

## 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 2013–2014.<sup>1</sup> The year saw substantial regulatory developments. The New York State Department of Environmental Conservation’s (“DEC”) environmental review of a proposal to amend its SEQRA regulations remains pending, with the final scoping for that review complete and the next milestone in the review process expected to be completed in 2015. New York City issued new regulations which aim to expedite the environmental review of certain types of special permit approvals that are generally understood not to have significant adverse environmental impacts. Finally, the New York City Mayor’s Office of Environmental Coordination issued a revised edition of its technical manual regarding SEQRA-mandated environmental review for projects subject to approval by agencies of the City, providing new guidance to developers and agency officials.

The Court of Appeals decided one case involving SEQRA issues during the *Survey* period, reaffirming the longstanding principle that, to establish standing to sue under SEQRA, a petitioner must allege that the challenged activity will cause him or her an environmental injury, and that standing cannot rest on allegations of solely economic harm. Other courts, including the lower and intermediate courts of New York, issued SEQRA decisions discussing various legal issues relevant to the SEQRA practitioner, including standing and mootness requirements, timeliness, the interaction of SEQRA with other state and federal laws, and the procedural and substantive requirements that SEQRA imposes on agencies.

Part I of this Article provides a brief overview of SEQRA’s statutory and regulatory requirements. Part II describes various recent regulatory developments, including both proposed and final changes to state-wide SEQRA regulations and changes to New York City’s regulations implementing SEQRA. Part III reviews the Court of Appeal’s sole SEQRA decision issued during the *Survey* period, *Association for a Better Long Island, Inc. v. New York State Department of Environmental Conservation*. Part IV discusses the more important of the numerous SEQRA decisions during the *Survey* period from the appellate divisions and supreme courts.

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1. The *Survey* period covered in this Article is July 1, 2013, to June 30, 2014. A prior *Survey* addresses SEQRA developments in the first half of 2013. See generally Mark A. Chertok & Daniel Mach, *Environmental Law: Developments in the Law of SEQRA, 2012-13 Survey of New York Law*, 64 SYRACUSE L. REV. 717 (2014).

## I. SUMMARY OVERVIEW OF SEQRA

SEQRA requires governmental agencies to consider the potential environmental impacts of their actions prior to rendering certain defined discretionary decisions, called “actions,” under SEQRA.<sup>2</sup> “The primary purpose of SEQRA is ‘to inject environmental considerations directly into governmental decision making.’”<sup>3</sup> 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.<sup>4</sup> SEQRA charges DEC with promulgating general SEQRA regulations, but it also authorizes other agencies to adopt their own regulations and procedures, provided that the regulations and procedures are consistent with and “no less protective of environmental values” those issued by DEC.<sup>5</sup>

A primary component of SEQRA is the Environmental Impact Statement (“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.<sup>6</sup>

Actions are grouped into three categories in DEC’s SEQRA regulations: Type I, Type II, or Unlisted.<sup>7</sup> 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.<sup>8</sup> Type I actions, also specifically enumerated, “are

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2. 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 & McKinney 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).

3. *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. New York 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).

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

5. *Id.* § 617.14(b); *see also* N.Y. ENVTL. CONSERV. LAW § 8-0113(1), (3) (McKinney 2014).

6. 6 NYCRR 617.9(b)(1)-(2), (5).

7. *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).

8. 6 NYCRR 617.5(a) (Type II actions).

more likely to require the preparation of an EIS than Unlisted actions.”<sup>9</sup> Unlisted Actions are not enumerated, but rather are a catchall of those actions that are neither Type I nor Type II.<sup>10</sup> In practice, the vast majority of actions are Unlisted.

Before undertaking an action (except for a Type II action), an agency must determine whether the proposed action may have one or more significant adverse environmental impacts, called a “determination of significance.”<sup>11</sup> To reach its determination of significance, the agency must prepare an environmental assessment form (“EAF”).<sup>12</sup> For Type I Actions, preparation of a “[F]ull EAF” is required, whereas for Unlisted actions, project sponsors may opt to use a “[S]hort EAF” instead.<sup>13</sup> SEQRA regulations provide models of each form,<sup>14</sup> 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.”<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup> If the answer is affirmative, the lead agency may in certain

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

10. 6 NYCRR 617.2(ak).

11. *Id.* §§ 617.6(a)(1)(i), 617.7.

12. *Id.* § 617.6(a)(2)-(3).

13. *Id.* §§ 617.6(a)(2)-(3), 617.20 (providing that the project sponsor prepares the factual elements of an EAF (Part 1), whereas the agency completes Part 2, which addresses the significance of possible adverse environmental impacts, and Part 3, which constitutes the agency’s Determination of Significance).

14. *See id.* § 617.20 (appendices consisting of the model EAFs). DEC also maintains EAF workbooks to assist project sponsors and agencies in using the forms. *See Environmental Assessment Form (EAF) Workbook*, N.Y. STATE DEP’T OF ENVTL. CONSERV., <http://www.dec.ny.gov/permits/90125.html> (last visited Apr. 14, 2014). I deleted the word new because I think, as noted, the forms are no longer new.

15. 6 NYCRR 617.2(m).

16. *Id.* § 617.6(b)(2)(i), (3)(ii). A coordinated review is required where a Type I action is involved. *Id.* § 617.4(a)(2).

17. *Id.* § 617.7(a)(2), (d).

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 EIS.<sup>18</sup>

If an EIS is prepared, typically the first step is the scoping of the contents of the Draft EIS. Although scoping is not actually required under SEQRA or DEC's implementing regulations, it is recommended by DEC and commonly undertaken when an EIS is required.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> Although not required, the lead agency typically holds a legislative hearing with respect to the Draft EIS.<sup>22</sup> That hearing may be, and often is, combined with other hearings required for the proposed action.<sup>23</sup>

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."<sup>24</sup> This analysis includes a "no action alternative," which evaluates the changes that are likely to occur in the absence of the proposed action.<sup>25</sup>

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18. *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 NYCRR 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.

19. DIV. OF ENVTL. PERMITS, THE SEQRA HANDBOOK, N.Y. STATE DEP'T OF ENVTL. CONSERV., 103 (3d ed. 2010), available at [http://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/seqrhandbook.pdf](http://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf). Scoping, when it occurs, is governed by section 617.8. 6 NYCRR 617.8. SEQR is an alternate acronym for SEQRA.

20. 6 NYCRR 617.8(a).

21. *Id.* § 617.8(b), (d)-(e).

22. *Id.* § 617.9(a)(4).

23. *See id.* § 617.3(h).

24. *Id.* § 617.9(b)(5)(v).

25. 6 NYCRR 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, LLC v. City of N.Y.*, 77 A.D.3d 434, 436, 908 N.Y.S.2d 657, 660 (1st Dep't 2010).

In addition to “analyz[ing] the significant adverse impacts and evaluat[ing] all reasonable alternatives,”<sup>26</sup> 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 plan . . . .<sup>27</sup>

The next step is the preparation of a Final EIS, which addresses any project changes, new information and/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 . . . .”<sup>28</sup> 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.<sup>29</sup>

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

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26. 6 NYCRR 617.9(b)(1).

27. *Id.* § 617.9(b)(5)(iii)(a)-(f).

28. *Id.* § 617.11(a), (d)(1)-(2).

29. *Id.* § 617.11(d)(5).

(“NEPA”).<sup>30</sup>

For agency actions that are broader or more general than site- or project-specific decisions, SEQRA regulations provide that agencies may prepare a Generic EIS.<sup>31</sup> Preparation of a Generic EIS is appropriate if: (1) a number of separate actions in an area, if considered singly, may have minor impacts, but if considered together may have significant impacts; (2) the agency action consists of a sequence of actions over time; (3) separate actions under consideration may have generic or common impacts; or (4) the action consists of an entire program of wide application or restricting the range of future alternative policies or projects.<sup>32</sup> Generic EISs commonly relate to common or program-wide impacts, and set forth criteria for when supplemental EISs will be required for site-specific or subsequent actions that follow approval of the initial program.<sup>33</sup>

The City of New York has promulgated separate regulations implementing the City’s, and its agencies’, environmental review process under SEQRA, which is known as City Environmental Quality Review (“CEQR”).<sup>34</sup> As previously explained, SEQRA grants agencies and local governments the authority to supplement DEC’s general SEQRA regulations by promulgating their own.<sup>35</sup> Section 192(e) of the New York City Charter delegates that authority to the Planning Commission.<sup>36</sup> To assist City agencies, project sponsors, and the public in navigating and understanding the CEQR process, the New York City Mayor’s Office of Environmental Coordination has published the CEQR Technical Manual.<sup>37</sup> First published in 1993, the Manual, as now revised, is about 800 pages long and provides an extensive explanation both of CEQR legal procedures and of methods for evaluating various types of

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30. *See generally* 42 U.S.C. §§ 4321-4370(f) (2012); *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).

31. 6 NYCRR 617.10(a).

32. *Id.* § 617.10(a)(1)-(4).

33. *Id.* § 617.10(c) (requiring Generic EISs to set forth such criteria for subsequent SEQRA compliance).

34. CEQR regulations are contained in Chapter 5 of Title 62 of the Rules of the City of New York. *See* 62 R.C.N.Y. § 5 (2014).

35. 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. 6 NYCRR 617.4(a)(2), 617.5(b), 617.14(e).

