ENVIRONMENTAL LAW: DEVELOPMENTS IN THE LAW OF SEQRA

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INTRODUCTION

This Article will discuss notable developments in the law relating to the New York State Environmental Quality Review Act (SEQRA) for the *Survey* period of 2016–2017.[1] The year saw one significant regulatory development. In February 2017, the New York State Department of Environmental Conservation (DEC) issued proposed rules to revise its

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1. The *Survey* period covered in this Article is July 1, 2016 to June 30, 2017. A prior *Survey* addresses SEQRA developments in the first half of 2016. *See* Mark A. Chertok et al., *2015–16 Survey of New York Law: Environmental Law: Developments in the Law of SEQRA*, 67 SYRACUSE L. REV. 897, 898 (2017).

SEQRA regulations for the first time since 1995.[2] The DEC then issued revised proposed regulations containing several significant changes after this *Survey* period ended.[3] The Court of Appeals did not issue any cases under SEQRA during this *Survey* period, although SEQRA was relevant to the Court of Appeals' decision in *Entergy Nuclear Operations v. New York State Department of State* regarding the relicensing of Indian Point nuclear power plant.[4] 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, statute of limitations, and standing requirements, as well as the procedural and substantive requirements that SEQRA imposes on agencies.[5]

Part I of this Article provides a brief overview of SEQRA's statutory and regulatory requirements. Part II reviews the proposed regulations that DEC issued in January 2016. Part III discusses the more important of the numerous SEQRA decisions issued during the *Survey* period.

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.[6] "The primary purpose of SEQRA is 'to inject environmental considerations directly

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2. 39 N.Y. Reg. 3–6 (proposed Feb. 8, 2017) (to be codified at 6 N.Y.C.R.R. § 617).

3. DIV. OF ENVTL. PERMITS, DEP'T OF ENVTL. CONSERVATION, REVISED DRAFT GENERIC ENVIRONMENTAL IMPACT STATEMENT ON THE PROPOSED AMENDMENTS TO THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQR) REGULATIONS (2018) [hereinafter Revised Draft GEIS], https://www.dec.ny.gov/docs/permits_ej_operations_pdf/617revdftfeis.pdf; State Environmental Quality Review Act—Proposed Amendments 2018, Dep't Envtl. Conservation, https://www.dec.ny.gov/permits/83389.html (last visited May 29, 2018). The public comment period for the revised proposed regulations and revised Draft Generic Environmental Impact Statement ended May 11, 2018 and will be covered in greater detail in our next *Survey* article. Significant changes in the proposed regulations are included in footnotes throughout this article.

4. *See* 28 N.Y.3d 279, 291–93, 66 N.E.3d 1062, 1069–70, 44 N.Y.S.3d 344, 351–52 (2016). In *Entergy*, the Court of Appeals considered whether Indian Point was exempt from the Coastal Management Program's consistency requirement, either because it was identified as grandfathered pursuant to SEQRA, or because a Final Environmental Impact Statement had been prepared prior to the effective date of the Department of State's regulations regarding coastal consistency. *Id.* at 287, 66 N.E.3d at 1066, 44 N.Y.S.3d at 348 (citing 19 N.Y.C.R.R. § 600.3(d) (2016)). The court upheld the Department of State's determination that neither exemption applied. *Id.* at 289–90, 66 N.E.3d at 1068–69, 44 N.Y.S.3d at 350–51.

5. *See infra* Part III.

6. SEQRA is codified at N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 2017); *see* 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)).

into governmental decision making.'"[7] 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.[8] SEQRA charges the 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 the DEC.[9]

A primary component of SEQRA is the Environmental Impact Statement (EIS), which—if its preparation is required—documents the proposed action, its reasonably anticipated significant adverse impacts on the environment, practicable measures to mitigate such impacts, unavoidable significant adverse impacts, and reasonable alternatives that achieve the same basic objectives as the proposal.[10]

Actions are grouped into three categories in the DEC's SEQRA regulations: Type I, Type II, or Unlisted.[11] 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.[12] Type I actions, also specifically enumerated, "are more likely to require the preparation of an EIS than Unlisted actions."[13] Unlisted actions are not enumerated, but rather are a catchall of those actions that are neither Type I nor Type II.[14] In practice, the vast

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7. 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, 415–16, 494 N.E.2d 429, 434–35, 503 N.Y.S.2d 298, 303–04 (1986).

