or approved LWRPs.

Unlike traditional permit or certification programs, the Division does not issue or deny a permit or certification. The Division instead reviews activities being considered by agencies in the coastal area, and determines whether the activity is consistent or inconsistent with the coastal policies of the State. If an activity is determined to be consistent with State coastal policies, the federal agency involved can proceed to authorize or undertake the action guided by DOS's decision. If an activity is determined to be inconsistent with State coastal policies, the federal agency is not allowed to proceed to authorize or undertake the action.

6. What agencies are subject to Consistency Review?

The consistency review process includes and affects federal agencies, the Department of State and its Division of Coastal Resources as the State's designated coastal management agency, other State agencies, and municipalities with approved LWRPs.

- **Federal consistency:** The CZMA requires that each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management

programs. All state agencies, including state created authorities, commissions and boards are required to follow federal consistency review procedures if the agency is either a recipient of federal funding or applicant for a federal permit. This requirement applies in the State's coastal zone.

- **State consistency:** All state agencies, including state created authorities, commissions and boards are required to follow certain consistency review procedures for direct, regulatory, or funding actions. This requirement applies in the State's coastal area and in any inland communities with an approved LWRP.
- **Local consistency:** Communities with adopted LWRPs must conduct a consistency review as part of their local decision-making as prescribed in their local consistency law.

7. What is required for a consistency determination?

The process for determining consistency with the State's coastal policies may involve the completion of a Federal Coastal Assessment Form (FCAF) or coastal assessment form (CAF), and an assessment of project impacts.

- **Federal consistency:** All state agencies, including state created authorities, commissions and boards are required to complete a Federal Coastal Assessment Form (FCAF) and an assessment of project impacts on State coastal policies. For federal permitting, the FCAF is submitted to DOS, along with copies of all other information required for the federal permit being applied for. For federal funding, state agencies submit a letter of to DOS describing the project and indicating the results of their policy assessment.
- **State consistency:** All state agencies, including state created authorities, commissions and boards are required to complete a CAF and determine if there are effects on coastal policies. If there are, the state agency completes its determination of consistency with those policies and submits a copy of the CAF to DOS. Additionally, when a State agency is acting as the lead agency or as an involved agency for actions involving an Environmental Impact Statement (EIS) pursuant to SEQRA, the EIS must include an identification of applicable coastal policies and the effects of the action on those policies.
- **Local consistency:** Communities with adopted LWRPs are required to complete a coastal assessment form (CAF) and determine if there are effects on coastal policies as part of their local decision-making as prescribed in their local consistency law.

8. How do project sponsors or agencies know whether a proposed action lies within the State's Coastal Area or a LWRP area?

The New York State Coastal Atlas presents a series of maps which delineate the State's Coastal Area Boundary and identify: Significant Coastal Fish and Wildlife Habitats; Scenic Areas of Statewide Significance; federally-owned lands; and Native American owned lands.

The Coastal Atlas can be found at:
http://www.nyswaterfronts.org/maps_relief.asp

A list of approved Coastal and Inland LWRPs can be found at:
http://www.nyswaterfronts.org/LWRP_Status.asp

The waterfront area for all LWRPs is described in detail in Section I of the LWRP.

Project sponsors can also contact the Department of State at the above address for information about the State's Coastal Area or a LWRP area.

9. What aspects of the Coastal and Inland Waterways Program are subject to SEQR?

SEQR applies to three separate aspects of this program:

- Consistency determinations for state agency actions undertaken in the State's Coastal Area or waterfront area of an approved LWRP;
- Adoption or amendment of Local Waterfront Revitalization Programs (LWRPs); and
- Local development activities located within the State's Coastal Area or the waterfront area of an approved LWRP.

During the SEQR review for these activities, potential impact(s) to coastal or inland waterway resources must be given equal weight with other environmental considerations in the determination of significance. If a positive declaration is issued, the EIS must address the potential impact(s) of the proposed action on coastal or inland waterway resources.

10. How does SEQR apply to consistency determinations for state agency actions undertaken in the State's Coastal Area or waterfront area of an approved LWRP?

The SEQR analysis for the proposed action will include an assessment of the potential effects on the State's coastal policies. The SEQR analysis will then form the basis for the consistency determination. The Findings statement issued by the state agency must certify that the proposed action is consistent with the applicable coastal policies/LWRP.

11. How does SEQR apply to the adoption or amendment of a Local Waterfront Revitalization Program (LWRP)?

A LWRP is a locally prepared, comprehensive land and water use plan for a community's natural, public, working waterfront, and developed waterfront resources. The adoption of a LWRP is therefore a Type I subject to SEQR.