36. N.Y.C. Charter ch. 8, § 192(e) (2014).

37. CITY ENVTL. QUALITY REVIEW TECHNICAL MANUAL, N.Y.C. MAYOR’S OFFICE OF ENVTL. COORDINATION, *available at* [http://www.nyc.gov/html/oec/downloads/pdf/2014\\_ceqr\\_tm/2014\\_ceqr\\_technical\\_manual.pdf](http://www.nyc.gov/html/oec/downloads/pdf/2014_ceqr_tm/2014_ceqr_technical_manual.pdf).

environmental impacts, such as transportation (traffic, transit and pedestrian), air pollutant emissions, noise, socioeconomic effects, and historic and cultural resources.<sup>38</sup>

## II. REGULATORY DEVELOPMENTS

### A. Proposed Amendments to SEQRA Regulations

During the *Survey* period, SEQRA practitioners continued to await the next development in DEC's ongoing proposal to revise its SEQRA regulations. On November 28, 2012, during a previous *Survey* period, DEC issued the Final Scope document for the environmental review of its proposed regulatory amendments,<sup>39</sup> but DEC has issued no further notices regarding that review. The content of DEC's proposed revisions was discussed in more detail in previous years' *Surveys*, and we will not repeat that analysis here.<sup>40</sup> However, the principal changes that DEC proposes are:

- Expanding the list of Type II Actions that are exempt from SEQRA review;<sup>41</sup>
- 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;<sup>42</sup>
- Requiring scoping (which, as noted, is an optional but fairly standard practice) for all EISs;<sup>43</sup>
- 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 review will be deemed complete;<sup>44</sup> and
- Clarify regulations relating to agencies' ability to "target" EISs on "relevant, significant, adverse impacts" rather than improbable

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38. *Id.*

39. 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), N.Y. STATE DEP'T OF ENVTL. CONSERV. (2012) [hereinafter FINAL SCOPE], available at [http://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/617finalscope.pdf](http://www.dec.ny.gov/docs/permits_ej_operations_pdf/617finalscope.pdf).

40. See Mark A. Chertok & Jonathan Kalmuss-Katz, *Environmental Law: Developments in the Law of SEQRA, 2011-12 Survey of New York Law*, 63 SYRACUSE L. REV. 713, 718-22 (2013); Chertok & Mach, *supra* note 1, at 723-24.

41. FINAL SCOPE, *supra* note 39, at 5-10.

42. *Id.* at 3-4.

43. *Id.* at 11.

44. *Id.* at 12-13.



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impacts.<sup>45</sup>

The next milestone will presumably be the preparation of a Generic EIS for the proposed amendments and, mostly likely, DEC's subsequent adoption of some or all of the proposed amendments or variants thereof. The date of that forthcoming milestone is not publically known, but it is generally expected to occur in 2015.

*B. New York City Designates New Type II Categories*

As previously explained, CEQR regulations govern environmental review by agencies of New York City. For many years, CEQR rules did not designate any Type II actions; instead, the City relied entirely on the general list of Type II actions contained in DEC's general SEQRA regulations.<sup>46</sup> During the *Survey* period, the New York City Planning Commission proposed rules that revised CEQR regulations by adding several categories of Type II actions.<sup>47</sup> The Planning Commission adopted the rules in final form on December 18, 2013, and the new rules took effect on January 26, 2014.<sup>48</sup>

The new rules define thirteen Type II Actions which, in the relevant agencies' experience and judgment, never require the preparation of an EIS. Those categories include certain types of actions and approvals by the City's Board of Standards and Appeals ("BSA") and by the City's Planning Commission.<sup>49</sup> The rule categorically excludes eight types of actions from CEQR/SEQRA review under all circumstances. Those actions include the issuance of special permits for "physical culture or health establishments," eating and drinking establishments, off-street parking facilities, parking garages, and parking spaces that are below certain size thresholds, as well as certain types of property acquisitions by the City, park mapping for small open space areas, and authorizations

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45. *Id.* at 10-11.

46. 62 R.C.N.Y. § 5-05.

47. N.Y.C. PLANNING COMM'N NOTICE OF PUBLIC HEARING (Sept. 13, 2013), at 2-3, *available at* [http://rules.cityofnewyork.us/sites/default/files/proposed\\_rules\\_pdf/city\\_environmental\\_quality\\_review\\_-\\_p\\_dcp\\_10\\_21\\_13\\_a.pdf](http://rules.cityofnewyork.us/sites/default/files/proposed_rules_pdf/city_environmental_quality_review_-_p_dcp_10_21_13_a.pdf). The proposed rules were reviewed in last year's *Survey*. See Chertok & Mach, *supra* note 1, at 725-27.

48. See *CEQR Type II List—14 DCP037Y*, N.Y.C. MAYOR'S OFFICE OF ENVTL. COORDINATION, <http://www.nyc.gov/html/oec/html/ceqr/14dcp037y.shtml> (last visited Feb. 2, 2015).

49. N.Y.C. PLANNING COMM'N NOTICE OF ADOPTION OF RULES (Oct. 21, 2013), at 1, *available at* [http://www.nyc.gov/html/oec/downloads/pdf/ceqr/Type%20II%20Rules\\_Notice\\_of\\_Adoption.pdf](http://www.nyc.gov/html/oec/downloads/pdf/ceqr/Type%20II%20Rules_Notice_of_Adoption.pdf).

for small increases in parking spaces for existing buildings.<sup>50</sup> Five other categories would qualify as Type II actions under the new rule, but only if the lead City agency determined that the action would have no potentially significant impacts related to hazardous materials or on archeological or natural resources.<sup>51</sup> 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 ten 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.<sup>52</sup> Developers and the affected City agencies should welcome these CEQR rules, which will expedite environmental review of various small projects and agency actions throughout the City.

*C. New York City Issues 2014 Revised CEQR Technical Manual*

As previously noted, the New York City Mayor's Office of Environmental Coordination ("OEC") publishes the CEQR Technical Manual to provide guidance regarding the CEQR environmental review process.<sup>53</sup> During the *Survey* period, OEC released a revised 2014 Edition of the CEQR Technical Manual, to be used as guidance for any environmental review subject to CEQR that is commenced on or after March 14, 2014.<sup>54</sup> OEC's revisions for the 2014 Edition are too numerous to relate in full here.<sup>55</sup> However, it should be noted that the new edition includes substantial revisions relating to the assessment of an action's consistency with the New York City Waterfront Revitalization Program, as well as New York City's long-term sustainability program and its goal of reducing greenhouse gas emissions and climate change impacts. The 2014 Edition also incorporates new regulatory standards relevant to CEQR review, including both the City's new designation of Type II

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50. *Id.* at 2-3.

51. *Id.* at 3-4.

52. *Id.* at 2-3.

53. CITY ENVTL. QUALITY REVIEW TECHNICAL MANUAL, *supra* note 37.

54. *See* 2014 CEQR TECHNICAL MANUAL, N.Y.C. MAYOR'S OFFICE OF ENVTL. COORDINATION, *available at* [http://www.nyc.gov/html/oec/html/ceqr/technical\\_manual\\_2014.shtml](http://www.nyc.gov/html/oec/html/ceqr/technical_manual_2014.shtml). A PDF of the entire 2014 edition is available at [http://www.nyc.gov/html/oec/downloads/pdf/2014\\_ceqr\\_tm/2014\\_ceqr\\_technical\\_manual.pdf](http://www.nyc.gov/html/oec/downloads/pdf/2014_ceqr_tm/2014_ceqr_technical_manual.pdf).

55. A complete summary of changes is available at [http://www.nyc.gov/html/oec/downloads/pdf/2014\\_ceqr\\_tm/2014\\_ceqr\\_tm\\_whats\\_changed.pdf](http://www.nyc.gov/html/oec/downloads/pdf/2014_ceqr_tm/2014_ceqr_tm_whats_changed.pdf).

Actions and new state and federal environmental regulations.

### III. SEQRA IN THE COURT OF APPEALS

The Court of Appeals issued no significant SEQRA rulings during the *Survey* period, although it did decide one case that involved the question of whether a SEQRA petitioner had standing to sue. In *Ass'n for a Better Long Island, Inc. v. New York State Department of Environmental Conservation*, the petitioners challenged amendments adopted by DEC to its regulations pertaining to the protection of endangered and threatened species.<sup>56</sup> DEC had issued a negative declaration with respect to the amendment, which established a formal process for the issuance of permits for the incidental taking of protected species.<sup>57</sup> The petitioners' challenge arose largely from the Town of Riverhead's ownership of a 3000-acre parcel of land slated for economic redevelopment that would likely impact some protected species.<sup>58</sup> Although the Court of Appeals reinstated three causes of action alleging that DEC had failed to comply with procedures required by the State Administrative Procedure Act for promulgating the new regulations,<sup>59</sup> it affirmed the lower courts' dismissal of the petitioners' fourth claim, which alleged that DEC issued its negative declaration without taking the required "hard look" at the amendment's environmental impacts under SEQRA.<sup>60</sup> Noting that the only injury that the petitioners alleged they would suffer as a result of the amendment was that redevelopment of the Town's parcel would be impeded by the new regulation, the Court recited its long-standing rule that "economic injury alone does not confer standing to sue under SEQRA" because such injury "is not within the zone of interests sought to be protected by the statute."<sup>61</sup> There is nothing novel about this principle, which was set forth by the Court of Appeals over two decades ago,<sup>62</sup> although the Court's application of the rule at the motion-to-dismiss

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56. 23 N.Y.3d 1, 5, 11 N.E.3d 188, 191, 988 N.Y.S.2d 115, 118 (2014).

57. *Id.* at 8-9, 11 N.E.3d at 194, 988 N.Y.S.2d at 121.

58. *Id.* at 5, 11 N.E.3d at 191, 988 N.Y.S.2d at 118.

59. *Id.* at 6, 11 N.E.3d at 191-92, 988 N.Y.S.2d at 118-19.

60. *Id.* at 8-9, 11 N.E.3d at 194, 988 N.Y.S.2d at 121.

61. *Ass'n for a Better Long Island, Inc.*, 23 N.Y.3d at 9, 11 N.E.3d at 194, 988 N.Y.S.2d at 121 (alterations in original omitted) (citations omitted).

