

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

6 NYCRR - Part 617

PREPARED BY THE NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
DIVISION OF ENVIRONMENTAL PERMITS & POLLUTION PREVENTION
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1.0 Description of the Action & Environmental Setting

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

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

2.0 Summary of Proposed Amendments to 6 NYCRR Part 617

617.2 DEFINITIONS

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

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

617.4 TYPE I ACTIONS

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

617.5 TYPE II ACTIONS

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

617.8 SCOPING

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

617.9 PREPARATION AND CONTENT OF ENVIRONMENTAL IMPACT STATEMENTS

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

617.12 DOCUMENT PREPARATION, FILING, PUBLICATION AND DISTRIBUTION

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

617.13 FEES AND COSTS

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

3.0 Discussion of Proposed Changes and Alternatives

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

3.1 Type I List

3.1.1 Preliminary Text Amendment:

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

Objectives and Rationale: The Department proposes to reduce some of the thresholds for residential subdivisions. Experience has shown that the thresholds for some of the Type I items for residential construction are rarely triggered because they were set too high in 1978. There is scant information in the 1978 draft and final EIS that demonstrates any basis for the selection of the thresholds other than the numbers in a rural and urban area should be different. The proposed change will bring the review of large subdivision into conformance with current practice. Large subdivisions are frequently the subject of an EIS and by nature when proposed on new sites often have one or more potentially significant impacts on the environment due to the need for the expansion of infrastructure such as water, sewer and roads needed to serve the new development.

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

3.1.2 Preliminary Text Amendment:

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

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

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

3.1.3 Preliminary Text Amendment:

- 617.4(b)(9) any Unlisted action that exceeds 25 percent of any threshold in this section [(unless the action is designed for the preservation of the facility or site)] occurring wholly or partially within, or substantially contiguous to, any historic building, structure, facility, site or district or prehistoric site that is listed on the National or State Register of Historic Places, or that has been [proposed by the New York State Board on Historic Preservation for a recommendation to the State Historic Preservation Officer for nomination for inclusion in the National Register, or that is] determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places (The National Register of Historic Places is established by 36 Code of Federal Regulation (CFR) Parts 60 and 63, 1994 (see section 617.17 of this Part));

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

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

3.2 Type II List

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

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

3.2.1 Preliminary Text Amendment:

- The acquisition, sale, lease, annexation or transfer of any ownership of land to undertake any activity on this list.

Objectives and Rationale: One of the basic concepts of SEQR is the “whole action”. Having the land transaction of a proposed activity subject to review under SEQR when the activity itself is listed as a Type II action violates this concept. This quirk has also resulted in affordable housing projects like those sponsored by not-for-profit agencies being subjected to SEQR review for the transfer of land from the municipality to the not-for-profit when the activity involved the construction of a one, two or three family residence which is a Type II action. Adding this item to the Type II list will remove a potential stumbling block to the construction of affordable housing and clarify.

Alternatives: The “no action” alternative would remove this item from the Type II list. Other suggested alternatives include adding acquisition of land by fee or easement for public open space or passive recreation.

3.2.2 Preliminary Text Amendment:

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

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

only guide the agency can use is zoning or the lack of zoning. In addition, the subsequent development of the property will generally result in an environmental review if the proposed action requires a discretionary permit or approval from a state or local agency

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

3.2.3 Preliminary Text Amendment:

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

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

Alternatives: The “no action” alternative would remove this item from the Type II list and continue to require a SEQR review prior to the proposed reuse of a vacant or abandoned structure. Other suggested alternatives: Expand this provision to apply to all structures including industrial uses.

3.2.4 Preliminary Text Amendment:

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

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

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

3.2.5 Preliminary Text Amendment:

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

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

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

3.2.6 Preliminary Text Amendment:

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

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

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

3.2.7 Proposed Text Amendment:

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

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

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

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

3.2.8 Preliminary Text Amendment:

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

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

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

3.2.9 Preliminary Text Amendment:

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

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

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

3.2.10 Preliminary Text Amendment:

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

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

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

3.2.11 Preliminary Text Amendment:

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

Objectives and Rationale: This item would clarify that the development and implementation of a brownfield clean-up agreement is a Type II action. The DEC has considered these types of agreements and clean-ups as civil or criminal enforcement proceedings [617.5(c)(29)]. As more agencies start to enter into these agreements it will clarify the correct SEQR classification for these activities.

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

3.3 Scoping

3.3.1 Preliminary Text Amendment:

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

not included by the project sponsor in the draft EIS cannot be the basis for the rejection of a draft EIS as inadequate.

Objectives and Rationale: The Department proposes to:

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

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

3.4 PREPARATION AND CONTENT OF ENVIRONMENTAL IMPACT STATEMENTS

3.4.1 Preliminary Text Amendment:

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

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

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

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

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

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

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

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

(iii) No final EIS need be prepared if:

(a) the proposed action has been withdrawn or;

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

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

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

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

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

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

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

3.5 SEQR Fees

3.5.1 Preliminary Text Amendment:

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

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

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

4.0 Issues Not Included in the Final Scope

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

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

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

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

4.2 Establish a Board or Council to Review SEQR Decisions

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

4.3 DEC Should Develop a Best Practice Manual

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

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

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