The SEQR review for a LWRP requires the completion of a Full EAF and a Determination of Significance prior to its adoption by the local government. Because the LWRP must be approved by the Secretary of State, the Department of State is an involved agency and must be included in the coordinated SEQR review. If a Positive Declaration is issued, the Final EIS and Findings Statement must also be prepared.

It should be noted that prior to approval of a LWRP by the Secretary of State, all local implementation techniques identified in the LWRP must be in place. The adoption of these local implementation techniques, including local laws, may also be subject to SEQR review.

Because the LWRP provides a comprehensive framework within which critical waterfront issues can be addressed, and because the LWRP includes local implementation techniques that may also be subject to SEQR review, an effective way to comply with SEQR would be through the preparation of a generic environmental impact statement.

12. How does SEQR apply to local development activities located within a LWRP area?

All LWRPs include a local consistency review law which is used to ensure that the actions of the community are consistent with the policies, uses and projects described in the LWRP. Communities with approved LWRPs conduct consistency reviews as part of their local decision-making on applications for development proposals. Some activities which are subject to local consistency review may also be subject to SEQR. It is important to note that even if a project is consistent with the LWRP, it may have potential site-specific impacts that must be addressed through the SEQR process.

During the SEQR review for these activities, potential impact(s) to coastal or inland waterway resources must be given equal weight with other environmental considerations in the determination of significance. If a positive declaration is issued, the EIS must address the potential impact(s) of the proposed action on coastal or inland waterway resources.

D. Agricultural Districts

In This Section You Will Learn about:

- SEQR and agricultural districts.

1. What is an agricultural district?

An agricultural district is an area of land certified by the Commissioner of the Department of Agriculture and Markets (pursuant to Agriculture and Markets Law, Article 25, sections 303 and 304) for the purpose of encouraging agricultural activity and protecting farm land.

2. How does SEQR apply to agricultural districts?

SEQR applies to agricultural districts in two ways:

- The adoption, modification and certification of an agricultural district is subject to SEQR, as are any subsequent modifications of such district; and
- Type I thresholds are lower for actions in agricultural districts. See [617.4\(b\)\(8\)](#)

3. What agencies must comply with SEQR in adopting, modifying and certifying agricultural districts?

County legislative bodies adopt or modify agricultural districts. The Commissioner of Agriculture and Markets must certify the districts and may, at his or her option, make modifications to a County proposal. The Commissioner of Agriculture and Markets may also create districts, upon his or her own initiative, for unique and irreplaceable agricultural land. The decisions of both the Commissioner of Agriculture and Markets and county legislative bodies in establishing or modifying agricultural districts are discretionary and subject to SEQR.

4. Is the initial adoption of an agricultural district a Type I action?

Yes. Paragraph 617.4(b)(1) lists as a Type I action the adoption by any agency of a comprehensive resource management plan. The formation of an agricultural district is considered to be a type of comprehensive resource management plan.

5. Is the recertification of an agricultural district with no material change subject to SEQR review?

No. The recertification of an agricultural district with no material change would be a Type II action. See [617.5\(c\)\(20\)](#).

6. How does presence of an agricultural district affect SEQR classification?

Any proposed Unlisted action which would lead to a non-agricultural use occurring wholly or partially within an agricultural district, becomes a Type I action if it exceeds 25% of any of the thresholds which establish Type I actions, as specified in Section 617.4. For example, in municipalities which have not adopted zoning or subdivisions, an agency decision to undertake, fund or approve construction of ten or more residential units would normally be considered a Type I action (see 617.4(b)(5)(i)). If the action is being considered within an Agricultural District, the threshold for Type I review would be reduced to 2.5 units or, in effect, a proposal for three or more units would be treated as Type I. Similarly, the physical disturbance of more than 2.5 acres (25% of 10 acres) associated with the construction of a water main in an agricultural district would be a Type I action (see 617.4(b)(6)(i)).

7. How does the presence of an agricultural district affect the SEQR review of a proposed action?

The Full EAF Part 2 requires that a lead agency evaluate any proposed action's potential impacts on agricultural uses and resources. Within an agricultural district, there is a stronger presumption than in other areas that any agricultural lands, uses, or resources deserve special protection. Thus, in reaching a determination of significance, the lead agency must specifically address potential impacts on agriculture when a non agricultural use is proposed within an agricultural district. If a lead agency concludes that a proposed non agricultural use may adversely affect agricultural activities, or compromise the qualities the agricultural district was established to protect, the lead agency may examine those potential impacts further by an EIS.

8. Where can a lead agency find more information regarding agricultural districts?

Department of Agriculture and Markets
Agricultural District Program
10B Airline Drive
Albany, NY 12235
Phone: (518) 457-2713

Chapter 9: Notable Court Decisions on SEQR

Notable Court Decisions on SEQR

This chapter contains brief summaries of some important court determinations regarding the SEQR process. This is not a comprehensive listing of all SEQR court decisions. Anyone seeking a specific legal interpretation, or considering a legal challenge, should consult an attorney.

