

ENVIRONMENTAL LAW: DEVELOPMENTS IN THE LAW OF SEQRA

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INTRODUCTION

This Article will discuss notable developments in the law relating to the New York State Environmental Quality Review Act (“SEQRA”) for the *Survey* period of 2012–2013.¹ The *Survey* period saw substantial

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1. The *Survey* period covered in this article is July 1, 2012, to June 30, 2013. A prior *Survey* addresses SEQRA developments in the first half of 2012. See generally Mark A. Chertok & Jonathan Kalmuss-Katz, *Environmental Law: Developments in the Law of*

regulatory developments, one SEQRA decision from the New York Court of Appeals, and an array of decisions from other New York and federal courts. In the regulatory sphere, the New York State Department of Environmental Conservation finalized scoping of its pending environmental review of proposed amendments to the SEQRA regulations themselves and issued revised model Environmental Assessment Forms for agencies to use in meeting their SEQRA obligations. Meanwhile, New York City issued rules classifying new Type II Actions that are exempt from review under the City's procedures. In its sole SEQRA decision during the *Survey* period, the Court of Appeals affirmed the appellate division's decision to require the New York City School Construction Authority to prepare a supplemental environmental impact statement ("EIS") of a project to build a public school campus on a remediated brownfield property in the Bronx, but substantially narrowed the scope of the lower court's holding. Other courts, including the lower and intermediate courts of New York and the federal Second Circuit, issued various SEQRA decisions clarifying, elaborating, and in some cases obscuring various legal issues, including standing, mootness, and timeliness requirements, the interaction of SEQRA with other state and federal laws, and the substantive requirements that SEQRA imposes on agencies in determining whether an action may have significant adverse environmental effects.

Part I of this Article provides a brief overview of SEQRA's statutory and regulatory requirements. Part II describes the various recent regulatory developments, including both proposed and final changes to state-wide SEQRA regulations and changes to New York City's own regulations implementing SEQRA. Part III reviews the sole SEQRA decision by the Court of Appeals issued during the *Survey* period, *Bronx Committee for Toxic Free Schools v. N.Y. City School Construction Authority*.² Part IV discusses other developments in SEQRA case law during the *Survey* period from the appellate division and supreme courts. Finally, Part V discusses a decision by the federal Court of Appeals for the Second Circuit addressing the extent to which SEQRA review may be preempted, in certain circumstances, by federal law.

I. SUMMARY OVERVIEW OF SEQRA

SEQRA requires governmental agencies to consider the potential

SEQRA, 2011-12 Survey of New York Law, 63 SYRACUSE L. REV. 713 (2013).

2. 20 N.Y.3d 148, 981 N.E.2d 766, 958 N.Y.S.2d 65 (2012).

environmental impacts of their actions prior to rendering certain defined discretionary decisions, called “actions” under SEQRA.³ “The primary purpose of SEQRA is ‘to inject environmental considerations directly into governmental decision making.’”⁴ The law applies to discretionary actions by the State of New York, its subdivisions, or local agencies that have the potential to impact the environment, including direct agency actions, funding determinations, promulgation of regulations, zoning amendments, and permits and similar approvals.⁵ SEQRA charges the New York State Department of Environmental Conservation (“DEC”) with promulgating general SEQRA regulations, but it also authorizes other agencies to adopt their own regulations and procedures, provided that any such regulations and procedures are consistent with and “no less protective . . . than” those issued by DEC.⁶

A primary component of SEQRA is the EIS, which—if its preparation is required—documents the proposed action, its reasonably anticipated significant adverse impacts on the environment, practicable measures to mitigate such impacts, unavoidable significant adverse impacts, and reasonable alternatives that achieve the same basic objectives as the proposal.⁷

Actions are grouped into three categories in DEC’s SEQRA regulations: Type I, Type II, or Unlisted.⁸ Type II actions are enumerated specifically and include only those actions that have been determined not to have the potential for a significant impact and thus not to be subject to review under SEQRA.⁹ Type I actions, also specifically enumerated, “are more likely to require the preparation of an EIS than Unlisted actions.”¹⁰ Unlisted actions are not enumerated,

3. SEQRA is codified at Environmental Conservation Law (“ECL”) sections 8-0101 to 8-0117. N.Y. ENVTL. CONSERV. LAW §§ 8-0101-8-0117 (McKinney 2005 & Supp. 2012); see also Mark A. Chertok & Ashley S. Miller, *Environmental Law: Climate Change Impact Analysis in New York Under SEQRA, 2007-08 Survey of New York Law*, 59 SYRACUSE L. REV. 763, 764-65 (2009).

4. *Akpan v. Koch*, 75 N.Y.2d 561, 569, 554 N.E.2d 53, 56, 555 N.Y.S.2d 16, 19 (1990) (quoting *Coca Cola Bottling Co. of N.Y., Inc. v. Bd. of Estimate of N.Y.C.*, 72 N.Y.2d 674, 679, 532 N.E.2d 1261, 1263, 536 N.Y.S.2d 33, 35 (1988)). For a useful overview of the substance and procedure of SEQRA, see *Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 414-16, 494 N.E.2d 429, 434-35, 503 N.Y.S.2d 298, 303-04 (1986).

5. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2 (2000) (defining actions and agencies subject to SEQRA).

6. N.Y. ENVTL. CONSERV. LAW § 8-0113(1), (3)(a).

7. 6 N.Y.C.R.R. § 617.9(b)(1)-(2), (5).

8. *Id.* § 617.2(ai)-(ak); see also N.Y. ENVTL. CONSERV. LAW § 8-0113(2)(c) (requiring DEC to identify Type I and Type II actions).

9. *Id.* § 617.5(a) (Type II actions).

10. *Id.* § 617.4(a) (Type I actions). This presumption may be overcome, however, if

but rather are a catch-all of those actions that are neither Type I nor Type II.¹¹ In practice, the vast majority of actions are Unlisted.

Before undertaking an action (except for a Type II action), a lead agency must determine whether the proposed action may have one or more significant adverse environmental impacts, called a “determination of significance.”¹² To make this decision, the project sponsor (which in some cases may be the lead agency) must prepare an Environmental Assessment Form (“EAF”).¹³ For Type I Actions, preparation of a “Full EAF” is required, whereas for Unlisted actions, project sponsors may opt to use a “Short EAF” instead.¹⁴ SEQRA regulations provide models of each form,¹⁵ but allow that the forms “may be modified by an agency to better serve it in implementing SEQR[A], provided the scope of the modified form is as comprehensive as the model.”¹⁶ Where multiple decision-making agencies are involved, there is usually a “coordinated review” pursuant to which a designated lead agency makes the determination of significance.¹⁷

If the lead agency “determine[s] either that there will be no adverse environmental impacts or that the . . . impacts will not be significant,” no EIS is required, and instead the lead agency issues a negative declaration.¹⁸ If the answer is affirmative, the lead agency may in certain cases impose conditions on the proposed action to sufficiently mitigate the potentially significant adverse impacts or, more commonly, the lead agency issues a positive declaration requiring the preparation of

an Environmental Assessment demonstrates the absence of significant, adverse environmental impacts. *Id.* § 617.4(a)(1); *see, e.g.*, *Hells Kitchen Neighborhood Ass’n v. City of N.Y.*, 81 A.D.3d 460, 461-62, 915 N.Y.S.2d 565, 567 (1st Dep’t 2011) (“[W]hile Type I projects are presumed to require an EIS, an EIS is not required when, as here, following the preparation of a comprehensive Environmental Assessment Statement (EAS), the lead agency establishes that the project is not likely to result in significant environmental impacts or that any adverse environmental impacts will not be significant.”).

11. 6 N.Y.C.R.R. § 617.2(a(i)).

12. *Id.* §§ 617.6(a)(1)(i), 617.7.

13. *Id.* § 617.6(a)(2), (3) (while the project sponsor prepares the factual elements of an EAF (Part 1), the agency completes Part 2, which addresses the significance of potential impacts and Part 3, the actual decision (the Determination of Significance)).

14. *Id.*

15. *See id.* § 617.20 Appendices A, B. DEC also maintains EAF workbooks to assist project sponsors and agencies in using the new forms. *See Environmental Assessment Form (EAF) Workbook*, N.Y.S. DEP’T OF ENVTL. CONSERV., <http://www.dec.ny.gov/permits/90125.html> (last visited Jan. 11, 2014).

16. 6 N.Y.C.R.R. § 617.2(m).

17. *Id.* § 617.6(b)(2)(i), (3)(ii).

18. *Id.* § 617.7(a)(2), (d).