62. *Soc'y of Plastics Indus. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 777, 573 N.E.2d 1034, 1043-44, 570 N.Y.S.2d 778, 787-88 (1991) (holding that although "plaintiff raises economic concerns of course does not foreclose its standing also to raise environmental injury," "economic injury does not confer standing to sue under SEQRA" because "[e]conomic injury is not by itself within SEQRA's zone of interests"); *see also 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) ("To qualify for standing to raise a SEQRA challenge, a party must demonstrate that it will suffer an injury that is environmental and not solely economic in nature.").

stage of the *Better Long Island* litigation serves as a reminder that parties must diligently allege the elements of standing in their pleadings to avoid potential dismissal of their challenge at an early stage of litigation. Moreover, as standing goes to subject matter jurisdiction,<sup>63</sup> it can be raised at any stage of the proceeding (including sua sponte by the court),<sup>64</sup> and thus a petitioner not only must be prepared to allege, but also bears the burden of proving its allegations to sustain standing.<sup>65</sup>

#### IV. SEQRA IN THE LOWER COURTS AND APPELLATE COURTS

##### A. *Thresholds and Procedural Requirements in SEQRA Litigation*

SEQRA litigation takes the form of a special proceeding under Article 78 of the New York Civil Practice Law and Rules.<sup>66</sup> 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 thresholds and procedural requirements.

##### 1. *Standing*

A SEQRA petitioner's obligation to establish standing to sue under the statute is one of the more frequently litigated issues in SEQRA caselaw, and a number of decisions during the *Survey* period expounded on these requirements. As the Court has explained, "[c]ourts surely do provide a forum for airing issues of vital public concern, but so do public hearings and publicly elected legislatures . . . . By contrast to those forums, a litigant must establish its standing in order to seek judicial review."<sup>67</sup>

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63. *Dental Soc'y of N.Y. v. Carey*, 61 N.Y.2d 330, 339, 462 N.E.2d 362, 366, 474 N.Y.S.2d 262, 266 (1984) ("Standing is a threshold jurisdictional issue in every action and proceeding and it should appear clearly from the pleadings.").

64. *Heritage Coal., Inc. v. City of Ithaca Planning & Dev. Bd.*, 228 A.D.2d 862, 865, 644 N.Y.S.2d 374, 377 (3d Dep't 1996) (emphasis omitted) (holding that a "petition should . . . have been dismissed on lack of standing grounds—an issue which can be raised by this Court sua sponte.").

65. *Sierra Club v. Vill. of Painted Post*, 115 A.D.3d 1310, 1311, 983 N.Y.S.2d 380, 382 (4th Dep't 2014) (alterations in original omitted) (internal citations omitted) (internal quotations marks omitted) ("[S]tanding requirements are not mere pleading requirements but instead are an indispensable part of the plaintiff's case, and therefore each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof.").

66. See N.Y. C.P.L.R. 7801 (McKinney 2014).

67. *Soc'y of Plastics Indus. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 769, 573 N.E.2d 1034, 1038, 570 N.Y.S.2d 778, 782 (1991).

It is well-established that, to have standing to sue, a SEQRA petitioner must demonstrate that the challenged action causes them injury that is (a) within the zone of interests sought to be protected by the statute and (b) different from any generalized harm caused by the action to the public at large.<sup>68</sup> SEQRA's "zone of interest" requires that the alleged injury be "environmental and not solely economic in nature."<sup>69</sup> Often, SEQRA litigation is brought by environmental conservation or historic preservation organizations and, as reaffirmed by the Second Department in one recent decision, such an organization is deemed to have "standing when 'one or more of its members would have standing to sue,' 'the interests it asserts are germane to its purposes,' and 'neither the asserted claim nor the appropriate relief requires the participation of the individual members.'"<sup>70</sup>

The appellate division issued several decisions during the *Survey* period addressing the first of SEQRA's requirements for standing—that the petitioner seek redress for an injury that is within the zone of interests sought to be protected by the statute. Under this "zone of interest" test, it has long been held, as noted above, that allegations of economic injury alone are insufficient to confer standing on a SEQRA petitioner.<sup>71</sup> In *County Oil Co., Inc. v. New York City Department of Environmental Protection*, the Second Department applied this principle to deny standing to an industry group challenging the adoption of stricter air emissions standards.<sup>72</sup> In *County Oil*, the industry group (which included certain individuals and companies engaged in industrial oil recycling) challenged New York City's amendments of its rules regarding emissions from use of certain fuel oils.<sup>73</sup> Although the petitioners did allege environmental harms consisting of the widespread improper disposal of used fuel oil that they asserted would result from the new rules, the only injury the petitioners asserted that would affect them specifically, as

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68. *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.*, 77 N.Y.2d at 773-74, 573 N.E.2d at 1041, 570 N.Y.S.2d at 785).

69. *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).

70. *Schlemme v. Planning Bd. Of Poughkeepsie*, 118 A.D.3d 893, 894, 988 N.Y.S.2d 640, 642 (2d Dep't 2014) (quoting *Soc'y of Plastics Planning Indus.*, 77 N.Y.2d at 775, 573 N.E.2d at 1042, 570 N.Y.S.2d at 786); see also *Save the Pine Bush, Inc.*, 13 N.Y.3d at 304, 918 N.E.2d at 921, 890 N.Y.S.2d at 409.

71. See, e.g., *Mobil Oil Corp.*, 76 N.Y.2d at 433, 559 N.E.2d at 643-44, 559 N.Y.S.2d at 949-50.

72. 111 A.D.3d 718, 719, 975 N.Y.S.2d 114, 115-16 (2d Dep't 2013).

73. *Id.* at 718, 975 N.Y.S.2d at 115.

opposed to the public at large,<sup>74</sup> was the “potential of economic harm” to fuel oil recycling businesses, an injury the court deemed “insufficient to confer standing” under SEQRA.<sup>75</sup> In *Town of Woodbury v. County of Orange*, the Second Department addressed the zone of interests issue again in passing, though it reached the opposite result.<sup>76</sup> In that case, the Town of Woodbury challenged the County of Orange’s plan to expand the capacity of a wastewater treatment facility located in the Town.<sup>77</sup> The Second Department summarily determined that the Town had “a demonstrated interest in the potential environmental impacts of the project,” and that the Town therefore had standing, but the court did not specify the grounds for standing.<sup>78</sup>

With respect to the second requirement for SEQRA standing (an alleged injury that is different from that to the general public), several decisions during the *Survey* period addressed one issue—the physical proximity of a petitioner’s own land to the site of the challenged proposal—that is commonly employed to establish such an injury.<sup>79</sup> In the context of challenges to rezoning decisions, courts have developed the now well-established principle that both “aggrievement” or “injury” and “an interest different from other members of the community” may be inferred or presumed if the petitioner resides or owns property that is proximate to the challenged action.<sup>80</sup> In *Schlemme v. Planning Board of Poughkeepsie*, the Second Department reaffirmed this basic principle by ruling that members of a historic preservation organization had standing, as properties owned by those members were “adjacent to the proposed project site . . . .”<sup>81</sup> (The court also held that the organization met the other requirements for establishing organizational standing.<sup>82</sup>) It should be noted, though, that although the *Schlemme* court held that the

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74. *Id.* at 718-19, 975 N.Y.S.2d at 115-16. In this way, the court also addressed the second SEQRA standing requirement—that the injury be different than generalized harm to the public at large. *Id.* at 719, 975 N.Y.S.2d at 115-16.

75. *Id.* at 719, 975 N.Y.S.2d at 116.

76. 114 A.D.3d 951, 981 N.Y.S.2d 126 (2d Dep’t 2014), *leave to appeal denied*, 24 N.Y.3d 903, 20 N.E.3d 657, 995 N.Y.S.2d 711 (2014).

77. *Id.* at 951-53, 981 N.Y.S.2d at 127-29.

78. *Id.* at 953, 981 N.Y.S.2d at 129 (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)).

79. *See Tuxedo Land Trust, Inc. v. Town Bd. Of Tuxedo*, 112 A.D.3d 726, 728, 977 N.Y.S.2d 272, 274 (2d Dep’t 2013).

80. *See 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) (citing *Mobil Oil Corp. v. Syracuse Indus. Dev. Agency*, 76 N.Y.2d 428, 433, 559 N.E.2d 641, 643, 559 N.Y.S.2d 947, 949 (1990)).

81. 118 A.D.3d 893, 894, 988 N.Y.S.2d 640, 642 (2d Dep’t 2014).

82. *Id.*

organizational members' proximity to the project site was sufficient to establish standing, the Court of Appeals has made clear that such proximity is not necessary to show standing in all cases—in other words, proximity is just one of several ways to establish an injury that is distinct from that of the public at large.<sup>83</sup>

In two other decisions, however, the appellate division qualified this general principle by rejecting petitioners' arguments that their proximity to the challenged projects established injury for purposes of standing. In the first, *O'Brien v. New York State Commission of Education*, the petitioner challenged a school district's plan to reorganize and upgrade the district's facilities.<sup>84</sup> Although the petitioner alleged that his property was proximate to one of the buildings scheduled for repurposing, the Third Department rejected the view that standing could be established by that proximity alone because the distance between the building and the petitioner's property was over 1,000 feet.<sup>85</sup> The Court held that "under our decisional law a distance of over 1,000 feet 'is not close enough to give rise to the presumption that the neighbor is or will be adversely affected by the proposed project.'"<sup>86</sup> One notable aspect of this decision—and an alarming one for would-be SEQRA petitioners (especially in the Third Department)—is that the court declared 1,000 feet to be insufficiently proximate without any explicit qualification based on the nature of the project, context, types of impacts or surrounding land uses.<sup>87</sup> By contrast, the decisions on which it relied generally discussed distance in the context of the nature of the project's likely impacts, intervening land uses, and other contexts rather than establishing a numerical, bright-line rule as to how far is too far to infer injury for standing purposes.<sup>88</sup>

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83. *Save the Pine Bush Inc., v. Common Council of Albany*, 13 N.Y.3d 297, 305, 918 N.E.2d 917, 921, 890 N.Y.S.2d 405, 409 (2009) (rejecting view that a "residence close to a challenged project is an indispensable element of standing in every environmental case.").

84. 112 A.D.3d 188, 190, 975 N.Y.S.2d 205, 206 (3d Dep't 2013).

85. *Id.* at 193-94, 975 N.Y.S.2d at 209.