These summaries give only a brief view of how the courts of the state and, in particular, the Court of Appeals, have interpreted SEQRA since its implementation. The case summaries are arranged by general topic for easier reference.

Action-Forcing Component

Town of Henrietta v. DEC 76 AD2d 215 (4th Dept 1980); *Orchards Assocs. v. Planning Bd of N. Salem* 114 AD2d 850 (2nd Dept 1985)

The cases make clear that an agency may impose conditions on a project outside its traditional area of jurisdiction and may even deny a project if the agency finds it must do so to avoid or mitigate significant adverse environmental impacts.

Alternatives

Webster Associates v. Town of Webster, 59 NY2d 220 (1983); *Environmental Defense Fund v. Flacke*, 96 AD2d 862 (2nd Dept 1983); *Consolidated Edison v. DEC* 112 AD2d 989 (2nd Dept 1985)

The courts have generally upheld the principle that only reasonable alternatives must be addressed and that such alternatives must be viable as well as technologically and economically feasible.

Community Character

Village of Chestnut Ridge v. Town of Ramapo, 45 AD3d 74 (2d Dept. 2007)

The Court held that villages located within the Town of Ramapo had standing to challenge the Town's enactment of a local law permitting adult student living facilities in certain residential zones adjacent to the villages. Relevant to community character and SEQR, the Court observed that, "[t]he power to define the community character is a unique prerogative of a municipality acting in its governmental capacity," and, that, generally, through the exercise of their zoning and planning powers, municipalities are given the job of defining their own character. The villages thus established a "demonstrated interest in the potential environmental impacts" of the adult student housing law inasmuch as the zone change may adversely affect the character of the village, and they therefore had standing to seek judicial review of the SEQR process that resulted in its adoption.

Lane Construction Corp. v. Cahill, 270 AD2d 609 (3rd Dept. 2000)

The Court upheld the Commissioner's determination to deny a Mined Land Reclamation Law and related permits to operate a hard rock quarry on the ground, among others, that the project's impacts on the historical and scenic character of the community could not be sufficiently mitigated. The subject mine would have reduced the elevation of a prominent topographic feature to the community of East Nassau, known as Snake Mountain, by approximately 270 feet. In denying permits for the mine, the Commissioner relied on the

administrative law judge's conclusion that there was no way to mitigate the long term impact of removal of this prominent topographic feature on the community of East Nassau.

East Coast Development Company v. Kay, 174 Misc2d 430 (Sup. Ct. Tompkins Co. 1996)
The Court held that the City of Ithaca Planning Commission, in denying site plan approval for a Wal-Mart store, improperly considered the competitive economic effect of the store on downtown Ithaca where the project itself, though within the city was far removed from the central business district and would not affect any "coherent enclave or development." The City had based its decision on the impact of the proposed store on the City's downtown revitalization efforts. The Court nonetheless upheld the Planning Commission on its other basis for denial, namely the visual impact of the proposed development on view between Buttermilk Falls State Park and the project site.

Community Character and Visual Impact

Wal-Mart Stores v. Planning Board of the Town of North Elba, 238 AD2d 93 (3d Dept. 1998)
The Court sustained, as rational, the planning board's denial of a proposed Wal-Mart store on the twin grounds that the store would have undue adverse impacts on community character and on a "Scenic Preservation Overlay" district which was established to protect the view of Whiteface Mountain along a highly traveled corridor in what the Court described as a premier resort community. The Planning Board's finding on community character was premised on SEQR as well as its own special use permit condition as pertains to community character that the store, if constructed, could be expected to result in commercial displacement sufficient to have an undue adverse impact on the Lake Placid region and its tourist economy. Likewise, the planning board's finding regarding visual impact was also based on its conditional use permit criteria, the fact that a portion of the proposed store was to be located within the Town's scenic preservation overlay district, and the impact that a large berm proposed as mitigation for the visual impact of the store and a projected traffic light installation would have on the visual qualities of the travel corridor.

Cumulative Impact

Chinese Staff & Workers v. City of New York 68 NY2d 359 (1986)
Where the City was reviewing the first of several large-scale luxury projects to be proposed in an ethnic neighborhood that it had recently rezoned to retain the low-scale neighborhood character, it was required to consider the cumulative and secondary impacts of this inconsistent project on the area.

Save the Pine Bush v. City of Albany 70 NY2d 193 (1987)
Where the City was reviewing 10 proposed projects in an ecologically unique area that it had recently rezoned to balance growth and environmental protection, it was required to review the cumulative effects of those projects in one EIS rather than review each one separately.