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an EIS.¹⁹

If an EIS is prepared, typically the first step is the scoping of the contents of the draft EIS. Although scoping is not currently required under SEQRA or DEC's implementing regulations, it is recommended by DEC and commonly undertaken when an EIS is required.²⁰ Scoping involves focusing the EIS on relevant areas of environmental concern, generally through a circulation of a draft scoping document and a public meeting with respect to the proposed scope, with the goal (not often achieved) of eliminating inconsequential subject matters.²¹ The Draft EIS, once prepared and accepted as adequate and complete by the lead agency, is then circulated for public and other agency review and comment.²² Although not required, the lead agency typically holds a legislative hearing with respect to the draft EIS.²³ That hearing is often combined with other hearings required for the proposed action.²⁴

A draft EIS must include an alternatives analysis, comparing the proposed action to a "range of reasonable alternatives . . . that are feasible, considering the objectives and capabilities of the project sponsor."²⁵ This analysis includes a "no action alternative," which evaluates the changes that are likely to occur in the absence of the proposed action.²⁶

In addition to "analyz[ing] the significant adverse impacts and

19. *Id.* §§ 617.2(h), 617.7(d). This is known as a conditioned negative declaration ("CND"). For a CND, the lead agency must issue public notice of its proposed CND and, if public comment identifies potentially significant adverse environmental impacts that were not previously addressed or were inadequately addressed, or indicates the mitigation measures imposed are substantively deficient, an EIS must be prepared. 6 N.Y.C.R.R. § 617.7(d)(1)(iv), (2), (3). CNDs cannot be issued for Type I actions or where there is no applicant (i.e., the project sponsor is a government agency). *Id.* § 617.7(d)(1). In practice, CNDs are not favored and not frequently employed.

20. N.Y. STATE DEP'T OF ENVTL. CONSERV., DIV. OF ENVTL. PERMITS, THE SEQRA HANDBOOK 103 (2010) [hereinafter SEQRA HANDBOOK], available at http://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf. Scoping, when it occurs, is governed by 6 N.Y.C.R.R. § 617.8. SEQR is an alternate acronym for SEQRA.

21. 6 N.Y.C.R.R. § 617.8(a).

22. *Id.* § 617.8(b), (d), (e).

23. *Id.* § 617.9(a)(4).

24. *See Id.* § 617.3(h).

25. *Id.* § 617.9(b)(5)(v).

26. 6 N.Y.C.R.R. § 617.9(b)(5)(v). The "no action alternative" does not necessarily reflect current conditions, but rather the anticipated conditions without the proposed action. In New York City, where certain development is allowed as-of-right (and does not require a discretionary approval), the no action alternative would reflect such a development and other changes that could be anticipated in the absence of the proposed action. *See Uptown Holdings, L.L.C. v. City of N.Y.*, 77 A.D.3d 434, 436, 908 N.Y.S.2d 657, 660 (1st Dep't 2010).

evaluat[ing] all reasonable alternatives,”²⁷ the draft EIS should include:

[W]here applicable and significant:

- (a) reasonably related short-term and long-term impacts, cumulative impacts and other associated environmental impacts;
- (b) those adverse environmental impacts that cannot be avoided or adequately mitigated if the proposed action is implemented;
- (c) any irreversible and irretrievable commitments of environmental resources that would be associated with the proposed action should it be implemented;
- (d) any growth-inducing aspects of the proposed action;
- (e) impacts of the proposed action on the use and conservation of energy . . . ; [and]
- (f) impacts of the proposed action on solid waste management and its consistency with the state or locally adopted solid waste management plan²⁸

The next step is the preparation of a final EIS, which addresses any project changes, new information, or changes in circumstances, and responds to all substantive comments on the draft EIS. After preparation of the final EIS, and prior to undertaking or approving an action, each acting agency must issue findings that the provisions of SEQRA and the DEC implementing regulations have been met and, “consider[ing] the relevant environmental impacts, facts and conclusions disclosed in the final EIS,” must “weigh and balance relevant environmental impacts with social, economic and other considerations.”²⁹ The agency must then

certify that consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable.³⁰

The substantive mitigation requirement of SEQRA is an important feature of the statute—a requirement notably absent from SEQRA’s parent federal statute, the National Environmental Policy Act

27. 6 N.Y.C.R.R. § 617.9(b)(1).

28. *Id.* § 617.9(b)(5)(iii)(a)-(f).

29. *Id.* § 617.11(a), (d)(1)-(2).

30. *Id.* § 617.11(d)(5).

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("NEPA").³¹

II. REGULATORY DEVELOPMENTS

A. Final Scoping for Proposed Amendments to SEQRA Regulations

During the *Survey* period, DEC took a step forward in its ongoing project to amend the SEQRA regulations so as to "streamline the SEQR[A] process without sacrificing meaningful environmental review."³² On November 28, 2012, DEC issued the Final Scope document for the environmental review of its proposed regulatory amendments.³³ As noted earlier, a scoping document is used under SEQRA to identify the range of potentially significant impacts that will be assessed in a Draft EIS.³⁴ The Final Scope document issued in November thus identifies the anticipated content of a forthcoming generic environmental impact statement ("GEIS") on DEC's proposed changes to its SEQRA regulations.³⁵

The proposed content of these proposed revisions was discussed in last year's *Survey*, and we will not repeat that analysis here.³⁶ However, the principle changes that DEC proposes are:

Expanding the list of Type II Actions that are exempt from SEQRA review,³⁷

Revising the list of Type I Actions, including reducing the size threshold above which residential projects become more likely to require preparation of an EIS;³⁸

Requiring scoping (which is currently optional but fairly standard practice) for all EISs;

Extending the deadline for finalizing a draft EIS, but providing that if the agency fails to issue the final EIS by the new deadline, its SEQRA

31. 42 U.S.C. §§ 4321-4370f (2006); *see also* Jackson v. N.Y. State Urban Dev. Corp., 67 N.Y.2d 400, 415, 494 N.E.2d 429, 434, 503 N.Y.S.2d 298, 303 (1986).

32. N.Y.S. DEP'T OF ENVTL. CONSERV., DIV. OF ENVTL. PERMITS & POLLUTION PREVENTION, FINAL SCOPE FOR GENERIC ENVIRONMENTAL IMPACT STATEMENT (GEIS) ON THE PROPOSED AMENDMENTS TO THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) ¶ 1 (2012) [hereinafter FINAL SCOPE], *available at* http://www.dec.ny.gov/docs/permits_ej_operations_pdf/617finalscope.pdf.

33. *Id.*

34. THE SEQRA HANDBOOK, *supra* note 20, at 102.

35. *See generally* FINAL SCOPE, *supra* note 32.

36. Chertok & Kalmuss-Katz, *supra* note 1, at 718-21.

37. FINAL SCOPE, *supra* note 32, at 5-10.

38. *Id.* at 3-4.

review will be deemed complete;³⁹ and

Clarify regulations relating to agencies' ability to "target" EISs on "relevant, significant, adverse impacts" rather than improbable impacts.⁴⁰

Once its environmental review of the proposed amendments is complete, DEC will propose to amend the regulations accordingly. The date of that proposal is not publically known, but it is generally expected to occur in 2014.

B. DEC Adopts New Model EAF Forms

Another regulatory development that occurred after the *Survey* period that warrants mention is DEC's final adoption of new model EAFs.⁴¹ As previously explained, project sponsors and agencies must complete an EAF before the lead agency makes its determination of significance—i.e., decides whether the proposed action "may have a significant adverse impact on the environment" and therefore requires an EIS.⁴² Agencies must use DEC's model EAFs unless they develop their own EAFs that are at least "as comprehensive as the model."⁴³

DEC has explained that changes in the content of the new forms "are designed to reflect changes in environmental concerns that have occurred since the previous forms were last published" and, that "the structure of the forms was also updated to make them easier to use."⁴⁴ The revised forms are substantially longer than the old ones and require more detail from the project sponsor and agency.⁴⁵ Notably, however, DEC removed a question from the old Full EAF that asked "is there, or is there likely to be, public controversy related to potential adverse environmental impacts?"⁴⁶ The agency explained that the question was

39. *Id.* at 13.

40. *Id.* at 10-11.

41. JOSEPH J. MARTENS, N.Y. STATE DEP'T OF ENVTL. CONSERV., AMENDED CERTIFICATE OF ADOPTION (2013), available at http://www.dec.ny.gov/docs/permits_ej_operations_pdf/amended61720.pdf (DEC originally announced its plan to adopt new Model EAF forms in January of 2012, but the agency postponed final adoption several times, and the new forms did not take effect until October 7, 2013).

42. N.Y. COMP. CODES R. & REGS. tit. 6, §§ 617.6(a)(1)(i)-(iv), 617.7(b)(3) (1995).

43. *Id.* §§ 617.2(m), 617.20 Appendices A, B.

44. *Id.* §§ 617.2(m), 617.20.

45. The revisions lengthened the model Full EAF from twenty-one pages to thirty-five, and the model Short EAF from two to four pages. Compare § 617.20 Appendices A, B (new forms) with Old EAF Forms (on file with the *Syracuse Law Review*).

46. FULL EAF, RESPONSE TO PUBLIC COMMENTS 8 (2012), available at http://www.dec.ny.gov/docs/permits_ej_operations_pdf/feafrespcom.pdf.

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eliminated because “it has no bearing in determining whether an action should require the preparation of an environmental impact statement and environmental reviews should not be influenced by the relative popularity of a particular proposal.”⁴⁷ This change is interesting, as answering “no” to that question is often cited in SEQRA litigation as evidence of inadequate SEQRA review when a project later proves controversial.⁴⁸

Some practitioners have expressed concern that the new EAFs will increase regulatory hurdles for project developers and municipalities and, by asking more questions, will multiply the alleged errors based on which project opponents can bring obstructionist lawsuits.⁴⁹ It remains to be seen whether these fears will prove well-founded.