8. 6 N.Y.C.R.R. § 617.2(b)–(c) (2016) (defining actions and agencies subject to SEQRA).

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

10. 6 N.Y.C.R.R. § 617.9(b)(1)–(2), (5) (2016).

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

12. 6 N.Y.C.R.R. § 617.5(a) (2016) (Type II actions).

13. 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.*, Hell's 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."). It is commonplace for a lead agency to determine that a Type I action does not require an EIS.

14. 6 N.Y.C.R.R. § 617.2(ak).

majority of actions are Unlisted.[15]

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."[16] To reach its determination of significance, the agency must prepare an environmental assessment form (EAF).[17] 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.[18] 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.[19] SEQRA regulations provide models of each form,[20] but allow that the forms "may be modified by an agency to better serve it in implementing SEQR[A], provided the scope of the modified form is as comprehensive as the model."[21] 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.[22] A coordinated review is required for Type I actions,[23] and the issuance of a negative declaration in a coordinated review binds other involved agencies.[24]

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.[25] If the answer is affirmative, the lead agency may in certain

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15. 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.

16. 6 N.Y.C.R.R. §§ 617.6(a)(1)(i), 617.7 (2016).

17. *Id.* § 617.6(a)(2)–(3).

18. 6 N.Y.C.R.R. §§ 617.6(a)(2)–(3), 617.20 (2017) (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 discussing part 3, which constitutes the agency's determination of significance).

19. *Id.* §§ 617.6(a)(2)–(3), 617.20.

20. *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*, DEP'T ENVTL. CONSERVATION, http://www.dec.ny.gov/permits/90125.html (last visited May 19, 2018).

21. 6 N.Y.CR.R. § 617.2(m) (2016). New York City, which implements SEQRA under its City Environmental Quality Review (*see* discussion *infra*), uses an Environmental Assessment Statement, or EAS, in lieu of an EAF. *See, e.g.*, Hell's Kitchen Neighborhood Ass'n, 81 A.D.3d 460, 461–62, 915 N.Y.S.2d 565, 567 (1st Dep't 2011).

22. 6 N.Y.C.R.R. § 617.6(b)(2)(i), (b)(3)(ii).

23. 6 N.Y.C.R.R. § 617.4(a)(2) (2016).

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

25. 6 N.Y.C.R.R. § 617.7(a)(2), (d) (2016).

cases impose conditions on the proposed action to sufficiently mitigate the potentially significant adverse impacts[26] or, more commonly, the lead agency issues a positive declaration requiring the preparation of an EIS.[27]

If an EIS is prepared, typically the first step is the scoping of the contents of the Draft EIS (DEIS).[28] 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.[29] 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.[30] The DEIS, once prepared and accepted as adequate and complete by the lead agency, is then circulated for public and other agency review and comment.[31] Although not required, the lead agency typically holds a legislative hearing with respect to the DEIS.[32] That hearing may be, and often is, combined with other hearings required for the proposed action.[33]

A DEIS 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."[34] This analysis includes a "no action alternative," which evaluates the "changes that are likely to occur . . . in the absence of the

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26. 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. *See id.* § 617.7(d)(1). "In practice, CNDs are not favored and not frequently employed." Chertok et al., *supra* note 1, at 901 n.27.

27. 6 N.Y.C.R.R. § 617.2(n); *see* 6 N.Y.C.R.R. § 617.7(a) (explaining when an EIS is and is not required).

28. *See* SEQRA HANDBOOK, *supra* note 15, at 104–05.

