

**ENVIRONMENTAL LAW:  
DEVELOPMENTS IN THE LAW OF SEQRA**

**Mark A. Chertok, Katherine E. Ghilain & Victoria S. Treanor<sup>†</sup>**

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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

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<sup>†</sup> Mark A. Chertok is a partner, and Katherine E. Ghilain and Victoria S. Treanor are associates, at Sive, Paget & Riesel P.C. in New York ([www.sprlaw.com](http://www.sprlaw.com)). All three authors practice environmental law at the firm.

the *Survey* period of 2015–2016.<sup>1</sup> The year did not see substantial regulatory developments. The New York State Department of Environmental Conservation’s (DEC) environmental review of a 2012 proposal to amend its SEQRA regulations remains pending, with the final scoping for that review having been completed in late 2012.<sup>2</sup> At a stakeholder meeting in Albany in March 2016, DEC announced that it would reveal proposed changes to the Part 617 SEQRA regulations within three weeks, but DEC did not issue any proposed regulatory changes or further announcements during the *Survey* period or before the close of 2016.<sup>3</sup>

The Court of Appeals decided two SEQRA cases during this *Survey* period. In the first, *Sierra Club v. Village of Painted Post*, the Court broadened and clarified the standing requirement, finding that “[t]he number of people who are affected by the challenged action is not dispositive of standing.”<sup>4</sup> In the second, *Ranco & Stone Corp. v. Vecchio*, the Court resolved confusion created by a prior decision regarding the ripeness of challenges to positive declarations, finding that a positive declaration requiring the preparation of an environmental impact statement (EIS) typically is not a final agency action, but it may be considered a final agency action when it appears unauthorized.<sup>5</sup> Other courts, including the lower and intermediate courts of New York, issued SEQRA decisions discussing various legal issues relevant to the SEQRA practitioner, including ripeness, standing, and mootness requirements; coordinated review; and other procedural and substantive requirements

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1. This *Survey* period covered in this Article is July 1, 2015 to June 30, 2016. A prior *Survey* addresses SEQRA developments in the first half of 2015. See generally Mark A. Chertok et al., *2014–15 Survey of New York Law: Environmental Law: Developments in the Law of SEQRA*, 66 SYRACUSE L. REV. 905 (2016).

2. Mark A. Chertok & Daniel Mach, *2013–14 Survey of New York Law: Environmental Law: Developments in the Law of SEQRA*, 65 SYRACUSE L. REV. 749, 756 (2015) (citing DIV. OF ENVTL. PERMITS & POLLUTION PREVENTION, N.Y. STATE DEP’T OF ENVTL. CONSERVATION, FINAL SCOPE FOR THE GENERIC ENVIRONMENTAL IMPACT STATEMENT (GEIS) ON THE PROPOSED AMENDMENTS TO THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) (2012), [http://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/617finalscope.pdf](http://www.dec.ny.gov/docs/permits_ej_operations_pdf/617finalscope.pdf)).

3. N.Y. STATE DEP’T OF ENVTL. CONSERVATION, PROPOSED CHANGES TO SEQR (2016); *NYSDEC to Propose SEQR Changes to 6 NYCRR Part 617!*, N.Y. ST. BAR ASS’N: ENVIROSPHERE (Mar. 27, 2016), <http://nysbar.com/blogs/environmental/2016/03/>. Please note that SEQR is an alternate acronym for the process of review under SEQRA.

4. (*Sierra Club III*), 26 N.Y.3d 301, 311, 43 N.E.3d 745, 749, 22 N.Y.S.3d 388, 392 (2015).

5. (*Ranco III*), 27 N.Y.3d 92, 100, 49 N.E.3d 1165, 1170, 29 N.Y.S.3d 873, 878 (2016) (first citing *Gordon v. Rush*, 100 N.Y.2d 236, 243, 792 N.E.2d 168, 172–73, 762 N.Y.S.2d 18, 22–23 (2003); and then citing *Rochester Tel. Mobile Commc’ns v. Ober*, 251 A.D.2d 1053, 1054, 674 N.Y.S.2d 189, 190 (4th Dep’t 1998)).

that SEQRA imposes on agencies.<sup>6</sup>

Part I of this Article provides a brief overview of SEQRA's statutory and regulatory requirements. Part II reviews the Court of Appeals' SEQRA decisions that were issued during the *Survey* period. Part III discusses the more important of the numerous SEQRA decisions issued during the *Survey* period from the appellate and supreme courts.

## 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>7</sup> "The primary purpose of SEQRA is 'to inject environmental considerations directly into governmental decision making.'"<sup>8</sup> The law applies to discretionary actions by New York State, its subdivisions, or local agencies that have the potential to impact the environment, including direct agency actions, funding determinations, promulgation of regulations, zoning amendments, permits, and similar approvals.<sup>9</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" than those issued by DEC.<sup>10</sup>

A primary component of SEQRA is the EIS, which—if its preparation is required—documents the proposed action, its reasonably anticipated significant adverse impacts on the environment, practicable measures to mitigate such impacts, unavoidable significant adverse impacts, and reasonable alternatives that achieve the same basic objectives as the proposal.<sup>11</sup>

Actions are grouped into three categories in DEC's SEQRA

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6. See *infra* Part III.

7. SEQRA is codified at N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to -0117 (McKinney 2005 & Supp. 2017); see also Mark A. Chertok & Ashley S. Miller, *2007–08 Survey of New York Law: Environmental Law: Climate Change Impact Analysis in New York Under SEQRA*, 59 SYRACUSE L. REV. 763, 764 (2009) (citing Philip Weinberg, *Introduction: SEQRA: Effective Weapon—If Used as Directed*, 65 ALB. L. REV. 315, 321–22 (2001)).

8. *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. v. Bd. of Estimate*, 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 Development Corp.*, 67 N.Y.2d 400, 414–17, 494 N.E.2d 429, 434–35, 503 N.Y.S.2d 298, 303–04 (1986).

9. 6 N.Y.C.R.R. § 617.2 (2016) (defining actions and agencies subject to SEQRA).

10. 6 N.Y.C.R.R. § 617.14(b) (2016); see also ENVTL. CONSERV. § 8-0113(1), (3).

11. 6 N.Y.C.R.R. § 617.9(b)(1)–(2), (5) (2016).

regulations: Type I, Type II, or Unlisted.<sup>12</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>13</sup> Type I actions, also specifically enumerated, “are more likely to require the preparation of an EIS than Unlisted actions.”<sup>14</sup> Unlisted actions are not enumerated, but rather are a catchall of those actions that are neither Type I nor Type II.<sup>15</sup> In practice, the vast majority of actions are Unlisted.<sup>16</sup>

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>17</sup> To reach its determination of significance, the agency must prepare an environmental assessment form (EAF).<sup>18</sup> For Type I actions, preparation of a “Full EAF” is required, whereas for Unlisted actions, project sponsors may opt to use a “Short EAF” instead.<sup>19</sup> While the Short and Full EAFs ask for similar information, the Full EAF is an expanded form that is used for Type I actions or other actions when a greater level of documentation and analysis is appropriate.<sup>20</sup> SEQRA regulations provide models of each form,<sup>21</sup> but allow that the forms “may be modified by an agency to better serve it in implementing SEQR[A],

12. 6 N.Y.C.R.R. § 617.2(ai)–(ak); *see also* ENVTL. CONSERV. § 8-0113(2)(c)(i) (requiring DEC to identify Type I and Type II actions).

13. 6 N.Y.C.R.R. § 617.5(a) (2016) (Type II actions).

14. 6 N.Y.C.R.R. § 617.4(a) (2016) (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 New York*, 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.”).

15. 6 N.Y.C.R.R. § 617.2(ak).

16. DIV. OF ENVTL. PERMITS, N.Y. STATE DEP’T OF ENVTL. CONSERVATION, *THE SEQRA HANDBOOK 3* (3d ed. 2010) [hereinafter *SEQRA HANDBOOK*], [http://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/seqrhandbook.pdf](http://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf).

17. 6 N.Y.C.R.R. §§ 617.6(a)(1)(i), 617.7 (2016).

18. *Id.* § 617.6(a)(2)–(3).

19. 6 N.Y.C.R.R. §§ 617.6(a)(2)–(3), 617.20 (2016) (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).

20. *Id.* §§ 617.6(a)(2)–(3), 617.20.

21. *See id.* § 617.20 (establishing model EAFs). DEC also maintains EAF workbooks to assist project sponsors and agencies in using the forms. *See Environmental Assessment Form (EAF) Workbooks*, N.Y. ST. DEP’T ENVTL. CONSERVATION, <http://www.dec.ny.gov/permits/90125.html> (last visited Apr. 11, 2017).

provided the scope of the modified form is as comprehensive as the model.”<sup>22</sup> Where multiple decision-making agencies are involved, there is usually a “coordinated review” with these “involved agencies” pursuant to which a designated lead agency makes the determination of significance.<sup>23</sup> A coordinated review is required for Type I actions,<sup>24</sup> and the issuance of a negative declaration in a coordinated review binds other involved agencies.<sup>25</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>26</sup> If the answer is affirmative, the lead agency may in certain cases impose conditions on the proposed action to sufficiently mitigate the potentially significant adverse impacts<sup>27</sup> or, more commonly, the lead agency issues a positive declaration requiring the preparation of an EIS.<sup>28</sup>

If an EIS is prepared, typically the first step is the scoping of the contents of the Draft EIS (DEIS).<sup>29</sup> 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>30</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>31</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>32</sup> Although not required, the lead agency

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22. 6 N.Y.C.R.R. § 617.2(m) (2016).

23. 6 N.Y.C.R.R. § 617.6(b)(2)(i), (b)(3)(ii).

24. 6 N.Y.C.R.R. § 617.4(a)(2) (2016).

25. *Id.* §§ 617.4(a)(2), 617.6(b)(3)(iii).

26. 6 N.Y.C.R.R. § 617.7(a)(2), (d) (2016).

27. 6 N.Y.C.R.R. §§ 617.2(h), 617.7(d)(2)(i). This is known as a conditioned negative declaration (CND). *Id.* § 617.2(h). 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. *Id.* § 617.7(d)(1)(iv), (2)(i), (3). CNDs cannot be issued for Type I actions or where there is no applicant (i.e., the project sponsor is a government agency). *See id.* § 617.7(d)(1). In practice, CNDs are not favored and not frequently employed. Chertok et al., *supra* note 1, at 909 n.24.

28. 6 N.Y.C.R.R. § 617.2(n), (d)(2).

29. SEQRA HANDBOOK, *supra* note 16, at 105.

30. Scoping, when it occurs, is governed by 6 N.Y.C.R.R. § 617.8. *Id.* at 104–05.

31. 6 N.Y.C.R.R. § 617.8(a), (e) (2016).

32. *Id.* § 617.8(b), (d)–(e).

typically holds a legislative hearing with respect to the Draft EIS.<sup>33</sup> That hearing may be, and often is, combined with other hearings required for the proposed action.<sup>34</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>35</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>36</sup>

In addition to “analyz[ing] the significant adverse impacts and evaluat[ing] all reasonable alternatives,”<sup>37</sup> and the Draft EIS should include, “where 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 ir retrievable 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>38</sup>

The next step is the preparation of a Final EIS, which addresses any project changes, new information and/or changes in circumstances, and

33. 6 N.Y.C.R.R. § 617.9(a)(4) (2016).

34. 6 N.Y.C.R.R. § 617.3(h) (2016) (authorizing “combined or consolidated proceedings”).

35. For private applicants, alternatives might reflect different configurations of a project on the site. They also might include different sites if the private applicant owns other parcels. The applicant should identify alternatives that might avoid or reduce environmental impacts. 6 N.Y.C.R.R. § 617.9(b)(5)(v).

36. *Id.* The “no action alternative” does not necessarily reflect current conditions, but rather the anticipated conditions without the proposed action. Chertok et al., *supra* note 1, at 910 n.31. 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 any such developments as well as other changes that could be anticipated in the absence of the proposed action. *See Uptown Holdings, LLC v. City of New York*, 77 A.D.3d 434, 436, 908 N.Y.S.2d 657, 660 (1st Dep’t 2010).

37. 6 N.Y.C.R.R. § 617.9(b)(1).

38. *Id.* § 617.9(b)(5)(iii)(a)–(f).

responds to all substantive comments on the Draft EIS.<sup>39</sup> After preparation of the Final EIS, and prior to undertaking or approving an action, each acting (i.e., involved) 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>40</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>41</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 (NEPA).<sup>42</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>43</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>44</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>45</sup>

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39. 6 N.Y.C.R.R. § 617.11(a) (2016).

40. *Id.* § 617.11(a), (d)(1)–(2).

41. *Id.* § 617.11(d)(5).

42. *See generally* 42 U.S.C. §§ 4321–4370(h) (2012) (establishing federal responsibilities for protecting and enhancing the quality of the environment); *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) (quoting Philip H. Gitlen, *The Substantive Impact of the SEQRA*, 46 ALB. L. REV. 1241, 1248 (1981)).

43. 6 N.Y.C.R.R. § 617.10(a) (2016).

44. *Id.* § 617.10(a)(1)–(4).

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

The City of New York (the “City”) has promulgated separate regulations implementing the City’s and City agencies’ environmental review process under SEQRA, which is known as City Environmental Quality Review (“CEQR”).<sup>46</sup> As previously explained, SEQRA grants agencies and local governments the authority to supplement DEC’s general SEQRA regulations by promulgating their own.<sup>47</sup> Section 192(e) of the New York City Charter delegates that authority to the City Planning Commission.<sup>48</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>49</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 environmental impacts, such as transportation (traffic, transit and pedestrian), air pollutant emissions, noise, socioeconomic effects, and historic and cultural resources.<sup>50</sup>

## II. SEQRA IN THE COURT OF APPEALS

The Court of Appeals issued two rulings in SEQRA cases during the *Survey* period. The first, *Sierra Club v. Village of Painted Post*, addressed standing.<sup>51</sup> To understand the importance of this decision, it must be placed in its historical context. Since 1991, the primary case on standing in SEQRA cases has been *Society of Plastics Industries v. County of Suffolk*, in which the Court of Appeals limited standing to those plaintiffs that “would suffer direct harm, injury that is in some way different from that of the public at large.”<sup>52</sup> This requirement had the effect of

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46. CEQR regulations are contained in RULES OF THE CITY OF NEW YORK tit. 6, ch. 5 (2017).

47. N.Y. ENVTL. CONSERV. LAW § 8-0113(1), (3) (McKinney Supp. 2017). That authority extends to the designation of specific categories of Type I and Type II actions. 6 N.Y.C.R.R. §§ 617.4(a)(2), 617.5(b), 617.14(e) (2016).

48. N.Y.C. CHARTER § 192(e) (2017).

49. N.Y.C. MAYOR’S OFFICE OF ENVTL. COORDINATION, CITY ENVIRONMENTAL QUALITY REVIEW TECHNICAL MANUAL intro.-1 (2014) [hereinafter CEQR TECHNICAL MANUAL 2014], [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). Limited revisions were added in 2016 to incorporate changes to the City’s Waterfront Revitalization Program related to climate change issue. N.Y.C. MAYOR’S OFFICE OF ENVTL. COORDINATION, CEQR TECHNICAL MANUAL 2014 EDITION REVISIONS 1 (2016) [hereinafter 2016 CEQR REVISIONS], [http://www.nyc.gov/html/oec/downloads/pdf/2014\\_ceqr\\_tm/2014\\_ceqr\\_tm\\_revisions\\_04\\_27\\_2016.pdf](http://www.nyc.gov/html/oec/downloads/pdf/2014_ceqr_tm/2014_ceqr_tm_revisions_04_27_2016.pdf).

50. See generally 2016 CEQR REVISIONS, *supra* note 49, at 1.

51. *Sierra Club III*, 26 N.Y.3d 301, 306, 43 N.E.3d 745, 746, 22 N.Y.S.3d 388, 389 (2015).

52. 77 N.Y.2d 761, 774, 573 N.E.2d 1034, 1041, 570 N.Y.S.2d 778, 785 (1991) (first

significantly limiting standing in cases involving environmental impacts that are felt equally by many people.<sup>53</sup>

Eighteen years later, the Court of Appeals clarified the standing requirement for cases involving threats to natural areas.<sup>54</sup> In *Save the Pine Bush v. Common Council of Albany*, the Court recognized that people who visit a particular area for recreation or study may suffer an adverse impact if the area is threatened.<sup>55</sup> The Court noted the long-established rule in federal courts that “a generalized ‘interest’ in the environment could not confer standing to challenge environmental injury, but that injury to a particular plaintiff’s ‘[a]esthetic and environmental well-being’ would be enough.”<sup>56</sup> The Court of Appeals adopted a similar rule in *Save the Pine Bush*, holding that the petitioners, who alleged repeated use of the Pine Bush area “for recreation and to study and enjoy the unique habitat found there” met the *Society of Plastics* test for standing by showing that the threatened harm would affect them differently from the general public.<sup>57</sup>

This year, in *Sierra Club v. Village of Painted Post*, the Court took the “opportunity to elucidate and further address the ‘special injury’ requirement of standing” that was set forth in *Society of Plastics*.<sup>58</sup> At issue in *Painted Post* were two resolutions adopted by Village of Painted Post’s Board of Trustees: a water sale agreement with a gas well operator in Tioga County, Pennsylvania, and a lease agreement with a respondent, Wellsboro & Corning Railroad, for the construction of a water

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citing *Mobil Oil Corp. v. Syracuse Indus. Dev. Agency*, 76 N.Y.2d 428, 559 N.E.2d 641, 559 N.Y.S.2d 947 (1990); then citing *Sun-Brite Car Wash v. Bd. of Zoning & Appeals*, 69 N.Y.2d 406, 509 N.E.2d 130, 515 N.Y.S.2d 418 (1987); then citing *Little Joseph Realty v. Town of Babylon*, 41 N.Y.2d 738, 363 N.E.2d 1163, 395 N.Y.S.2d 428 (1977); then citing *Cord Meyer Dev. Co. v. Bell Bay Drugs*, 20 N.Y.2d 211, 229 N.E.2d 44, 282 N.Y.S.2d 259 (1967); and then citing *Empire City Subway Co. v. Broadway & Seventh Ave. R.R. Co.*, 87 Hun. 279, 33 N.Y.S. 1055 (1895)).