C. New York City Designates New Type II Categories

New York City has issued regulations implementing the City’s obligations under SEQRA, known as City Environmental Quality Review (“CEQR”).⁵⁰ This year, the New York City Planning Commission proposed and finalized a rule that designates thirteen categories of projects as Type II Actions to be exempted from CEQR.⁵¹ The Planning Commission characterized the new rule, which took effect on January 26, 2014, as an attempt to “simplify the environmental review process for applicants while freeing agency resources to focus on actions that may have the potential for significant adverse impacts on the environment.”⁵²

As previously explained, SEQRA grants agencies and local

47. *Id.*

48. *See, e.g.,* *Chu v. N.Y. State Urban Dev. Corp.*, No. 103638/06, 2006 N.Y. Slip Op. 52055(U), at 6 (Sup. Ct. N.Y. Cnty. 2006) (“The alleged flaws in the EAF [included] that it indicated that there would not likely be public controversy . . .”).

49. *See, e.g.,* George S. Van Nest, *Environmental Law: New York State DEC Revises SEQR EAF Forms*, THE DAILY RECORD (June 16, 2013, 11:12 PM), <http://nydailyrecord.com/blog/2013/06/16/environmental-law-new-york-state-dec-revises-seqr-eaf-forms>.

50. CEQR regulations are contained in Chapter 5 of Title 62 of the Rules of the City of New York.

51. N.Y. CITY PLANNING COMM’N, NOTICE OF PUBLIC HEARING (2013) [hereinafter NYCPC NOTICE OF PUBLIC HEARING], *available at* http://rules.cityofnewyork.us/sites/default/files/proposed_rules_pdf/city_environmental_quality_review_-_p_dcp_10_21_13_a.pdf; N.Y. CITY PLANNING COMM’N, NOTICE OF ADOPTION OF RULES (2013), *available at* http://rules.cityofnewyork.us/sites/default/files/adopted_rules_pdf/type_ii_rules_notice_of_adoption_0.pdf.

52. NYCPC NOTICE OF PUBLIC HEARING, *supra* note 52. This action occurred after the *Survey* period, but its importance for SEQRA review in New York City warrants discussion here.

governments the authority to supplement DEC's general SEQRA regulations by promulgating their own.⁵³ Section 192(e) of the New York City Charter delegates that authority to the Planning Commission, which has adopted CEQR procedures that govern environmental review of actions taken by the City and its agencies.⁵⁴ Previously, CEQR rules did not designate any Type II actions; instead, the City relied entirely on the general list of Type II actions promulgated by DEC.⁵⁵ The Planning Commission developed the list of new Type II actions by identifying those unlisted actions which, in its experience and judgment, never require the preparation of an EIS.⁵⁶

The new rule defines thirteen Type II actions, which include certain types of actions and approvals by the City's Board of Standards and Appeals ("BSA") and by the Planning Commission.⁵⁷ The rule would categorically exclude eight categories of actions from SEQRA review under all circumstances.⁵⁸ Those eight include special permits for "physical health or culture establishments," eating and drinking establishments, off-street parking facilities, parking garages, and parking spaces that are below certain size thresholds.⁵⁹ They also include certain types of property acquisitions by the city, park mapping for small open space areas, and authorizations for small increases in parking spaces for existing buildings.⁶⁰ Five other categories would qualify as Type II actions under the new rule only if the agency determined that the action would have no potentially significant impacts related to hazardous materials or on archeological or natural resources.⁶¹ In addition, the new rule provides that three types of special permits—those (1) for radio and television towers, (2) for buildings to exceed the height regulations around airports, and (3) to enlarge residential buildings by up to 10 units—will remain subject to environmental review if the project site is at least partially within or substantially contiguous to any historic place under local, state, and federal historic preservation laws.⁶²

53. N.Y. ENVTL. CONSERV. LAW § 8-0113(1), (3) (McKinney 2014). That authority extends to the designation of specific categories of Type I and Type II actions. N.Y. COMP. CODES R. & REGS. tit. 6, §§ 617.4(a)(2), 617.5(b), 617.14(e) (2012).

54. N.Y.C. CHARTER § 192(e) (2013).

55. RULES OF N.Y.C. 62, § 5-05 (2013).

56. NYCPC NOTICE OF PUBLIC HEARING, *supra* note 52.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. NYCPC NOTICE OF PUBLIC HEARING, *supra* note 52.

62. *Id.*

Developers and the affected City agencies should welcome these CEQR rules, which will speed environmental review of various small projects throughout the City.

III. SEQRA IN THE COURT OF APPEALS

The Court of Appeals decided one SEQRA case during the *Survey* period: *Bronx Committee for Toxic Free Schools v. New York City School Construction Authority*.⁶³ *Bronx Committee* was discussed in last year's *Survey*,⁶⁴ and we will not repeat the analysis of lower court decisions or background except as necessary to understand the Court of Appeals' decision.

Bronx Committee arose from the intersection of SEQRA review and another component of New York environmental law, the Brownfield Cleanup Program ("BCP").⁶⁵ The BCP was enacted in 2003 "to encourage persons to voluntarily remediate brownfield sites for reuse and redevelopment," through a combination of tax credits and liability protection.⁶⁶ Remediation of BCP sites is generally conducted pursuant to a remedial action work plan ("RAWP") that sets the parameters of the proposed cleanup.⁶⁷ At a typical brownfield site, however, not all of the contamination is removed or treated during the remediation process. Instead, long-term engineering controls—for example, vapor barriers (to protect against intrusion of vapors) or land use limitations—are imposed in order to prevent exposure to residual contamination that remains on site.⁶⁸ The use of engineering controls requires the preparation of a Site Management Plan that sets forth, *inter alia*, the maintenance and monitoring obligations relating to those continuing controls.

Bronx Committee arose as a challenge to the New York City School Construction Authority's remediation of a 6.6-acre site for use as public schools, athletic fields, and open space.⁶⁹ The northwestern part of the site was accepted into the BCP, and the RAWP provided for various remediation measures, including engineering controls to take

63. 20 N.Y.3d 148, 152, 981 N.E.2d 766, 767, 958 N.Y.S.2d 65, 66 (2012).

64. See Chertok & Kalmuss-Katz, *supra* note 1, at 724-29.

65. The BCP is governed by Article 27, Title 14 of New York's Environmental Conservation Law. N.Y. ENVTL. CONSERV. LAW §§ 27-1401 to 27-1435 (McKinney 2013).

66. *Id.* § 27-1403.

67. See N.Y. COMP. CODES R. & REGS. tit. 6, § 375-3.8(g)(3) (2013).

68. See N.Y. ENVTL. CONSERV. LAW § 27-1415(5) (Consol. 2013).

69. Bronx Comm. for Toxic Free Sch. v. N.Y.C. Sch. Constr. Auth., No. 13800/07, at 2 (Sup. Ct. Bronx Cnty. Nov. 7, 2008) (on file with authors).

effect following remediation.⁷⁰ However, the RAWP did not detail the longer-term monitoring or maintenance plans that would be necessary to ensure the effectiveness of those post-remediation measures because the School Construction Authority “believed a choice of maintenance and monitoring methods . . . would be premature . . . [until] after cleanup work has been done, and the post-cleanup soil and groundwater conditions can be assessed.”⁷¹ Following approval of a RAWP, but before the completion of remediation or preparation of a Site Management Plan, the School Construction Authority began review of its cleanup and redevelopment plans under SEQRA.⁷² A Final EIS was published in 2009, but, like the RAWP, it did not address the long-term maintenance and monitoring plans for the site’s engineering controls.⁷³

The petitioners then filed a suit challenging the School Construction Authority’s SEQRA review, alleging that the EIS was inadequate because it lacked a complete description of the “long-term maintenance and monitoring plan and/or objectives for the Site.”⁷⁴ While the case was pending in Bronx County Supreme Court, the School Construction Authority released—for eventual public comment under the BCP—a proposed Site Management Plan that outlined the long-term monitoring and maintenance protocols that were omitted from the RAWP and EIS.⁷⁵ The supreme court held that the inclusion of the long-term monitoring and maintenance measures in this later-arising, proposed Site Management Plan did not excuse the School Construction Authority’s failure to analyze the monitoring and maintenance requirements as part of the SEQRA review process.⁷⁶ It thus ordered the School Construction Authority to prepare a supplemental EIS (“SEIS”) “that details a plan for long-term maintenance and monitoring.”⁷⁷ In a 2011 decision, the First Department affirmed the lower court’s decision.⁷⁸

The Court of Appeals affirmed the lower courts, but in a decision that is narrowly written and that suggests at least three limits on the

70. *Id.* at 4-5, 8-9.

71. Bronx Comm. for Toxic Free Sch. v. N.Y.C. Sch. Constr. Auth., 20 N.Y.3d 148, 153-54, 981 N.E.2d 766, 768, 958 N.Y.S.2d 65, 67 (2012).

72. *Bronx Comm. for Toxic Free Sch.*, No. 13800/07, at 8-9.

73. *Bronx Comm. for Toxic Free Sch.*, 20 N.Y.3d at 154, 981 N.E.2d at 768, 958 N.Y.S.2d at 67.