Long Island Pine Barrens Society, Inc. v Planning Bd. of Brookhaven, 80 NY2d 500 (1992)
After acknowledging the ecological importance of the Long Island Central Pine Barrens region, the Court went on to hold that local governments in three towns separately reviewing hundreds of discreet development projects proposed in the Central Pine Barrens region were not required to consider the cumulative impact of the applications where the applications were only connected by their geography and there was no larger governmental plan compelling cumulative impact assessment. The Court determined that mere policy expressions favoring protection of the Pine Barrens and SEQR were not a substitute for a

governmental plan. The Court distinguished its earlier decisions in *Save the Pine Bush v. City of Albany* (70 NY2d 193) and *Chinese Staff & Workers Assn. v. City of New York* (68 NY2d 359) where cumulative impact assessment of discreet developments were compelled by the existence of overarching, adopted governmental land use plans for the preservation of the Albany Pine Barrens region and Chinatown, respectively. As a post script, in 1993, the New York State Legislature enacted Long Island Pine Barrens Protection Act to establish a regional planning body for the Central Pine Barrens region, known as the Long Island Pine Barrens Commission, and to create of a regional plan and accompanying generic environmental impact statement that would take account of cumulative impacts (Laws of 1993, chapters 262, 263, amending Environmental Conservation Law article 57). The Long Island Pine Barrens Joint Planning and Policy Commission adopted the plan in 1995.

North Fork Environmental Council, Inc. v. Janoski, 196 AD2d 590 (2d Dept. 1993).

In evaluating the potential environmental effect of a project before it, the lead agency must consider cumulative impacts of other simultaneous or subsequent actions which are included in any long-range plan of which the action under consideration is a part. Projects may be deemed related for requiring an assessment of cumulative impact if they take place in a geographic area which is subject to a larger plan for development as discussed in *Long Island Pine Barrens Society, Inc. v. Planning Board of the Town of Brookhaven* (above). In this case, the Town's designation of an area as a critical environmental area did not constitute a larger plan for requiring cumulative impact assessment of a condominium development.

Conditioned Negative Declaration

Shawangunk Mountain Env'tl. Ass'n v. Planning Bd. of the Town of Gardiner, 157 AD2d 273 (3d Dept 1990).

The Court held that the planning board impermissibly cut short an environmental review of potential large impacts of a 13-lot subdivision on a tract of land in the Shawangunk Mountain region by failing to require the preparation of a environmental impact statement (EIS) for the project. The planning board classified the action as a Type 1 action, which, under the regulations of the Department of Environmental Conservation, are more likely to require the preparation of an EIS. Additionally, in the course of the subdivision review, the planning board identified potentially significant environmental impacts of the action due to its location. The developer subsequently submitted revisions of its proposal, incorporating new restrictions including those relating to lot clearing, grading, stormwater management, road design and a stipulation for site plan approval of individual lots. Considering the new modifications, the planning board issued a negative declaration without considering the safeguards that an EIS would provide in ensuring a comprehensive evaluation of the subdivision including alternatives. An EIS ensures a review of possible alternatives (including the no action alternative) and provides for public disclosure and feedback. The Court held that the negative declaration was tantamount to a "conditioned negative declaration" inasmuch as the conditions were clearly conditions precedent to a negative declaration, a procedure not permitted for Type I actions.

Merson v McNally, 90 NY2d 742 (1997).

The Court held that, under certain circumstances, a negative declaration may be issued for a Type I action under SEQRA even when the project has been modified during the review process to accommodate environmental concerns. The legal issue in *Merson v. McNally* was whether the changes to the project involving a mine, which allowed the planning board to arrive at a negative declaration, amounted to a "conditioned negative declaration" or "CND." CNDs are defined in the SEQRA regulations at 6 NYCRR 617.2(h); they are a form of negative

declaration for Unlisted actions only where the action may have one or more potentially significant environmental impacts that can be eliminated or adequately mitigated by conditions imposed by the lead agency. In *Merson v. McNally*, which involved a Type I action, through what was characterized by the Court as an "open and deliberative review process," the applicant had eliminated traffic, noise and groundwater contamination concerns through various project design changes that clearly obviated the need for an EIS. To distinguish the facts of *Merson* from the situation involving an unlawful CND for a Type I action, the Court articulated a two-fold test to determine whether a CND has been unlawfully issued for a Type I action as follows: "Whether the project, as initially proposed, might result in the identification of one or more significant adverse environmental effects; and whether the proposed mitigating measures incorporated into part 3 of the EAF were identified and required by the lead agency as a condition precedent to the issuance of the negative declaration."

Findings/Balancing

Hudson River Fisherman's Assn. v. Williams 139 AD2d 234 (3rd Dept 1988).