53. Michael B. Gerrard & Edward McTiernan, *Survey of 2015 Cases Under State Environmental Quality Review Act*, N.Y.L.J. (July 14, 2016), <http://www.newyorklawjournal.com/id=1202762456454/Survey-of-2015-Cases-Under-State-Environmental-Quality-Review-Act?slreturn=20170110152523> (“This was in many ways like a codification of the tragedy of the commons.”).

54. *Save the Pine Bush, Inc. v. Common Counsel of Albany*, 13 N.Y.3d 297, 305, 918 N.E.2d 917, 921, 890 N.Y.S.2d 405, 409 (2009).

55. *Id.* at 305–06, 918 N.E.2d at 921–22, 890 N.Y.S.2d at 409–10.

56. *Id.* at 305, 918 N.E.2d at 921, 890 N.Y.S.2d at 405 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972)) (first citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562–63 (1992); and then citing *Friends of the Earth, Inc. v. Laidlaw Env’t Servs., Inc.*, 528 U.S. 167, 183 (2000)).

57. *Id.* at 305–06, 918 N.E.2d at 921–22, 890 N.Y.S.2d at 409–10.

58. *Sierra Club III*, 26 N.Y.3d 301, 306, 43 N.E.3d 745, 746, 22 N.Y.S.3d 388, 389 (2015).

transloading facility.<sup>59</sup> Prior to adopting the two resolutions, the Village determined that the sale of its water was a Type II action, and therefore was exempt from review under SEQRA.<sup>60</sup> It also determined that the lease was a Type I action and issued a negative declaration, concluding that the lease would not result in any significant adverse environmental impacts.<sup>61</sup> The petitioners brought an Article 78 petition challenging the Type II determination for the water sale agreement and the negative declaration for the lease.<sup>62</sup> They alleged that the Village failed to comply with SEQRA because it (1) “failed to consider significant adverse environmental impacts of water withdrawals”; (2) improperly classified the water sale agreement as a Type II action; and (3) “impermissibly segmented its review of the water sale agreement and the lease agreement.”<sup>63</sup> The respondents moved to dismiss on several grounds, including standing.<sup>64</sup>

The petitioners’ opposition included an affidavit from a petitioner, John Marvin, in which he “stated that when the water trains began running, he ‘heard train noises frequently, sometimes every night’ and that the ‘noise was so loud it woke [him] up and kept [him] awake repeatedly.’”<sup>65</sup> The supreme court granted summary judgment in favor of the petitioners, annulling the resolutions and issuing an injunction enjoining further water withdrawals pending compliance with SEQRA.<sup>66</sup> It also denied the respondents’ motion to dismiss for lack of standing, holding that while all but one of the individual petitioners and organizations alleged only generalized harm, petitioner Marvin’s allegations showed that his harm was distinct.<sup>67</sup> The Appellate Division, Fourth Department, unanimously reversed the judgment and dismissed the petition on the ground that Marvin lacked standing, reasoning that he would not suffer noise impacts different from the public at large because other village residents living along the train line would suffer similar

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59. *Id.* at 306–07, 43 N.E.3d at 746, 22 N.Y.S.3d at 389.

60. *Id.* at 307, 43 N.E.3d at 746, 22 N.Y.S.3d at 389.

61. *Id.* at 307, 43 N.E.3d at 747, 22 N.Y.S.3d at 390.

62. *Id.*

63. *Sierra Club III*, 26 N.Y.3d at 308, 43 N.E.3d at 747, 22 N.Y.S.3d at 390; *see infra* Section II.D.1 (discussing segmentation).

64. *Id.*

65. *Id.* at 308, 43 N.E.3d at 747–48, 22 N.Y.S.3d at 390–91.

66. (*Sierra Club I*), No. 2012/00810, 2013 N.Y. Slip Op. 52342(U), at 13 (Sup. Ct. Steuben Cty. Mar. 25, 2013), *rev’d*, 134 A.D.3d 1475, 23 N.Y.S.3d 506 (4th Dep’t), *rev’d*, 26 N.Y.3d 301, 43 N.E.3d 745, 22 N.Y.S.3d 388 (2015); *see also Sierra Club III*, 26 N.Y.3d at 308, 43 N.E.3d at 748, 22 N.Y.S.3d at 391.

67. *Sierra Club III*, 26 N.Y.3d at 309, 43 N.E.3d at 748, 22 N.Y.S.3d at 391.

noise impacts.<sup>68</sup>

The Court of Appeals concluded that the appellate division “applied an overly restrictive analysis” of the *Society of Plastics* requirement that harm be different from the general public.<sup>69</sup> The Court found that “the number of people who are affected by the challenged action is not dispositive of standing,” and the Court declared that “[t]he harm that is alleged must be specific to the individuals who allege it, and must be ‘different in kind or degree from the public at large,’ but it need not be unique.”<sup>70</sup> It held that Marvin had standing because, rather than alleging an indirect effect from the increased train noise, he alleged “a particularized harm that may also be inflicted upon others in the community who live near the tracks.”<sup>71</sup> Accordingly the order was reversed and the matter remitted to the appellate division.<sup>72</sup> As discussed below, on remand, the Fourth Department ruled that the Village failed to comply with SEQRA.<sup>73</sup>

The second Court of Appeals decision in this *Survey* period, *Ranco Sand & Stone Corp. v. Vecchio*,<sup>74</sup> which we discussed in our prior *Survey* Article,<sup>75</sup> addressed the question of whether a positive declaration is a final agency action subject to review and resolved confusion stemming from a prior case, *Gordon v. Rush*.<sup>76</sup> In *Gordon*, the Court of Appeals broke with earlier precedent and allowed a challenge to a positive declaration,<sup>77</sup> holding that there is no “bright line” rule regarding the finality of positive declarations; the determination requires consideration of various factors.<sup>78</sup> Specifically, according to the *Gordon* court, a

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68. *Sierra Club v. Village of Painted Post (Sierra Club II)*, 134 A.D.3d 1475, 1478, 23 N.Y.S.3d 506, 510 (4th Dep’t 2015); *see also Sierra Club III*, 26 N.Y.3d at 309–10, 43 N.E.3d at 748, 22 N.Y.S.3d at 391.

69. *Sierra Club III*, 26 N.Y.3d at 310, 43 N.E.3d at 749, 22 N.Y.S.3d at 392 (citing *Soc’y of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 774, 573 N.E.2d 1034, 1041, 570 N.Y.S.2d 778, 785 (1991)).

70. *Id.* at 311, 43 N.E.3d at 749, 22 N.Y.S.3d at 392 (quoting *Soc’y of Plastics Indus.*, 77 N.Y.2d at 778, 573 N.E.2d at 1044, 570 N.Y.S.2d at 788).

71. *Id.*

72. *Id.* at 312, 43 N.E.3d at 750, 22 N.Y.S.3d at 393.

73. *Sierra Club II*, 134 A.D.3d at 1478, 23 N.Y.S.3d at 510.

74. (*Ranco III*), 27 N.Y.3d 92, 49 N.E.3d 1165, 29 N.Y.S.3d 873 (2016).

75. Chertok & Mach, *supra* note 2, at 756.

76. *Ranco Sand & Stone Corp. (Ranco II)*, 124 A.D.3d 73, 75, 998 N.Y.S.2d 68, 82 (2d Dep’t 2014) (citing *Gordon v. Rush*, 100 N.Y.2d 236, 792 N.E.2d 168, 762 N.Y.S.2d 18 (2003)).

77. *Gordon*, 100 N.Y.2d at 243, 792 N.E.2d at 172, 762 N.Y.S.2d at 22 (citing *Rochester Tel. Mobile Commc’ns v. Ober*, 251 A.D.2d 1053, 1054, 674 N.Y.S.2d 189, 190 (4th Dep’t 1998)).

78. *Id.* at 243, 792 N.E.2d at 172, 762 N.Y.S.2d at 22 (citing *Rochester Tel. Mobile Commc’ns*, 251 A.D.2d at 1054, 674 N.Y.S.2d at 190).

positive declaration is ripe for review when (1) the action imposes an obligation, denies a right, or fixes “some legal relationship as a consummation of the administrative process”; and (2) “the apparent harm inflicted by the action may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party.”<sup>79</sup> In *Gordon*, the Town of Southampton Coast Erosion Hazard Board of Review declared itself lead agency and issued a positive declaration where it lacked the authority to do so;<sup>80</sup> the DEC, as lead agency, had previously conducted a coordinated review (in which the Board had an opportunity to participate but failed to do so), resulting in a negative declaration<sup>81</sup> that, as noted above, was binding on involved agencies.<sup>82</sup> The Court determined that it would be inappropriate to deny review in this circumstance, so it found that the positive declaration requiring that the owners prepare a DEIS was ripe for review.<sup>83</sup> This decision created confusion and led to additional lawsuits challenging positive declarations.<sup>84</sup>

In *Ranco*, the Court of Appeals again confronted the question of the finality of a positive declaration, holding that it was not ripe for judicial review.<sup>85</sup> In *Ranco*, the petitioner challenged the Town Board’s positive declaration, arguing that the positive declaration was ripe under the *Gordon* framework because it would force the company to incur significant expenses to prepare an unnecessary DEIS.<sup>86</sup> The lower courts determined that the matter was not ripe, because the positive declaration was the initial step in the decision-making process.<sup>87</sup> The Court of Appeals affirmed, finding that the positive declaration did impose an obligation on Ranco, satisfying the first prong of the *Gordon* inquiry, but that the inability to recover the resources expended on the DEIS was insufficient to satisfy the second prong—that the harm could not be

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79. *Id.* at 242, 792 N.E.2d at 172, 762 N.Y.S.2d at 22 (quoting *Essex County v. Zagata*, 91 N.Y.2d 447, 453, 695 N.E.2d 232, 235, 672 N.Y.S.2d 281, 284 (1998)).

80. *Id.* at 244, 792 N.E.2d at 173, 762 N.Y.S.2d at 23.

81. *Id.* at 243, 792 N.E.2d at 172, 762 N.Y.S.2d at 22.

82. *Gordon*, 100 N.Y.2d at 244, 792 N.E.2d at 173, 762 N.Y.S.2d at 22 (first citing 6 N.Y.C.R.R. § 617.6(b)(3)(iii) (2003); and then citing 6 N.Y.C.R.R. § 617.3(h) (1987)).

83. *Id.* at 243, 792 N.E.2d at 173, 762 N.Y.S.2d at 23.

84. *See* 2 MICHAEL B. GERRARD ET AL., ENVIRONMENTAL IMPACT REVIEW IN NEW YORK § 7.02[1] (2016).

85. *Ranco III*, 27 N.Y.3d 92, 94, 49 N.E.3d 1165, 1166, 29 N.Y.S.3d 873, 874 (2016).

86. *Id.* at 98, 49 N.E.3d at 1168, 29 N.Y.S.3d at 876.

87. *Ranco II*, 124 A.D.3d 73, 86, 998 N.Y.S.2d 68, 79 (2d Dep’t 2014); *Ranco Sand & Stone Corp. v. Vecchio (Ranco I)*, No. 09-45491, 2011 N.Y. Slip Op. 34221(U), at 1 (Sup. Ct. Suffolk Cty. Nov. 29, 2011).

ameliorated in the future.<sup>88</sup> The Court reasoned that the expenditure of unrecoverable costs was insufficient to distinguish this case from any other preliminary administrative action, and allowing that expenditure to satisfy the *Gordon* inquiry inappropriately would render every positive declaration requiring a DEIS ripe for review.<sup>89</sup>

With respect to *Gordon*, the Court in *Ranco* clarified that “the ruling in *Gordon* was never meant to disrupt the understanding of appellate courts that a positive declaration imposing a DEIS requirement is usually not a final agency action, and is instead an initial step in the SEQRA process.”<sup>90</sup> It explained that

*Gordon* stands for the proposition that where the positive declaration appears unauthorized, it may be ripe for judicial review, as, for example, when the administrative agency is not empowered to serve as lead agency, when the proposed action is not subject to SEQRA, or when a prior negative declaration by an appropriate lead agency appears to obviate the need for a DEIS suggesting that further action is improper.

*Ranco* does not claim the declaration is unauthorized or that the property is not subject to SEQRA, nor does it present any other basis to conclude that the Town Board acted outside the scope of its authority. Therefore, the matter is not ripe for judicial review.<sup>91</sup>

No cases applying *Ranco* were decided during the *Survey* period. It is likely that there will be fewer challenges to positive declarations going forward.

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

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

SEQRA litigation invariably is a special proceeding under Article 78 of Civil Practice Law and Rules (CPLR).<sup>92</sup> Both SEQRA and Article 78 impose upon petitioners certain threshold and procedural requirements, apart from the substantive requirement of proving that the

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88. *Ranco III*, 27 N.Y.3d at 100, 49 N.E.3d at 1170, 29 N.Y.S.3d at 878.

89. *Id.*

90. *Id.* (citing *Rochester Tel. Mobile Commc'ns v. Ober*, 251 A.D.2d 1053, 1054, 674 N.Y.S.2d 189, 190 (4th Dep't 1998)).

91. *Id.* at 100–01, 49 N.E.3d at 1170, 29 N.Y.S.3d at 878 (first citing *Gordon v. Rush* 100 N.Y.2d 236, 243, 792 N.E.2d 168, 172, 762 N.Y.S.2d 18, 22 (2003); then citing *Ctr. of Deposit, Inc. v. Village of Deposit*, 90 A.D.3d 1450, 1452, 936 N.Y.S.2d 709, 712 (3d Dep't 2011); and then citing *Gordon*, 100 N.Y.2d at 243, 792 N.E.2d at 172–73, 762 N.Y.S.2d at 22–23).

92. N.Y. C.P.L.R. 7803 (McKinney 2008).

agency failed to comply with SEQRA.<sup>93</sup> A number of decisions during the *Survey* period addressed questions arising from these threshold and procedural requirements.

### *I. Standing*

Standing is one of the more frequently litigated issues in SEQRA case law.<sup>94</sup> To establish standing, a SEQRA petitioner must demonstrate that the challenged action causes injury that is (1) within the zone of interests sought to be protected by the statute, and (2) different from any generalized harm caused by the action to the public at large.<sup>95</sup> To fall within SEQRA's "zone of interests," the alleged injury must be "environmental and not solely economic in nature."<sup>96</sup> As reflected in the discussion of *Village of Painted Post* in Part II, above, the harm must be "different in kind or degree from the public at large," but it need not be unique.<sup>97</sup> An organization has standing to sue when "one or more of its members would have standing to sue," the interests asserted by the organization "are germane to its purposes," and "neither the asserted claim nor the appropriate relief requires the participation of the [organization's] individual members."<sup>98</sup>

Several SEQRA decisions addressed standing during this *Survey* period, in addition to the Court of Appeals' decision in *Village of Painted Post*. Shortly after this decision, the Putnam County Supreme Court applied *Painted Post* to find standing in *Napolitano v. Town Board of Southeast*.<sup>99</sup> In *Napolitano*, four petitioners challenged the Town Board's

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93. N.Y. C.P.L.R. 7801(1) (McKinney 2008).

94. Charlotte A. Biblow, *Courts Tackle Standing and SEQRA Review*, N.Y.L.J. (May 22, 2014), <http://www.newyorklawjournal.com/id=1202656265540/Courts-Tackle-Standing-and-SEQRA-Review?slreturn=20170215134149>.

95. *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) (quoting *Soc'y of Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761, 774, 573 N.E.2d 1034, 1041, 570 N.Y.S.2d 778, 785 (1991)).

96. *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) (first citing *Niagara Recycling, Inc. v. Town Bd.*, 83 A.D.2d 335, 340, 443 N.Y.S.2d 951, 955 (4th Dep't 1981); and then citing *Webster Assoc. v. Webster*, 112 Misc. 2d 396, 402, 447 N.Y.S.2d 401, 405 (Sup. Ct. Monroe Cty. 1981)).

97. *Sierra Club III*, 26 N.Y.3d 301, 311, 43 N.E.3d 745, 749, 22 N.Y.S.3d 388, 392 (2015) (quoting *Soc'y of Plastics*, 77 N.Y.2d at 778, 573 N.E.2d at 1044, 570 N.Y.S.2d at 788).

98. *Soc'y of Plastics*, 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*, 13 N.Y.3d at 304, 918 N.E.2d at 921, 890 N.Y.S.2d at 409.

99. 51 Misc. 3d 206, 209, 24 N.Y.S.3d 494, 497 (Sup. Ct. Putnam Cty. 2015) (first citing *John John, LLC v. Planning Bd. of Brookhaven*, 15 A.D.3d 486, 487, 790 N.Y.S.2d 500, 502 (2d Dep't 2005); and then citing *Comm. to Pres. Brighton Beach & Manhattan Beach v. Council of N.Y.*, 214 A.D.2d 335, 336, 625 N.Y.S.2d 134, 136 (1st Dep't 1995)).

approval of a rezoning application to allow for a hotel and retail space development.<sup>100</sup> The respondents moved to dismiss the petition on standing and statute of limitations grounds.<sup>101</sup> The court discussed the Court of Appeals' recent decision in *Village of Painted Post* and concluded that the petitioners had standing; four petitioners lived less than a mile from the proposed site and had "particular environmental, increased traffic, and visual concerns."<sup>102</sup>

At least two of the standing decisions in this *Survey* period involved the presumption of standing that arises based on a party's proximity to the proposal at issue.<sup>103</sup> In challenges to rezoning decisions, there is a well-established presumption that both "aggrievement" or "injury" and "an interest different from other members of the community" may be inferred or presumed if the petitioner resides in the geographic area encompassed by the proposed rezoning or owns property subject to the rezoning.<sup>104</sup> This principle was reaffirmed in *Plattsburgh Boat Basin, Inc. v. City of Plattsburgh*, in which the court held that the owner of a property subject to a zoning change need not plead specific environmental harm to establish standing to challenge the sufficiency of an agency's efforts to comply with SEQRA.<sup>105</sup>

The presumption that developed in the context of rezonings has been applied outside of the rezoning context in certain cases where proximity to a particular action has been sufficient to establish standing.<sup>106</sup> Indeed, multiple courts have held that "[i]njury-in-fact may arise from the existence of a presumption established by the allegations demonstrating close proximity to the subject property or, in the absence of such a

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100. *Id.* at 207, 24 N.Y.S.3d at 495.