74. *Bronx Comm. for Toxic Free Sch.*, No. 13800/07, at 13.

75. *Id.* at 14.

76. *Id.* at 16-17.

77. *Id.* at 17.

78. Bronx Comm. for Toxic Free Sch. v. N.Y.C. Sch. Constr. Auth., 86 A.D.3d 401, 402, 927 N.Y.S.2d 45, 46 (1st Dep’t 2011). For a detailed discussion of the First Department’s decision, see Chertok & Kalmuss-Katz, *supra* note 1, at 726-27.

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requirements of SEQRA that might apply in other, similar cases. First, the Court of Appeals “assume[d], without deciding, that the Authority acted reasonably in postponing a detailed consideration of its long-term maintenance and monitoring measures until after it had completed cleanup work at the site and after its EIS was filed.”⁷⁹ In relying on that assumption, the Court implied that an agency may, consistent with SEQRA, approve a project based upon an EIS that is completed prior to site remediation and that does not consider long-term monitoring and maintenance, so long as those issues are subsequently considered under SEQRA.

Second, the concurrence opined that “[i]f the Authority had addressed long-term maintenance and monitoring in the draft RAWP, which was subject to public review and comment as part of the formal BCP citizen participation program, there presumably would have been no need to cover the same topic separately in the draft EIS.”⁸⁰ Although the School Construction Authority determined that “inclusion of [maintenance and monitoring] details in the draft RAWP was premature,” BCP regulations require at least the description of maintenance and monitoring plans in a RAWP.⁸¹ In other cases, it may be possible to include sufficient detail at that stage to satisfy SEQRA’s “hard look” requirement, negating the need for later supplementation.

Finally, in ruling that SEQRA required the School Construction Authority to prepare a supplemental EIS for the long-term monitoring and maintenance measures at issue in this case, the Court of Appeals limited its holding to situations where the environmental significance of such measures is beyond reasonable dispute. The Court explained: “We do not view this case as a dispute over . . . whether events occurring after the EIS was filed were significant enough to call for a supplement. If those were the issues, we would defer to any reasonable judgment made by the Authority.”⁸² However, the School Construction Authority did not dispute that its maintenance and monitoring plans were “essential” to protecting the site’s occupants from potential contamination.⁸³ In future cases, however,

79. *Bronx Comm. for Toxic Free Sch. v. N.Y.C. Sch. Constr. Auth.*, 20 N.Y.3d 148, 156, 981 N.E.2d 766, 769, 958 N.Y.S.2d 65, 68 (2012).

80. *Id.* at 160, 981 N.E.2d at 772, 958 N.Y.S.2d at 71 (Read, J., concurring).

81. N.Y. COMP. CODES R. & REGS. tit. 6, §§ 375-3.8(f)(2)(iv), 375-3.8(g)(3)(vi) (2013) (requiring work plan to include an alternatives analysis that contains, *inter alia*, “an evaluation of the reliability and viability of the long-term implementation, maintenance, monitoring, and enforcement of any proposed institutional or engineering controls”).

82. *Bronx Comm. for Toxic Free Sch.*, 20 N.Y.3d at 156, 981 N.E.2d at 769, 958 N.Y.S.2d at 68.

83. *Id.*

an agency may be able to claim deference if it reasonably determines that such measures will not have significant adverse environmental impacts through a supplemental environmental assessment or technical memorandum.

IV. SEQRA IN THE LOWER COURTS AND APPELLATE COURTS

A. *Threshold Requirements and Procedural Bars in SEQRA Litigation*

SEQRA litigation takes the form of a special proceeding under Article 78 of the New York Civil Practice Law and Rules.⁸⁴ Both SEQRA and Article 78 impose certain requirements on petitioners apart from the substantive requirement of proving that the agency failed to comply with SEQRA. A number of decisions during the *Survey* period addressed questions arising from those threshold requirements.

1. *Standing and Mootness*

Several cases in the *Survey* period addressed various barriers to a petitioner's eligibility to maintain suit under SEQRA. These include the requirements that the petitioner have standing, that the claim for relief not have become moot because of a change in circumstances, and that the petitioner exhaust any available administrative remedies before filing the Article 78 proceeding.

With respect to standing, Article 78 petitioners must establish that the challenged action causes them injury that is (a) within the zone of interests sought to be promoted by the statute and (b) different from harm to the public at large.⁸⁵ SEQRA's "zone of interest" requires that the alleged injury be "environmental and not solely economic in nature."⁸⁶ Questions of standing under SEQRA frequently boil down to the petitioner's proximity to the challenged activity because the Court of Appeals has held that both "aggrievement" and "an interest different from other members of the community" may be inferred from proximity.⁸⁷ Several decisions during the *Survey* period expounded on these requirements.

84. See N.Y. C.P.L.R. 7801 (McKinney 2008).

85. *Save the Pine Bush, Inc. v. Common Council of Albany*, 13 N.Y.3d 297, 308-09, 918 N.E.2d 917, 924, 890 N.Y.S.2d 405, 412 (2009) (Pigott, J., concurring) (citing *Soc'y of Plastics Indus. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 773-74, 573 N.E.2d 1034, 1040-41, 570 N.Y.S.2d 778, 784-85 (1991)).

86. *Mobil Oil Corp. v. Syracuse Indus. Dev. Agency*, 76 N.Y.2d 428, 433, 559 N.E.2d 641, 644, 559 N.Y.S.2d 947, 950 (1990).

87. *Gernatt Asphalt Prods., Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 687, 664 N.E.2d 1226, 1238, 642 N.Y.S.2d 164, 176 (1996).

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In *Shapiro v. Town of Ramapo* and the related appeal, *Youngewirth v. Town of Ramapo Town Board*, the Second Department reaffirmed the longstanding principle that a resident who challenges a rezoning decision under SEQRA may establish standing based on proximity to the action at issue.⁸⁸ The Court of Appeals has developed the rule that proximity alone may establish standing in the context of rezoning based on the notion that even before there is any new development, a property owner “has a legally cognizable interest in being assured that the town satisfied SEQRA before taking action to rezone its land.”⁸⁹

Shapiro and *Youngewirth* involved challenges by residents of the Town of Clarkstown to the rezoning of a parcel across the street from their houses that would allow development of multi-family residences.⁹⁰ The supreme court had dismissed the petition after concluding that “[a]lthough petitioners’ property is across the street from the edge of the land in question, their home is not adjacent to that portion of the property actually affected by the zoning change.”⁹¹ It had relied on the Town’s findings, in the record, that the rezoning would only affect a central portion of the site, with the result that “the land across the street from petitioners would not contain the re-zoned multi-family housing.”⁹² Thus, the areas at issue were over 1000 feet away and could not be accessed from the petitioners’ property except by a “journey of nearly one mile.”⁹³ That, the lower court ruled, was not sufficiently close to the petitioners’ residence to establish standing on the basis of proximity alone. Furthermore, the court noted that “petitioners have shown no actual injury to them, different from any injury to the community at large,” to establish standing under that general standard.⁹⁴ The Second Department reversed, summarily noting that a resident who lives in “close proximity” to a site need not show “actual injury or special damage” to establish standing.⁹⁵ However, the appellate

88. *Shapiro v. Town of Ramapo*, 98 A.D.3d 675, 677, 950 N.Y.S.2d 154, 156 (2d Dep’t 2012); *Youngewirth v. Town of Ramapo Town Bd.*, 98 A.D.3d 678, 680, 950 N.Y.S.2d 157, 160 (2d Dep’t 2012).

89. *Gernatt Asphalt Prods.*, 87 N.Y.2d at 687, 664 N.E.2d at 1238, 642 N.Y.S.2d at 176 (quoting *Har Enters. v. Town of Brookhaven*, 74 N.Y.2d 524, 529, 548 N.E.2d 1289, 1293, 549 N.Y.S.2d 638, 642 (1989)).

90. *Shapiro v. Town of Ramapo*, No. 5195/2010, 2010 N.Y. Slip Op. 51915(U), at 1-2 (Sup. Ct. Rockland Cnty. 2010).

91. *Id.* at 5.

92. *Id.*

93. *Id.* at 5-7.

94. *Id.* at 7 (citing *Harris v. Town Bd. of Riverhead*, 73 A.D.3d 922, 924, 905 N.Y.S.2d 598, 600 (2d Dep’t 2010)).

95. *Shapiro v. Town of Ramapo*, 98 A.D.3d 675, 677, 950 N.Y.S.2d 154, 156 (2d

decision did not clarify whether the lower court erred by considering the rezoned segment of the site separately from the portion that was across the street from petitioners or, instead, in concluding that 1000 feet was not “close enough” to establish standing by proximity.