86. *Id.* (quoting *Finger Lakes Zero Waste Coal., Inc. v. Martens*, 95 A.D.3d 1420, 1421-22, 944 N.Y.S.2d 336, 338 (3d Dep't 2012) and citing its collection of caselaw within this case) (citing *Clean Water Advocates of N.Y., Inc. v. N.Y. State Dep't of Envtl. Conserv.*, 103 A.D.3d 1006, 1007-08, 962 N.Y.S.2d 390, 391-92 (3d Dep't 2013)).

87. *Id.*

88. *See Clean Water Advocates of N.Y., Inc.*, 103 A.D.3d at 1007-08, 962 N.Y.S.2d at 392 (citing omission of contextual information in holding that 900 feet is insufficient); *Finger Lakes Zero Waste Coal., Inc.*, 95 A.D.3d at 1421-22, 944 N.Y.S.2d at 338 (holding only that "ordinarily, a distance of 4,000 feet from the proposed project is not close enough to give rise to the presumption that the neighbor is or will be adversely affected . . ."); *Burns Pharmacy of Rensselaer, Inc. v. Conley*, 146 A.D.2d 842, 844, 536 N.Y.S.2d 248, 249-50 (3d Dep't 1989) (holding that distance of "1,000 to 1,500 feet" was insufficient, noting that "[t]he

In *In re Tuxedo Land Trust, Inc. v. Town Board of Tuxedo*, the Second Department addressed what is the “relevant distance” in evaluating whether proximity gives rise to standing.<sup>89</sup> In *Tuxedo*, a homeowner and non-profit organizations challenged certain land use permits and development approvals for a planned community of 1,200 residential units and over 100,000 square feet of non-residential development.<sup>90</sup> 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 the parcel was large and the proposed project was not to be located on the portion of that tract that was closest to the petitioner.<sup>91</sup> Holding that “the 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.<sup>92</sup>

Potentially relevant to the court’s decision in *Tuxedo* is the fact that the agency action at issue was an amendment to a permit and site plan approval, not a rezoning action.<sup>93</sup> Unlike a site-plan approval, which might impact an adjacent landowner only to the extent that the physical development itself is proximately located, a rezoning decision can potentially alter land use of the entire parcel or parcels to be rezoned. The principle that standing may be inferred from proximity developed in the context of rezoning,<sup>94</sup> and thus may have less force outside of that

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subject site in this case is in the city where three blocks is a considerable distance.”); *Gallahan v. Planning Bd.*, 307 A.D.2d 684, 685, 762 N.Y.S.2d 850, 850-51 (3d Dep’t 2003) (citing intervening land uses in determining a distance of 1,000 feet was insufficient to infer injury establishing standing). The *Finger Lakes* court and *Clean Water Advocates* court also cited *Buerger v. Town of Grafton*, which held that a petitioner’s home which was 600 feet from the project site was insufficiently proximate to establish an inference of injury, but that decision does not make clear what the context is for its determination that 600 feet was insufficient. *Finger Lakes Zero Waste Coal, Inc.*, 95 A.D.3d at 1422, 944 N.Y.S.2d at 338 (citing *Buerger v. Town of Grafton*, 235 A.D.2d 984, 985, 652 N.Y.S.2d 880, 881-82 (3d Dep’t 1997)); *Clean Water Advocates of N.Y., Inc.*, 103 A.D.3d at 1008, 962 N.Y.S.2d at 392 (citation omitted).

89. 112 A.D.3d 726, 728, 977 N.Y.S.2d 272, 274 (2d Dep’t 2013).

90. See generally *In re Tuxedo Land Trust Inc. v. Town of Tuxedo (Tuxedo Land Trust I)*, No. 13675/10, 2012 N.Y. Slip Op. 50377(U) (Sup. Ct. Orange Cnty. 2012), *aff’d sub nom. In re Tuxedo Land Trust, Inc. v. Town Bd. of Tuxedo (Tuxedo Land Trust II)*, 112 A.D.3d 726, 977 N.Y.S.2d 272 (2d Dep’t. 2013). For a detailed review of the lower court’s decision, see Chertok and Kalmuss-Katz’s *Survey*. Chertok & Kalmuss-Katz, *supra* note 40, at 729-30.

91. *Tuxedo Land Trust I*, No. 13675/10, 2012 N.Y. Slip Op. 50377(U), at 5.

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

93. *Id.* at 727, 977 N.Y.S.2d at 274.

94. *Gernatt Asphalt Prods., Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 674, 664 N.E.2d 1226, 1230, 642 N.Y.S.2d 164, 168 (1996).



context. In another case from the *Survey* period, *Oyster Bay Associates L.P. v. Town of Oyster Bay*, the Supreme Court for Suffolk County made explicit this distinction between rezoning and other agency actions.<sup>95</sup> In that case, the SEQRA petitioner challenged the Town's approval of a contract to sell a parcel of municipal property.<sup>96</sup> The court held that the petitioner lacked standing even though his property was adjacent to the property to be sold.<sup>97</sup> It reasoned that

While it has been held that close proximity to the premises that is the subject of a challenged zoning determination grants a party standing without the need to show actual injury or special damage to establish the first prong of the standing test, this is not a matter in which [the petitioner] challenges a zoning decision.<sup>98</sup>

Likewise, in *Sierra Club v. Village of Painted Post*, the Fourth Department reasoned: “[w]here, as here, the proceeding does not involve a ‘zoning-related issue . . . , there is no presumption of standing to raise’ a challenge under [SEQRA] based solely on a party’s proximity.”<sup>99</sup> Although not all courts have limited the principle that proximity may demonstrate a distinct injury for standing purposes to zoning cases (for example, the decision at issue in *Tuxedo* was a site plan approval, not a zoning amendment), these cases show that SEQRA petitioners cannot rely consistently on that principle where they do not challenge a zoning decision.

Several other lower-court decisions during the *Survey* period addressed the circumstances in which proximity to a project may give rise to an inference of injury for purposes of standing. In *deZafra v. Town of Brookhaven Planning Board*, the Supreme Court for New York County noted the petitioners’ failure to even allege “that they reside in close proximity” or otherwise “establish an injury different from the public at large” in dismissing their SEQRA challenge.<sup>100</sup> In *Trustees of Freeholders of Commonality of East Hampton v. Zoning Board of Appeals of East Hampton*, in denying a motion to dismiss a SEQRA Article 78 petition, the Supreme Court for Suffolk County recited the principle that “an adverse effect or aggrievement may be inferred from proximity thereby enabling, a nearby property owner to maintain an

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95. See generally No. 13-16015, 2013 N.Y. Slip Op. 52292(U), at 10-11 (Sup. Ct. Suffolk Cnty. 2013).

96. *Id.* at 1-2.

97. *Id.* at 10-11.

98. *Id.* (internal citations omitted).

99. 115 A.D.3d 1310, 1311, 983 N.Y.S.2d 380, 382 (4th Dep’t 2014) (citations omitted).

100. No. 34733/2012, 2013 N.Y. Slip Op. 31709(U), at 5 (Sup. Ct. Suffolk Cnty. 2013).

action without proof of actual injury,” though it ultimately determined that the petitioners’ showing of actual injury “obviated” the need to prove proximity.<sup>101</sup>

Another decision from the *Survey* period, *Sierra Club v. Village of Painted Post*,<sup>102</sup> addressed whether a petitioner’s environmental injury is sufficiently distinct from that to the public at large to support standing in a different context. In *Village of Painted Post*, the Fourth Department reversed the lower court’s denial of a motion to dismiss for lack of standing with respect to a resident of the Village who challenged the approval of a “transloading” facility that would enable the export of excess water from the Village’s municipal water supply by train on existing railroad lines.<sup>103</sup> Although the organizational petitioner, Sierra Club, had alleged standing on the basis of several of its members’ individual standing, the lower court had dismissed the petition with respect to every member except for one, whose standing was challenged in the appeal. That individual, who resided near the existing railroad lines but not within earshot of the proposed transloading facility, cited noise from increased train traffic as the basis for standing. While acknowledging “that noise falls within the zone of interests sought to be protected by SEQRA,” the court held that the petitioner had failed to establish the second requirement for standing.<sup>104</sup> It reasoned that the petitioner “raised no complaints concerning noise from the transloading facility itself,” and because “the rail line at issue runs through the entire Village, along a main thoroughfare,” it concluded that “the noise of a train that moves throughout the entire Village, as opposed to the stationary noise of the transloading facility” did not constitute “noise impacts different in kind or degree from the public at large.”<sup>105</sup>

Finally, in one lower court decision from the *Survey* period, the Supreme Court for New York County addressed the extent to which a SEQRA petitioner’s challenge to the public financing of a project may be barred by the second requirement for standing. In *Prospect Park East Network v. New York State Homes & Community Renewal*, the court denied a preliminary injunction in a challenge to a planned residential tower in Brooklyn.<sup>106</sup> The petitioners alleged injuries arising from the “height and bulk of the building” as well as resultant “change[s] [to] the

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101. No. 38647/2012, 2013 N.Y. Slip Op. 32484(U), at 6 (Sup. Ct. Suffolk Cnty. 2013).

102. 115 A.D.3d 1310, 983 N.Y.S.2d 380 (4th Dep’t 2014).

103. *Id.* at 1312, 983 N.Y.S.2d at 383.

104. *Id.* (internal citations omitted).

105. *Id.* at 1312-13, 983 N.Y.S.2d at 383 (internal quotation marks omitted).