101. *Id.* at 208, 24 N.Y.S.3d at 496.

102. *Id.* at 209, 24 N.Y.S.3d at 497 (first citing *John John*, 15 A.D.3d at 487, 790 N.Y.S.2d at 502; and then citing *Brighton Beach*, 214 A.D.2d at 336, 625 N.Y.S.2d at 136).

103. *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); *Plattsburgh Boat Basin, Inc. v. City of Plattsburgh*, 50 Misc. 3d 271, 274, 21 N.Y.S.3d 529, 531 (Sup. Ct. Clinton Cty. 2015).

104. *See Gernatt Asphalt Prods., Inc.*, 87 N.Y.2d at 687, 664 N.E.2d at 1238, 642 N.Y.S.2d at 176 (first citing *Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals of N. Hempstead*, 69 N.Y.2d 406, 413–14, 508 N.E.2d 130, 133–34, 515 N.Y.S.2d 418, 421–22 (1987); and then citing *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)).

105. *Plattsburgh Boat Basin, Inc.*, 50 Misc. 3d at 274, 21 N.Y.S.3d at 531 (citing *Har Enters. v. Town of Brookhaven*, 74 N.Y.2d 524, 526, 548 N.E.2d 1289, 1291, 549 N.Y.S.2d 638, 640 (1989)).

106. *See, e.g., Radow v. Bd. of Appeals of Hempstead*, 120 A.D.3d 502, 502–03, 989 N.Y.S.2d 914, 915 (2d Dep't 2014) (stating the petitioners of zoning variances could establish standing by showing they were in close proximity to the subject property).

presumption, the existence of an actual and specific injury.”<sup>107</sup> For example, in *Shoreham Wading River Advocates for Justice v. Town of Brookhaven Planning Board*,<sup>108</sup> landowners and an unincorporated association brought a hybrid Article 78/declaratory judgment action challenging variances and various Planning Board decisions allowing for the construction of a solar energy production facility in Shoreham, New York.<sup>109</sup> The court found that the four adjacent property owners had standing by virtue of their proximity alone.<sup>110</sup> The court noted that, “[b]ut for proximity, the allegations claimed by the individual plaintiffs would not have conferred standing had they been asserted by non-adjacent landowners,” because they did not assert any non-general, specific injury to their property within the zone of interests.<sup>111</sup> However, the application of this proximity presumption has been inconsistent.<sup>112</sup> In *Azulay v. City of New York*, for example, the court found that nearby petitioners who challenged the grant of zoning applications allowing a change in parking requirements for the Staten Island Mall, and thereby allowing the Mall’s expansion, lacked standing because they failed to allege an injury different from that suffered by the general public.<sup>113</sup> The petitioners, one of whom lived within one-tenth of a mile and one of whom lived within 2.5 miles of the Mall, argued they would suffer direct harm from the substantial increases in exhaust fumes, traffic, and pedestrian congestion that would follow the Mall’s expansion.<sup>114</sup> The respondents argued that the petitioners lacked standing because their allegations regarding traffic congestion and inadequate parking were too generalized to support standing, and the court agreed.<sup>115</sup> The court added that living in close proximity to the Mall was not sufficient, by itself, to establish standing under SEQRA.<sup>116</sup>

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107. *Id.* (quoting *Powers v. De Groodt*, 43 A.D.3d 509, 513, 841 N.Y.S.2d 163, 167 (3d Dep’t 2007)) (citing *Sun-Brite Car Wash*, 69 N.Y.2d at 414, 508 N.E.2d at 134, 515 N.Y.S.2d at 422).

108. No. 22674/2014, 2015 N.Y. Slip Op. 31444(U) (Sup. Ct. Suffolk Cty. Aug. 3, 2015).

109. *Id.* at 5–6.

110. *Id.* at 15–16.

111. *Id.*

112. *See, e.g.*, *Azulay v. City of New York*, No. 080170/15, 2016 N.Y. Slip Op. 50428(U), at 10 (Sup. Ct. Richmond Cty. Mar. 28, 2016).

113. *Id.* at 10 (first citing *Soc’y of Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761, 774, 573 N.E.2d 1034, 1041, 570 N.Y.S.2d 778, 785 (1991); and then citing *Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668, 687, 664 N.E.2d 1226, 1238, 642 N.Y.S.2d 164, 176 (1996)).

114. *Id.* at 3.

115. *Id.* at 7.

116. *Id.* at 10 (first citing *Soc’y of Plastics*, 77 N.Y.2d at 774, 573 N.E.2d at 1041, 570 N.Y.S.2d at 785; and then citing *Gernatt Asphalt Prods.*, 87 N.Y.2d at 687, 664 N.E.2d at

General concerns about traffic congestion were insufficient to support standing in *Glyca Transportation, LLC v. City of New York* as well.<sup>117</sup> In *Glyca Transportation*, the petitioners, yellow taxi medallion owners, drivers, leasing agents, entities that manage taxi medallions, and a trade association, brought suit challenging the New York City Taxi and Limousine Commission's (TLC) actions in allowing companies like Uber to compete with yellow taxis.<sup>118</sup> The petitioners' third cause of action alleged that TLC violated SEQRA and CEQR by failing to prepare an EIS.<sup>119</sup> In addition to holding that the third cause of action was time-barred, the court held that the petitioners lacked standing for several reasons.<sup>120</sup> First, the petitioners' claim of environmental harm, namely that thousands of additional black cars would cause environmental harm, apparently due to the environmental effects of increased traffic congestion, was speculative and therefore insufficient to establish injury in fact.<sup>121</sup> Second, the petitioners did not show that the harm they alleged would be different from that of the public.<sup>122</sup> Finally, the petitioners' allegation that their livelihoods as professional drivers would be adversely affected by increased traffic congestion was an economic injury, not an environmental one, and therefore was not sufficient to allege standing under SEQRA.<sup>123</sup>

Similarly, in *Turner v. County of Erie*,<sup>124</sup> the Appellate Division, Fourth Department, affirmed the lower court's dismissal of an Article 78 petition on standing grounds for failing to allege an environmental injury.<sup>125</sup> In *Turner*, the petitioners brought an Article 78 petition seeking to annul a negative declaration issued by the County of Erie for a new academic building on the Amherst Campus of Erie Community College

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1238, 642 N.Y.S.2d at 176).

117. No. 8962/15, 2015 N.Y. Slip Op. 31703(U), at 11 (Sup. Ct. Queens Cty. Sept. 8, 2015).

118. *Id.* at 1.

119. *Id.* at 10.

120. *Id.* at 11.

121. *Id.* (first citing N.Y. State Ass'n of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 211, 810 N.E.2d 405, 407, 778 N.Y.S.2d 123, 125 (2004); and then citing Rent Stabilization Ass'n of N.Y.C. v. Miller, 15 A.D.3d 194, 194, 789 N.Y.S.2d 126, 127–28 (1st Dep't 2005)) ("Speculation about increased traffic congestion does not suffice to confer standing on a party." (citing Riverhead PGC, LLC v. Town of Riverhead, 73 A.D.3d 931, 934, 905 N.Y.S.2d 595, 598 (2d Dep't. 2010))).

122. *Glyca Transp. LLC*, 2015 N.Y. Slip Op. 31703(U), at 11.

123. *Id.* at 11 (citing 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)).

124. 136 A.D.3d 1297, 24 N.Y.S.3d 812 (4th Dep't), *lv. denied*, 27 N.Y.3d 906, 56 N.E.3d 899, 36 N.Y.S.3d 619 (2016).

125. *Id.* at 1297–98, 24 N.Y.S.3d at 813–14.

(ECC), instead of at an alternative site within the City of Buffalo.<sup>126</sup> One petitioner, a student at ECC, alleged that he would be harmed by the construction because he did not own a car and it would be expensive and inconvenient for him and other students to use public transportation to get to the Amherst Campus to attend classes there.<sup>127</sup> Another petitioner, the former County Executive of Erie County, alleged that if the facility were built there instead of in the City of Buffalo, “[he] would be harmed in that all of the work [he had] done and all of the procedures [he had] fought for would be shown to have been useless.”<sup>128</sup> Finally, a petitioner who was the City Council member for the City of Buffalo said that he would be harmed by the building’s placement because his reputation among his constituents would suffer.<sup>129</sup> The court found that none of these was an environmental injury.<sup>130</sup> While two of the petitioners also argued that construction would have “lasting environmental impacts, including urban sprawl, traffic congestion, redistribution of residential development, and the routing of mass transit in the future,” neither resided in the affected community, so they could not rely on traffic and population distribution issues to establish standing.<sup>131</sup> Thus, because none of the petitioners established an environmental injury different from the public at large, they lacked standing.<sup>132</sup>

In *Town of Marilla v. Travis*,<sup>133</sup> the petitioners, the Town of Marilla and an individual, brought an Article 78 action challenging the DEC’s issuance of a negative declaration and an air permit issued pursuant to 6 N.Y.C.R.R. pt. 360, which allowed the respondents to use an existing storage tank to house a digestate.<sup>134</sup> The respondents challenged both of the petitioners’ standing, first arguing that the individual petitioner did not allege that his proximity gave rise to a “direct injury” that was different from the public at large.<sup>135</sup> The court disagreed, noting that the individual petitioner’s property was within 150 feet of the storage tank,

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126. *Id.* at 1297, 24 N.Y.S.3d at 813.

127. *Id.* at 1298, 24 N.Y.S.3d at 814.

128. *Id.*

129. *Turner*, 136 A.D.3d at 1298, 24 N.Y.S.3d at 814.

130. *Id.* at 1299, 24 N.Y.S.3d at 815.

131. *Id.* at 1298–99, 24 N.Y.S.3d at 814–15 (citing *Jackson v. New Rochelle*, 145 A.D.2d 484, 485, 535 N.Y.S.2d 741, 742 (2d Dep’t 1988)).

132. *Id.* at 1299, 24 N.Y.S.3d at 815.

133. No. I-2014-000101, 2015 N.Y. Slip Op. 51367(U) (Sup. Ct. Erie Cty. Aug. 24, 2015).

134. *Id.* at 1. The digestate, known commercially as Equate, is used as a fertilizer on farm fields. For more information, see *Quasar Anaerobic Digestion Facilities*, N.Y. ST. DEP’T ENVTL. CONSERVATION, <http://www.dec.ny.gov/chemical/94368.html> (last visited Apr. 11, 2017).

135. *Travis*, 2015 N.Y. Slip Op. 51367(U), at 5.

and was both downgrade and downstream from the tank.<sup>136</sup> The court held, “This geographical disposition, coupled with the fact that any fumes emanating from the tank will be significantly more bothersome to its abutting neighbors, lead us to conclude that Petitioner would endure an environmental harm which ‘is different from that suffered by the public at large.’”<sup>137</sup> Regarding the Town petitioner, the respondents argued that the Town’s “mere assertion of its general police powers, its acting as stewards of its environment, of enforcing its zoning laws, or acting in a representative capacity for its affected citizens is insufficient” to confer standing on a municipality.<sup>138</sup> However, the court held that, while the Town’s petition was “light on specifics,” standing rules are not meant to be heavy-handed, and it could not say, as a matter of law, “that [the] [p]etitioner’s pleadings [were] so wanting as to warrant a dismissal on standing grounds.”<sup>139</sup> Thus, the court held that both petitioners had standing.<sup>140</sup> As discussed below, the court upheld DEC’s determinations.<sup>141</sup>

Two courts addressed the standing of an unincorporated association during this *Survey* period. As the court in *Shoreham Wading River Advocates for Justice v. Town of Brookhaven Planning Board* explained, to be an organizational litigant, an unincorporated organization must be “the appropriate entity to act as the advocate for the group of individuals whose rights it claims to be asserting.”<sup>142</sup> To make that determination, the court must consider four factors:

- (1) the capacity of the organization to assume an adversary position;
- (2) the size and composition of the organization as reflecting a position fairly representative of the community or interest which it seeks to protect;
- (3) whether the adverse effect of the decisions and actions sought to be reviewed on [behalf of] the group represented is within the zone of interests sought to be protected; and
- (4) whether a full participating membership in the representative organization be [sic] open to all residents and property owners in the relevant neighborhood.<sup>143</sup>

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136. *Id.*

137. *Id.* (quoting Long Island Contractors’ Ass’n v. Town of Riverhead, 17 A.D.3d 590, 595, 793 N.Y.S.2d 494, 499 (2d Dep’t 2005)).

138. *Id.* at 4.

139. *Id.* (citing Ass’n for a Better Long Island, Inc. v. N.Y. State Dep’t of Envtl. Conservation, 23 N.Y.3d 1, 6, 11 N.E.3d 188, 192, 988 N.Y.S.2d 115, 119 (2014)).

140. *Travis*, 2015 N.Y. Slip Op. 51367(U), at 4.

141. *Id.* at 7.

142. No. 22674/2014, 2015 N.Y. Slip Op. 31444(U), at 10 (Sup. Ct. Suffolk Cty. Aug. 3, 2015).

143. *Id.* (citing Douglaston Civic Ass’n v. Galvin, 36 N.Y.2d 1, 7, 324 N.E.2d 317, 321,

The party seeking review of the action has the burden of establishing standing.<sup>144</sup> In *Shoreham*, the court considered this four pronged test and determined that Shoreham Wading River Advocates for Justice (SWRAJ) lacked standing because there was insufficient information provided to determine whether SWRAJ is fairly representative of the Shoreham Wading River community.<sup>145</sup>

In *Toll Land V Partnership v. Planning Board of Tarrytown*, the court considered an unincorporated association's standing in the context of a motion to intervene.<sup>146</sup> In *Toll Land V*, Friends of Brace Cottage (FBC) sought to intervene in a matter involving a proposed development that would require the demolition of a historic cottage.<sup>147</sup> The petitioners first challenged FBC on standing grounds; the court found that FBC had standing because its members had engaged in research and advocacy for the preservation of the cottage and had "an appreciation of the structure as a potentially significant historic and architectural site that is greater than most other members of the public."<sup>148</sup> This interest was within SEQRA's zone of interests, because SEQRA's definition of "environment" includes "objects of historic or aesthetic significance."<sup>149</sup>

The court conditionally granted FBC's motion to intervene.<sup>150</sup> Pursuant to CPLR 7802(d), the court "may allow other interested persons to intervene."<sup>151</sup> The court found that FBC was "interested" in the matter, noting that the requisite interest is not limited to a financial stake or property right: "[T]he law recognizes that a legitimate legal interest, particularly in matters concerning the environment and cultural or aesthetic resources, cannot always be set forth in terms of potential monetary gain or loss, or by making a claim to ownership of property."<sup>152</sup> The court rejected the petitioners' argument that intervention should be denied because the cottage was inaccessible to the public, privately owned, and located on private lands, stating the following:

[T]he state legislature has recognized that the benefits of preserving the

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364 N.Y.S.2d 830, 835 (1974)).

144. *Id.*

145. *Id.* at 10–11 (citing *Friends of Woodstock, Inc. v. Woodstock Planning Bd.*, 152 A.D.2d 876, 879, 543 N.Y.S.2d 1007, 1010 (3d Dep't 1989)).

146. 49 Misc. 3d 662, 667, 12 N.Y.S.3d 874, 879 (Sup. Ct. Westchester Cty. 2015).

147. *Id.* at 664–65, 12 N.Y.S.3d at 876–78.

148. *Id.* at 670, 12 N.Y.S.3d at 880–81 (citing *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)).

149. *Id.* at 671, 12 N.Y.S.3d at 881.

150. *Id.* at 674, 12 N.Y.S.3d at 884.

151. N.Y. C.P.L.R. 7802(d) (McKinney 2008).

152. *Toll Land V*, 49 Misc. 3d at 672, 12 N.Y.S.3d at 882 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562–63 (1992)).

“historical, archaeological, architectural and cultural heritage of the state” inure to the community at large by offering residents “a sense of orientation and civic identity,” that such heritage “is fundamental to our concern for the quality of life,” and that it “produces numerous economic benefits to the state.”<sup>153</sup>

The court therefore found that FBC’s interest was valid for purposes of intervention under CPLR 7802(d).<sup>154</sup> However, because FBC was an unincorporated association, it lacked the capacity to sue in its own name; such an association must appear by its president or treasurer.<sup>155</sup> The court therefore conditionally granted FBC’s motion to intervene, allowing it ten days to serve and file an amended answer appearing by its president or treasurer.<sup>156</sup>

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

In addition to standing, a SEQRA petitioner also must satisfy several threshold requirements, including that the claim be ripe, that administrative remedies be exhausted, and that the claim be timely brought within the statute of limitations period.<sup>157</sup>

### *A. Ripeness*

With respect to ripeness, only final agency actions are subject to challenge in a SEQRA (or any other Article 78) challenge.<sup>158</sup> An agency action is “final” where it “impose[s] an obligation, den[ies] a right or fix[es] some legal relationship as a consummation of the administrative process.”<sup>159</sup>

In addition to the Court of Appeals’ decision in *Ranco*, several other court decisions during this *Survey* period addressed ripeness. In *Toll Land V*, discussed above, the court determined that a positive declaration requiring the preparation of an SEIS was a final agency action ripe for

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153. *Id.* at 673, 12 N.Y.S.3d at 883 (quoting N.Y. PARKS REC. & HIST. PRESERV. LAW § 14.01 (McKinney 2013)).

154. *Id.*

155. *Id.* (first citing *Martin v. Curran*, 303 N.Y. 267, 280, 101 N.E.2d 683, 685 (1951); and then citing *Cnty. Bd. 7 v. Schaffer*, 84 N.Y.2d 148, 155, 639 N.E.2d 1, 2, 615 N.Y.S.2d 644, 647 (1994)).

156. *Id.* at 674, 12 N.Y.S.3d at 883 (citing N.Y. GEN. ASS’NS LAW § 12 (McKinney 2012)).