This ambiguity is interesting in light of another recent appeal, *Tuxedo Land Trust, Inc. v. Town Board of Town of Tuxedo*. In *Tuxedo*, the Second Department reached the opposite result in another application of the presumption of injury based on proximity.⁹⁶ The petitioners, homeowners and non-profit organizations, challenged certain land use permits and development approvals for a planned community of 1200 residential units and over 100,000 square feet of non-residential development.⁹⁷ As in *Shapiro* and *Youngewirth*, the tract of land on which the proposed action would take place was located across the street from the residence of at least one petitioner, but not on the portion of that tract that was closest to the petitioner.⁹⁸ Holding that “[t]he relevant distance is the distance between the petitioner’s property and the actual structure or development itself, not the distance between the petitioner’s property and the property line of the site,” the Second Department ruled that the “individual petitioners’ properties were not located in sufficient proximity to the proposed development” to establish standing.⁹⁹ *Tuxedo* is distinguishable from *Shapiro* and *Youngewirth* because, while those decisions concerned rezoning decisions, the petitioners in *Tuxedo* challenged only an amendment to a permit and site plan approval decision. Still, it is not clear from the opinions of the courts whether that distinction or some other factual difference warrants the different results in these cases.¹⁰⁰

Dep’t 2012).

96. See generally *Tuxedo Land Trust, Inc. v. Town Bd. of Town of Tuxedo*, 112 A.D.3d 726, 977 N.Y.S.2d 272 (2d Dep’t 2013) (decided on December 11, 2013, after the *Survey* period but before this Article went to press).

97. *Tuxedo Land Trust, Inc. v. Town of Tuxedo*, No. 13675/10, 2012 N.Y. Slip Op. 50377(U), at 4-7 (Sup. Ct. Orange Cnty. 2012); see also Chertok & Kalmuss-Katz, *supra* note 1, at 729–30 (for a detailed review of the lower court’s decision).

98. *Tuxedo Land Trust, Inc.*, 2012 N.Y. Slip Op. 50377(U), at 4-7.

99. *Tuxedo Land Trust, Inc.*, 112 A.D.3d at 728, 977 N.Y.S.2d at 274.

100. In addition to those cases in which the courts discussed standing at length, in *Town of Blooming Grove v. Cnty. of Orange*, the Second Department summarily ruled that the petitioners had standing because they had established “‘a demonstrated interest in the potential environmental impacts of the project.’” 103 A.D.3d 655, 657, 959 N.Y.S.2d 265, 267 (2d Dep’t 2013) (quoting *Town of Babylon v. N.Y. State Dep’t of Transp.*, 33 A.D.3d 617, 618–19, 822 N.Y.S.2d 138, 140 (2d Dep’t 2006)). In another case, the federal district court for the Western District of New York applied New York law of standing to decide that a petitioner did have standing under SEQRA. See *Campaign for Buffalo History, Architecture & Culture, Inc. v. Buffalo & Ft. Erie Pub. Bridge Auth.*, No. 12-CV-00605, 2013 WL 672323, at *4 (W.D.N.Y. Feb. 22, 2013).

Mootness “is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy.”¹⁰¹ Mootness issues arise in SEQRA proceedings when a project that is subject to the agency action progresses to such a point that the court will not be able to redress petitioner’s alleged injuries even if it ultimately grants the petition and annuls the agency action.¹⁰² In that circumstance, a respondent may argue that the petitioner’s alleged injury has already occurred and that, even if the injury is ongoing, annulment of the agency action will not redress that harm. Indeed, because “mootness is a doctrine related to subject matter jurisdiction,”¹⁰³ there is no barrier to it being raised (either by a party or by the court sua sponte) on account of developments in a project during the pendency of a proceeding or during a subsequent appeal.

In *Village of Chestnut Ridge v. Town of Ramapo*, the respondents raised such a mootness defense on appeal.¹⁰⁴ The case arose from the Town of Ramapo’s issuance of a negative declaration regarding the enactment of zoning provisions and a site approval for an adult student housing development.¹⁰⁵ Several petitioners whom the lower court had determined not to have standing appealed.¹⁰⁶ They sought a preliminary injunction barring construction during that appeal, but the court denied their request.¹⁰⁷ As a result, construction of the challenged project was “substantially completed” during the course of the litigation.¹⁰⁸ The developer then argued that the “petitioners’ arguments with respect to the [project] Site plan have been rendered academic”—that is, that they had become moot.¹⁰⁹

The Second Department disagreed because petitioners in the appeal had moved for preliminary relief barring construction during that proceeding.¹¹⁰ Thus, the court reasoned that those petitioners put the

101. *Dreikausen v. Zoning Bd. of Appeals of City of Long Beach*, 98 N.Y.2d 165, 172, 774 N.E.2d 193, 196, 746 N.Y.S.2d 429, 432 (2002).

102. *See id.* (“[T]he doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy.”).

103. *In re Grand Jury Subpoenas for Locals 17, 135, 257 & 608 of the United Bhd. of Carpenters & Joiners*, 72 N.Y.2d 307, 311, 528 N.E.2d 1195, 1197, 532 N.Y.S.2d 722, 724 (1988).

104. 99 A.D.3d 918, 953 N.Y.S.2d 75 (2d Dep’t 2012).

105. *Id.* at 918-19, 953 N.Y.S.2d at 77.

106. *Id.* at 923-24, 953 N.Y.S.2d at 81.

107. *Id.* at 924, 953 N.Y.S.2d at 81.

108. *Id.* at 924, 953 N.Y.S.2d at 82.

109. *Vill. of Chestnut Ridge*, 99 A.D.3d at 924, 953 N.Y.S.2d at 82.

110. *Id.*

developer “on notice that construction was undertaken at its own risk.”¹¹¹ The court’s decision follows a line of cases that have held that an attempt to obtain a preliminary injunction to preserve the status quo during litigation will avoid charges that subsequent construction renders a claim moot, even if the injunction is denied.¹¹² Other factors that weigh against courts deeming a claim moot on account of the completion of construction include “whether a party proceeded in bad faith and without authority,” “where novel issues or public interests . . . warrant continuing review,” and “where a challenged modification is readily undone, without undue hardship.”¹¹³ By drawing on these principles, *Chestnut Ridge* highlights how the mootness analysis in SEQRA cases frequently amounts to an equitable inquiry that might seem more suitable in an application of laches or estoppel.

Finally, under the doctrine of administrative exhaustion, “courts generally refuse to review a determination on environmental or zoning matters based on evidence or arguments that were not presented during the proceedings before the lead agency.”¹¹⁴ In *Youngewirth*, the Second Department touched briefly on the requirement that a SEQRA petitioner exhaust administrative remedies. The court rejected the respondents’ argument that one petitioner failed to exhaust administrative processes because she did not actively participate in the relevant town proceedings.¹¹⁵ The court noted that the petitioner had alleged that the objections that the petitioner raised “were fully and specifically advanced by others at a public hearing conducted by the Town Board or in written comments timely submitted to the Town Board.”¹¹⁶ In so ruling, the court demonstrated that, unlike standing, which concerns the qualifications of the individual petitioner, administrative exhaustion embodies a policy of ensuring that the agency has an opportunity to review issues in the first instance—a policy that may be fulfilled even if the petitioner has been less than fully diligent.¹¹⁷

111. *Id.* at 925, 953 N.Y.S.2d at 82.

112. *See, e.g.*, *Dreikausen v. Zoning Bd. of Appeals*, 98 N.Y.2d 165, 173, 774 N.E.2d 193, 197, 746 N.Y.S.2d 429, 433 (2002); *Schupak v. Zoning Bd. of Appeals of Town of Marbletown*, 31 A.D.3d 1018, 1019, 819 N.Y.S.2d 335, 336 (3d Dep’t 2006) (citing *Defreestville Area Neighborhood Ass’n, Inc. v. Planning Bd. of Town of N. Greenbush*, 16 A.D.3d 715, 717, 790 N.Y.S.2d 737, 740 (3d Dep’t 2005)).

113. *Dreikausen*, 98 N.Y.2d at 173, 744 N.E.2d at 197, 746 N.Y.S.2d at 433.

114. *Miller v. Kozakiewicz*, 300 A.D.2d 399, 400, 751 N.Y.S.2d 524, 526-27 (2d Dep’t 2002).

115. *Youngewirth v. Town of Ramapo Town Bd.*, 98 A.D.3d 678, 681, 950 N.Y.S.2d 157, 161 (2d Dep’t 2012).

116. *Id.* at 680, 950 N.Y.S.2d at 160.

117. *Id.* at 680-81, 950 N.Y.S.2d at 160-61. *See also, e.g.*, *Fannie Mae Jackson v.*

2. *The Statute of Limitations and Laches*

Under the general statute of limitations provided for petitioners pursuant to Article 78 of the New York Civil Practice Law and Rules (“CPLR”), a SEQRA challenge must be made “four months after the determination to be reviewed becomes final and binding upon the petitioner.”¹¹⁸ A common focus of litigation over timeliness in SEQRA actions is how far an agency must progress in planning an action before the statute begins to run. The blackletter law on this issue is that the statute starts to run when the agency has, in effect, “committed itself to ‘a definite course of future decisions.’”¹¹⁹ Determining when that occurred, though, is frequently debatable.