106. No. 101695/13, 2014 N.Y. Slip Op. 31577(U), at 10 (Sup. Ct. N.Y. Cnty. 2014).

demographic profile of the neighborhood via gentrification.”<sup>107</sup> The building was zoning-compliant and so could have been built in its same form without any public approvals; it was subject to SEQRA only because the developer applied for tax-exempt public bond financing on account of its commitment to reserve a certain number of units as affordable housing to rent at below-market prices for low-income tenants.<sup>108</sup> Noting that the provision of affordable housing units “might partially address one of petitioners’ concerns,” and that “the baseline condition is that [the developer] could build the Project as of right,” the court concluded that there was a “serious question as to whether petitioners have standing . . . .”<sup>109</sup> The court relied on the First Department’s decision in *Sutherland v. New York City Housing Development Corp.*, which held that, in a challenge to the public financing of a project, petitioners will lack standing where “unrefuted evidence shows that the building’s structure would have been the same without [the public financing], the only difference being that without such [financing], all of the apartment units would rent at market rates” instead of below-market, affordable housing rates.<sup>110</sup> One way of understanding this principle is that, where there is no “nexus” between public financing of a project and the project’s adverse physical or socioeconomic environmental impacts on a petitioner, the petitioner cannot claim a distinct, personalized interest in preventing the project’s public financing itself.

## *2. Ripeness, the Statute of Limitations, and Administrative Exhaustion*

Apart from standing, a SEQRA petitioner must satisfy several threshold requirements, including that the claim be ripe, that administrative remedies have been exhausted, and that the claim be timely brought within the statute of limitations period.

With respect to ripeness, a SEQRA challenge (like all Article 78 challenges) may only be brought against an agency action that is final,<sup>111</sup> meaning that it “‘impose[s] an obligation, den[ies] a right or fix[es] some legal relationship as a consummation of the administrative process.’”<sup>112</sup>

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107. *Id.* at 9-10.

108. *Id.* at 4.

109. *Id.* at 9, 16.

110. *Id.* at 10 (quoting *Sutherland v. N.Y.C. Hous. Dev. Corp.*, 61 A.D.3d 479, 480, 877 N.Y.S.2d 43, 44 (1st Dep’t 2009)).

111. N.Y. C.P.L.R. 7801(1) (McKinney 2012).

112. *Essex Cnty. v. Zagata*, 91 N.Y.2d 447, 453, 695 N.E.2d 232, 235, 672 N.Y.S.2d 281, 284 (1998) (quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103,

In *In re Schaefer v. Legislature of Rockland County*, the Second Department held that the county's adoption of a comprehensive plan was not a final agency action ripe for review, reasoning that because the plan "was merely a policy document setting forth recommendations for future action, not an actual plan for development of specific land, any environmental harm which might befall the petitioners was purely speculative, and no actual, concrete injury was inflicted" by it.<sup>113</sup> This decision is of interest because, in contrast to county comprehensive plans, municipal comprehensive plans (i.e., plans adopted by villages, towns, or cities) generally are final agency actions subject to challenge under SEQRA.<sup>114</sup> Indeed, DEC's SEQRA regulations designate the adoption of a municipal comprehensive plan as a "Type I" action,<sup>115</sup> implying that such events are subject to review. *Schaefer* therefore should be understood to hold only that a county plan which contains only policy recommendations, rather than a plan effectuating changes to zoning and land use ordinances or other actions directly impacting legal rights, does not constitute a final agency action subject to challenge under SEQRA.

In *In re Patel v. Board of Trustees of Muttontown*, the Second Department reached a similar conclusion with respect to a challenge to a SEQRA findings statement relating to a special use permit and site plan application.<sup>116</sup> A findings statement, under SEQRA, is a document issued by the agency reflecting the agency's conclusions based on an EIS, after that document is prepared.<sup>117</sup> In *Patel*, the Village board had issued a findings statement, but not yet issued a decision on the pending application for a special use permit and site plan approval, when the petitioner brought suit.<sup>118</sup> Noting that an agency action is not final until the agency reaches a "definitive position on the issue that inflicts an actual, concrete injury," the court held that the challenged findings statement "did not inflict injury in the absence of an actual determination

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113 (1948).

113. 112 A.D.3d 642, 643, 976 N.Y.S.2d 178, 179-81 (2d Dep't 2013) (alterations omitted) (internal citations omitted) (internal quotation marks omitted).

114. See, e.g., *Troy Sand & Gravel Co., Inc. v. Town of Nassau*, 82 A.D.3d 1377, 1378, 918 N.Y.S.2d 667, 669 (3d Dep't 2011) (granting petition to annul a town's adoption of a comprehensive land use plan based on SEQRA violation).

115. 6 NYCRR 617.4(b)(1).

116. 115 A.D.3d 862, 982 N.Y.S.2d 142 (2d Dep't 2014). This decision is consistent with the Court of Appeals' holding in *Eadie v. Town Board of North Greenbush*, that the statute of limitations began to run when a Town board enacted a rezoning amendment, not when the underlying SEQRA findings statement was issued several weeks earlier. 7 N.Y.3d 306, 316-17, 854 N.E.2d 464, 468-69, 821 N.Y.S.2d 142, 146-47 (2006).

117. See 6 NYCRR 617.11.

118. *Patel*, 115 A.D.3d at 863-64, 982 N.Y.S.2d at 144.

of the subject applications for a special use permit and site-plan approval,” and so dismissed the petition as unripe.<sup>119</sup> Like *Schaefer*, however, the holding of *Patel* should be understood to be narrow, reflecting only that, under the facts of that case, the challenged SEQRA document did not impose any injury or obligation on the petitioners. In other cases, courts have deemed the issuance of an agency’s SEQRA determinations to constitute final agency action. For example, in *Gordon v. Rush*, the Court of Appeals held that a challenge to the issuance of a positive declaration was a final agency action ripe for review because it imposed an obligation to prepare an EIS on a private permit applicant.<sup>120</sup>

A related procedural issue in SEQRA litigation concerns the timeliness of a SEQRA challenge under the applicable statute of limitations. Under the general statute of limitations provided for petitioners pursuant to Article 78 of the New York Civil Practice Law and Rules, a SEQRA challenge must be made “four months after the determination to be reviewed becomes final and binding upon the petitioner.”<sup>121</sup> The statute’s four-month prescriptive period begins to run when the agency has “committed itself to ‘a definite course of future decisions.’”<sup>122</sup>

In *Becker-Manning v. Common Council of Utica*, the Fourth Department affirmed the lower court’s dismissal of a SEQRA petition on timeliness grounds because the petitioners brought suit more than four months after the challenged zoning amendment, rejecting petitioners’ argument that, because the amendment was adopted without the required SEQRA review, the statute of limitations would not begin to run until such review occurred.<sup>123</sup> This reasoning demonstrates that, because SEQRA claims usually arise in the context of an Article 78 challenge to an agency’s final decision on a proposal, it is the challenged decision, rather than SEQRA processes that occur before that decision that generally triggers the applicable statute of limitations.<sup>124</sup>

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119. *Id.* at 864, 982 N.Y.S.2d at 144 (citations omitted) (internal quotation marks omitted).

120. 100 N.Y.2d 236, 243, 792 N.E.2d 168, 172-73, 762 N.Y.S.2d 18, 22-23 (2003).

121. N.Y. C.P.L.R. 217(1).

122. *Young v. Bd. of Trs. of Blasdell*, 89 N.Y.2d 846, 848-49, 675 N.E.2d 464, 466, 652 N.Y.S.2d 729, 731 (1996) (quoting 6 NYCRR 617.2(b)(2)).

123. 114 A.D.3d 1143, 980 N.Y.S.2d 651 (4th Dep’t 2014).

124. A notable exception to this principle arises when, as may occur in the context of a coordinated review among several agencies, the challenged agency’s last action is its issuance of a SEQRA document, and the final decision rests with another agency. Thus, in *Stop-The-Barge ex rel. Gilrain v. Cahill* the Court of Appeals held that the statute began to run upon one agency’s issuance of a conditioned negative declaration, rather than upon the subsequent permit decision by another agency. 1 N.Y.3d 218, 221, 803 N.E.2d 361, 362, 771 N.Y.S.2d

Another threshold requirement that must be met for a SEQRA challenger to bring suit under Article 78 results from the doctrine of administrative exhaustion. Under that doctrine, “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.”<sup>125</sup> However, no case during the *Survey* period involved a significant discussion or ruling relating to the issue of exhaustion.

### 3. Mootness

Mootness “is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy.”<sup>126</sup> 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, as a practical matter, to redress petitioner’s alleged injuries.<sup>127</sup> A typical situation giving rise to mootness is where a petitioner’s alleged injuries arise from the construction impacts of a project and those impacts have already occurred and ceased by the time the court reaches its decision. Another common mootness scenario arises where a project is so substantially completed that redress of the injuries that it causes can only be accomplished through draconian means—such as demolition of the project—which the court deems to be unfairly severe. Mootness may be raised at any time, by a party or by the court *sua sponte*, because the facts that give rise to mootness constitute the absence of an actual controversy, which is an “essential wherewithal of a court’s jurisdiction.”<sup>128</sup>

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40, 41 (2003); *but see* *Walton v. N.Y. State Dep’t of Corr. Servs.*, 8 N.Y.3d 186, 196, 863 N.E.2d 1001, 1006-07, 831 N.Y.S.2d 749, 754-55 (2007) (holding that statute of limitations did not begin upon issuance of a conditioned negative declaration and distinguishing *Stop-the-Barge* on the ground that the SEQRA document was subject to revision by the agency until a decision was issued in the underlying Public Service Commission proceeding). For a general discussion of ripeness and when the statute of limitations begins to run under SEQRA, see Gerrard, Ruzow, and Weinberg’s *Environmental Impact Review*. MICHAEL B. GERRARD ET AL., ENVIRONMENTAL IMPACT REVIEW IN NEW YORK § 7.02[1], at 7-6-7-15 (2d ed. 1990 Supp. 2014).

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

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

127. *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.”).

128. *Cerniglia v. Ambach*, 145 A.D.2d 893, 894, 536 N.Y.S.2d 227, 229 (3d Dep’t 1988).