29. *Id.*; 6 N.Y.C.R.R. § 617.8(a) (2016). Scoping, when it occurs, is governed by 6 N.Y.C.R.R. § 617.8. SEQRA HANDBOOK, *supra* note 155, at 104–05. As discussed in Part II, *infra*, the DEC's proposed SEQRA amendments would make scoping mandatory.

30. 6 N.Y.C.R.R. § 617.8(a), (e).

31. *Id.* § 617.8(b), (d)–(e).

32. 6 N.Y.C.R.R. § 617.9(a)(4) (2016).

33. 6 N.Y.C.R.R. § 617.3(h) (2016) ("Agencies must . . . provid[e], where feasible, for combined or consolidated proceedings . . . .").

34. 6 N.Y.C.R.R. § 617.9(b)(5)(v). For private applicants, alternatives might reflect different configurations of a project on the site. *Id.* They also might include different sites if the private applicant owns other parcels. *Id.* The applicant should identify alternatives that might avoid or reduce environmental impacts. *Id.*

proposed action."[35]

In addition to "analyz[ing] the significant adverse impacts and evaluat[ing] all reasonable alternatives,"[36] the DEIS 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 irretrievable commitments of environmental resources that would be associated with the proposed action should it be implemented;
>
> (d)any growth-inducing aspects of the proposed action;
>
> (e)impacts of the proposed action on the use and conservation of energy . . . ; [and]
>
> (f)impacts of the proposed action on solid waste management and its consistency with the state or locally adopted solid waste management plan.[37]

The next step is the preparation of a Final EIS, which addresses any project changes, new information and/or changes in circumstances, and responds to all substantive comments on the DEIS.[38] 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."[39] 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

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35. *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).

36. 6 N.Y.C.R.R. § 617.9(b)(1).

37. *Id.* § 617.9(b)(5)(iii)(a)–(f).

38. 6 N.Y.C.R.R. § 617.11(a) (2016).

39. *Id.* § 617.11(a), (d)(1)–(2).

> practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable.[40]

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).[41]

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.[42] 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."[43] 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.[44]

The City of New York (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).[45] As previously explained, SEQRA grants agencies and local governments the authority to supplement DEC's general SEQRA regulations by promulgating their own.[46] Section 192(e) of the New York City Charter delegates that authority to the City Planning Commission.[47] In addition, 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*

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40. *Id.* § 617.11(d)(5).

41. *See* 42 U.S.C. §§ 4321–70(h) (2012) (establishing federal responsibilities for protecting and enhancing the quality of the environment); 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 (1982)).

42. 6 N.Y.C.R.R. § 617.10(a) (2016).

43. *Id.* § 617.10(a)(1)–(4).

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

45. CEQR regulations are contained in RULES OF THE CITY OF NEW YORK, tit. 62, ch. 5 (2018).

46. N.Y. ENVTL. CONSERV. LAW § 8-0113(1), (3) (McKinney 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).

47. N.Y.C. CHARTER § 192(e) (2018); *see* RULES OF THE CITY OF NEW YORK, tit. 62 § 5.01.

Technical Manual.[48] 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.[49]

II. REGULATORY DEVELOPMENTS

In February 2017, the DEC proposed the most significant changes to its regulations since implementing SEQRA in more than twenty years. The amendments are designed to streamline the environmental review process without sacrificing meaningful review or environmental protection.[50] The regulations also are meant to align SEQRA with state initiatives, including the advancement of renewable energy and green infrastructure, and the consideration of climate change impacts.[51] As noted above, after this Survey period, the DEC issued revised proposed regulations and a revised Draft Generic Environmental Impact Statement for public comment.[52] Significant changes in the revised proposed regulations are indicated in the footnotes, where applicable.