In *Seniors for Safety v. New York City Department of Transportation*, residents challenged the City’s decision to build a bicycle lane on Prospect Park West, a thoroughfare in Brooklyn.¹²⁰ The petitioners asserted four separate SEQRA claims, three of which are relevant here. The first cause of action alleged that the City agency’s decision to make the bike lane permanent after an initial trial period was invalid under Article 78 of the CPLR because it was arbitrary and capricious.¹²¹ The third and fourth claims alleged that the installation of the bike path, even during the trial period, violated SEQRA.¹²² The court held that the latter two claims were untimely because the petitioners commenced the action more than four months after the path was installed, by which time the agency “had by then committed itself.”¹²³ The court determined that this was true “[e]ven if [the court] accept[ed] the petitioners’ contentions that the NYCDOT deferred the decision to make the project final until the end of the study period.”¹²⁴ This ruling may suggest that SEQRA petitioners must be careful lest “trials” or other preliminary steps that an agency takes in evaluating a

N.Y. State Urban Dev. Corp., 67 N.Y.2d 400, 427, 494 N.E.2d 429, 442, 503 N.Y.S.2d 298, 311 (1986) (holding that archaeological issues were subject to judicial review even though no party raised those issues during the administrative proceeding because the agency did in fact consider them).

118. See N.Y. C.P.L.R. 217(1) (McKinney 2008); see also *Save the Pine Bush, Inc. v. City of Albany*, 70 N.Y.2d 193, 203, 512 N.E.2d 526, 529, 518 N.Y.S.2d 943, 946 (1987) (holding that CPLR 217(1) applies to SEQRA proceedings).

119. *Young v. Bd. of Trs. of the Vill. of Blasdell*, 89 N.Y.2d 846, 848-49, 675 N.E.2d 464, 466, 652 N.Y.S.2d 729, 731 (1996) (quoting N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(b)(2) (2000)).

120. 101 A.D.3d 1029, 1030-31, 957 N.Y.S.2d 710, 711-12 (2d Dep’t 2012).

121. *Id.* at 1031, 957 N.Y.S.2d at 712.

122. *Id.*

123. *Id.* at 1032-33, 957 N.Y.S.2d at 713.

124. *Id.* at 1032, 957 N.Y.S.2d at 713.

project have the effect of triggering the statute of limitations earlier than the petitioner would expect—particularly when physical alterations to the environment have been implemented.

In *Miner v. Town of Duanesburg Planning Board*, the Third Department applied the equitable doctrine of laches, which permits dismissal of a claim where the complaining party unduly delays asserting that claim in such a way as to cause injury or prejudice to the other party.¹²⁵ The petitioners in *Miner* ran an antique shop across the street from the site of a proposed propane storage facility.¹²⁶ Although the petitioners tried to negotiate with the project sponsor to mitigate the visual impacts of the facility, they did not file their Article 78 petition for review under SEQRA until construction was almost complete.¹²⁷ The court reasoned that the petitioners’ “failure to pursue any legal remedy while construction of the facility proceeded to near completion right before their eyes must result in dismissal of this proceeding.”¹²⁸ Although the decision does not say how long the petitioners waited before filing their petition, the fact that they were not barred by the four-month statute of limitations suggests that it was not especially long. This case thus highlights the fact that potential SEQRA petitioners have much to lose if they sit on their rights, even when they comply with the statute of limitations.

These cases from the *Survey* period demonstrate that the procedural aspects of SEQRA litigation—standing, mootness, administrative exhaustion, and timeliness—continue to be a major focus of argument. Practitioners should be cognizant of the importance of these threshold issues in drafting pleading documents and in forming defenses to SEQRA challenges.

3. Other Issues in SEQRA Litigation

In the previously discussed *Shapiro* decision, the Second Department noted a point about Article 78 procedure that is important for all SEQRA practitioners to remember.¹²⁹ Section 7804(f) of the CPLR allows a respondent to file a motion to dismiss before an answer to “raise an objection in point of law.”¹³⁰ Such objections are limited to issues that are “capable of disposing of the case without reaching the

125. 98 A.D.3d 812, 813-14, 950 N.Y.S.2d 207, 209 (3d Dep’t 2012).

126. *Id.* at 813, 950 N.Y.S.2d at 208-09.

127. *Id.* at 813, 950 N.Y.S.2d at 209.

128. *Id.* at 814, 950 N.Y.S.2d at 209.

129. *Shapiro v. Town of Ramapo*, 98 A.D.3d 675, 677-78, 950 N.Y.S.2d 154, 156-57 (2d Dep’t 2012).

130. N.Y. C.P.L.R. 7804(f) (McKinney 2013).

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merits”—a category that includes several of the issues previously mentioned, such as standing, timeliness, and *res judicata*.¹³¹ A motion to dismiss raising these threshold issues is not limited, as a motion to dismiss for failure to state a claim would be, to the allegations of the petition and may be accompanied by evidence.¹³² A corresponding principle of Article 78 law is that a court may not award the petitioner affirmative relief without allowing the respondent first to file an answer.¹³³

In *Shapiro*, in addition to ruling that the petitioners lacked standing, the lower court had also dismissed the petition on the ground that the town’s SEQRA determinations were not arbitrary or capricious.¹³⁴ The Second Department held that “it was error for the Supreme Court to reach the merits of the petitioners’ SEQRA claims prior to service of the respondents’ answers and the filing of the full administrative record.”¹³⁵ However, the court added that, “[o]n the appellate record before us, it cannot be said that ‘the facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer.’”¹³⁶ The exception to which the court referred, by which a court may reach the merits of an Article 78 petition before the respondent answers, developed outside the SEQRA context.¹³⁷ But the court’s reference to it in *Shapiro* raises the unanswered question of whether, and in what circumstances, SEQRA proceedings may be amendable to determination on the merits at the motion-to-dismiss stage.

B. Agency Determinations of Environmental Significance

As explained, the requirement to prepare an EIS turns on the

131. *Hull-Hazard, Inc. v. Roberts*, 129 A.D.2d 348, 350, 517 N.Y.S.2d 824, 825 (3d Dep’t 1987); *see also* N.Y. C.P.L.R. 3211(a), 7804(f) (McKinney 2008).

132. *See* N.Y. C.P.L.R. 3211(c) (McKinney 2008) (providing for the consideration of factual issues on motion to dismiss).

133. *Nassau BOCES Cent. Council of Teachers v. Bd. of Coop. Educ. Servs.*, 63 N.Y.2d 100, 102, 469 N.E.2d 511, 511, 480 N.Y.S.2d 190, 190 (1984).

134. *Shapiro v. Town of Ramapo*, No. 5195/2010, 2010 N.Y. Slip Op. 51915(U), at 9 (Sup. Ct. Rockland Cnty. 2010).

135. *Shapiro v. Town of Ramapo*, 98 A.D.3d 675, 677, 950 N.Y.S.2d 154, 157 (2d Dep’t 2012).

136. *Id.* at 678 (quoting *Nassau BOCES Cent. Council of Teachers*, 63 N.Y.2d at 101, 469 N.E.2d at 511, 480 N.Y.S.2d at 190).

137. *Nassau BOCES Cent. Council of Teachers*, 63 N.Y.2d at 102, 469 N.E.2d at 511, 480 N.Y.S.2d at 190; *see generally* *O’Hara v. Del Bello*, 47 N.Y.2d 363, 391 N.E.2d 1311, 418 N.Y.S.2d 334 (1979).

identification of potentially significant adverse impacts. Because the issuance of a negative declaration concludes an agency's obligations under SEQRA, a large number of SEQRA petitioners challenge the substantive validity of that document.¹³⁸ Judicial review of significance determinations is deferential, with the reviewing court requiring only that the agency identify the relevant areas of concern, take a hard look at them, and provide a "reasoned elaboration" for its decision.¹³⁹

Nonetheless, in *Bergami v. Town Board of Town of Rotterdam*, the Third Department reversed the trial court's decision to uphold a negative declaration issued for a town's rezoning of certain land for commercial uses.¹⁴⁰ The court agreed with the petitioners, who were nearby residential property owners, that although the town board had identified the relevant areas of environmental concern, it failed to take a "hard look" because it "completely deferred any consideration" of the applicable criteria set forth in SEQRA regulations until the project sponsor later submitted a proposed site plan.¹⁴¹ The court also criticized the town for relying extensively on (1) a letter submitted by the project sponsor's engineer two days before the town issued the negative declaration, and (2) an area-wide study that failed to address environmental impacts of the specific tracts to be rezoned by the town's resolution.¹⁴² *Bergami* demonstrates that, despite their deference, courts will scrutinize the technical adequacy of an agency's review.

In *Chestnut Ridge*, by contrast, the Second Department reversed the trial court's annulment of a town's negative declaration related to its approval of the developer's site plan.¹⁴³ The trial court's decision had rested on consideration of two issues of environmental concern: traffic and community character.¹⁴⁴ In reversing, the appellate division noted that the town "was not required to accept the opinions of the petitioners'

138. Although challenges to positive declarations are possible, they are limited to specific circumstances and do not occur nearly as frequently as challenges to negative declarations. See MICHAEL B. GERRARD ET AL., ENVIRONMENTAL IMPACT REVIEW IN NEW YORK §3.05[2][E] (1990 & supp. 2013).

139. *Chinese Staff & Workers' Ass'n v. Burden*, 19 N.Y.3d 922, 924, 973 N.E.2d 1277, 1279, 950 N.Y.S.2d 503, 505 (2012). This standard derives from the general standard for review in Article 78 proceedings, according to which the court may annul an agency action only if it "was affected by an error of law or was arbitrary and capricious or an abuse of discretion." *Akpan v. Koch*, 75 N.Y.2d 561, 570, 554 N.E.2d 53, 57, 555 N.Y.S.2d 16, 20 (1990) (quoting N.Y. C.P.L.R. 7803(3) (2013)).