Agencies retain discretion, within the limits set forth in SEQOR to avoid or mitigate impacts, to choose among alternatives and balance environmental harm against social and economic need. In this case, the need for a drinking water supply outweighed some level of harm to fish life. See also *Jackson v. UDC* 67 NY2d 400 (1986).

Matter of WEOK Broad. Corp. v Planning Board of the Town of Lloyd, 79 NY2d 373 (1992).

The Court sustained lower court decisions that annulled the planning board's decision to deny site plan review for a radio transmitter tower based on its conclusion that adverse aesthetic environmental impacts to the FDR homestead revealed in the environmental impact statement could not be avoided or sufficiently mitigated. The applicant had applied to the Town of Lloyd Planning Board for site plan approval to construct an AM radio tower consisting of five transmission facilities. An analysis showed that there would be minor visual impact from six viewpoints and moderate impact from one viewpoint. The analysis was conducted during the leaf-off period in the spring. The applicant thereafter reduced the height of tallest proposed tower by nearly half, agreed to construct the towers with an open lattice works to make them less visible, and also agreed to paint three of the five towers gray to further decrease visibility. The Planning Board, nonetheless, denied site plan review based on the possibility that there may be a visual impact on the FDR homestead. In holding the Planning Board's site plan review denial to be arbitrary and capricious, the Court found that the Board had unlawfully relied on general community objection rather than expert or scientific evidence to counter the applicant's detailed analysis.

Hard Look Test

H.O.M.E.S. v. UDC 69 AD2d 222 (4th Dept. 1979).

The court held that, in order for a negative declaration to be upheld, the record must show that the agency identified relevant areas of environmental concern, thoroughly analyzed them for significant adverse impact and supported its determination with reasoned elaboration. In this case, the failure to consider the increased traffic from a proposed sports stadium resulted in a nullified action.

Lead Agency Responsibility

Yellow Lantern Kampground v. Town of Cortlandville, 279 AD2d 6 (3rd Dept. 2000).

The Town Board's rezoning action was annulled as it failed to complete Part 3 of the

environmental assessment form (EAF) although in completing the form the board had classified certain impacts as potentially large. The EAF specifically directs the lead agency to complete Part 3 of the EAF if any impact is classified as potentially large in Part 2 of the EAF. Further, the failure to complete Part 3 of the EAF was not excused under the authority to modify the EAF. Although a lead agency may modify the EAF to better serve its implementation of SEQR provided the modified form is as comprehensive as the model form [6 NYCRR 617.2(m)], there was no evidence in the record to show that the Town Board had done so.

Coca-Cola Bottling Co. v. City of New York 72 NY2d 803 (1988)

The court clarified that a lead agency must be an agency with decision-making responsibility for an action. This role cannot be delegated to an advisory board or an agency with no part in approving, funding or undertaking an action.

Litigation Ripeness

Gordon v Rush, 100 NY2d 236 (2003)

The Court of Appeals held that petitioners challenge to a positive declaration made by the Town of Southampton's Coastal Erosion Hazard Board's was ripe for judicial review. Prior to the board's positive declaration, the Department of Environmental Conservation (DEC), as lead agency, issued a negative declaration and tidal wetlands permit for the same project, namely a bulkhead. In issuing its negative declaration, the DEC had coordinated its review with the Town's Coastal Erosion Hazard Administrator. In holding that petitioner's challenge to the positive declaration was ripe for judicial review, the Court of Appeals found that the Board acted outside the scope of its authority when it decided to conduct its own SEQR review and then to issue a positive declaration. In holding that the Coastal Erosion Hazard Board's positive declaration was ripe for judicial review, the Court of Appeals indicated that it was doing so because of the circumstances present in that case where the board was redoing the SEQR process after the lead agency had coordinated review with the town and issued a negative declaration. Because of these circumstances, the Court indicated that it was not following the rule adopted by some appellate courts, namely that a positive declaration requiring a draft environmental impact statement is merely a step in the agency decision-making process, and as such is not final or ripe for review

Low Threshold

Inland Vale Farm v. Stergianopolous, 104 AD2d 395 (2nd Dept 1985)

Where a significant adverse impact has been identified, it cannot be ignored; an EIS must be prepared. See also *Soule v. Town of Colonie*, 95 A.D.2d 982 (3rd Dept 1983), in which a negative declaration for a sports stadium was upheld, even though the court recognized the low threshold for an EIS resulting from the regulatory language requiring an EIS where there "may" be a potential significant impact.

Procedural Compliance

Rye Town/King Civic Assn. v. Town of Rye 2 AD2d 474 (2nd Dept. 1981)

The Town's informal review of environmental impacts, not conducted according to SEQR's procedures was found to be inadequate. Strict (or "literal") compliance with the procedures was held to be required to ensure that the mandates of the law were met.