A critical aspect of New York's mootness jurisprudence is the principle that a party seeking to halt construction of a development project through a court challenge must move for injunctive relief at each stage of the proceeding to preserve a claim from mootness, based on the rationale that the petitioner must make such efforts if it "wishes to cast the risk of going forward with the work upon" the developer.<sup>129</sup> Exceptions according to which a court may hear an otherwise moot case are generally limited to situations in which at least one of three factors is present: "(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., a substantial and novel issue."<sup>130</sup>

In *deZafra v. Town of Brookhaven Planning Board*, the Supreme Court for Suffolk County dismissed a SEQRA challenge based primarily on its determination that the case was moot.<sup>131</sup> The petitioners in *deZafra* sought to halt construction of an approximately seven-acre development that would include an expansion of a post office, a cultural center, and a small amount of retail space.<sup>132</sup> The Article 78 proceeding was a continuation of a series of litigations that had begun following a 2000 approval of the project.<sup>133</sup> In dismissing the case as moot, the court found critical that in those litigations the petitioners had failed "to seek an injunction to prevent the completion of the project over a period of a decade," with the result that, at the time of the decision, "[t]he construction project herein [was] complete and a certificate of occupancy [had] been issued."<sup>134</sup> The court also reasoned that no exception to mootness applied both because the issues raised were neither novel nor evading review, and because the project involved development of real estate, and "[r]eal property is unique and, therefore, there will be no repetition with regard to the subject property."<sup>135</sup>

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129. *Weeks Woodlands Ass'n, Inc. v. Dormitory Auth. of N.Y.*, 95 A.D.3d 747, 752, 945 N.Y.S.2d 263, 268 (1st Dep't 2012), *aff'd*, 20 N.Y.3d 919, 980 N.E.2d 532, 956 N.Y.S.2d 483 (2012).

130. *Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714-15, 409 N.E.2d 876, 878, 431 N.Y.S.2d 400, 402 (1980).

131. No. 34733/2012, 2013 N.Y. Slip Op. 31709(U), at 4 (Sup. Ct. Suffolk Cnty. 2013).

132. *Id.* at 2.

133. *Id.*

134. *Id.* at 4.

135. *Id.*

#### 4. Attorney's Fees

Some environmental laws contain fee-shifting provisions that allow litigants who prevail in enforcing the statutes to recover attorney's fees,<sup>136</sup> but SEQRA does not. In one decision from the *Survey* period, however, a group of SEQRA petitioners successfully argued that they were entitled to fees under the New York State Equal Access to Justice Act ("EAJA"), which provides that "a court shall award to a prevailing party, other than the state, fees and other expenses incurred by such party in any civil action brought against the state, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust."<sup>137</sup> In *Develop Don't Destroy (Brooklyn), Inc. v. Empire State Development Corp.*, the Supreme Court for New York County relied on that provision to require the Empire State Development Corporation ("ESDC"), a public benefit corporation, to pay attorney's fees to the petitioners after the court granted their request that the agency be required to prepare a Supplemental EIS ("SEIS") in relation to the construction of the Atlantic Yards Arena Development Project in Brooklyn.<sup>138</sup>

As a preliminary matter, the *Develop Don't Destroy* court ruled that the ESDC was an agency of the State subject to EAJA because, as the lead agency for purposes of SEQRA review of the Atlantic Yards project, "ESDC was charged with the discretionary decision-making power of assessing whether preparation of an SEIS was required."<sup>139</sup> For that reason, the court ruled that although ESDC is not a State agency when it acts under its general mandate, which consists of "financing and promoting economic development" in New York, it is subject to the EAJA "where it acts in its separate capacity as a governmental decision-maker" by reviewing a project under SEQRA.<sup>140</sup> "[A] party has 'prevailed' within the meaning of the . . . EAJA if it has succeeded in acquiring a substantial part of the relief sought in the lawsuit,"<sup>141</sup> and the court held that the petitioners in *Develop Don't Destroy* did so by obtaining a ruling that an SEIS was required for a future phase of the Atlantic Yards project.<sup>142</sup> The court relied largely on its prior decision in

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136. See, e.g., 33 U.S.C. § 1365(d) (2014) (the fee-shifting statute under the Clean Water Act).

137. N.Y. C.P.L.R. 8601(a) (McKinney 2014).

138. No. 114631/2009, 2013 N.Y. Slip Op. 23319, at 29-31 (Sup. Ct. N.Y. Cnty. 2013).

139. *Id.* at 11.

140. *Id.* at 12.

141. N.Y. State Clinical Lab. Ass'n v. Kaladjian, 85 N.Y.2d 346, 355, 649 N.E.2d 811, 815, 625 N.Y.S.2d 463, 467 (1995).

142. *Develop Don't Destroy*, No. 114631/2009, 2013 N.Y. Slip Op. 23319, at 29-30.



which it characterized the ESDC's SEQRA review process as inadequate in several significant respects.<sup>143</sup> Though the decision was fact-specific, the court's award of attorney's fees in *Develop Don't Destroy* is likely to spur future SEQRA petitioners to seek similar awards against state agencies or, using the court's logic, against state-created authorities or public benefit corporations.

*B. Procedural Requirements Imposed by SEQRA on State Agencies*

As explained in Part I, above, much of SEQRA's mandate is essentially procedural: agencies must comply with its requirements to identify the type of action at issue, prepare an EAF if necessary, issue a determination of significance, and, if the determination is positive, require preparation of an EIS. Several cases during the *Survey* period concerned agencies' alleged failures to comply with one or more of these procedural mandates.

As previously explained, an initial stage of SEQRA review is the agency's determination of whether the proposed action is a "Type I," "Type II," or "Unlisted" action. One much-litigated "Type II" category (for which no SEQRA review is required) applies to "acts of a ministerial nature involving no exercise of discretion."<sup>144</sup> In *Westwater v. New York City Board of Standards & Appeals*, the court interpreted the scope of that Type II category.<sup>145</sup> It held that an amendment to a variance and site plan for the construction of a hotel and residential building in Manhattan was a ministerial action because the amendment would not alter the height or setback authorized by the variance and, under applicable zoning law, the Board of Standards and Appeals therefore permissibly granted the amendment without conducting a new, discretionary variance analysis.<sup>146</sup> By contrast, in *Board of Managers of the Plaza Condominium v. New York City Department of Transportation*, the same court considered the scope of a Type I category<sup>147</sup> which applies to actions "occurring wholly or partially within, or substantially contiguous to, any historic" site.<sup>148</sup> Although the challenged program—a bicycle sharing program to be operated through large parts of Manhattan and Brooklyn—would include individual bicycle stations that might be "substantially

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143. *Id.* at 29 (citation omitted).

144. N.Y. COMP. CODE R. & REGS. tit. 6, § 617.5(c)(19) (2014).

145. No. 100059/13, 2013 N.Y. Slip Op. 32515(U), at 13 (Sup. Ct. N.Y. Cnty. 2013).

146. *Id.* at 15-16.

147. No. 101392/13, 2014 N.Y. Slip Op. 50718(U), at 11-12 (Sup. Ct. N.Y. Cnty. 2014).

148. 6 NYCRR 617.4(b)(9).

contiguous” to historic sites, the court found that the “[p]rogram *as a whole*” is not “substantially contiguous” to any specific historic place “and thus was properly classified as an Unlisted action.”<sup>149</sup>

Even when an action is properly classified as a Type I action (which is more likely to require an EIS than an Unlisted action), SEQRA procedures do not require an EIS if the agency permissibly determines that the action will not have significant adverse environmental impacts.<sup>150</sup> The Third Department reaffirmed this rule in *Gabrielli v. Town of New Paltz*, a challenge to the Town’s enactment of a local law pertaining to wetlands protection, ruling that “a [T]ype I action does not, ‘per se, necessitate the filing of an [EIS].’”<sup>151</sup>

As previously explained, for Type I and Unlisted actions, agencies must prepare an EAF prior to reaching their determination of significance and final decision. It is axiomatic that, although agencies receive judicial deference to their substantive decisions, SEQRA requires “strict compliance with [its] prescribed procedures[.]”<sup>152</sup> and this requirement applies with full force to the requirement to prepare an EAF, as demonstrated in *24 Franklin Avenue R.E. Corp. v. Heaship*.<sup>153</sup> There, in a challenge to a zoning code amendment for which a Town had issued a negative declaration, the court determined that

[t]he Town Board voted to approve the zoning amendment on September 20, 2007, but the EAF is dated October 15, 2007. Hence, it is clear that the EAF was not reviewed prior to the approval of the amendment. Accordingly, respondent’s failure to comply with SEQRA rendered its approval of Local Law # 4 in violation of lawful procedure.<sup>154</sup>

This case serves as a reminder that agencies which fail to comply with SEQRA’s fundamental procedural requirements will receive little sympathy from the courts, regardless of the ultimate environmental significance of the challenged action.

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149. *Bd. of Mgrs. of the Plaza*, No. 101392/13, 2014 N.Y. Slip Op. 50718(U), at 6.

150. 6 NYCRR § 617.7(a)(2).

151. 116 A.D.3d 1315, 1316, 984 N.Y.S.2d 468, 473 (3d Dep’t 2014) (alteration in original omitted) (quoting *Shop-Rite Supermarkets, Inc. v. Planning Bd. of Wawarsing*, 82 A.D.3d 1384, 1386, 918 N.Y.S.2d 647, 650 (3d Dep’t 2011)).

152. *Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 429, 494 N.E.2d 429, 444, 503 N.Y.S.2d 298, 313 (1986).

153. No. 24531/2007, 2014 N.Y. Slip Op. 50456(U) (Sup. Ct. Westchester Cnty. 2014).

154. *Id.* at 22-23 (citation omitted).

C. “Hard Look” Review and the Adequacy of Agency Determinations of Environmental Significance and Environmental Impact Statements

Though, as noted, courts require strict compliance with SEQRA’s procedural mandates, agencies’ decisions receive far more judicial deference where petitioners challenge not an agency’s compliance with applicable procedures, but its ultimate conclusions relating to the environmental impacts of a proposal. With respect to those substantive conclusions, courts have long held that “[j]udicial review . . . is limited to ‘whether the agency identified the relevant areas of environmental concern, took a ‘hard look’ at them, and made a ‘reasoned elaboration’ of the basis for its determination.’”<sup>155</sup> Under Article 78’s deferential standard of review for agencies’ discretionary judgments and evidentiary findings, a negative declaration or EIS issued in compliance with applicable law and procedures “will only be annulled if it is arbitrary, capricious or unsupported by the evidence.”<sup>156</sup> Given this deferential standard of review, successful challenges to EISs are rare.<sup>157</sup> Successful challenges to determinations of significance are more common, but, as several unsuccessful challenges from the *Survey* period show, petitioners in such cases still carry a difficult burden of proof.