157. N.Y. C.P.L.R. 7801(1) (McKinney 2008).

158. *Id.*

159. *Essex County 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, 113 (1948)).

review.<sup>160</sup> The court described the multi-faceted determination set forth in the Second Department's decision in *Ranco*, noting that in applying the test, the court tries to "balance the goals of preventing piecemeal review of each determination made in the context of the SEQRA process . . . against the possibility of real harm to the complaining party."<sup>161</sup> Evaluating the harm requires considering the time and expense required for additional environmental review, whether the applicant already has been through a coordinated review process, and the facts and circumstances of the case.<sup>162</sup>

In *Toll Land V*, the positive declaration requiring an SEIS "effectively direct[ed] the reopening of the petitioner's subdivision application," which had been finalized four years earlier.<sup>163</sup> The court found that "the fact that the petitioner has already been through a completed coordinated review process is a factor that weighs heavily in favor of permitting review of the [B]oard's determination," because the petitioner would have no remedy for the unnecessary time and money spent preparing the SEIS.<sup>164</sup> The court added that the length of time that had passed since the subdivision's approval meant that this was not a challenge to a "preliminary step in the decision-making process," and was not "an attempt to engage in piecemeal litigation of the SEQRA process."<sup>165</sup> Finally, the court noted "that the petitioners . . . raised the issue of whether the [B]oard had jurisdiction to effectively reopen the subdivision application" after four years.<sup>166</sup> The court concluded that the determination was ripe for review:

Since the petitioners have embarked upon development pursuant to the approved subdivision plan that was approved several years ago, . . . it would be unfair to require them to expend additional resources for environmental reviews of an already-approved application without first obtaining judicial review of the validity of the Board's request.<sup>167</sup>

The Board's motion to dismiss on ripeness grounds therefore was

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160. *Toll Land V*, 49 Misc. 3d at 670, 12 N.Y.S.3d at 880.

161. *Id.* at 668, 12 N.Y.S.3d at 879 (omission in original) (quoting *Ranco II*, 124 A.D.3d 73, 86, 998 N.Y.S.2d 68, 78 (2d Dep't 2014)).

162. *Id.* (first citing *Gordon v. Rush*, 100 N.Y.2d 236, 243, 792 N.E.2d 168, 172–73, 762 N.Y.S.2d 18, 22–23; and then citing *Ranco II*, 124 A.D.3d at 86, 998 N.Y.S.2d at 78–79).

163. *Id.*

164. *Id.* at 669, 12 N.Y.S.3d at 880 (citing *Gordon*, 100 N.Y.2d at 243, 792 N.E.2d at 172, 762 N.Y.S.2d at 22).

165. *Toll Land V*, 49 Misc. 3d at 669, 12 N.Y.S.3d at 880 (quoting *Young v. Board of Trs.*, 221 A.D.2d 975, 977, 634 N.Y.S.2d 605, 607–08 (4th Dep't 1995)) (citing *Town of Coeymans v. City of Albany*, 237 A.D.2d 856, 857, 655 N.Y.S.2d 172, 173 (3d Dep't 1997)).

166. *Id.*

167. *Id.* at 669–70, 12 N.Y.S.3d at 880.

denied.<sup>168</sup> *Toll Land V* was decided prior to the Court of Appeals' decision in *Ranco*, but it appears to present the circumstances for which the *Ranco* opinion contemplated that a positive declaration could be ripe for review: there was a question of the Board's jurisdiction and ability to effectively reopen a subdivision application that had been previously approved based on a completed EIS.

In matters where the SEQRA review has not yet been completed, the issue may not be ripe for review. In *Affiliated Brookhaven Civic Organizations, Inc. v. Suffolk Regional Off-Track Betting Corp.*, the petitioners sought an injunction barring the Suffolk Regional Off-Track Betting Corporation (SCROTBC) from attempting to construct a video lottery terminal casino in the town of Brookhaven based on the town's zoning.<sup>169</sup> The respondents argued that the matter was not ripe because the facility would be subject to future review under SEQRA.<sup>170</sup> The court agreed, explaining that a determination is final and binding only if it "has its impact upon a petitioner who thereby is aggrieved,"<sup>171</sup> and "[t]he concept of impact requires certainty and immediacy of harm, and 'a-fortiori, the controversy cannot be ripe if the claimed harm may be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party.'"<sup>172</sup> Thus, the court held that the matter was not ripe for review, because "on the face of [the] [p]etitioners' argument there [was] no mistaking that the [p]etitioners [were] not challenging an action that with certain[ty] and immediacy harm them, but [were] merely attempting to prevent a speculative harm from taking place."<sup>173</sup>

In *Global Companies, LLC v. New York State Department of Environmental Conservation*, the court dismissed a challenge to the DEC's purported rescission of a negative declaration on ripeness grounds, because DEC, the lead agency, had neither rescinded the negative declaration nor made a final determination on a permit application.<sup>174</sup> In that case, the petitioner Global Companies, LLC applied

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168. *Id.* at 670, 12 N.Y.S.3d at 880.

169. No. 602867/2015, 2016 N.Y. Slip Op. 30014(U), at 1–2 (Sup. Ct. N.Y. Cty. Jan. 7, 2016).

170. *Id.* at 2.

171. *Id.* at 4–5 (quoting *Edmead v. McGuire*, 67 N.Y.2d 714, 716, 490 N.E.2d 853, 854, 499 N.Y.S.2d 934, 935 (1986)).

172. *Id.* at 5 (quoting *Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 520, 496 N.E.2d 183, 189, 505 N.Y.S.2d 24, 30 (1986)).

173. *Id.* (citing *Parent Teacher Ass'n of P.S. 124M v. Bd. of Educ.*, 138 A.D.2d 108, 112, 529 N.Y.S.2d 761, 764 (1st Dep't 1988)).

174. 52 Misc. 3d 568, 577, 35 N.Y.S.3d 830, 837 (Sup. Ct. Albany Cty. 2016) (citing *Stop-The-Barge v. Cahill*, 1 N.Y.3d 218, 224, 803 N.E.2d 361, 363–64, 771 N.Y.S.2d 40, 42–

to DEC for a Title V air permit, and DEC issued a negative declaration, Notice of Complete Application (NOCA), and draft permit in November 2013, beginning an eighteen-month statutory time period pursuant to Environmental Conservation Law § 19-0311 for DEC to act on the application.<sup>175</sup> Near the end of that period, in a letter dated May 21, 2015, DEC informed Global that it intended to rescind the negative declaration and already had rescinded the NOCA.<sup>176</sup> Global sued to prohibit DEC from rescinding the negative declaration and to compel DEC to act on its permit application.<sup>177</sup> Global argued that DEC failed to timely rescind the negative declaration, inappropriately waiting until the end of the statutory period.<sup>178</sup> The respondents (NYSDEC, the Acting Commissioner of NYSDEC, and the NYSDEC Regional Permit Administrator) argued that the May 21, 2015 letter was a “‘non-final agency determination’ because NYSDEC neither rescinded the negative declaration nor made a final determination on the permit application.”<sup>179</sup> The court concluded that the rescission of the NOCA was not untimely, and that the issue of the negative declaration’s rescission was not ripe for judicial review “as NYSDEC’s intent to rescind was not a final administrative action.”<sup>180</sup> The court remanded the matter to DEC to issue a determination in accordance with Environmental Conservation Law § 19-0311(2)(i) with respect to Global’s permit application within sixty days.<sup>181</sup> However, the court declined to compel DEC to take any specific action with respect to the negative declaration.<sup>182</sup>

### *B. Statute of Limitations*

A related procedural issue in SEQRA litigation concerns the timeliness of a SEQRA challenge under the applicable statute of limitations.<sup>183</sup> Pursuant to the general statute of limitations for Article 78 proceedings, a SEQRA challenge must be made “within four months after the determination to be reviewed becomes final and binding upon the

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43 (2003)).

175. *Id.* at 571, 35 N.Y.S.3d at 833; N.Y. ENVTL. CONSERV. LAW § 19-0311(2)(i) (McKinney 2006).

176. *Glob. Cos.*, 52 Misc. 3d at 571, 35 N.Y.S.3d at 833.

177. *Id.* at 574, 576, 35 N.Y.S.3d at 835–36.

178. *Id.* at 576, 35 N.Y.S.3d at 836; 6 N.Y.C.R.R. § 617.7(f) (2016).

179. *Glob. Cos.*, 52 Misc. 3d at 576, 35 N.Y.S.3d at 836–37.

180. *Id.* at 577, 35 N.Y.S.3d at 837 (citing *Stop-The-Barge v. Cahill*, 1 N.Y.3d 218, 223, 803 N.E.2d 361, 363, 771 N.Y.S.2d 40, 42 (2003)).

181. *Id.* at 575, 35 N.Y.S.3d at 836 (citing N.Y. ENVTL. CONSERV. LAW § 19-0311(2)(i) (McKinney 2006)).

182. *Id.* at 578, 35 N.Y.S.3d at 838.

183. *See Chertok et al.*, *supra* note 1, at 920.

petitioner,”<sup>184</sup> and that period begins to run when the agency has taken a “definitive position on the issue that inflicts an actual, concrete injury.”<sup>185</sup> As a practical matter, it can be difficult to identify that point in time when the statute of limitations begins to run, and the trigger point has become an area of some confusion, stemming from two Court of Appeals decisions: *Stop-The-Barge v. Cahill*<sup>186</sup> and *Eadie v. Town Board of North Greenbush*.<sup>187</sup> In *Stop-The-Barge*, the Court considered whether the limitations period began when the conditioned negative declaration (CND) that DEC issued became final, or when DEC issued the air permit a year later.<sup>188</sup> The Court concluded that the CND was a final agency action for purposes of judicial review of the SEQRA claim, because that was the end of the SEQRA review, and “the issuance of the CND resulted in actual concrete injury to [the] petitioners because the declaration essentially gave the developer the ability to proceed with the project without the need to prepare an [EIS].”<sup>189</sup> The Court added that it would be unreasonable to allow the petitioners to postpone their challenge to the CND until the permit was issued given the lengthy time period between the two actions, and using the CND as the trigger point was “consistent with the policy of resolving environmental issues and determining whether an environmental impact statement will be required at the early stages of project planning.”<sup>190</sup> In *Eadie*, on the other hand, the Court considered whether the statute of limitations began to run with the SEQRA Findings Statement or the subsequent rezoning enactment and held that it was the latter.<sup>191</sup> The Court distinguished *Stop-The-Barge* because it did not involve “the enactment of legislation,” and in that case “the completion of the SEQRA process was the last action taken by the agency whose determination [the] petitioners challenged.”<sup>192</sup> The *Eadie*

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184. N.Y. C.P.L.R. 217(1) (McKinney 2003).

185. *Stop-The-Barge*, 1 N.Y.3d at 223, 803 N.E.2d at 363, 771 N.Y.S.2d at 42 (quoting *Essex County v. Zagata*, 91 N.Y.2d 447, 453, 695 N.E.2d 232, 235, 672 N.Y.S.2d 281, 284 (1998)); see *Young v. Bd. of Trs.*, 89 N.Y.2d 846, 848–49, 675 N.E.2d 464, 466, 652 N.Y.S.2d 729, 731 (1996) (“[T]he Statute of Limitations was triggered when the Board committed itself to ‘a definite course of future decisions.’” (quoting 6 N.Y.C.R.R. § 617.2(b)(2) (1996)) (citing *Save the Pine Bush v. City of Albany*, 70 N.Y.2d 193, 203, 512 N.E.2d 526, 529, 518 N.Y.S.2d 943, 946 (1987))).

186. 1 N.Y.3d 218, 803 N.E.2d 361, 771 N.Y.S.2d 40 (2003).

187. 7 N.Y.3d 306, 854 N.E.2d 464, 821 N.Y.S.2d 142 (2006).

188. *Stop-The-Barge*, 1 N.Y.3d at 222–23, 803 N.E.2d at 363, 771 N.Y.S.2d at 42.

189. *Id.* at 223–24, 803 N.E.2d at 363, 771 N.Y.S.2d at 42.

190. *Id.* at 224, 803 N.E.2d at 364, 771 N.Y.S.2d at 43 (citing *Long Island Pine Barrens Soc’y, Inc. v. Planning Bd.*, 78 N.Y.2d 608, 613, 585 N.E.2d 778, 781, 578 N.Y.S.2d 466, 469 (1991)).

191. *Eadie*, 7 N.Y.3d at 312, 854 N.E.2d at 466, 821 N.Y.S.2d at 144.

192. *Id.* at 317, 854 N.E.2d at 469, 821 N.Y.S.2d at 147.

court reasoned that no concrete injury was inflicted until the rezoning was enacted; until then, the petitioners' injury was only contingent.<sup>193</sup> Thus, the Court held that "an [A]rticle 78 proceeding brought to annul a zoning change may be commenced within four months of the time the change is adopted"; however, the Court added that "[t]his does not mean that, in every case where a SEQRA process precedes a rezoning, the statute of limitations runs from the latter event, for in some cases it may be the SEQRA process, not the rezoning, that inflicts the injury of which the petitioner complains."<sup>194</sup> Courts grappled with this question in several cases during this *Survey* period.

In *Napolitano v. Town Board of Southeast*, discussed above, the respondents moved to dismiss the petition on statute of limitations grounds, arguing that the statute of limitations began to run with the Town Board's adoption of SEQRA findings, rather than the rezoning resolution, which occurred two months later.<sup>195</sup> As the Court of Appeals did in *Eadie*, the court concluded that the limitations period began to run when the Board passed the rezoning resolution after the completion of the SEQRA process.<sup>196</sup> The court reasoned that it was the rezoning resolution that resulted in the actual injury to the petitioners, "because the resolution essentially gave the [r]espondents the ability to proceed with the project under the new zoning classification."<sup>197</sup>

In *Town of Marilla v. Travis*, discussed above, involving an Article 78 proceeding challenging the DEC's negative declaration and decision to issue a Part 360 air permit, the court addressed the question of which event triggered the statute of limitations: DEC's negative declaration or its subsequent permit decision.<sup>198</sup> The court in *Marilla* held that the relevant event for statute of limitations purposes was the permit issuance.<sup>199</sup> The court found that the negative declaration was not the last action taken by the agency whose action was challenged in the lawsuit; "had DEC declined to issue the Part 360 Permit, no harm would have accrued to [the] [p]etitioners as the project could not have gone forward."<sup>200</sup> The court distinguished *Stop-The-Barge* on the ground that,

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193. *Id.*

194. *Id.*

195. 51 Misc. 3d 206, 208, 24 N.Y.S.3d 494, 496 (Sup. Ct. Putnam Cty. 2015).

196. *Id.* at 210, 24 N.Y.S.3d at 497.

197. *Id.* (citing *Stop-The-Barge v. Cahill*, 1 N.Y.3d 218, 223–24, 803 N.E.2d 361, 363, 771 N.Y.S.2d 40, 42 (2003)).

198. No. I-2014-000101, 2015 N.Y. Slip Op. 51367(U), at 4 (Sup. Ct. Erie Cty. Aug. 24, 2015).

199. *Id.*

200. *Id.* (first citing *Eadie v. Town Bd. of N. Greenbush*, 7 N.Y.3d 306, 317, 854 N.E.2d

in *Barge*, the air permit was issued by a different agency than the one that issued the SEQRA findings, whereas in *Marilla*, the same agency issued the negative declaration and permit.<sup>201</sup>

### C. Administrative Exhaustion

Administrative exhaustion is another threshold requirement that must be met for a challenger to sustain a suit under Article 78. Under the doctrine of administrative exhaustion, “courts generally refuse to review a determination on environmental or zoning matters based on evidence or arguments that were not presented during the proceedings before the lead agency.”<sup>202</sup> This principle was reaffirmed during this *Survey* period in *Azulay v. City of New York*, discussed above, in which the court found that the petitioners did not exhaust their administrative remedies.<sup>203</sup> The petitioners had multiple opportunities to participate in the public review and comment process before the City Planning Commission issued the approvals allowing the Mall’s expansion; however, the petitioners did not raise their concerns until after the SEQRA process had concluded and the authorizations were granted.<sup>204</sup> Thus, the court concluded, “Having failed to avail themselves of the opportunity to do so, [the] petitioners may not now be heard for the first time to assert their objections.”<sup>205</sup>

### 3. Mootness

Mootness arises “where a change in circumstances prevents a court

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464, 469, 821 N.Y.S.2d 142, 147 (2006); and then citing *Stop-The-Barge*, 1 N.Y.3d at 223–24, 803 N.E.2d at 363, 771 N.Y.S.2d at 42).

201. *Id.* In *Stop-the-Barge v. Cahill*, the predecessor of the respondent, New York City Energy (NYCE), applied to the New York City Department of Environmental Protection (DEP) for permits to install a power generator on a barge moored in the East River. 1 N.Y.3d at 221, 803 N.E.2d at 362, 771 N.Y.S.2d at 41. The DEP assumed lead agency status, conducted a coordinated SEQRA review, and issued three conditional negative declarations. *Id.* NYCE simultaneously applied for and received an air permit from NYSDEC. *Id.* at 221–22, 803 N.E.2d at 362, 771 N.Y.S.2d at 41. The Court held that, notwithstanding the later permit from NYSDEC, the negative declaration was the triggering event for limitations purposes; it “resulted in actual concrete injury to [the] petitioners because [it] essentially gave the developer the ability to proceed with the project without the need to prepare an environmental impact statement.” *Id.* at 223–24, 803 N.E.2d at 363, 771 N.Y.S.2d at 42.

202. *Miller v. Kozakiewicz*, 300 A.D.2d 399, 400, 751 N.Y.S.2d 524, 526–27 (2d Dep’t 2002) (first citing *Long Island Pine Barrens Soc’y v. Planning Bd. of Brookhaven*, 204 A.D.2d 548, 550, 611 N.Y.S.2d 917, 918–19 (2d Dep’t 1994); then citing *Harriman v. Town Bd. of Monroe*, 153 A.D.2d 633, 635, 544 N.Y.S.2d 860, 862 (2d Dep’t 1989); and then citing *Aldrich v. Pattison*, 107 A.D.2d 258, 267–68, 486 N.Y.S.2d 23, 30 (2d Dep’t 1985)).

203. No. 080170/15, 2016 N.Y. Slip Op. 50428(U), at 10 (Sup. Ct. Richmond Cty. Mar. 28, 2016) (citing *Aldrich*, 107 A.D.2d at 267–68, 486 N.Y.S.2d at 30).

204. *Id.* at 5.