Schenectady Chemicals v. Flacke 83 AD2d 460 (3rd Dept. 1981)

DEC conducted a permit review under the mining law of a mining permit application prior to

issuing a negative declaration. Its SEQR review, conducted only after the negative declaration was issued, failed to comply strictly with the procedures of SEQR.

Remedy for Noncompliance

Tri-County Taxpayers v. Town Board 55 NY2d 41 (1982)

The Court found that the remedy for an agency's failure to comply with SEQR was to nullify the action taken or approved by that agency. In most cases, the matter is sent back to the agency for it to make a determination of significance; in a few cases, courts have ordered that EISs be prepared.

Rule of Reason

Coalition Against Lincoln West v. City of New York 94 AD2d 483 (1st Dept. 1983);

Environmental Defense Fund v. Flacke, 96 AD2d 862 (2nd Dept 1983)

This rule limits the consideration of impacts solely to reasonably related potential impacts and states generally that not every conceivable alternative or mitigation measure needs to be considered; speculative impacts may be ignored.

Akpan v. Koch, 75 NY2d 561 (1990)

The Court held that the New York City Board of Estimate ("BOE") took a hard look at the impact of the Atlantic Yards Terminal Project, a residential and commercial urban renewal project, on secondary displacement of low income residents in the surrounding neighborhood. In determining that the BOE's had met its substantive obligations under SEQR, the Court stated: "As plaintiff's concede that the agency 'looked' at the issue of secondary displacement, this case requires this court to determine when an agency has given sufficient consideration to an environmental issue to constitute the required 'hard look' at the subject. Since it is not the court's role to evaluate de novo the data presented to the agency, the court must, as with substantive SEQRA obligations generally, be guided by a rule of reason and refrain from substituting its judgment for that of the agency. Thus challenges to the conclusions drawn from the data presented requiring such substitution of judgment will likely fail. Nevertheless, an agency, acting as a rational decision maker, must have conducted an investigation and reasonably exercised its discretion so as to make a reasoned elaboration as to the effect of a proposed action on an environmental concern [citation omitted]. Thus, while a court is not free to substitute its judgment for that of the agency on substantive matters, the court must ensure that, in light of the circumstances of a particular case, the agency has given due consideration to pertinent environmental factors. This determination is best made on a case by case basis..." *Id.* at 571.

Segmentation

Citizens Concerned for the Harlem Valley Environment v. Town Board of the Town of Ardenia, 264 AD2d 394 (2d Dept 1999)

The Town Board of Ardenia issued a negative declaration for the rezoning of a parcel of land for mining and the development of a light industrial park. The negative declaration did not consider the environmental impacts of the mining. The Court found that the rezoning was an integral part of the mining proposal and held that the impacts of the mining had to be considered at the same time as the environmental review of the rezoning for the industrial park.

Concerned Citizens for the Environment v. Zagata, 243 AD2d 20 (3d Dept 1998)

The Court found that the Department of Environmental Conservation (DEC) was justified in

conducting a segmented review for a solid waste transfer station. The company submitted an application and a draft environmental impact statement to the DEC for a permit to construct and operate an integrated solid waste management facility consisting of 1) an incinerator, 2) a materials recovery facility and 3) a solid waste transfer station. Later the company submitted a new application seeking a permit for the construction and operation of only the transfer station. The record was found to contain ample support for the position that the solid waste transfer station would have independent utility from the incinerator and the materials recovery facility.

Stewart Park & Reserve Coalition v. New York State Department of Transportation, 157 AD 2d 1 (3d Dept 1990), affd 77 NY2d 970 (1991)

The Court determined that the Department of Transportation had rationally determined that it could conduct a separate review of the development of commercial air service at Stewart Airport from the development of plans for the surrounding buffer area based on the conclusion that the plans were not functionally dependent on each other.

Schodack Concerned Citizens v. Town Bd. of Schodack, 142 Misc 2d 590 (Sup Ct, Rensselaer County 1989), affd 148 AD2d 130 (3rd Dept 1989)

An EIS was prepared for the construction of a proposed supermarket warehouse distribution facility. The facility was designed to serve 23 retail supermarkets that were part of the long range plan of the sponsor. Project opponents felt that the lead agency had improperly segmented the review because it failed to consider the environmental impacts from the construction of the 23 supermarkets. The Court held that to require the EIS to consider the environmental impacts from each of these 23 individual stores was beyond the scope of the review for the distribution center and that each of the sites would be subjected to its own environmental review by the agency required to approve the location.

Village of Westbury v. Department of Transportation, 75 NY2d 62 (1989)

DOT issued a negative declaration for the reconstruction of a highway interchange. The Court found that the interchange reconstruction was closely linked to the widening of the Northern State Parkway which was also in the planning process and ruled that the projects must be considered as one action for the purposes of conducting an environmental review since they were complementary components of DOT's plan to alleviate traffic.