140. 97 A.D.3d 1018, 1022, 949 N.Y.S.2d 245, 249 (3d Dep't 2012).

141. *Id.*

142. *Id.* at 1021, N.Y.S.2d at 249.

143. *Village of Chestnut Ridge v. Town of Ramapo*, 99 A.D.3d 918, 953 N.Y.S.2d 75 (2d Dep't 2012).

144. *Id.* at 926, 953 N.Y.S.2d at 83.

experts over those of its own consultants,” and that the record included studies suggesting that the development would contribute to only small traffic increases (1.5%), and that the project site plan “minimized any adverse impacts on community character by providing for substantial landscaping and aesthetic design.”¹⁴⁵ “Under the circumstances,” the court concluded, the town gave “due consideration to pertinent environmental factors.”¹⁴⁶ In one trial court decision, *Greater Huntington Civic Group, Inc. v. Town of Huntington*, the court likewise deferred to an agency’s reliance on expert consultants: “While the petitioners dispute many of the findings, an agency may rely on consultants to conduct the analyses that support their environmental review of a proposed project.”¹⁴⁷ These cases serve as a reminder of the value—if not the necessity—of retaining expert assistance in conducting a SEQRA review.

In two other decisions from the *Survey* period, the appellate division ruled that the state agencies’ negative declarations complied with SEQRA. In *Frigault v. Town of Richfield Planning Board*, the Third Department upheld the town’s determination on a request for a special use permit for a small wind energy facility in the town.¹⁴⁸ It noted that the town hired a consultant, held eleven meetings as part of its environmental review, conducted studies on at least five major areas of environment concern, received input from state agencies with relevant expertise, and issued a “thorough and reasoned analysis” of its decision.¹⁴⁹ Likewise, in *265 Penn Realty Corp. v. City of New York*, the Second Department summarily rejected a challenge to a town’s negative declaration relating to the condemnation by the City of New York of property that had previously been used, and would continue to be used, as an emergency medical service station for the city’s fire department.¹⁵⁰ The court emphasized that the action did not involve a change in use and that the City diligently prepared a full environmental assessment that found no adverse environmental impacts.¹⁵¹

Interestingly, in another case involving SEQRA review of governmental condemnation of property, *Zutt v. State of New York*, the Second Department held that the state had violated SEQRA’s

145. *Id.* at 925-27, 953 N.Y.S.2d at 82-84.

146. *Id.* at 927, 953 N.Y.S.2d at 84 (quoting *Akpan v. Koch*, 75 N.Y.2d 561, 571, 554 N.E.2d 53, 58, 555 N.Y.S.2d 16, 21 (1990)).

147. No. 30487/11, 2012 N.Y. Slip Op. 52146(U), at 4 (Sup. Ct. Suffolk Cnty. 2012).

148. 107 A.D.3d 1347, 1350, 968 N.Y.S.2d 673, 677 (3d Dep’t 2013).

149. *Id.*

150. 99 A.D.3d 1014, 1014, 953 N.Y.S.2d 141, 142 (2d Dep’t 2012).

151. *Id.* at 1015-16, 953 N.Y.S.2d at 143.

substantive requirements at an initial stage of making its determination of significance: identifying the action as Type I, Type II, or Unlisted.¹⁵² In *Zutt*, residents challenged the Department of Transportation's ("DOT's") condemnation of part of their property for drainage of stormwater from a state highway.¹⁵³ The agency had concluded its SEQRA review at the earliest possible point by determining that the condemnation was a Type II action under DOT regulations.¹⁵⁴ The court refrained from ruling that the action was not a Type II action as a matter of law. Instead, it annulled the agency's determination on the ground that the agency had failed to take a "hard look" or provide a "reasoned elaboration" for its conclusion that it was.¹⁵⁵

Although substantive review under SEQRA tends to be a case-specific inquiry, the general principle demonstrated by these decisions is that courts defer to an agency's negative declaration unless, as in *Bergami*, the record fails to show any meaningful, independent review by the agency. If the agency at least does that, as in *Chestnut Ridge* and *Frigault*, courts will not annul its negative declaration merely on the basis of evidence that tends to contradict the agency's reasonable determinations.

C. Segmentation, Supplementation, Coordinated Review, and Other SEQRA Issues

1. Unlawful "Segmentation" of SEQRA Review

One of the challenges that SEQRA practitioners face is defining the proper boundaries of the action to be analyzed. SEQRA regulations provide that government actions "commonly consist of a set of activities or steps . . . Considering only a part or segment of an action is contrary to the intent of [SEQRA]."¹⁵⁶ Unlawful segmentation includes both (1) where an agency divides a larger project into smaller components that do not require preparation of an EIS, thus avoiding preparation of an EIS, and (2) where an agency excludes subsequent phases or stages from a proposed action in order to avoid or limit the scope of an EIS.¹⁵⁷

For example, in *Town of Blooming Grove v. County of Orange*, the Second Department ruled that a negative declaration was invalid, in part

152. 99 A.D.3d 85, 100, 949 N.Y.S.2d 402, 414 (2d Dep't 2012).

153. *Id.* at 88, 949 N.Y.S.2d at 405.

154. *Id.* at 93, 949 N.Y.S.2d at 409.

155. *Id.* at 102, 949 N.Y.S.2d at 415.

156. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.3(g)(1) (2000).

157. *See* Comm. to Stop Airport Expansion v. Wilkinson, No. 10-41928, 2012 N.Y. Slip Op. 31914(U), at 8 (Sup. Ct. Suffolk Cnty. 2012).

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because of improper segmentation.¹⁵⁸ In 2007, the County of Orange purchased 258 acres of property, which it in turn sold to a developer and guaranteed that it would ensure adequate sewer capacity for the planned residential and commercial development.¹⁵⁹ The town and village in which the property was located then commenced a SEQRA review for the development, including the necessary sewer connections, issued a positive declaration, and began preparing an EIS.¹⁶⁰ As the resulting delay prevented the county from ensuring a sewer capacity as required by its contract with the developer, it commenced a separate SEQRA proceeding on a plan to extend a county sewer district to include the property.¹⁶¹ The county promptly issued a negative declaration.¹⁶² The Second Department held that “the County improperly segmented” review of the county sewer extension from the developer’s project because the two consisted of “an integrated and cumulative development plan sharing a common purpose.”¹⁶³

In contrast, the Second Department reversed a lower court’s annulment of a town board’s approval of a biomass gasification facility following the preparation of an EIS in *Highview Estates of Orange County, Inc. v. Town Board of Town of Montgomery*.¹⁶⁴ The petitioners challenged the board’s SEQRA review on the ground “that final design details for subsequent phases of site-plan approval were not reviewed in the [final EIS] or addressed in the findings statement.”¹⁶⁵ The Second Department disagreed, noting that the board “reviewed the entire project” and that the failure to finalize some details that would be necessary in subsequent phases of site-plan review was not improper segmentation in light of the EIS’s provision that “any environmentally significant modifications to the project would result in the need for a supplemental [EIS].”¹⁶⁶

The apparently deliberate attempt by the county in *Blooming Grove* to avoid full SEQRA review and expedite a project by considering one element of a larger development separately demonstrates an unusually easy case. The unclear line, at issue in *Highview Estates*, between when an EIS’s omission of later-stage

158. 103 A.D.3d 655, 657, 959 N.Y.S.2d 265, 267 (2d Dep’t 2013).

159. *Id.* at 656, 959 N.Y.S.2d at 266.

160. *Id.* at 656, 959 N.Y.S.2d at 267.

161. *Id.* at 656–57, 959 N.Y.S.2d at 267.

162. *Id.* at 657, 959 N.Y.S.2d at 267.

163. *Town of Blooming Grove*, 103 A.D.3d at 657, 959 N.Y.S.2d at 267.

164. 101 A.D.3d 716, 717, 955 N.Y.S.2d 175, 177 (2d Dep’t 2012).

165. *Id.* at 720, 955 N.Y.S.2d at 179.

166. *Id.* at 720, 955 N.Y.S.2d at 179-80.

project details will rise to the level of improper segmentation is more typical of SEQRA segmentation questions.