205. *Id.* at 10 (citing *Aldrich*, 107 A.D.2d at 267–68, 486 N.Y.S.2d at 30).

from rendering a decision that would effectively determine an actual controversy.”<sup>206</sup> In SEQRA cases, mootness typically arises when a project that is subject to the agency action progresses to a point at which the court is unable to redress a petitioner’s alleged injuries.<sup>207</sup> A typical example is where a petitioner’s alleged injuries arise from the construction impacts of a project, and those impacts already have occurred and ceased by the time the court reaches its decision. Another common scenario is when a project has progressed to a point at which redress of the petitioner’s injuries only can be accomplished through draconian means, such as demolition of the project, which the court determines would be unfairly severe.<sup>208</sup> Mootness may be raised at any time, by a party or by the court *sua sponte*, because it goes to the existence of an actual controversy, and therefore the court’s subject matter jurisdiction.<sup>209</sup>

New York’s mootness jurisprudence makes clear that a party seeking to halt construction of a project through a court challenge must move for injunctive relief at each stage of the proceeding to preserve a claim for mootness.<sup>210</sup> Courts generally will make an exception and hear an otherwise moot case in situations in which at least one of the following 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., substantial and novel issues.”<sup>211</sup>

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206. *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) (citing ARTHUR KARGER, *THE POWERS OF THE NEW YORK COURT OF APPEALS* § 71(a), at 426–29 (3d ed. 2005)). For example, during this *Survey* period, a SEQRA claim was rendered academic by amendments to the applicable Village Code that obviated the need to obtain the exemption upon which the SEQRA claim was based. *Sullivan v. Vill. of Southampton Bd. of Trs.*, No. 14-24031, 2015 N.Y. Slip Op. 32261(U), at 4 (Sup. Ct. Suffolk Cty. Nov. 23, 2015) (citing *Citizens for St. Patrick’s v. City of Watervliet City Council*, 126 A.D.3d 1159, 1160–61, 5 N.Y.S.3d 582, 584–85 (3d Dep’t 2015)).

207. *See Dreikausen*, 98 N.Y.2d at 172, 774 N.E.2d at 196, 746 N.Y.S.2d at 432.

208. *See, e.g., Weeks Woodlands Ass’n v. Dormitory Auth.*, 95 A.D.3d 747, 767, 945 N.Y.S.2d 263, 279 (1st Dep’t), *aff’d*, 20 N.Y.3d 919, 980 N.E.2d 532, 956 N.Y.S.2d 483 (2012).

209. *Cerniglia v. Ambach*, 145 A.D.2d 893, 894, 536 N.Y.S.2d 227, 229 (3d Dep’t 1988) (citing *Sibron v. New York*, 392 U.S. 40, 50 n.8 (1968)).

210. The court explained that the rationale that the petitioner must move for an injunction if it wants “to cast the risk of going forward with the work upon” the developer. *Weeks Woodlands Ass’n*, 95 A.D.3d at 752–53, 945 N.Y.S.2d at 268.

211. *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).

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

As explained in Part I, much of SEQRA's mandate is procedural; agencies must comply with SEQRA's 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.<sup>212</sup> Several cases during the *Survey* period concerned agencies' alleged failures to comply with one or more of these procedural mandates.

Two cases from this *Survey* period involved an agency's failure to complete the SEQRA process prior to taking an action. In *City of Johnstown v. Town of Johnstown*, the Third Department held that the City's failure to comply with SEQRA required dismissal of an action regarding the public interest determination for a proposed annexation.<sup>213</sup> Similarly, in *24 Franklin Ave. R.E. Corp. v. Heaship*, among other legal deficiencies, the Town Board failed to prepare and review a complete EAF prior to enacting an amendment to a local law, rendering the amendment invalid.<sup>214</sup>

As previously described, an initial stage of SEQRA review is the agency's classification of a proposed action as a Type I, Type II, or Unlisted action.<sup>215</sup> Most challenges on this subject involve the classification itself, and several decisions addressed classifications during this *Survey* period.

On remand to the Fourth Department from the Court of Appeals, the court in *Painted Post* evaluated the Village's determination that the Water Agreement was a Type II action not subject to SEQRA, and found it arbitrary and capricious.<sup>216</sup> The sale of one million gallons per day of water is not specifically defined as a Type I or Type II action pursuant to SEQRA regulations.<sup>217</sup> Among the actions defined as Type I under the regulations are the use of "ground or surface water in excess of [two million gpd]," and "any Unlisted action[] that exceeds 25 percent of any threshold in this section, occurring wholly or partially within or

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212. *See supra* Part I.

213. 135 A.D.3d 1081, 1082, 23 N.Y.S.3d 417, 419 (3d Dep't 2016) (citing *City Council of Watervliet v. Town Bd. of Colonie*, 3 N.Y.3d 508, 520, 822 N.E.2d 339, 345, 789 N.Y.S.2d 88, 94 (2004)).

214. 139 A.D.3d 742, 745, 30 N.Y.S.3d 695, 698 (2d Dep't 2016) (first citing 6 N.Y.C.R.R. §§ 617.6, 617.7 (2016); then citing *Falcon Grp., LLC v. Town/Vill. of Harrison Planning Bd.*, 131 A.D.3d 1237, 1240, 17 N.Y.S.3d 469, 472–73 (2d Dep't 2015); and then citing *Tauber v. Village of Spring Valley*, 56 A.D.3d 660, 661, 868 N.Y.S.2d 239, 241 (2d Dep't 2008)).

215. *See supra* Part I.

216. *Sierra Club II*, 134 A.D.3d 1475, 1477, 23 N.Y.S.3d 506, 509 (4th Dep't 2015).

217. *Id.* (citing 6 N.Y.C.R.R. § 617.4, 617.5 (2015)).

substantially contiguous to any publicly owned or operated parkland, recreation area or designated open space.”<sup>218</sup> The court in *Painted Post* opined, “Where, as here, the [DEC] has set a threshold clarifying that the use of a certain amount of a natural resource, e.g., land or water, constitutes a Type I action, it is reasonable to assume that the DEC has ‘implicitly determined that an annexation of less than [that threshold] is an “[U]nlisted action.”’<sup>219</sup> Thus, the court concluded that the Water Agreement implicitly was an Unlisted action.<sup>220</sup> In addition, because there was “evidence in the record that the transloading facility may be substantially contiguous to a publicly owned park,” and the Water Agreement called for the use of water at fifty percent of the threshold for a Type I action, the court said that it also could be deemed a Type I action under title 6 N.Y.C.R.R. § 617.4(b)(10).<sup>221</sup> Without resolving the question of which type of action it was, the court concluded that SEQRA review was required for the Water Agreement.<sup>222</sup>

Several decisions during this *Survey* period upheld Type II classifications declaring the action exempt from SEQRA review. In *Committee to Preserve the Historic Chautauqua Amphitheater v. Board of Trustees of the Chautauqua Institute*, the court held that the replacement of an amphitheater in the town of Chautauqua was a Type II action.<sup>223</sup> The SEQRA regulations provide, in relevant part, that a “replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site” is not subject to SEQRA review.<sup>224</sup> The court noted, “In order to constitute a replacement in kind, exact replication is not required. A replacement in kind will be effected if a new facility has a substantially similar use as the old facility.”<sup>225</sup> In this case, the “Board of Trustees undertook significant efforts to replicate the shape, form, look

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218. 6 N.Y.C.R.R. § 617.4(b)(6)(ii), (b)(10) (2016).

219. *Sierra Club II*, 134 A.D.3d at 1478, 23 N.Y.S.3d at 510 (last two alterations in original) (quoting *City Council of Watervliet v. Town Bd. of Colonie*, 3 N.Y.3d 508, 517–18, 822 N.E.2d 339, 343, 789 N.Y.S.2d 88, 92 (2004)).

220. *Id.*

221. *Id.* (first citing 6 N.Y.C.R.R. § 617.4(b)(6)(ii); and then citing 6 N.Y.C.R.R. § 617.4(b)(10)).

222. *Id.*

223. 51 Misc. 3d 729, 736, 25 N.Y.S.3d 583, 588 (Sup. Ct. Chautauqua Cty. 2016).

224. 6 N.Y.C.R.R. § 617.5(c)(2) (2016) (“The following actions are not subject to review under this Part: . . . [R]eplacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site, including upgrading buildings to meet building or fire codes, unless such action meets or exceeds any of the thresholds in section 617.4 of this Part.”).

225. *Comm. to Preserve the Hist. Chautauqua Amphitheater*, 51 Misc. 3d at 736, 25 N.Y.S.3d at 588 (first citing *Manhattan Valley Neighbors v. Koch*, 168 A.D.2d 262, 262, 562 N.Y.S.2d 621, 622 (1st Dep’t 1990); and then citing *Anderberg v. N.Y. State Dep’t of Envtl. Conservation*, 141 Misc. 2d 594, 597, 533 N.Y.S.2d 828, 831 (Sup. Ct. Albany Cty. 1988)).

and feel of the current structure. The proposed amphitheater will have the same use and purpose as the current one and it is located in the same place.”<sup>226</sup> Therefore, the new amphitheater constituted a replacement in kind and was exempt from SEQRA.<sup>227</sup>

In *Rappaport v. Village of Saltaire*, the Second Department held that an agreement between a Village and an individual regarding land that the individual previously conveyed to the Village that terminated restrictive covenants and a reversionary interest held by that individual was a Type II action.<sup>228</sup> The court added that, even if the agreement were subject to SEQRA, “the Board’s determination that approval of the agreement would not have a significant negative impact on the environment was not arbitrary and capricious.”<sup>229</sup> And in *Smithline v. Town & Village of Harrison*, the Second Department upheld the Town’s determination that the construction of drainage that would connect to existing storm sewers and require a temporary and permanent easement on the petitioners’ property was a Type II action.<sup>230</sup>

In *Sullivan Farms IV, LLC v. Village of Wurtsboro*, the court held that the Town Board’s decision to rescind a subdivision approval that was void ab initio was ministerial and was not an action triggering SEQRA.<sup>231</sup>

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226. *Id.*

227. *Id.*

228. 130 A.D.3d 930, 932, 14 N.Y.S.3d 107, 110 (2d Dep’t 2015) (first citing 6 N.Y.C.R.R. § 617.2(b) (2015); then citing N.Y. ENVTL. CONSERV. LAW § 8-0105(4) (McKinney 2005); and then citing *Town of Woodbury v. County of Orange*, 114 A.D.3d 951, 954, 981 N.Y.S.2d 126, 130 (2d Dep’t 2014)).

229. *Id.* (citing 6 N.Y.C.R.R. § 617.7(a)(2) (2015)). The court also held that the public trust doctrine is not applicable to a property that is subject to a reversionary interest; “[w]here ‘the land acquired by the [municipality] for public . . . purposes was conveyed subject to a condition subsequent it is not under the control of the Legislature.’” *Id.* (alterations in original) (omission in original) (quoting *Grant v. Koenig*, 39 A.D.2d 1000, 1001, 333 N.Y.S.2d 591, 594 (3d Dep’t 1972)).

230. 131 A.D.3d 1173, 1174, 16 N.Y.S.3d 823, 824 (2d Dep’t 2015) (first citing 6 N.Y.C.R.R. § 617.5(c)(11), (15), (33) (2015); then citing *Rodgers v. City of North Tonawanda*, 60 A.D.3d 1379, 1379, 875 N.Y.S.2d 409, 409 (4th Dep’t 2009); then citing *Kaplan v. Inc. Village of Lynbrook*, 12 A.D.3d 410, 411, 784 N.Y.S.2d 586, 587 (2d Dep’t 2004); and then citing *Civ. Ass’n of Utopia Estates v. City of New York*, 258 A.D.2d 650, 650, 685 N.Y.S.2d 781, 781 (2d Dep’t 1999)); 6 N.Y.C.R.R. § 617.5(c)(11) (2016) (“[E]xtension of utility distribution facilities, including . . . water and sewer connections to render service in approved subdivisions or in connection with any action on this list.”); *Id.* § 617.5(c)(15) (“[M]inor temporary uses of land having negligible or no permanent impact on the environment.”); *Id.* § 617.5(c)(33) (“[E]mergency actions that are immediately necessary on a limited and temporary basis for the protection or preservation of life, health, property or natural resources, provided that such actions are directly related to the emergency and are performed to cause the least change or disturbance, practicable under the circumstances, to the environment.”); 6 N.Y.C.R.R. § 617.6(a)(1)(i) (2016) (“If the action is a Type II action, the agency has no further responsibilities under this Part.”).

231. 134 A.D.3d 1275, 1279, 21 N.Y.S.3d 450, 454 (3d Dep’t 2015) (first citing *Reiss v.*

The petitioners also alleged that the Planning Board violated SEQRA by failing to make any findings when it rescinded the subdivision approval,<sup>232</sup> however, that claim was rendered moot by the Planning Board's subsequent adoption of a determination that made the requisite findings.<sup>233</sup> The court further held that the adoption of local laws was properly treated as an Unlisted action because they did not change the allowable uses in a zoning district;<sup>234</sup> they only amended the procedures to be employed in assessing proposed subdivisions and cluster developments.<sup>235</sup> Moreover, the requisite short EAFs were submitted and showed no environmental impacts, so the hard look requirement was met.<sup>236</sup>

In *Board of Managers of Plaza Condo. v. New York City Department of Transportation*, the court held that the City Department of Transportation properly categorized a citywide bicycle share program as an Unlisted action and analyzed the program "as a whole," rather than reviewing each proposed bike station individually.<sup>237</sup> The petitioners had challenged the location of one bike share station, arguing that each station should have been reviewed individually, and that the station at issue should have been classified as a Type I due to its proximity to a historic building and a site listed on the National Register of Historic Places.<sup>238</sup> The court rejected this assertion, holding that DOT's analysis was proper and noting that, even if the classification were incorrect, it would

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Keator, 150 A.D.2d 939, 942, 541 N.Y.S.2d 864, 865 (3d Dep't 1989); and then citing ENVTL. CONSERV. § 8-0105(4), (5)(iii)). The subdivision approval was issued upon the expectation that land would be annexed from another town, but that annexation never occurred. The acreage located in the Village was insufficient to support the number of units proposed in the development pursuant to the formula in the zoning law. *Sullivan Farms IV*, 134 A.D.3d at 1278, 21 N.Y.S.3d at 453.

232. *Id.*

233. *Id.* (first citing *City of Gloversville v. Town of Johnstown*, 210 A.D.2d 760, 761–62, 620 N.Y.S.2d 184, 185 (3d Dep't 1994); then citing *Weinstein Enters. v. Town of Kent*, 171 A.D.2d 874, 875, 568 N.Y.S.2d 26, 26 (2d Dep't 1991); and then citing *City of Glens Falls v. Town of Queensbury*, 90 A.D.3d 1119, 1120–21, 933 N.Y.S.2d 762, 763 (3d Dep't 2011)).

234. *Id.*

235. *Sullivan Farms IV*, 134 A.D.3d at 1278, 21 N.Y.S.3d at 453 (first citing 6 N.Y.C.R.R. § 617.2(m) (2015); then citing 6 N.Y.C.R.R. § 617.6(a)(3) (2015); then citing *Ellsworth v. Town of Malta*, 16 A.D.3d 948, 949, 792 N.Y.S.2d 227, 228 (3d Dep't 2005)).

236. *Sullivan Farms IV*, 134 A.D.3d at 1279, 21 N.Y.S.3d at 454.

237. (*Bd. of Managers of Plaza Condo. II*), 131 A.D.3d 419, 420, 14 N.Y.S.3d 375, 376 (1st Dep't 2015) (first citing CEQR TECHNICAL MANUAL 2014, *supra* note 49, at 2-2 to -3; and then citing *Cambridge Owners Corp. v. N.Y.C. Dep't of Transp.*, 118 A.D.3d 634, 634, 989 N.Y.S.2d 30, 31 (1st Dep't 2014)).

238. *See Bd. of Managers of Plaza Condo. v. N.Y.C. Dep't of Transp. (Bd. Of Managers of Plaza Condo. I)*, No. 101392/13, 2014 N.Y. Slip Op. 50718(U), at 6 (Sup. Ct. N.Y. Cty. Apr. 28, 2014), *aff'd*, 131 A.D.3d 419, 14 N.Y.S.3d 375 (1st Dep't 2015).

constitute harmless error because the respondents properly found that no significant environmental impact would result from the program and no EIS was required.<sup>239</sup>

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

Agency decisions are accorded significant judicial deference where the petitioners challenge an agency’s conclusions regarding the environmental impacts of a proposal.<sup>240</sup> 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>241</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>242</sup> Successful challenges to EISs are uncommon because of this deferential standard of review.<sup>243</sup> Success is relatively more common in challenges to determinations of significance, but as several unsuccessful challenges from the *Survey* period show, petitioners in such cases face a difficult burden of proof.

*1. Adequacy of Determinations of Environmental Significance*

The issuance of a negative declaration concludes an agency’s obligations under SEQRA.<sup>244</sup> As a result, challenges to a project for which agencies conclude that no EIS is necessary often seek to show that the agency’s issuance of a negative declaration was arbitrary and capricious because, contrary to the agency’s determination, the proposed

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239. *Bd. of Managers of Plaza Condo. II*, 131 A.D.3d at 420, 14 N.Y.S.3d at 376 (first citing *Hells Kitchen Neighborhood Ass’n v. City of New York*, 81 A.D.3d 460, 462, 915 N.Y.S.2d 565, 567 (1st Dep’t); then citing *Rusciano & Son Corp. v. Kiernan*, 300 A.D.2d 590, 590, 752 N.Y.S.2d 377, 378 (2d Dep’t 2002); and then citing *Jaffe ex rel. Cragsmoor Pres. All. v. RCI Corp.*, 119 A.D.2d 854, 855, 500 N.Y.S.2d 427, 429 (3d Dep’t)).

240. *See, e.g., Riverkeeper, Inc. v. Planning Bd.*, 9 N.Y.3d 219, 231–32, 881 N.E.2d 172, 177, 851 N.Y.S.2d 76, 81 (2007) (quoting *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)).

241. *Id.* (quoting *Jackson*, 67 N.Y.2d at 417, 494 N.E.2d at 436, 503 N.Y.S.2d at 305).

242. *Schaller v. Town of New Paltz Zoning Bd. of Appeals*, 108 A.D.3d 821, 822–23, 968 N.Y.S.2d 702, 703–04 (3d Dep’t 2013) (first citing N.Y. C.P.L.R. 7803(3) (McKinney 2008); then citing *Riverkeeper, Inc.*, 9 N.Y.3d at 232, 881 N.E.2d at 177, 851 N.Y.S.2d at 81; and then citing *Troy Sand & Gravel Co. v. Town of Nassau*, 82 A.D.3d 1377, 1378, 918 N.Y.S.2d 667, 669 (3d Dep’t 2011)).