Karasz v. Wallace, 134 Misc2d 1052 (4th Dept 1987) (Sup Ct, Saratoga County 1987)

The town board considered the construction of a single building on a large lot separately from other construction planned by the developer for the same site. The Court found that to allow piecemeal development of the site was impermissible segmentation.

Sutton v. Board of Trustees 122 AD2d 506 (3rd Dept 1986)

The Village approved the rezoning of a hospital property to allow two phases of construction of additional facilities. The negative declaration and approval was overturned because the Board considered only the impacts from the first phase of the project.

Kirk-Astor Drive Nbhd. Assn. v. Town Bd. of Pittsford 106 A.D.2d 868 (4th Dept 1984)

The Board rezoned 64 acres from residential to manufacturing/office. The court held that it failed to comply with SEQR because it considered only the impacts from the change in zoning classification and did not consider the impacts of the change from the current use (vacant) to manufacturing/office and that it failed to consider the impacts of the proposed project at the rezoning stage.

Standing

Society of the Plastics Industries, Inc. v. County of Suffolk, 77 N.Y.2d 761 (1991)

The Court of Appeals rejected a challenge, based on lack of standing to bring the litigation, by a national trade organization of companies involved in plastic related businesses, for profit member corporations, and one local manufacturer of plastics to Suffolk County's adoption of a local law which banned retail food establishments from using certain non-biodegradable plastic containers and utensils. Suffolk County had issued a negative declaration under SEQRA prior to adopting the local law. The petitioners challenged the County's negative declaration by alleging both economic injury from the ban and that the ban would result in various significant environmental impacts from the substitution of paper products including increased trucking traffic to and from disposal sites, with attendant noise, congestion and emissions, and that paper substitutes will increase waste in landfills, with attendant effects including possible hazardous leachate seeping into the aquifer. With regard to the law of standing, the Court held that in challenging an action where the alleged impacts are geographically local, the petitioner must show special harm to establish standing to bring the litigation, in addition to having to meet the traditional standing requirements of having suffered an "injury in fact and that the claim was in the zone of interests protected by SEQRA. The special harm requirement, a requirement that the Court borrowed from standing requirements applicable to zoning challenges, means that the plaintiffs must show that they would suffer injury that is in some way different from that of the public at large. The Court went on to hold that the environmental interests asserted by the organizational petitioners with regard to the plastics ban were not germane to their corporate purposes and that the local manufacturer of plastics failed to demonstrate special injury as a result of the County's adoption of the plastics ban.

State Policy

EFS Ventures v. Foster 71 NY2d 359 (1988)

The Court refused to allow a lead agency reviewing a proposed modification to a completed project to require mitigation in the form of changes to the original project (which had improperly escaped SEQRA review). In its review, the court noted the important state purposes served by SEQRA and stated that if the mitigation proposed to be imposed by the Town had a demonstrable connection with the impacts of the proposed modification, the town might have been correct.

Jackson v. UDC 67 NY2d 400 (1986)

This case, involving the Times Square redevelopment project, is a mini- treatise on a wide range of SEQRA issues, including substantive and procedural compliance, alternatives, the rule of reason and the scope of judicial review. The Court recognized the important state policy expressed in SEQRA.

Substantive Compliance

Aldrich v. Pattison 107 AD2d 258 (2d Dept 1985)

Where the question is the adequacy or content of the environmental review conducted, rather than whether the right steps were followed, agencies need to **substantially comply** with both the letter and spirit of the law. Where an agency has made a reasoned decision on a thorough record, the court will not substitute its judgment, but will allow the agency to exercise some discretion. See also *Jackson v. UDC* 67 NY2d 400 (1986).

Supplements

Glen Head-Glenwood Landing Civic Council v. Town of Oyster Bay 88 AD2d 484 (2nd Dept 1982)

Subsequent to issuing a final EIS, the Town was informed that the developer-assured sewer hook-up with a neighboring town was not approved. The court held that a supplemental EIS was required to discuss such significant new information. See also *Horn v. IBM* 110 AD2d 87 (2nd Dept 1985).