1. Adequacy of Determinations of Environmental Significance

Because the issuance of a negative declaration concludes an agency’s obligations under SEQRA, SEQRA challenges to projects, for which agencies conclude no EIS is necessary, often seek to show that the agency’s issuance of a negative declaration was unreasonable because the proposed action in fact may have significant adverse environmental impacts.<sup>158</sup> In several decisions during the *Survey* period, petitioners asserted such a challenge to a negative declaration, though without success.

For example, in *Schaller*, a challenge to an approval of a site plan and zoning variance for the construction of a hotel, the court summarily rejected the petitioners’ argument that the agencies’ conditioned negative

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155. *In re Riverkeeper, Inc. v. Planning Bd. of Se.*, 9 N.Y.3d 219, 231-32, 881 N.E.2d 172, 177, 851 N.Y.S.2d 76, 81 (2007) (quoting *Jackson*, 67 N.Y.2d at 417, 494 N.E.2d at 436, 503 N.Y.S.2d at 305).

156. *Schaller v. Town of New Paltz Zoning Bd. of Appeals*, 108 A.D.3d 821, 823, 968 N.Y.S.2d 702, 704 (3d Dep’t 2013) (citation omitted).

157. See GERRARD, *supra* note 124, § 7.04[4] at 7-79.

158. Although challenges to positive declarations are possible in certain limited circumstances, they do not occur nearly as frequently as challenges to negative declarations. See *id.* § 3.05[2][e], at 3-116.

declaration did not adequately assess the project's impacts.<sup>159</sup> The court recited the extent of the agencies' review, which included review of a full EAF and assessment of traffic impacts, visual effects, and various other environmental issues, as well as adoption of certain mitigation measures, and noted the lead agency's "detailed reasoning and elaboration" for its negative declaration.<sup>160</sup> *Schaller* thus demonstrates the strongest defense agencies have against SEQRA challenges to a negative declaration: a well-developed record that shows consultation with relevant experts, evaluation of relevant potential impacts, and a detailed statement of the agency's rationale for its determination of significance.

Likewise, in *Gabrielli*, a challenge to the Town's enactment of a local law pertaining to wetlands protection, the Third Department reversed the lower court's ruling in favor of the petitioners after determining that the agency took the required "hard look" at the new law's potential environmental impacts before issuing a negative declaration.<sup>161</sup> As in *Schaller*, the court emphasized the presence of record evidence showing that the Town consulted with relevant experts in its environmental conservation board and department of agriculture, reviewed the EAF, and issued a "detailed description of the action" and the basis for the negative declaration.<sup>162</sup> Although the petitioners argued that the Town had failed to identify the wetland areas to be regulated under the new law with sufficient specificity, the court deemed the Town's use of available mapping tools sufficient, given the availability for on-site property inspections to provide property owners with more detailed evaluations of the law's coverage.<sup>163</sup>

In *Prospect Park*, the court denied a preliminary injunction in a challenge to a planned residential tower in Brooklyn in part based on its conclusion that the state agency's negative declaration reflected an adequate evaluation of the building's impacts.<sup>164</sup> In doing so, the court relied on the First Department's decision in *Committee to Preserve Brighton Beach & Manhattan Beach v. Council of New York*, which held that, in evaluating the environmental impacts of a project approval, an agency may measure the project's expected impacts against the future

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159. *Schaller*, 108 A.D.3d at 823-24, 968 N.Y.S.2d at 704-05.

160. *Id.* at 823, 968 N.Y.S.2d at 704.

161. *Gabrielli v. Town of New Paltz*, 116 A.D.3d 1315, 1316, 984 N.Y.S.2d 468, 473 (3d Dep't 2014) (quoting *In re Shop-Rite Supermarkets, Inc. v. Planning Bd. of Wawarsing*, 82 A.D.3d 1384, 1386, 918 N.Y.S.2d 647, 650 (3d Dep't 2011)).

162. *Id.* at 1317, 918 N.Y.S.2d at 474.

163. *Id.* at 1317-18, 918 N.Y.S.2d at 474-75.

164. *Prospect Park E. Network v. N.Y. State Homes & Cmty. Renewal*, No. 101695/13, 2014 N.Y. Slip Op. 31577(U), at 10 (Sup. Ct. N.Y. Cnty. 2014).

development of the site that would reasonably be expected to occur on an as-of-right basis (i.e., not requiring any agency approvals) if the project were not approved.<sup>165</sup> In *Prospect Park*, the court applied this “as of right” analysis in the context of an agency’s approval of financing for a project that, if privately financed, itself could be built as-of-right.<sup>166</sup> It reasoned that because “the baseline condition is that the [developer] could build the Project as of right . . . the impact of [the financing agency’s] involvement in the project is slight.”<sup>167</sup> Though the precise circumstances of this case may be unusual, the court’s holding that the baseline for an agency’s evaluation is the development that would otherwise occur as-of-right at the project site represents an important element of the “hard look” analysis which SEQRA requires.<sup>168</sup>

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

## 2. Adequacy of Agencies’ EISs

SEQRA petitioners have been similarly unsuccessful in challenging the adequacy of EISs during the *Survey* period. For example, in *Glick v. Harvey*, a challenge to New York City’s approval of New York University’s (“NYU”) proposal to expand its campus facilities in the Greenwich Village neighborhood of Manhattan, the court rejected the petitioners’ argument that the Final EIS should have considered, as an alternative to the project, building the new facilities in a different part of New York City.<sup>169</sup> Noting that locating the campus expansion near the university’s existing facilities would facilitate the goal of allowing cross-discipline interaction among faculty and students, the court reasoned that

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165. *Id.* at 15 (citing *Manhattan Beach v. Council of N.Y.*, 214 A.D.2d 335, 337, 625 N.Y.S.2d 134, 136 (1st Dep’t 1995)).

166. *Id.*

167. *Id.*

168. The right to develop “as of right” is atypical. In New York City, “as of right” development includes only projects that are zoning compliant and, as a result, require only the issuance of ministerial building permits to construct; such projects are exempt from SEQRA under a Type II category that applies to non-discretionary agency actions. *See, e.g.*, *Citizens for the Pres. of Windsor Terrace v. Smith*, 122 A.D.2d 827, 828, 505 N.Y.S.2d 896, 898 (2d Dep’t 1986); 6 NYCRR 617.5(c)(19).

169. No. 103844/12, 2014 N.Y. Slip Op. 30008(U), at 70 (Sup. Ct. N.Y. Cnty. 2014).

it was “not prepared to rule that the purpose [of facilitating cross-discipline interaction] is invalid,” and therefore held that “[t]he City’s failure to require NYU to consider the alternative of building [in another neighborhood] was . . . not arbitrary and capricious.”<sup>170</sup> This ruling (which was upheld on appeal by the First Department following the *Survey* period)<sup>171</sup> reflects the general SEQRA principle that “[n]ot every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before a [Final EIS] will satisfy the substantive requirements of SEQRA.”<sup>172</sup> The *Glick* court also rejected the petitioners’ argument that “the City failed to take an ‘independent hard look’” merely because the Final EIS was prepared by NYU, noting that “there is no indication that NYU failed to identify the nature or extent of any resources that would potentially be impacted by the Project.”<sup>173</sup>

Likewise, in *WTC Neighborhood Alliance ex rel. Perillo v. Kelly*, the court upheld a generic EIS in relation to the New York City Police Department’s (“NYPD”) security plan for the World Trade Center site in downtown Manhattan against a challenge based on an alleged failure to adequately discuss alternatives.<sup>174</sup> Though the EIS discussed three alternatives, the petitioner argued that it should have considered, in those alternatives, a particular terrorist-attack scenario.<sup>175</sup> The court explained that “while the NYPD has to consider a reasonable number of alternatives, these alternatives do not have to be the same as those proposed by petitioner.”<sup>176</sup>

These cases demonstrate the difficulty SEQRA petitioners commonly face when relying on the argument that an agency’s SEQRA review, though procedurally sound, should have been done differently as a substantive matter.

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170. *Id.* at 51.

171. *Glick v. Harvey*, 121 A.D.3d 498, 500, 994 N.Y.S.2d 118, 120 (1st Dep’t 2014) (citing *Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 417, 494 N.E.2d 429, 436, 503 N.Y.S.2d 298, 305 (1986)).

172. *Jackson*, 67 N.Y.2d at 417, 494 N.E.2d at 436, 503 N.Y.S.2d at 305 (quoting *Aldrich v. Pattison*, 107 A.D.2d 258, 266, 486 N.Y.S.2d 23, 29 (2d Dep’t 1985)).

173. *Glick*, No. 103844/12, 2014 N.Y. Slip Op. 30008(U), at 51-52 (internal quotation marks omitted).

174. No. 101498/2013, 2014 N.Y. Slip Op. 50156(U), at 6-7 (Sup. Ct. N.Y. Cnty. 2014).

175. *Id.* at 7.

176. *Id.* (citations omitted).