243. *See* 2 GERRARD ET AL., *supra* note 84, § 7.04[4].

244. 6 N.Y.C.R.R. § 617.5 (2016); *see* 2 GERRARD ET AL., *supra* note 84, § 2.01[3][b].

action may have significant adverse environmental impacts, or that the agency failed to provide a written, reasoned explanation for that determination.<sup>245</sup> In several decisions during the *Survey* period, petitioners asserted challenges to negative declarations, with some success.

In *Dawley v. Whitetail 414, LLC*, the Fourth Department annulled the negative declaration issued by the town of Tyre's Town Board for failure to provide a written, reasoned elaboration.<sup>246</sup> In *Dawley*, the petitioners challenged the negative declaration issued by the respondent Town of Tyre Town Board for the Lago Resort and Casino, which required Board approval of the site plan application and several related resolutions.<sup>247</sup> The Town Board issued the negative declaration on June 12, 2014.<sup>248</sup> Subsequently, special counsel for the Town Board prepared an attachment supporting the negative declaration, to "explain[] the findings made by the Town Board at the meeting and the rationale for the [negative declaration]." <sup>249</sup> However, the attachment was not provided to the Town Board until July 11, 2014, and the Town Board never passed a resolution approving the attachment or adopting it as part of the negative declaration.<sup>250</sup> The Fourth Department held that the Town Board violated SEQRA, noting that "SEQRA's procedural mechanisms mandat[ed] strict compliance, and anything less [would] result in annulment of the lead agency's determination of significance."<sup>251</sup>

The court rejected the respondents' argument that it should search the entire record to discern the Town Board's reasoning for the negative declaration, stating that "[a] record evincing an extensive legislative process . . . is neither a substitute for strict compliance with SEQRA's [written] reasoned elaboration requirement nor sufficient to prevent annulment," and that the intent of the regulation requiring the agency to set forth a reasoned elaboration with references to supporting documentation is "to focus and facilitate judicial review and, of no lesser

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245. C.P.L.R. 7803(3); *see also* Chertok et al., *supra* note 1, at 927. Challenges to positive declarations are less common than challenges to negative declarations. *See* 2 GERRARD ET AL., *supra* note 84, § 3.05[2][e]. Part of the reason is that positive declarations generally are not considered final agency actions. *See supra* text accompanying note 90.

246. 130 A.D.3d 1570, 1571, 14 N.Y.S.3d 854, 856 (4th Dep't), *lv. granted*, 132 A.D.3d 1331, 17 N.Y.S.3d 346 (4th Dep't), *appeal withdrawn*, 27 N.Y.3d 990, 59 N.E.3d 1212, 38 N.Y.S.3d 100 (2016).

247. *Id.* at 1570, 14 N.Y.S.3d at 855.

248. *Id.*

249. *Id.* at 1570–71, 14 N.Y.S.3d at 855.

250. *Id.* at 1571, 14 N.Y.S.3d at 855.

251. *Dawley*, 130 A.D.3d at 1571, 14 N.Y.S.3d at 856 (citing *King v. Saratoga Cty. Bd. of Supervisors*, 89 N.Y.2d 341, 348, 675 N.E.2d 1185, 1187, 653 N.Y.S.2d 233, 235 (1996)).

importance, to provide affected landowners and residents with a clear, written explanation of the lead agency's reasoning at the time the negative declaration is made."<sup>252</sup> Thus, the Fourth Department reversed the lower court's dismissal of the petition, annulled the negative declaration, and vacated the site plan approval and related resolutions.<sup>253</sup>

After the Fourth Department's decision, the Town conducted a second SEQRA review and the petitioners challenged the Town's negative declaration again, in *Casino Free Tyre v. Town Board of Tyre*.<sup>254</sup> The court denied the petitioners' claim that the scope and magnitude of the project made an EIS mandatory, noting that "[w]hile there is a very low threshold to require an EIS in a Type I action, there is no hard line rule requiring an EIS for a certain sized project."<sup>255</sup> The court also denied the petitioners' claim that the Town applied the wrong legal standard in its SEQRA analysis.<sup>256</sup> The court explained that the SEQRA regulation "requires a 'may' standard if the agency determines that an EIS is required, and a 'will be no' or 'will not be' standard if the agency determines an EIS is not required."<sup>257</sup>

The petitioners also asserted three allegations regarding mitigation measures: (1) the Town did not sufficiently evaluate the mitigation measures that were incorporated into the project; (2) the Town inappropriately relied on the measures, including those in a Community Mitigation Plan (CMP), in issuing the negative declaration; and (3) reliance on the CMP made it an improper conditioned negative declaration because the CMP was not accepted until after negative declaration was issued.<sup>258</sup> The court denied all three claims, holding that the Town took the requisite hard look at the potential impacts in

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252. *Id.* at 1571, 14 N.Y.S.3d at 856 (citing *Troy Sand & Gravel Co. v. Town of Nassau*, 82 A.D.3d 1377, 1379, 918 N.Y.S.2d 667, 670 (3d Dep't 2011)).

253. *Id.*

254. 51 Misc. 3d 665, 667, 27 N.Y.S.3d 350, 353 (Sup. Ct. Seneca Cty.), *aff'd*, 140 A.D.3d 1711, 31 N.Y.S.3d 906 (4th Dep't 2016).

255. *Id.* at 668–69, 27 N.Y.S.3d at 354.

256. *Id.* at 670, 27 N.Y.S.3d at 355.

257. *Id.* at 669, 27 N.Y.S.3d at 354. The regulation states the following:

The lead agency must determine the significance of any Type I or Unlisted action in writing in accordance with this section. To require an EIS for a proposed action, the lead agency must determine that the action may include the potential for at least one significant adverse environmental impact. To determine that an EIS will not be required for an action, the lead agency must determine either that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant.

6 N.Y.C.R.R. § 617.7(a) (2016).

258. *Casino Free Tyre*, 51 Misc. 3d at 670, 27 N.Y.S.3d at 355. See note 27, *supra*, for a discussion of conditioned negative declarations.

conjunction with the mitigating design changes that were developed in response to questions and concerns raised in the SEQRA process.<sup>259</sup> The court also concluded that the CMP did not make the negative declaration conditional, because the Town reviewed the CMP's contents at the meeting before the negative declaration was issued.<sup>260</sup> Moreover, the court noted that the CMP included mitigation measures that addressed issues under both SEQRA and the Gaming Act, and the Town took the requisite hard look at those measures that addressed SEQRA issues during the review process.<sup>261</sup>

Regarding the petitioners' remaining nine causes of action under SEQRA, the court held that the Town did not improperly segment its SEQRA review, it was not bound to the findings in part 2 of its prior environmental review, and the Town adequately addressed impacts relating to the casino's impact on agricultural resources and land, as well as other potential impacts.<sup>262</sup> Thus, the proceeding was dismissed, and the negative declaration and related resolutions were upheld.<sup>263</sup>

In *Wellsville Citizens for Responsible Development, Inc. v. Wal-Mart Stores, Inc.*, the court reversed the lower court's decision and granted an Article 78 petition, annulling a negative declaration for the construction of a Wal-Mart.<sup>264</sup> In *Wellsville*, the petitioners alleged both procedural and substantive violations of SEQRA.<sup>265</sup> The petitioners first argued that the Town Board improperly failed to complete part 3 of the EAF; however, the court held, "As long as the factors set forth in part 3 of the EAF are addressed by the lead agency in its environmental review of the project, there is no need to complete part 3, or to nullify the negative declaration if a lead agency fails to do so."<sup>266</sup> The court held that

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259. *Casino Free Tyre*, 51 Misc. 3d at 673, 27 N.Y.S.3d at 357.

260. *Id.* at 673, 27 N.Y.S.3d at 357.

261. *Id.* The Upstate New York Gaming Economic Development Act ("Gaming Act") authorized the New York State Gaming Commission to license casinos in certain regions of New York. N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 1310 (McKinney 2017). The law requires, among other things, that the applicant identify how it will address problem gambling concerns, workforce development, and community development. N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 1316(5) (McKinney 2017). It also requires that the applicant commit to a community mitigation plan for the host municipality that addresses infrastructure costs and emergency services costs. RAC. PARI-MUT. WAG. & BREED. § 1316(6)–(7).

262. *Casino Free Tyre*, 51 Misc. 3d at 673–74, 27 N.Y.S.3d at 357–58; RAC. PARI-MUT. WAG. & BREED. § 1316(5)–(7).

263. *Casino Free Tyre*, 51 Misc. 3d at 674–75, 27 N.Y.S.3d at 358, *aff'd*, 140 A.D.3d 1711, 31 N.Y.S.3d 906 (4th Dep't 2016).

264. 140 A.D.3d 1767, 1767, 33 N.Y.S.3d 653, 654 (4th Dep't 2016).

265. *Id.* at 1767–69, 33 N.Y.S.3d at 655–56.

266. *Id.* at 1768, 33 N.Y.S.3d at 655 (citing *Residents Against Wal-Mart v. Planning Bd.*, 60 A.D.3d 1343, 1344, 875 N.Y.S.2d 691, 693 (4th Dep't)).

the Town Board had addressed the potentially larger impacts identified in part 2, so the negative declaration did not have to be annulled.<sup>267</sup> The court also rejected the petitioner's argument that the Town Board's failure to notify the Planning Board before assuming lead agency status required nullification of the negative declaration, finding that, under the circumstances of the case, such a failure was inconsequential.<sup>268</sup>

After rejecting the petitioner's procedural arguments, the court considered whether the Town Board took the requisite hard look at the Wal-Mart Supercenter's potential environmental impacts.<sup>269</sup> The petitioner argued that the Town Board failed to adequately evaluate the potential adverse impacts of the project on traffic, wildlife, community character, and surface water.<sup>270</sup> The court held that the traffic analysis was sufficient but that the Town's analysis was inadequate with respect to the three other elements.<sup>271</sup> Specifically, with respect to wildlife, the Town Board determined that the project would have no significant impact on wildlife by relying on letters from the New York Natural Heritage Program (NHP) and the U.S. Fish and Wildlife Service indicating that those agencies did not have records of any endangered or threatened species on the project site.<sup>272</sup> However, the Town Board previously had been told that birds listed by DEC as "threatened" and of "special concern" and included in NHP's "watch list" had been spotted on the project site.<sup>273</sup> Moreover, the NHP letter warned that the information in the letter was not a substitute for on-site surveys, which the Town Board never required.<sup>274</sup> Thus,

[g]iven the information received from the public that state-listed threatened species might be present on the project site and the failure of the Town Board to investigate the veracity of that information, [the court] conclude[d] that the Town Board failed to take a hard look at the impact of the project on wildlife,<sup>275</sup>

rendering the negative declaration arbitrary and capricious.<sup>276</sup>

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267. *Id.* at 1768, 33 N.Y.S.3d at 655.

268. *Id.* (citing *King v. County of Monroe*, 255 A.D.2d 1003, 1004, 679 N.Y.S.2d 779, 781 (4th Dep't 1998)).

269. *Wellsville Citizens for Responsible Dev., Inc.*, 140 A.D.3d at 1768, 33 N.Y.S.3d at 655.

270. *Id.* at 1768–71, 33 N.Y.S.3d at 655–57.

271. *See id.*

272. *Id.* at 1769, 33 N.Y.S.3d at 656.

273. *Id.* at 1769, 33 N.Y.S.3d at 655–56.

274. *Wellsville Citizens for Responsible Dev., Inc.*, 140 A.D.3d at 1769, 33 N.Y.S.3d at 656.

275. *Id.*

276. *Id.*

Regarding “community character,” the court confirmed that “existing community or neighborhood character” is included in SEQRA’s definition of “environment,” and that SEQRA “require[s] a lead agency to consider more than impacts upon the physical environment.” including the potential displacement of local residents and businesses.<sup>277</sup> Thus, contrary to the Town Board’s assertion, the Town had to consider the impacts of the big box development on community character, and it failed to do so, requiring the annulment of the negative declaration.<sup>278</sup> Finally, regarding the potential impacts on surface water, the court held that the Town Board erred in failing to consider the potential surface water impacts of the project as a whole.<sup>279</sup> The Town Board examined only the footprint of the store and related areas, excluding the golf course holes that were adjacent to and part of the project.<sup>280</sup> Thus, the Town Board failed to take the requisite hard look at the potential surface water impact of the entire project, and the Town Board’s resolution adopting the negative declaration was annulled.<sup>281</sup>

Despite these victories, the petitioners were largely unsuccessful in challenging negative declarations during this *Survey* period. In *DeFeo v. Zoning Board of Appeals of Bedford*, the court upheld the Planning Board’s negative declaration upon finding that the traffic analysis was sufficient.<sup>282</sup> The court noted that, in determining whether the requisite hard look was taken, the Court of Appeals evaluates the agency’s substantive obligations under SEQRA in light of a “rule of reason,” and the extent to which each environmental factor must be discussed depends on the nature of the action.<sup>283</sup> In addition to finding the traffic analysis sufficient, the court noted that the Planning Board was not required to accept the opinions of the petitioner’s consultant over its own traffic consultant.<sup>284</sup> Similarly, in *Saint James Antiochian Orthodox Church v.*

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277. *Id.* at 1770, 33 N.Y.S.3d at 656 (first citing SEQRA HANDBOOK, *supra* note 16, at 179; then citing N.Y. ENVTL. CONSERV. LAW § 8-0105 (McKinney 2005); and then citing *Chinese Staff & Workers Ass’n v. City of New York*, 68 N.Y.2d 359, 366, 502 N.E.2d 176, 181, 509 N.Y.S.2d 499, 503 (1986)).

278. *Id.* (first citing *Village of Chestnut Ridge v. Town of Ramapo*, 45 A.D.3d 74, 94–95, 841 N.Y.S.2d 321, 339 (2d Dep’t 2007); and then citing *Wal-Mart Stores v. Town of N. Elba Planning Bd.*, 238 A.D.2d 93, 98, 668 N.Y.S.2d 774, 777 (1998)).

279. *Wellsville Citizens for Responsible Dev., Inc.*, 140 A.D.3d at 1770, 33 N.Y.S.3d at 656–57.

280. *Id.* at 1770, 33 N.Y.S.3d at 657 (citing *Long Island Pine Barrens Soc’y, Inc. v. Town Bd.*, 290 A.D.2d 448, 448–49, 736 N.Y.S.2d 87, 88 (2d Dep’t 2002)).

281. *Id.* at 1770–71, 33 N.Y.S.3d at 657.

282. 137 A.D.3d 1123, 1127, 28 N.Y.S.3d 111, 116 (2d Dep’t 2016).

283. *Id.* at 1127, 28 N.Y.S.3d at 115 (quoting *Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668, 688, 664 N.E.2d 1126, 1238, 642 N.Y.S.2d 164, 176 (1996)).

284. *Id.* at 1127, 28 N.Y.S.3d at 116 (first citing *Thorne v. Vill. of Millbrook Planning*

*Town of Hyde Park Planning Board*, the Second Department upheld the Town of Hyde Park Planning Board's negative declaration, holding that it took the requisite hard look and set forth a reasoned elaboration for the decision.<sup>285</sup> And in *Meyer v. Zoning Board of Appeals of Utica*, the court held that the Zoning Board of Appeals of the City of Utica complied with SEQRA in issuing a negative declaration.<sup>286</sup>

In *Itzler v. Town Board of Huntington*, the court upheld the issuance of a negative declaration for a Type I action involving the re-zoning of a thirty-seven acre parcel known as Oaktree Dairy in the town of Huntington.<sup>287</sup> The Town Board's resolution adopting the negative declaration said that "upon due deliberation of the completed [EAF] . . . the Town Board finds that the action will not have a significant effect on the environment because the rezoning action incorporates measures and conditions of approval to mitigate impacts."<sup>288</sup> In rejecting the petitioners' challenges to the negative declaration, the court noted that the petitioners failed to provide any admissible evidence to challenge the EAF's findings regarding the potential impacts of the project.<sup>289</sup> It also reiterated the fact that a Type I action does not necessarily require an EIS, and explained,

A negative declaration may be properly issued on a Type 1 action where, as here, the project has been modified during the initial review process to accommodate environmental concerns of the lead agency and other interested parties. The modifications must negate the continued potentiality of the adverse effects of the proposed action. The modifications may not be conditions unilaterally imposed by the lead agency, but adjustments incorporated by the project sponsor to mitigate concerns identified by the public and the reviewing agencies and be publicly evaluated prior to the issuance of the negative declaration.<sup>290</sup>

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Bd., 83 A.D.3d 723, 725–26, 920 N.Y.S.2d 369, 372 (2d Dep't 2011); then citing *Brooklyn Bridge Park Legal Def. Fund, Inc. v. N.Y. State Urban Dev. Corp.*, 50 A.D.3d 1029, 1031, 856 N.Y.S.2d 235, 237 (2d Dep't 2008); and then citing *Ball v. N.Y. State Dep't of Envtl. Conservation*, 35 A.D.3d 732, 733, 826 N.Y.S.2d 698, 699 (2d Dep't 2006)).

285. 132 A.D.3d 687, 688, 17 N.Y.S.3d 481, 483 (2d Dep't 2015) (citing *Thorne*, 83 A.D.3d at 725, 920 N.Y.S.2d at 371).

286. 139 A.D.3d 1406, 1407, 31 N.Y.S.3d 385, 386–87 (4th Dep't 2016).

287. No. 14-18447, 2015 N.Y. Slip Op. 32259(U), at 1, 5 (Sup. Ct. Suffolk Cty. Nov. 24, 2015).

288. *Id.* at 3.

289. *Id.* at 5 (first citing *Village of Tarrytown v. Planning Bd.*, 292 A.D.2d 617, 619, 741 N.Y.S.2d 44, 48 (2d Dep't 2002); then citing *Riverhead Bus. Improvement Dist. Mgmt. Ass'n v. Stark*, 253 A.D.2d 752, 753, 677 N.Y.S.2d 383, 385 (2d Dep't 1998); and then citing *Kahn v. Pashnik*, 231 A.D.2d 568, 570, 647 N.Y.S.2d 279, 281 (2d Dep't 1996)).