Riverkeeper v. Planning Board of the Town of Southeast, 9 NY3d 219 (2007)

The Court affirmed the Planning Board's determination not to require the preparation of a second supplemental draft environmental impact statement ("SDEIS") for a large scale residential subdivision project. In 1988, the applicant had applied for approval to construct 104 clustered homes on a 309-acre parcel, and both a final environmental impact statement ("EIS") and a final supplemental EIS were prepared for the project. On February 25, 1991, the Planning Board issued a findings statement approving the development, which included a directive that the applicant develop a technologically advanced sewage treatment plant. The Planning Board granted preliminary subdivision approval on August 10, 1998, and conditional final approval on June 10, 2002. Between the time of the findings statement and the approvals, there were various regulatory and design changes in the project along with changes in the surrounding area. For example, the Army Corp. of Engineers determined that the actual number of acres effected by the project was slightly larger, the Governor had designated the east of Hudson portion of the New York City Watershed (where the development was proposed) as a Critical Resource Water, and new regulations were issued limiting allowable discharge of phosphorous into the watershed. Petitioners commenced an Article 78 proceeding that challenged the Planning Board's approval on the ground that the changes required the Planning Board to prepare a second supplemental EIS pursuant to SEQRA regulations relating to supplemental EISs [6 NYCRR 617.9(a)(7)]. The Supreme Court sent the case back to the Planning Board to determine whether another supplemental EIS should be prepared because of the changes. On remand, in 2003, after reviewing all the information that the applicant and the consultants had provided including independent assessments, the Planning Board determined that the changes were not significant so as to require the preparation of a second supplemental EIS. Petitioners challenged the determination on remand. Ultimately, the Court of Appeals sustained the Planning Board's determination as rational and supported by scientific and empirical evidence in the record and that none of the changes would have materially affected the design of the project that was ultimately approved. For example, the Court pointed out that the regulatory changes were not significant as they were anticipated by the design of the sewage treatment plant. The case underscores the need to rationally consider the significance of intervening changes especially in the case of large scale projects for projects that undergo lengthy review periods.

Time Period to Commence SEQRA Litigation (Statute of Limitations)

Eadie v Town Board of the Town of North Greenbush, 7 NY3d 306 (2006)

The Court held that the four-month period during which an Article 78 proceeding may be commenced to challenge SEQRA findings made as part of a rezoning action begins to run from the date the Town Board enacted the rezoning legislation rather than from the date the Town Board adopted SEQRA findings in connection with the rezoning. Generally, an Article 78 proceeding to review a governmental decision must be commenced within a period specified by statute after the decision becomes final and binding upon the petitioner. This period runs from the date that the petitioner has suffered a concrete injury not

amendable to further administrative review and corrective action. The adoption of findings was amenable to further administrative review and corrective action as the Town Board had the option of not adopting the rezoning. The case reaffirms the Court of Appeals earlier decision in *Save the Pine Bush v. City of Albany*, 70 N.Y.2d 1993 (1987), which held that a challenge to alleged SEQR violations in the adoption of local legislation must be commenced within four months from the City's adoption of the legislation. The Court distinguished its 2003 holding in *Stop the Barge* (discussed below) by noting that the *Stop the Barge* case did not involve legislation and no further action was required of the Board that adopted the conditioned negative declaration.

[A word of caution: when calculating the statute of limitations in rezoning actions preceded by SEQR findings, note that the Court stated that there might be some instances where it would deem the statute of limitations to run from the adoption of findings in a rezoning action, such as where "mitigation measures required by the final GEIS and adopted in the findings statement unlawfully burdened their [petitioners] right to develop their property."]

Stop-The-Barge v Cahill, 1 NY3d 218 (2003)

The Court held that the four-month period during which an Article 78 proceeding may be commenced to challenge the New York City Department of Environmental Protection's ("DEC") issuance of a conditioned negative declaration (CND) ran from the date the DEP issued the CND for the installation of a power generator on a floating barge. While SEQR determinations, such as negative and positive declarations, are regarded as preliminary steps in the decision-making process and as such are amenable to further administrative review and corrective action, the Court, nonetheless, held that the statute of limitations on the CND ran from its issuance of the CND as DEP had no further approvals to make or permits to issue. *Stop the Barge*, therefore, stands as an exception to the general rule, based on its peculiar set of facts, regarding when the statute of limitations begins to run for legal actions or proceedings involving SEQR.

Timing

Sun Beach Real Estate v. Anderson, 98 AD2d 367 (2nd Dept. 1983)

The court held that the time for the default provisions for subdivision plat approval does not begin to run until there is a complete application and such an application must include a draft EIS or a negative declaration. See also *Long Island Pine Barrens Society v. Town of Brookhaven*, 78 NY2d 608 (1991).

Visual Impact

Lane Construction Corp. v. Cahill, 270 AD2d 609 (3d Dept. 2000)

The Court upheld the Commissioner's determination to deny a Mined Land Reclamation Law and related permits to operate a hard rock quarry on the ground, among others, "that the project's impacts on the historical and scenic character of the community cannot be sufficiently mitigated." *Id.* at 610. The subject mine would have reduced the elevation of a prominent topographic feature to the community of East Nassau, known as Snake Mountain, by approximately 270 feet. In denying permits, the Commissioner had particularly relied on the ALJ's conclusion that there was no way to mitigate the long term impact of removal of this prominent topographic feature on the community of East Nassau.