2. *Supplementation*

As noted in *Highview Estates of Orange County, Inc. v. Town Board of Town of Montgomery*,¹⁶⁷ one way in which agencies may be able to postpone consideration of later-stage issues without foregoing complete SEQRA review is through supplementation. SEQRA provides for the preparation of supplemental EIS when proposed project changes, newly discovered information, or changes in circumstances give rise to significant adverse environmental impacts not adequately addressed in the EIS.¹⁶⁸ Whether issues, impacts, or project details omitted from an initial EIS require preparation of a supplemental EIS is a frequent subject of litigation, the most prominent example of which during the *Survey* period being the *Bronx Committee* decision previously discussed.¹⁶⁹

However, other than *Bronx Committee*, only a few decisions during the *Survey* period discussed supplementation issues. In *Kellner v. City of New York Department of Sanitation*, the First Department summarily rejected an argument that the New York City Department of Sanitation impermissibly declined to prepare a supplemental EIS in relation to the construction of a new transfer station.¹⁷⁰ And, as noted in *Highview Estates*,¹⁷¹ the court relied on the possibility of later supplementation in ruling that the omission of certain details from an initial EIS was not unlawful segmentation.¹⁷²

3. *Coordinated Review and the Collateral Effect of SEQRA Determinations*

One of the procedural requirements of SEQRA is that, for all Type I actions that involve more than one agency, the lead agency must conduct a coordinated review.¹⁷³ Under SEQRA regulations, if the lead agency exercises due diligence, its determination of significance “is binding on all other involved agencies.”¹⁷⁴ A less clearly defined issue

167. 101 A.D.3d 716, 720, 955 N.Y.S.2d 175, 179-80 (2d Dep’t 2012).

168. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(a)(7) (1995).

169. *See supra* Part III.

170. 107 A.D.3d 529, 529, 967 N.Y.S.2d 356, 357 (1st Dep’t 2013).

171. 101 A.D.3d at 720, 955 N.Y.S.2d at 179-80.

172. *Id.*

173. 6 N.Y.C.R.R. § 617.6(b)(3). Agencies also have the option of doing coordinated review for Unlisted Actions, but it is not required. *See id.* § 617.6(b)(4).

174. *Id.* § 617.6(b)(3)(iii).

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is the effect of such a determination of significance on an agency that was not involved in the coordinated review.

In *Town of Blooming Grove*, as discussed previously, the court determined that the County of Orange had improperly segmented its SEQRA review of a sewer project from the related development.¹⁷⁵ Following that determination, the court also held that the county's violation violated SEQRA regulations related to coordinated review.¹⁷⁶ Because the town and village in which the development would occur had declared themselves co-lead agencies and "had already issued a positive declaration," the court reasoned that "the County was prohibited from issuing a subsequent determination" of no significant impact.¹⁷⁷ This conclusion follows directly from the applicable SEQRA regulations.

A more difficult question is what bearing one agency's findings during an environmental review under SEQRA have when another agency considers environmental impacts as part of an administrative proceeding under another state or local law. In *Luburic v. Zoning Board of Appeals of Village of Irvington*, the Second Department affirmed the decision of the trial court annulling the denial of a zoning variance.¹⁷⁸ In connection with the construction of a single-family residence, the petitioner had worked with the village's Planning Board to obtain necessary permit approvals.¹⁷⁹ The Planning Board had declared itself lead agency, conducted review under SEQRA, and issued a conditioned negative declaration¹⁸⁰—a procedure by which an agency may approve an action without preparing an EIS, if certain mitigation conditions are met.¹⁸¹ When the petitioner then applied for a variance from Irvington's Zoning Board of Appeals ("ZBA"), the ZBA denied her application on the purported ground that it "would produce an undesirable change in the neighborhood and have a negative impact on the surrounding physical and environmental conditions . . . because the conditions imposed by the Planning Board were 'impractical' and 'implausible.'"¹⁸² The Second Department deemed this rationale arbitrary and capricious, reasoning that "given the Planning Board's

175. *Town of Blooming Grove v. Cnty. of Orange*, 103 A.D.3d 655, 657, 959 N.Y.S.2d 265, 267 (2d Dep't 2013).

176. *Id.*

177. *Id.*

178. 106 A.D.3d 824, 825, 827–28, 966 N.Y.S.2d 440, 441, 443 (2d Dep't 2013).

179. *Id.* at 824, 966 N.Y.S.2d at 441.

180. *Id.* at 825–26, 966 N.Y.S.2d at 442.

181. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(h) (2000).

182. *Luburic*, 106 A.D.3d at 825–26, 966 N.Y.S.2d at 442.

role in addressing environmental concerns . . . and in the absence of any further evidence to support its conclusion, the ZBA's finding on this factor lacked a rational basis."¹⁸³ It is not clear from the court's decision whether the ZBA was an involved agency, in which case it would be bound by the Planning Board's SEQRA significance determination.¹⁸⁴ However, the court's rationale—that the ZBA's conclusions lacked evidentiary support—suggests that even if an agency was not involved with another agency's SEQRA determination of significance, it is not free to disregard that agency's environmental assessment as it may relate to other agency actions.

In *Troy Sand & Gravel Co. v. Town of Nassau*, however, the Third Department limited that principle, holding that another agency's prior environmental determinations under SEQRA could not preclude a town from considering environmental impacts under its zoning authority.¹⁸⁵ The plaintiff in *Troy Sand & Gravel Co.* sought a special use permit and site plan approval for a quarry.¹⁸⁶ It had previously obtained a mining permit from DEC, which had conducted review under SEQRA and issued an EIS and findings statement.¹⁸⁷ When the Town Board retained a consultant to analyze the environmental impacts of the project, the operator filed a declaratory judgment action and sought a preliminary injunction prohibiting the town from revisiting the environmental review completed by DEC.¹⁸⁸ The trial court granted the injunction, but the appellate division reversed, explaining that, "while zoning ordinances are to be interpreted and administered in accord with SEQRA, the SEQRA process and requirements do not change the existing jurisdiction of agencies nor the jurisdiction between or among state and local agencies—that is, SEQRA neither preempts nor interferes with local zoning ordinances."¹⁸⁹ Thus, DEC's "SEQRA findings did not bind the Town to issue the requested special use permit or preclude it from employing the procedures—and considering the standards—in its own local zoning regulations, including the environmental and neighborhood impacts of the project."¹⁹⁰ The court held that this was true even though the Town Board had participated in

183. *Id.* at 826, 966 N.Y.S.2d at 442.

184. 6 N.Y.C.R.R. § 617.6(b)(3)(iii).

185. 101 A.D.3d 1505, 1506, 957 N.Y.S.2d 444, 446-47 (3d Dep't 2012).

186. *Id.* at 1505, 957 N.Y.S.2d at 445-46.

187. *Id.* at 1505, 957 N.Y.S.2d at 446.

188. *Id.* at 1505-06, 957 N.Y.S.2d at 446.

189. *Id.* at 1507, 957 N.Y.S.2d at 447 (citations omitted) (internal quotation marks omitted).

190. *Troy Sand & Gravel Co.*, 101 A.D.3d at 1507, 957 N.Y.S.2d at 447.

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DEC's coordinated SEQRA review as an involved agency.¹⁹¹

V. SEQRA IN THE FEDERAL COURTS: FEDERAL PREEMPTION OF
SEQRA?

Federal courts rarely opine on the proper interpretation of SEQRA itself, and that was true during the *Survey* period. However, in *Fortress Bible Church v. Feiner*, the Second Circuit considered a question of first impression among all the federal courts of appeals: whether a state environmental quality statute may constitute a zoning law under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").¹⁹²

RLUIPA bars states from enforcing a "land use regulation," defined as "a zoning or landmarking law . . . that limits or restricts a claimant's use or development of land," in a manner that unduly imposes a substantial burden on a person or institution's religious exercise.¹⁹³ The Second Circuit held that, although "no sense do we believe that ordinary environmental review considerations are subject to RLUIPA," SEQRA could be preempted by RLUIPA in situations in which the state law "serves as a vehicle to resolve zoning and land use issues."¹⁹⁴ The court accordingly affirmed a judgment and award of damages to the plaintiffs (a church and its pastor) on their claim that a burdensome SEQRA review required by a municipality for the construction of a worship facility violated RLUIPA.¹⁹⁵ The court provided an important limit on its holding by relying largely on the fact that the municipality has applied SEQRA on a discriminatory and bad faith basis.¹⁹⁶ Still, if similar claims continue to find success in the courts, municipalities may find that even if they can avoid challenges to their SEQRA review under Article 78, they are potentially liable as defendants on RLUIPA claims.

CONCLUSION

Case law from the *Survey* period demonstrates that SEQRA continues to present the courts with difficult legal questions related to standing, mootness, state and federal preemption, and the adequacy of agencies' determinations under SEQRA. These issues are destined to

191. *Id.* at 1505, 957 N.Y.S.2d at 446.

192. 694 F.3d 208, 216 (2d Cir. 2012).

193. 42 U.S.C. §§ 2000cc(a)(1), 2000cc-5(5) (2006).

194. *Fortress Bible Church*, 694 F.3d at 218.

195. *Id.* at 212, 225.

196. *Id.* at 219.

continue to evolve as the courts are presented by new SEQRA challenges.

This year promises to be another interesting year in the development of SEQRA regulations. As previously noted, SEQRA practitioners in all agencies and industries may anticipate DEC's proposal of revisions to its SEQRA regulations, as provided for in the Final Scope issued in 2012. Furthermore, 2014 may see the issuance of the highly-anticipated Revised Supplemental Generic Environmental Impact Statement for Horizontal Drilling and High-Volume Hydraulic Fracturing, a comprehensive study of the environmental and health impacts of hydrofracking in the Marcellus and Utica Shale regions of New York. A revised draft of the document was released for public comment in 2011, and DEC received more than 60,000 comments before the comment period closed on January 11, 2012. These and other changes in the law of SEQRA will be covered in future installments of the *Survey of New York Law*.