290. In this case, in response to community concerns, modifications were made to reduce density and traffic, increase open space, and decrease potential environmental impacts. *Id.*

The petitioners also argued that the cumulative impact analysis was insufficient because it did not consider two other nearby senior housing projects, one 1.6 miles away, and the other over five miles away.<sup>291</sup> The court found these claims to be without merit; in addition to the fact that the potential traffic impacts of one senior housing project actually were considered, “[t]he existence of a broadly conceived policy regarding land use in a particular locale [was] not a sufficiently unifying ground for tying otherwise unrelated projects together and requiring them to be considered in tandem as ‘related’ proposals for purposes of [SEQRA].”<sup>292</sup> Finally, the petitioners alleged that the review was improperly segmented because the Town Board’s decision stated that further review might be required if new information arose or revisions to the plans were made.<sup>293</sup> However, as discussed in Section II.D.1 below, this is not a proper segmentation claim; SEQRA regulations, 6 N.Y.C.R.R. §§ 617.7(c) and (f) specifically provide for additional SEQRA review when “changes may be proposed for the project” and “new information is discovered.”<sup>294</sup> Thus, the court held that the Town Board complied with the substantive requirements of SEQRA.<sup>295</sup>

In *Town of Marilla v. Travis*, discussed above, the court considered the adequacy of the DEC’s EAF and negative declaration for a Part 360 air permit.<sup>296</sup> With respect to SEQRA, the petitioners argued that DEC improperly characterized the project as an Unlisted action and failed to take a hard look at the eight areas of potential environmental concern set forth in the negative declaration.<sup>297</sup> The court upheld this classification

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291. *Id.*

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

SEQRA HANDBOOK, *supra* note 16, at 83.

292. *Itzler*, 2015 N.Y. Slip Op. 32259(U), at 5 (first citing *Long Island Pine Barrens Soc’y, Inc. v. Planning Bd.*, 80 N.Y.2d 500, 513, 606 N.E.2d 1373, 1278, 591 N.Y.S.2d 982, 987 (1992); and then citing *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 776, 809 N.Y.S.2d 98, 108 (2d Dep’t 2005)).

293. *Id.*

294. *Id.* at 6 (citing 6 N.Y.C.R.R. § 617.7(c), (f) (2016)).

295. *Id.* (first citing *Highview Estates of Orange Cty., Inc. v. Town Bd.*, 101 A.D.3d 716, 719, 955 N.Y.S.2d 175, 179 (2d Dep’t 2012); and then citing *Riverkeeper, Inc. v. Planning Bd.*, 9 N.Y.3d 219, 223, 881 N.E.2d 172, 178, 851 N.Y.S.2d 76, 82 (2007)).

296. No. I-2014-000101, 2015 N.Y. Slip Op. 51367(U), at 6 (Sup. Ct. Erie Cty. Aug. 24, 2015).

297. *Id.* at 3.

and DEC's determination that the Full EAF and supporting documentation supported a negative declaration.<sup>298</sup> The court noted that DEC relied upon several factors to support its determination, and the court held that DEC's recitation of those factors manifested the requisite "reasoned elaboration" to support the negative declaration.<sup>299</sup>

Two cases during this *Survey* period addressed the question of whether a negative declaration was timely rescinded. In *Pittsford Canalside Properties, LLC v. Village of Pittsford*, the Fourth Department upheld the lower court's decision to annul certain resolutions on the ground that the Board lacked authority to rescind its negative declaration.<sup>300</sup> In that case, the Board of Trustees of the Village of Pittsford issued a negative declaration for a proposed mixed-use development and thereafter adopted a resolution issuing special permits for the project.<sup>301</sup> After the Planning Board issued preliminary site plan approval, the Board of Trustees determined that there had been "substantive changes" to the project that would have a "potential significant adverse impact" that was not originally considered; it passed a resolution to that effect, rescinding the negative declaration and issuing a positive declaration.<sup>302</sup> The petitioner challenged the resolutions, seeking their annulment and the reinstatement of the negative declaration.<sup>303</sup> The court concluded that the lower court properly annulled the challenged resolutions because the Board of Trustees did not have the authority to rescind the negative declaration.<sup>304</sup> Specifically, "the Board

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298. *Id.* at 7.

299. *Id.* The factors included the following:

1) the Storage Tank is an existing tank located at the Trav-Co Farms; 2) the total acreage of the project site area only comprises 2 acres; 3) no new construction or land clearing is required; 4) no regulated wetlands or streams are located on Trav-Co Farms; 5) the depth to ground water table is 2 feet; 6) based upon DEC's review of its Natural Heritage Program maps, no threatened or endangered species or significant or unique habitat are identified on the project area; 7) Trav-Co Farms is accessible from several main transportation routes in Erie County which can handle the associated traffic levels, the project site can accommodate several vehicles waiting in queue, and there are only 3-to-6 inbound trips anticipated per day (on a 250-day basis); and 8) based on the implementation of the mandated Operational Requirements Plan, Standard Operating Procedure, and Contingency Plan for Spill Prevention and Response for the Storage Tank, potential impacts to air, odor, noise, dust and water will be avoided to the maximum extent practicable.

*Id.*

300. 137 A.D.3d 1566, 1568, 29 N.Y.S.3d 709, 712 (4th Dep't), *lv. dismissed*, 27 N.Y.3d 1080, 54 N.E.3d 1174, 35 N.Y.S.3d 301 (2016).

301. *Id.* at 1566, 29 N.Y.S.3d at 710–11.

302. *Id.* at 1567, 29 N.Y.S.3d at 711.

303. *Id.*

304. *Id.* at 1568, 29 N.Y.S.3d at 712.

was authorized to rescind its negative declaration ‘prior to its decision to undertake, fund, or approve an action,’” and the Board already had made its decision to approve the action when it issued the special permits.<sup>305</sup>

In the second case, *Leonard v. Planning Board of Union Vale*, a hybrid declaratory judgment/Article 78 proceeding, the plaintiffs/petitioners had obtained a negative declaration in 1987 in connection with a proposal to subdivide a 950-acre parcel in the town of Union Vale.<sup>306</sup> They received approval from the Planning Board to subdivide a portion of the property, and developed that portion.<sup>307</sup> In 2012, the plaintiffs/petitioners sought “preliminary plat approval to subdivide the remainder of the parcel,” called the East Mountain North subdivision, relying upon the 1987 negative declaration.<sup>308</sup> The Planning Board rejected the application, on the grounds that the 1987 negative declaration was not operative and the East Mountain North subdivision was a new action requiring SEQRA review.<sup>309</sup> The plaintiffs/petitioners sought review of the resolutions and a judgment declaring that the 1987 negative declaration remained in full force unless amended or rescinded pursuant to 6 N.Y.C.R.R. §§ 617.7(e) or (f).<sup>310</sup> The Second Department upheld the lower court’s conclusion that the Planning Board was arbitrary and capricious in determining that the East Mountain North subdivision was a new action.<sup>311</sup> The court explained that the Planning Board’s resolution was “based on faulty premises, among which was the erroneous legal conclusion that the 1987 negative declaration had expired,” and also because the changes made to the project since 1987 “did not support the conclusion that the East Mountain North subdivision [was] now a new action under SEQRA.”<sup>312</sup>

The court then considered whether the 1987 negative declaration should be amended pursuant to 6 N.Y.C.R.R. § 617.7(e)(1), or had to be rescinded pursuant to 6 N.Y.C.R.R. § 617.78(f)(1).<sup>313</sup> Upon reviewing

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305. *Pittsford Canalside Props.*, 137 A.D.3d at 1568, 29 N.Y.S.3d at 712 (first citing *United Water New Rochelle v. Planning Bd.*, 2 A.D.3d 627, 628, 768 N.Y.S.2d 612, 613 (2d Dep’t 2003); and then citing 6 N.Y.C.R.R. § 617.7(f)(1) (2016)).

306. 136 A.D.3d 868, 869–70, 26 N.Y.S.3d 293, 295–96 (2d Dep’t 2016).

307. *Id.* at 870, 26 N.Y.S.3d at 296.

308. *Id.*

309. *Id.*

310. *Id.*

311. *Leonard*, 136 A.D.3d at 871, 26 N.Y.S.3d at 297.

312. *Id.* (first citing 6 N.Y.C.R.R. § 617.2(b)(2) (2016); and then citing *Monteiro v. Town of Colonie*, 158 A.D.2d 246, 250, 558 N.Y.S.2d 730, 732 (3d Dep’t 1990)).

313. *Id.* at 871–72, 26 N.Y.S.3d at 297 (first citing 6 N.Y.C.R.R. § 617.7(e)(1)–(f)(1) (2016); then citing *Riverkeeper, Inc. v. Planning Bd.*, 9 N.Y.3d 219, 228–29, 881 N.E.2d 172, 175, 851 N.Y.S.2d 76, 79 (2007); then citing *Boyles v. Town Bd.*, 278 A.D.2d 668, 691, 718

the standards in the SEQRA regulations, the court determined that the Planning Board improperly concluded that the amendment and rescission provisions were inapplicable, stating that they are authorized at any time prior to the lead agency's decision to approve an action."<sup>314</sup> The Planning Board never gave final approval to subdivide the entire parcel or the portion now at issue, so it was still authorized to assess potential environmental impacts.<sup>315</sup> The Second Department therefore remitted the matter to the Supreme Court, Dutchess County "for the entry of a judgment, inter alia, declaring that a negative declaration issued pursuant to SEQRA to the plaintiffs . . . in 1987, remain[ed] in full force and effect unless amended or rescinded pursuant to [6 N.Y.C.R.R. §§ 617.7(e) or (f)]."<sup>316</sup>

### 2. Adequacy of Agencies' EISs and Findings Statements

Petitioners have been similarly unsuccessful in challenging the adequacy of EISs during the *Survey* period, with one notable exception. In *Friends of P.S. 163, Inc. v. Jewish Home Lifecare*, the court found that an EIS prepared by the New York State Department of Health (DOH) was inadequate because it failed to take the requisite hard look at noise

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N.Y.S.3d 430, 433 (3d Dep't 2000); and then citing *Greenwich Citizens Comm., Inc. v. Ctys. of Warren & Wash. Indus. Dev. Agency*, 164 A.D.2d 469, 473, 565 N.Y.S.2d 239, 242 (3d Dep't 1990)).

314. *Id.* at 872, 26 N.Y.S.3d at 297 (quoting 6 N.Y.C.R.R. § 617.7(f)(1)).

315. *Id.*

316. *Leonard*, 136 A.D.3d at 872, 26 N.Y.S.3d at 298. In a second decision issued on the same day, the Second Department held that there was no cognizable property interest to support a violation of due process rights in the Planning Board's determination that the 1987 negative declaration was inapplicable. *Leonard v. Planning Bd.*, 136 A.D.3d 873, 874, 26 N.Y.S.3d 155, 157 (2d Dep't 2016) (citing *Bower Assoc. v. Town of Pleasant Valley*, 2 N.Y.3d 617, 628, 814 N.E.2d 410, 416, 781 N.Y.S.2d 240, 246 (2004)). In a related action in federal court, the Southern District of New York dismissed a due process claim, finding that the plaintiffs had no cognizable property interest in the negative declaration because the Board's authority to rescind a negative declaration is subject to its discretion, is not narrowly circumscribed, and the negative declaration requires review if there is new information or there are changes to the project. *Leonard v. Planning Bd.*, 154 F. Supp. 3d 59, 68 (S.D.N.Y. 2016) (citing 6 N.Y.C.R.R. § 617.7(f)), *vacated in part and remanded* by 659 F. App'x 35 (2d Cir. 2016). After the conclusion of the *Survey* period, the Second Circuit vacated the dismissal of the plaintiffs-appellants' due process claims and remanded to the district court with directions to dismiss the second amended complaint without prejudice, holding that the plaintiffs' due process claims were not ripe for adjudication because the Board's rescission of the negative declaration is not a final decision on the subdivision application, and the utility exception to the final decision requirement did not apply (i.e., the allegations in the complaint did not compel the conclusion that the Board already determined it would deny the plaintiffs' subdivision application; the Board could review a DEIS and reissue a negative declaration or approve the application after considering a FEIS). *Leonard v. Planning Bd.*, 659 F. App'x 36, 36, 39-40 (2d Cir. 2016).

impacts from construction.<sup>317</sup> Jewish Home Lifecare, Manhattan (JHL) sought to construct a twenty-story nursing home on the Upper West Side of Manhattan.<sup>318</sup> DOH's approval of the facility pursuant to Public Health Law § 2802(1) was subject to SEQRA, so JHL submitted an environmental assessment statement to DOH.<sup>319</sup> DOH issued a positive declaration and assumed the role of lead agency, first issuing a scoping document and then issuing a DEIS.<sup>320</sup> Following hearings and the conclusion of the public comment period, DOH issued a FEIS and adopted a Findings Statement stating, *inter alia*, that SEQRA's requirements had been satisfied and that the adverse environmental impacts of the project would be "minimized or avoided to the maximum extent practicable."<sup>321</sup> The petitioners challenged the DOH's findings, alleging that DOH failed to give the requisite hard look to several environmental factors and alternatives, specifically that DOH "committed numerous errors with respect to its analysis of the construction impacts for noise, hazardous materials, traffic, mitigation of those harms, and an alternative re-build scenario."<sup>322</sup>

Although a state agency, DOH relied on criteria set forth in the *CEQR Technical Manual* to perform the analyses in the FEIS.<sup>323</sup> Among its analyses, DOH found that elevated construction noise levels would occur for two or more years outside residential buildings adjacent to the proposed site, but that windows and air conditioning units would reduce interior noise to an acceptable level.<sup>324</sup> In addition, DOH found that there would be elevated noise levels at P.S. 163 for about fourteen months, which "was 'not deemed a significant adverse construction noise impact under applicable *CEQR Technical Manual* Criteria,' but would nonetheless be mitigated by measures offered by JHL."<sup>325</sup> Regarding hazardous materials, DOH concluded that any adverse impacts that might occur from disturbing contaminant-containing soil would be avoided through the implementation of a Remedial Action Plan (RAP) and

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317. Nos. 100546/15, 100641/15, 2015 N.Y. Slip Op. 51997(U), at 11 (Sup. Ct. N.Y. Cty. Dec. 9, 2015), *rev'd*, 146 A.D.3d 576, 46 N.Y.S.3d 540 (1st Dep't 2017).

318. *Id.* at 1.

319. *Id.* at 1–2.

320. *Id.* at 2.

321. *Id.* at 2–3.

322. *Friends of P.S. 163, Inc.*, 2015 N.Y. Slip Op. 51997(U), at 10–11. This is a common approach for projects that are proposed or approved by state entities. *See infra* text accompanying notes 353.

323. *See Friends of P.S. 163, Inc.*, 2015 N.Y. Slip Op. 51997(U), at 3.

324. *Id.*

325. *Id.* (emphasis added).

Construction Health and Safety Plan (CHASP).<sup>326</sup> Regarding traffic, DOH performed a detailed traffic analysis even though one was not required by the CEQR guidelines and concluded that potential impacts would be minor or addressed by the New York City Department of Transportation (DOT).<sup>327</sup>

The petitioners argued that “DOH failed to address evidence of the particular damage to children’s development and learning caused by elevated noise levels, and erroneously determined that the duration and level of excess noise would not have a significant adverse impact on P.S. 163,” in part by adopting the *CEQR Technical Manual’s* noise level standard as an acceptable level for classrooms.<sup>328</sup> The court agreed, concluding as follows:

The FEIS did not address the particular adverse effects of elevated noise levels on children’s learning abilities or performance in school, and did not respond to public comments raising such concerns, other than to reiterate its adherence to CEQR standards and the proposed mitigation measures offered by JHL, and to state that lower noise level standards are not achievable in urban environments. Considering the exceptional circumstances of this matter, involving an elementary school, with children as young as three years old, in extremely close proximity to the construction site, and DOH’s finding that CEQR standards would be exceeded, even with the proposed mitigation measures, for nine months of construction, DOH’s singular reliance on CEQR guidelines, which do not address the special circumstances here, falls short of showing that the requisite hard look was taken.<sup>329</sup>

The court added that DOH did not sufficiently consider additional noise mitigation measures, such as central air conditioning, for the school.<sup>330</sup>

After denying the sufficiency of compliance with CEQR guidelines with respect to construction noise, the court then relied on the *CEQR Technical Manual* guidelines to uphold some of DOH’s other analyses.<sup>331</sup> Regarding hazardous materials, the court found that DOH based its findings on a “comprehensive and detailed investigation of hazardous materials at the site,” and that the investigation was conducted “in accordance with [*CEQR Technical Manual*] criteria and federal and state

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326. *Id.* at 5.

327. *Id.* at 5–6.

328. *Friends of P.S. 163, Inc.*, 2015 N.Y. Slip Op. 51997(U), at 9–10.

329. *Id.* at 11.

330. *Id.*

331. *Id.* at 12.

standards and guidelines in effect at [the] time of investigation.”<sup>332</sup> However, the court found that DOH did not take a sufficiently hard look at all mitigation measures or provide a reasoned elaboration for not considering containment measures.<sup>333</sup> In upholding the traffic analysis, the court used the *CEQR Technical Manual* as the standard, stating that the “petitioners submit[ted] nothing to show that the traffic study area did not comport with [*CEQR Technical Manual*] guidelines,” and “it was not unreasonable for DOH to rely on DOT to implement the recommended mitigation measures, as ‘nothing in the act bars an agency from relying upon mitigation measures it cannot itself guarantee in the future.’”<sup>334</sup> The court also found that DOH acted within its discretion when choosing among alternatives.<sup>335</sup> In conclusion, the court held, “Although the record indicates that DOH followed proper SEQRA procedures, the court finds that DOH, in certain substantive areas identified above, did not take the requisite hard look at specific environmental issues. Any remaining arguments raised by the parties have been considered by the [c]ourt and found unavailing.”<sup>336</sup>

This supreme court decision in *Jewish Home* breaks with a long line of precedent upholding reliance on the *CEQR Technical Manual*; in fact, it is the first court to find that an environmental review conducted in accordance with the *CEQR Technical Manual* was insufficient.<sup>337</sup> Courts have consistently accepted reliance on the *CEQR Technical Manual* as establishing compliance with SEQRA.<sup>338</sup> That long line of cases includes

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332. *Id.*

333. *Friends of P.S. 163, Inc.*, 2015 N.Y. Slip Op. 51997(U), at 13.