The February 2017 proposed regulations expanded the list of Type

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48. N.Y.C. MAYOR'S OFFICE OF ENVTL. COORDINATION, CITY ENVIRONMENTAL QUALITY REVIEW TECHNICAL MANUAL, at introduction-1 (2014), 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, CITY ENVIRONMENTAL QUALITY REVIEW 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.

49. *See* 2016 CEQR REVISIONS, *supra* note 48, at 1.

50. 39 N.Y. Reg. 3–6 (proposed Feb. 8, 2017) (to be codified at 6 N.Y.C.R.R. § 617).

51. Some commenters have expressed concern that, in an effort to promote certain state initiatives (i.e., sustainable development, solar power), the DEC has inappropriately failed to provide the requisite "showing that those uses have been determined to not have a significant effect on the environment." New York State Bar Association, Comments on the New York State Department of Environmental Conservation Proposed Amendments to 6 N.Y.C.R.R. Part 617 SEQRA Implementing Regulations, (May 25, 2017), https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=73277 [hereinafter NYSBA COMMENTS]. The Environmental Conservation Law provides that DEC's "Type II" list

> shall include . . . [a]ctions or classes of actions which have been determined not to have a significant effect on the environment and which do not require environmental impact statements under this article. In adopting the rules and regulations, the commissioner shall make a finding that each action or class of actions identified does not have a significant effect on the environment.

ENVTL. CONSERV. § 8-0113(2)(c)(ii).

52. *See* Revised Draft GEIS, *supra* note 3.

II activities—those activities that are exempt from SEQRA—to include the following[53]: (1) upgrade of an existing structure or facility to meet new energy codes; (2) retrofit of a structure or facility to incorporate green infrastructure; (3) "[i]nstallation of fiber-optic or other broadband cable technology in existing highway[s] or utility rights of way[;]"[54] (4) co-location of cellular antennas and repeaters;[55] (5) installation of five megawatts or less of solar energy arrays on sanitary landfills, brownfield sites that have obtained a certificate of completion, wastewater treatment facilities, sites zoned for industrial use, and solar canopies at or above parking facilities;[56] (6) lot line adjustments and area variances not involving a change in allowable density;[57] (7) minor subdivisions;[58] (8) sustainable development;[59] (9) reuse of an existing residential or commercial structure;[60] (10) recommendations of a county or regional planning entity; (11) dedication of parkland;[61] (12) an agency's acquisition of under 100 acres of land to be dedicated as parkland;[62] (13) certain transfers of land to provide affordable housing;[63] (14) sale and conveyance of real property by public auction; (15) brownfield site

53. DIV. OF ENVTL. PERMITS, DEP'T OF ENVTL. CONSERVATION, DRAFT GENERIC ENVIRONMENTAL IMPACT STATEMENT ON THE PROPOSED AMENDMENTS TO THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQR) REGULATIONS 12–36 (2017) [hereinafter Draft GEIS], http://www.dec.ny.gov/docs/permits_ej_operations_pdf/drft617geis.pdf.

54. The revised proposed regulations added a requirement that the cables be installed using trenchless burial or aerial placement on existing piles. Revised Draft GEIS, *supra* note 3, at 35.

55. The revised proposed regulations withdrew this proposed addition to the Type II. *Id.* at 39.

56. The revised proposed regulations changed the Type II limit on project size from five megawatts to twenty-five acres. It also added the installation of solar energy arrays on an existing structure, provided that it is not listed or eligible for listing on the National or State Register of Historic Places or is located within a district listed in either Register. *Id.* at 47.

57. The revised proposed regulations limited this proposed Type II addition to the granting of individual setback and lot line variances and adjustments. *Id.* at 60.

58. The revised proposed regulations withdrew this addition to the Type II list. *Id.* at 63.

59. The revised proposed regulations withdrew this addition to the Type II list. Revised Draft GEIS, *supra* note 3, at 71.

60. The revised proposed regulations clarified this proposed addition and specified that it may not meet or exceed the thresholds in 6 N.Y.C.R.R. 617.4. *Id.* at 80.