*D. 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 . . . [c]onsidering only a part or segment of an action is contrary to the intent of SEQRA.”<sup>177</sup> Unlawful segmentation occurs when either (1) an agency divides a larger project into smaller components, thereby avoiding review of the entire project’s cumulative impact, or (2) an agency excludes subsequent phases or stages from a proposed action in order to avoid or limit the scope of review.<sup>178</sup> Segmentation is not strictly prohibited by SEQRA, although it is disfavored; DEC’s SEQRA regulations provide, and the courts held in the leading case of *Concerned Citizens for the Environment v. Zagata* and its progeny, that an agency may permissibly segment review if “the agency clearly states its reasons therefor and demonstrates that such review is no less protective of the environment.”<sup>179</sup>

Several cases from the *Survey* period examined segmentation issues. In *GM Components Holdings, LLC v. Town of Lockport Industrial Development Agency*, the Fourth Department considered under what circumstances the review of a property acquisition, but not its subsequent development, constitutes segmented review.<sup>180</sup> In *GM Components*, the petitioners challenged the decision of the Lockport Industrial Development Agency (“LIDA”) to condemn ninety-one acres of vacant land for the purpose of expanding LIDA’s industrial park.<sup>181</sup> The petitioners’ segmentation claim was that LIDA considered only the impacts of acquiring the property and not the future development of it.<sup>182</sup> The court rejected the argument, stating that “[a]lthough LIDA considered only the impact of the acquisition and not the impact of

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177. 6 NYCRR 617.3(g)(1).

178. 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).

179. 243 A.D.2d 20, 22, 672 N.Y.S.2d 956, 958 (3d Dep’t 1998); see 6 NYCRR 617.3(g)(1) (“If a lead agency believes that circumstances warrant a segmented review, it must clearly state in its determination of significance, and any subsequent EIS, the supporting reasons and must demonstrate that such review is clearly no less protective of the environment.”).

180. 112 A.D.3d 1351, 1352, 977 N.Y.S.2d 836, 838 (4th Dep’t 2013).

181. *Id.* at 1351, 977 N.Y.S.2d at 837.

182. *Id.* at 1352, 977 N.Y.S.2d at 838.

potential development,” that limited review did not constitute segmentation because

although LIDA intends to sell the property to a potential developer, there was no identified purchaser or specific plan for development at the time the SEQRA review was conducted, and thus . . . the acquisition is not a separate part of a set of activities or steps’ in a single action or project.<sup>183</sup>

Whereas *GM Holdings* considered what constitutes segmentation in the first place, in *Saratoga Springs Preservation Foundation v. Boff*, the Fourth Department addressed the issue of when segmented review is permissible.<sup>184</sup> In that case, a challenge to the Saratoga Springs Design Review Commission’s authorization of the demolition of a historic building as structurally unsafe, the petitioners argued that the Commission improperly limited its review to the decision to allow demolition, thereby segmenting and avoiding proper review of the impacts of future redevelopment of the site.<sup>185</sup> The Third Department rejected the argument, reasoning that the administrative record showed that the landlord had no immediate plans for construction and the Commission had “clearly set forth” its reasoning that the unsafe structure required demolition and that because any future construction plans would require the Commission’s review, “the environment would not be less protected” by segmented review.<sup>186</sup> *Saratoga Springs* demonstrates that where review of an initial part of a project, apart from future stages of development, has a rational basis and independent utility, and will not undermine SEQRA’s purposes, courts will accept agencies’ decisions to segment review.

Together, *Saratoga Springs* and *GM Components* demonstrate the two fundamental questions relevant to segmentation—what is

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183. *Id.* at 1353, 977 N.Y.S.2d at 838-39 (alterations in original omitted) (internal citations omitted) (internal quotation marks omitted) (quoting *Settco, LLC v. N.Y. State Urban Dev. Corp.*, 305 A.D.2d 1026, 1027, 759 N.Y.S.2d 833, 835 (4<sup>th</sup> Dep’t 2003)). Although *GM Components* was appealed to the Court of Appeals, the Court dismissed the appeal without reaching the merits because it determined that the case involved no substantial constitutional question, a necessary predicate for the Court to have jurisdiction to review the merits of the case. *GM Components Holdings, LLC v. Town of Lockport Indus. Dev. Agency*, 22 N.Y.3d 1165, 1165, 8 N.E.3d 842, 843, 985 N.Y.S.2d 466, 466 (2014); *see* N.Y. C.P.L.R. 5601(b) (providing the Court of Appeals’ jurisdiction over cases raising substantial constitutional issues). That dismissal accordingly neither affirms nor reverses the Fourth Department’s holdings. *See generally GM Components, LLC*, 22 N.Y.3d at 1165, 8 N.E.3d at 842, 985 N.Y.S.2d at 466.

184. 110 A.D.3d 1326, 1327-28, 973 N.Y.S.2d 835, 838 (3d Dep’t 2013).

185. *Id.*

186. *Id.* at 1328, 973 N.Y.S.2d at 838.



segmentation and when it is permissible—though the holding of neither case dramatically altered or abrogated existing case law authorities on those issues.<sup>187</sup>

## 2. Supplementation

SEQRA provides for the preparation of a 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 original EIS.<sup>188</sup> Whether issues, impacts, or project details omitted from an initial EIS require preparation of an SEIS is a frequent subject of litigation.

In *South Bronx Unite! v. New York City Industrial Development Agency*, the First Department considered whether an SEIS was required for a change in the Industrial Development Agency's plans for development of the Harlem River Yards, an industrial area in the South Bronx.<sup>189</sup> An EIS had been prepared in 1993 for the agency's plans to develop the parcel, but during the following two decades the agency's development plans for the parcel were altered to respond to changing commercial demand.<sup>190</sup> In 2012, Fresh Direct, an online food and grocery retailer, applied to the agency to relocate some of its facilities to the Harlem River Yards and submitted an EAF using a "net-increment" approach to show that the incremental environmental impacts of Fresh Direct's proposed facilities over those impacts evaluated in the 1993 EIS were not significant.<sup>191</sup> Based on that EAF, the agency adopted a negative declaration for Fresh Direct's proposal and issued tax subsidies and other financial incentives for the project.<sup>192</sup> In the *South Bronx* litigation, the First Department rejected the petitioners' argument that the agency should have prepared an SEIS for the Fresh Direct facility, holding that the agency "identified the relevant areas of environmental concern related

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187. In one lower court case decided during the *Survey* period, *Board of Managers of the Plaza Condominium v. New York City Department of Transportation*, the Supreme Court for New York County rejected the petitioner's claim that the New York City Department of Transportation's review of a bike share program, which included a station to be installed near the Plaza condominium building, was improperly segmented from a plan to install an upgraded traffic signal nearby, noting that the signal upgrade was proposed in response to a complaint that was separate and unrelated (and predated) review of the bike share program. No. 101392/13, 2014 N.Y. Slip Op. 50718(U), at 7 (Sup. Ct. N.Y. Cnty. 2014).

188. 6 NYCRR 617.9(a)(7).

189. 115 A.D.3d 607, 607-08, 983 N.Y.S.2d 8, 10 (1st Dep't 2014), *leave to appeal denied*, 24 N.Y.3d 908 (2014).

190. *Id.* at 608, 983 N.Y.S.2d at 10.

191. *Id.* at 608-09, 983 N.Y.S.2d at 11.

192. *Id.* at 609, 983 N.Y.S.2d at 11.

to the proposed action (including traffic, air quality and noise impact), took the requisite ‘hard look’ at them and, in its negative declaration, set forth a reasoned elaboration of the basis for its determination that a[n] SEIS was not required.”<sup>193</sup> This decision demonstrates that, as with their determinations of significance generally, agencies receive deference from courts in deciding whether an SEIS is needed, provided that the agencies meet the fundamental requirements of taking a “hard look” at the change in the project’s potential for significant adverse environmental impacts.

In *Town of Woodbury v. County of Orange*, a challenge to the County’s proposed sale of wastewater treatment capacity, the Second Department held that the lower court “properly upheld” an amended Final EIS and findings statement that were challenged on the ground that the County legislature should have issued an SEIS.<sup>194</sup> The court reasoned that the County legislature’s “determination to accept the amended documents in lieu of requiring preparation of a [SEIS] was not arbitrary and capricious.”<sup>195</sup> This decision reflects that courts will not entertain challenges that put form over substance with respect to the requirement to supplemental review, and that agencies have some leeway in determining the best way to address changes in project proposals so as to ensure full review.

#### CONCLUSION

Case law from the *Survey* period demonstrates that SEQRA continues to present the courts with difficult legal questions related to standing, mootness, and other procedural issues, as well as the adequacy of agencies’ negative declarations and EISs. These issues are destined to continue to evolve as the courts are presented by new SEQRA challenges.

2015 also 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 issuance of a Draft EIS pertaining to its proposal of revisions to its SEQRA regulations, as provided for in the Final Scope issued in 2012. Furthermore, 2015 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

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193. *Id.* at 610, 983 N.Y.S.2d at 12.

194. 114 A.D.3d 951, 953-54, 981 N.Y.S.2d 126, 129 (2d Dep’t 2014), *leave to appeal denied*, 24 N.Y.3d 903, 20 N.E.3d 657, 995 N.Y.S.2d 711 (2014).

195. *Id.*

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Utica Shale regions of New York. A revised draft of the document was released for public comment in 2011, and on December 17, 2014, DEC Commissioner Joseph Martens directed DEC staff to complete the SEQRA process in early 2015.<sup>196</sup> The same day, New York Governor Andrew Cuomo stated that he will use his authority to ban hydraulic fracturing in the State, and presumably the generic EIS will contain the environmental rationale for doing so.<sup>197</sup> These and other developments in the law of SEQRA will be covered in future installments of the *Survey of New York Law*.

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196. *Revised Draft SGEIS on the Oil, Gas and Solution Mining Regulatory Program (September 2011)*, N.Y. STATE DEP'T OF ENVTL. CONSERV., <http://www.dec.ny.gov/energy/75370.html> (last visited Apr. 14, 2015).

197. Thomas Kaplan, *Citing Health Risks, Cuomo Bans Fracking in New York State*, N.Y. TIMES, A1 (Dec. 17, 2014), available at [http://www.nytimes.com/2014/12/18/nyregion/cuomo-to-ban-fracking-in-new-york-state-citing-health-risks.html?\\_r=0](http://www.nytimes.com/2014/12/18/nyregion/cuomo-to-ban-fracking-in-new-york-state-citing-health-risks.html?_r=0).