334. *Id.* at 14 (quoting *Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 422, 494 N.E.2d 429, 439, 503 N.Y.S.2d 298, 308 (1986)).

335. *Id.*

336. *Id.* at 15.

337. *Compare id.*, with *infra* note 338 (breaking from the long line of precedent allowing reliance on the *CEQR Technical Manual* guidelines, in holding that reliance on the CEQR guidelines was not enough when the agency failed to account for the particular adverse effects of the project on children’s learning abilities or performance in school).

338. *See generally* Brief for Amicus Curiae City of New York at 21–24, *Friends of P.S. 163, Inc. v. Jewish Home Lifecare*, Nos. 1444, 1445 (1st Dep’t filed Apr. 20, 2016) (first citing *Bd. of Managers of Plaza Condo. II*, 131 A.D.3d 419, 419–20, 14 N.Y.S.3d 375, 375–76 (1st Dep’t 2015) (citing the *CEQR Technical Manual* in concluding agency appropriately reviewed bike share program); then citing *Chinese Staff & Workers’ Ass’n v. Burden*, 88 A.D.3d 425, 932 N.Y.S.2d 1 (1st Dep’t 2011) (“[Reviewing agency] met its obligation to take a ‘hard look’ and properly applied standard methodologies pursuant to the guidelines set forth in the *CEQR Technical Manual* in determining . . . no significant adverse environmental impacts . . . .”); then citing *Hand v. Hosp. for Special Surgery*, No. 116270/08, 2012 N.Y. Slip Op. 50060(U) (Sup. Ct. N.Y. Cty. Jan. 11, 2012) (upholding environmental review conducted under the *CEQR Technical Manual*); then citing *Chinese Staff & Workers Ass’n v. Bloomberg*, 26 Misc. 3d 979, 987, 896 N.Y.S.2d 588, 595 (Sup. Ct. N.Y. Cty. 2009) (“The

decisions from this *Survey* period. In *Azulay v. City of New York*, discussed above, the court held that a FEIS was sufficient, noting that “the empirical data collected at bar was analyzed in accordance with the methodologies contained in the *CEQR Technical Manual*, thereby providing the City with a rational basis for its findings.”<sup>339</sup> In *Plaza Condo*, discussed above, the court cited the *CEQR Technical Manual* to support its conclusion that the agency properly reviewed the City bike share program as a whole, rather than reviewing individual bike share stations separately.<sup>340</sup> The Appellate Division, First Department heard

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problem with [the petitioners’] argument . . . is that [the City’s] assessment of socioeconomic impacts in the FEIS followed the two-step approach set forth in the *CEQR Technical Manual* . . . .”); then citing *Collier Realty LLC v. Bloomberg*, 24 Misc. 3d 1071, 1077, 877 N.Y.S.2d 866, 872 (Sup. Ct. N.Y. Cty. 2009) (upholding review of Far Rockaway rezoning that included consideration “of the score of environmental review categories identified in the *CEQR Technical Manual*”); then citing *Landmark West! v. Burden*, No. 119036/03, 2004 N.Y. Slip Op. 50331(U) (Sup. Ct. N.Y. Cty. Apr. 15, 2004) (agency consideration of impact on historic resources followed guidance of *CEQR Technical Manual* and constitute hard look); then citing *Coalition Against Lincoln W., Inc. v. Weinsall*, 21 A.D.3d 215, 223, 799 N.Y.S.2d 205, 212 (1st Dep’t 2005) (reversing trial court and upholding agency determination that SEIS was not warranted where agency used criteria in *CEQR Technical Manual*); then citing *Fisher v. Giuliani*, 280 A.D.2d 13, 18, 720 N.Y.S.2d 50, 53 (1st Dep’t 2001) (rejecting challenge to environmental assessment; zoning amendment would not have significant traffic impact because it would not exceed *CEQR Technical Manual*’s threshold for analysis); then citing *Weeks Woodland Ass’n v. Dormitory Auth.*, No. 110502/10, 2011 N.Y. Slip Op. 30286(U), at 33–34 (Sup. Ct. N.Y. Cty. Jan. 5, 2011) (agency took hard look at traffic and neighborhood character impacts of hospital addition because assessment complied with *CEQR Technical Manual*); then citing *Coalition to Save Coney Island v. City of New York*, No. 116672/09, 2010 N.Y. Slip Op. 50839(U) (Sup. Ct. N.Y. Cty. May 6, 2010) (noting that FEIS complied with *CEQR Technical Manual* in denying preliminary injunction to stop tree removal prior to construction of Yankee Stadium); then citing *Neighborhood in the Nineties v. City of N.Y. Bd. of Standards & Appeals*, No. 115705/07, 2009 N.Y. Slip Op. 51812(U) (Sup. Ct. N.Y. Cty. Aug. 13, 2009) (upholding environmental assessment and noting agency’s reliance on *CEQR Technical Manual*); then citing *Fetman v. Burden*, No. 23319/06, 2007 N.Y. Slip Op. 51779(U) (Sup. Ct. Kings Cty. July 10, 2007) (upholding negative declaration, noting environmental assessment was prepared using *CEQR Technical Manual*); then citing *Powell v. City of New York*, No. 108220/06, 2007 N.Y. Slip Op. 51409(U) (Sup. Ct. N.Y. Cty. June 18, 2007) (relying on *CEQR Technical Manual* in holding that detailed analysis of potential construction impacts was unnecessary due to short duration of construction); then citing *Save Our Parks v. City of New York*, 2006 N.Y. Misc. LEXIS 2365, at \*17 (Sup. Ct. N.Y. Cty. Aug. 15, 2006) (noting agency followed open space analysis guidelines and used formula specified in *CEQR Technical Manual* when upholding negative declaration); and then citing *Develop Don’t Destroy (Brooklyn), Inc. v. Empire State Dev. Corp.*, 94 A.D.3d 508, 511, 942 N.Y.S.2d 477, 480 (1st Dep’t 2012) (noting that state public benefit corporation failed to take hard look when failed, without sufficient reason, to consider reasonable worst case development scenario in *CEQR Technical Manual*).

339. No. 080170/15, 2016 NY Slip Op. 50428(U), at 10 (Sup. Ct. Richmond Cty. Mar. 28, 2016).

340. *Bd. of Managers of Plaza Condo. II*, 131 A.D.3d at 419–20, 14 N.Y.S. at 375–76 (first citing *CEQR TECHNICAL MANUAL* 2014, *supra* note 49, at 2-2 to -3; and then citing *Cambridge Owners Corp. v. N.Y.C. Dep’t of Transp.*, 118 A.D.3d 634, 634, 989 N.Y.S.2d

argument in the *Jewish Home* appeal in May 2016.<sup>341</sup> We will bring you the results of the appeal in our next *Survey* Article.

In *Kiryas Joel, N.Y. v. Village of Woodbury*, the petitioners alleged that the Village failed to strictly comply with SEQRA's requirements in adopting a Comprehensive Plan and two local laws, because an EAF was required and the Village prepared an EIS instead.<sup>342</sup> While, as the court noted, "SEQRA mandates literal compliance with its procedural requirements and substantial compliance is insufficient to discharge the responsibility of the agency under the act," the SEQRA regulations at 6 N.Y.C.R.R. § 617.6(a)(4) also allow an agency to waive a requirement for an EAF if a DEIS is prepared, which was the case here.<sup>343</sup> In addition, the Second Department held that the supreme court erred in granting the portion of the petition/complaint seeking to annul the Comprehensive Plan and Zoning Amendments on substantive SEQRA grounds, holding that the Board of Trustees adequately analyzed a reasonable range of alternatives.<sup>344</sup>

The EIS informs an agency's Findings Statement, so the two should be consistent. In *Falcon Group, LLC v. Town/Village of Harrison Planning Board*, the Second Department affirmed the supreme court's decision to annul the Harrison Planning Board's SEQRA Findings Statement as unsupported by the evidence because its conclusions "were based, at least in part, on factual findings which were contradicted by the scientific and technical analyses included in the FEIS and not otherwise supported by empirical evidence in the record."<sup>345</sup> In addition, the Findings Statement did not adequately consider alternatives reviewed in the FEIS.<sup>346</sup> Thus, the Second Department concluded that the supreme court properly annulled the Findings Statement and remitted the matter

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30, 31 (1st Dep't 2014)).

341. APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT, TUESDAY, MAY 24, 2016 (2016), <http://www.courts.state.ny.us/courts/AD1/calendar/16Calendars/June/may24.pdf>.

342. 138 A.D.3d 1008, 1009, 31 N.Y.S.3d 83, 86 (2d Dep't 2016).

343. *Id.* at 1011–12, 31 N.Y.S.3d at 86–87 (quoting *E. End Prop. Co. No. 1 v. Kessel*, 46 A.D.3d 817, 820, 851 N.Y.S.2d 565, 569 (2d Dep't 2007)); *see also* 6 N.Y.C.R.R. § 617.6(a)(4) (2016).

344. *Id.* at 1013, 31 N.Y.S.3d at 87 (first citing *E. End Prop. Co. No. 1*, 46 A.D.3d at 822, 851 N.Y.S.2d at 570; and then citing *Rusciano & Son Corp. v. Kiernan*, 300 A.D.2d 590, 591–92, 752 N.Y.S.2d 377, 379 (2d Dep't 2002)).

345. 131 A.D.3d 1237, 1240, 17 N.Y.S.3d 469, 472–73 (2d Dep't 2015) (first citing *Kinderhook Dev., LLC v. City of Gloversville Planning Bd.*, 88 A.D.3d 1207, 1209, 931 N.Y.S.2d 447, 449 (3d Dep't 2011); and then citing *Ernalex Constr. Realty Corp. v. Bellissimo*, 256 A.D.2d 338, 340, 681 N.Y.S.2d 298, 300 (2d Dep't 1998)).

346. *Id.* at 1240, 17 N.Y.S.3d at 473 (first citing N.Y. ENVTL. CONSERV. LAW § 8-0109(2)(d), (f) (McKinney 2005); and then citing *Rye Town/King Civic Ass'n v. Town of Rye*, 82 A.D.2d 474, 481, 442 N.Y.S.2d 67, 71 (2d Dep't 1981)).

to the Board to issue findings that were consistent with the contents of the FEIS.<sup>347</sup> This decision highlights the importance of disclosing both sides of contested opinions in EISs, so the deciding agency has a basis upon which it can determine which to adopt.

*D. Segmentation, Supplementation, Coordinated Review, and Other SEQRA Issues*

*1. Unlawful “Segmentation” of SEQRA Review*

Defining the proper boundaries of an action can be a difficult task.<sup>348</sup> SEQRA regulations provide that “[c]onsidering only a part or segment of an action is contrary to the intent of SEQR[A].”<sup>349</sup> As explained by the Third Department, impermissible segmentation occurs in two situations: (1) “when a project which would have a significant effect on the environment is split into two or more smaller projects, with the result that each falls below the threshold requiring [SEQRA] review”; and (2) “when a project developer wrongly excludes certain activities from the definition of his project for the purpose of keeping to a minimum its environmentally harmful consequence, thereby making it more palatable to the reviewing agency and community.”<sup>350</sup> Segmentation is not strictly prohibited by SEQRA, but it is disfavored; DEC’s SEQRA regulations provide that a lead agency permissibly may segment review if “the agency clearly states its reasons therefor and demonstrates that such review is no less protective of the environment.”<sup>351</sup>

Two cases from the *Survey* period briefly addressed segmentation issues. First, in the Fourth Department’s decision in *Village v. Painted Post*, as explained above in Section III.B, the court held that SEQRA review was required for the Water Agreement at issue.<sup>352</sup> In addition, the court noted that, although the Village previously conducted a SEQRA review of the Lease Agreement authorizing the construction of a transloading facility, segmentation is “generally disfavored,” and the lower court “properly determined . . . that all of [the] respondent Village’s resolutions should be annulled and that a consolidated SEQRA review of

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347. *Id.*

348. Chertok et al., *supra* note 1, at 931–33.

349. 6 N.Y.C.R.R. § 617.3(g)(1) (2016).

350. *Schultz v. Jorling*, 164 A.D.2d 252, 255, 563 N.Y.S.2d 876, 879 (3d Dep’t 1990) (first citing *Sutton v. Bd. of Trs.*, 122 A.D. 506, 508, 505 N.Y.S.2d 263, 265 (3d Dep’t 1986); and then citing 2 GERRARD ET AL., *supra* note 84, § 5.02[1]).

351. *Concerned Citizens for the Env’t v. Zagata*, 243 A.D.2d 20, 22, 672 N.Y.S.2d 956, 958 (3d Dep’t 1998) (citing 6 N.Y.C.R.R. § 617.3(g)(1) (1998)).

352. *Sierra Club II*, 134 A.D.3d 1475, 1478, 23 N.Y.S.3d 506, 510 (4th Dep’t 2015).

both agreements was required.”<sup>353</sup>

Second, in *Itzler v. Town Board of Huntington*, the court rejected the petitioners’ allegation of segmentation.<sup>354</sup> The petitioners argued that the review was segmented because the Town Board decision said that further SEQRA review may be required in the future based on new information or revisions to the plans.<sup>355</sup> However, as the court noted, this is not segmentation.<sup>356</sup> As discussed in the next Section, SEQRA provides for such additional review under these circumstances.

## 2. Supplementation

SEQRA provides for the preparation of an SEIS when a proposed project changes, there is newly discovered information, or changes in circumstances give rise to significant adverse environmental impacts not adequately addressed in the original EIS.<sup>357</sup> Whether issues, impacts, or project details omitted from an initial EIS require preparation of an SEIS is a frequent subject of litigation.<sup>358</sup> One case during this *Survey* period involved this issue. In *Toll Land V*, the court determined that the Planning Board’s decision to require the preparation of an SEIS was a final agency action that was ripe for review.<sup>359</sup> However, the merits of the Planning Board’s decision were not addressed.<sup>360</sup>

## 3. Coordinated Review

One of the procedural requirements of SEQRA is that, for all Type I actions that involve more than one agency, the lead agency must conduct a coordinated review.<sup>361</sup> Under SEQRA regulations, if the lead agency exercises due diligence, its determination of significance “is binding on all other involved agencies.”<sup>362</sup>

353. *Id.* (citing *Forman v. Trs. of State Univ. of N.Y.*, 303 A.D.2d 1019, 1019, 757 N.Y.S. 180, 182 (4th Dep’t 2003)).

354. No. 14-18447, 2015 N.Y. Slip Op. 32259(U), at 6 (Sup. Ct. Suffolk Cty. Nov. 24, 2015).

355. *Id.* at 5.

356. *Id.* at 6 (citing 6 N.Y.C.R.R. § 617.7(c), (f) (2015)).

357. 6 N.Y.C.R.R. § 617.9(a)(7) (2016).

358. Chertok et al., *supra* note 1, at 933–35.

359. *Toll Land V P’ship v. Planning Bd.*, 49 Misc. 3d 662, 670, 12 N.Y.S.3d 874, 880 (Sup. Ct. Westchester Cty. 2015).

360. *Id.* at 669 n.2, 12 N.Y.S.3d at 880 n.2.

361. 6 N.Y.C.R.R. § 617.6(b)(3) (2016). Agencies have the option of conducting a coordinated review for Unlisted actions, but it is not required. *Id.* § 617.6(b)(4).

362. *Id.* § 617.6(b)(3)(iii) (“If a lead agency exercises due diligence in identifying all other involved agencies and provides written notice of its determination of significance to the identified involved agencies, then no involved agency may later require the preparation of an EAF, a negative declaration or an EIS in connection with the action. The determination of

In *Shoreham Wading River*, discussed above, the plaintiffs alleged that the respondent Brookhaven Zoning Board of Appeals (ZBA), which granted variances necessary for the solar farm project at issue, was a coordinating agency that was required to participate with the lead agency Planning Board in the environmental review of all actions taken in connection with all town approvals concerning the construction of the solar farm.<sup>363</sup> The ZBA contended that the variances were Type II actions, so they did not require any further environmental assessment or review.<sup>364</sup> The court agreed with the ZBA that nothing further was required, noting that “[a]t the time the variances were sought, the [ZBA’s] actions were *de minimis* with respect to the application for the solar farm project and there was no need to aggregate its findings at that point with the review to be undertaken by the [Planning Board].”<sup>365</sup>

In *Town of Marilla v. Travis*, the court upheld DEC’s classification of an application for a Part 360 air permit for a tank as an Unlisted action, which “allowed DEC to ‘proceed as if it was the only involved agency.’”<sup>366</sup> The court found that the petitioners’ contentions that the Town of Marilla was necessarily an “involved agency” requiring “coordinated review,” were unfounded, and that the town’s correspondence indicating that it had no approval authority over the tank or any interest in assuming lead agency status underscored those findings.<sup>367</sup>

#### CONCLUSION

Case law from the *Survey* period demonstrates that SEQRA continues to present the courts with difficult legal questions related to standing, ripeness, statute of limitations and other procedural issues, as well as the adequacy of agencies’ determinations of significance and the contents of EISs. These issues will continue to evolve as the courts are presented by new SEQRA challenges. SEQRA practitioners may anticipate DEC’s issuance of a Draft EIS pertaining to its proposal of revisions to the SEQRA regulations, as provided for in the Final Scope

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significance issued by the lead agency following coordinated review is binding on all other involved agencies.”). When more than one agency is involved and the lead agency determines that an EIS is required, it must engage in a coordinated review. *Id.* § 617.6(b)(2)(ii).

363. *Shoreham Wading River Advocates for Justice v. Town of Brookhaven Planning Bd.*, No. 22674/2014, 2015 N.Y. Slip Op. 31444(U), at 6 (Sup. Ct. Suffolk Cty. Aug. 3, 2015).

364. *Id.*

365. *Id.*

366. No. I-2014-000101, 2015 N.Y. Slip Op. 51367(U), at 7 (Sup. Ct. Erie Cty. Aug. 24, 2015) (citing 6 N.Y.C.R.R. § 617.6(b)(4) (2015)).

367. *Id.*

issued in 2012. These and other developments in the law of SEQRA will be covered in future installments of the *Survey of New York Law*.