61. This proposed Type II addition was merged with the acquisition of parkland. *See infra* note 61.

62. The revised proposed regulations changed the Type II threshold from one hundred acres to twenty-five acres and combined it with the dedication of parkland, such that it now reads: "An agency's acquisition and dedication of [twenty-five] acres or less of land for parkland, or dedication of land for parkland that was previously acquired, or acquisition of a conservation easement." Revised Draft GEIS, *supra* note 3, at 86.

63. The revised proposed regulations would, in lieu of this Type II, modify existing 6 N.Y.C.R.R. § 617.5(c)(9) to include "transfers of land" to construct one, two, and three family housing. *Id.* at 91.

cleanup agreements;[64] and (16) anaerobic digesters.[65] Not only would the expansion of the Type II list result in fewer projects requiring EISs, but it also should help advance some of New York State's initiatives.[66]

The Type I list also would be changed. The thresholds for residential subdivisions and parking spaces based on community size would be lowered, which likely would mean that more large scale developments would require an EIS.[67] In addition, the threshold for designating Unlisted actions as Type I actions due to their proximity to historic resources was changed to cover only those Unlisted actions that exceed twenty-five percent of Type I thresholds (instead of all Unlisted actions), making it consistent with the threshold that applies to other Unlisted actions.[68] This provision also would apply to projects that are in close proximity to both listed properties and those that have been determined to be eligible for listing on the State Register of Historic Places.[69]

The proposed regulations would make the scoping of EISs mandatory and emphasize the use of EAFs as the first step in scoping.[70] They would require the consideration of mitigation "to avoid or reduce an action's environmental impacts and vulnerability from the effects of climate change [such as] sea level rise and flooding."[71] They would better define the acceptance procedures for draft EISs, and clarify that a lead agency is able to deny an action for which a generic EIS has been prepared.[72] They would implement the preexisting statutory EIS website publication requirement and encourage the electronic filing of draft and final EIS scopes, and draft and final EISs.[73] Finally, they would clarify the fee assessment authority in the regulations by specifying that project sponsors can request an estimate of the costs for preparing or reviewing

64. The revised proposed regulations withdrew this addition to the Type II list. *Id.* at 96.

65. The revised proposed regulations withdrew this addition to the Type II list based on environmental justice concerns. *Id.* at iv, 97.

66. *See* Draft GEIS, *supra* note 53, at 12.

67. *Id.* at 5–9.

68. *Id.* at 9–10.

69. *Id.* at 10. This approach mirrors that used in the National Historic Preservation Act (NHPA), which accords protection to both properties that are listed on the National Register and those that are eligible for listing. *See, e.g.*, 54 U.S.C. § 306108 (Supp. IV 2016) (requiring federal agencies to consider the effect of a federal undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register).

70. Draft GEIS, *supra* note 53, at 41–42. The revised proposed regulations retain optional scoping for Supplemental EISs. Revised Draft GEIS, *supra* note 3, at 107.

71. Draft GEIS, *supra* note 53, at 45.

72. *Id.* at 45–46, 48–49.

73. *Id.* at 83. The revised proposed regulations delete the qualifier "to the extent practicable" and impose a mandatory website publication requirement for the draft and final EIS scopes, as well as the draft and final EISs. Revised Draft GEIS, *supra* note 3, at 134.

a draft EIS, as well as the invoices or statements for the work performed.[74]

The comment period for the proposed rules closed on May 19, 2017.[75] DEC has not provided a timetable for the publication of the final GEIS and adoption of the final regulations.[76]

III. CASE LAW DEVELOPMENTS

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).[77] Both SEQRA and Article 78 impose upon petitioners certain threshold and procedural requirements, apart from the substantive requirement of proving that the agency failed to comply with SEQRA.[78] A number of decisions during the *Survey* period addressed questions arising from these threshold and procedural requirements.[79]

1. Standing

Standing is one of the more frequently litigated issues in SEQRA case law.[80] 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

74. Draft GEIS, *supra* note 53, at 49.

75. 39 N.Y. Reg. 4 (proposed Feb. 8, 2017) (to be codified at 6 N.Y.C.R.R. § 617).

76. The comment period for the revised proposed regulations ended on May 11, 2018. *See supra* note 3. We will provide updates in our next *Survey* article.

77. *See* N.Y. C.P.L.R. 7803 (McKinney 2008).

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

79. As discussed in our prior *Survey* article, mootness is another procedural issue that may arise in the context of a SEQRA review. Chertok et al., *supra* note 1, at 923–24. Mootness arises "where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy." Dreikausen v. Zoning Bd. of Appeals, 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) (3d ed. 2005)). In SEQRA cases, this typically occurs 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. *See id.* at 173, 774 N.E.2d at 197, 746 N.Y.S.2d at 433 (first citing Friends of Pine Bush v. Planning Bd., 86 A.D.2d 246, 248, 450 N.Y.S.2d 966, 968 (3d Dep't 1982); then citing Vitiello v. City of Yonkers, 255 A.D.2d 506, 507, 680 N.Y.S.2d 607, 608–09 (2d Dep't 1998); then citing Watch Hill Homeowners Ass'n v. Town Bd., 226 A.D.3d 1031, 1032, 641 N.Y.S.2d 443, 444 (3d Dep't 1996); and then citing Michalak v. Zoning Bd. of Appeals, 286 A.D.2d 906, 908, 731 N.Y.S.2d 129, 131 (4th Dep't 2001)). No cases dealt with this issue during this *Survey* period.

80. *See* Charlotte A. Biblow, *Courts Tackle Standing and SEQRA Review*, N.Y.L.J., May 22, 2014, at 3.

generalized harm caused by the action to the public at large.[81] To fall within SEQRA's "zone of interests," the alleged injury must be "environmental and not solely economic in nature."[82] The harm must be "'different in kind or degree from the public at large,' but it need not be unique."[83] 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."[84] In addition, only involved agencies can establish standing to contest a lead agency determination.[85]

Several SEQRA decisions addressed standing during this *Survey* period. In *Wooster v. Queen City Landing, LLC*, three individuals and Buffalo Niagara Riverkeeper Inc. challenged a negative declaration issued for the construction of Queen City Landing, a mixed-use facility in Buffalo's Outer Harbor area.[86] The Fourth Department affirmed the lower court's ruling that the three individuals had standing, because they engaged in "repeated, not rare or isolated use" of the Outer Harbor area for recreation, study, and enjoyment, such that the threatened environmental harm would affect them differently than the public at large.[87] The court also upheld the lower court's conclusion that Buffalo

81. 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. Cty. of Suffolk, 77 N.Y.2d 761, 773–76, 573 N.E.2d 1034, 1041–42, 570 N.Y.S.2d 778, 785–86 (1991)).

82. 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, 341, 443 N.Y.S.2d 951, 955 (4th Dep't 1981); and then citing Webster Assocs. v. Town of Webster, 112 Misc. 2d 396, 402, 447 N.Y.S.2d 401, 405 (Sup. Ct. Monroe Cty. 1981)).

83. Sierra Club v. Vill. of Painted Post, 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).

84. *Soc'y of Plastics*, 77 N.Y.2d at 775, 573 N.E.2d at 1042, 570 N.Y.S.2d at 786; *see Save the Pine Bush*, 13 N.Y.3d at 304, 918 N.E.2d at 921, 890 N.Y.S.2d at 409 (citing *Soc'y of Plastics*, 77 N.Y.2d at 775, 573 N.E.2d at 1042, 570 N.Y.S.2d at 786).

85. Preserve Hudson Valley, Inc. v. N.Y. State Dep't of Envtl. Conservation, No. 1707/2015, at 3–4 (Sup. Ct. Orange Cty. Oct. 11, 2016) (first citing King v. Cty. of Saratoga Indus. Dev. Agency, 208 A.D.2d 194, 201, 622 N.Y.S.2d 339, 344 (3d Dep't 1995), *lv. denied*, 85 N.Y.2d 809, 651 N.E.2d 920, 628 N.Y.S.2d 52 (1995); and then citing Incorporated Vill. of Poquott v. Cahill, 11 A.D.3d 536, 542–43, 782 N.Y.S.2d 823, 829–30 (2d Dep't 2004), *lv. dismissed in part, denied in part*, 5 N.Y.3d 819, 836 N.E.2d 1149, 802 N.Y.S.2d 26 (2005)).

86. 150 A.D.3d 1689, 1689, 54 N.Y.S.3d 812, 814 (4th Dep't 2017) (first citing N.Y. C.P.L.R. 7801(1) (McKinney 2008); and then citing N.Y. ENVTL. CONSERV. LAW § 8-0101 (McKinney 2017)).

87. *Id.* at 1690, 54 N.Y.S.3d at 814 (quoting *Save the Pine Bush*, 13 N.Y.3d at 305, 918 N.E.2d at 922, 890 N.Y.S.2d at 409) (first citing *Sierra Club*, 26 N.Y.3d at 311, 43 N.E.3d at 749, 22 N.Y.S.3d at 392; and then citing Long Island Pine Barrens Soc'y v. Central Pine

Niagara Riverkeeper met the requirements for organizational standing.[88]

The Second Department reached the opposite conclusion in *Brummel v. Town of North Hempstead Town Board*.[89] In *Brummel*, the petitioners challenged the placement of an aerating tower to filter contaminants from water, known as an "air stripper," in a wooded area in Christopher Morley Park.[90] The petitioners alleged that they frequently used and enjoyed the park, specifically the wooded area and paths near the air stripper, and claimed that the construction of the air stripper would destroy the natural and scenic features of the wooded area because it would require the removal of numerous well-developed trees and vegetation.[91] The court found that the petitioners failed to establish that they used and enjoyed the portion of the park in the vicinity of the proposed project more than the other members of the public.[92] The court also found that their "alleged environmentally related injuries are too speculative and conjectural to demonstrate an actual and specific injury-in-fact."[93] Similarly, in *Morabito v. Martens*,[94] a challenge to New York State's prohibition on high volume hydraulic fracturing discussed in a prior *Survey* article,[95] the Third Department affirmed the lower court's dismissal on standing grounds, because the petitioner's position was no different than that of any other landowner in the state.[96]

Barrens Joint Planning & Policy Comm'n, 113 A.D.3d 853, 856, 980 N.Y.S.2d 468, 471 (2d Dep't 2014)).

88. *Id.* at 1690, 54 N.Y.S.3d at 815 (first citing *Soc'y of Plastics*, 77 N.Y.2d at 775, 573 N.E.2d at 1042, 570 N.Y.S.2d at 786; and then citing *Long Island Pine Barrens Soc'y*, 113 A.D.3d at 856, 980 N.Y.S.2d at 471).

89. 145 A.D.3d 880, 882, 43 N.Y.S.3d 495, 497 (2d Dep't 2016), *lv. denied*, 29 N.Y.3d 903, 80 N.E.3d 400, 57 N.Y.S.3d 707 (2017) (first citing *Save the Pine Bush*, 13 N.Y.3d at 301, 918 N.E.2d at 918, 890 N.Y.S.2d at 406; and then citing Niagara Pres. Coal. v. N.Y. Power Auth., 121 A.D.3d 1507, 1510, 994 N.Y.S.2d 487, 492 (4th Dep't 2014)).

90. *Id.* at 881, 43 N.Y.S.3d at 496.

91. *Id.*

92. *Id.* at 882, 43 N.Y.S.3d at 497 (first citing *Save the Pine Bush*, 13 N.Y.3d at 301, 918 N.E.2d at 918, 890 N.Y.S.2d at 406; and then citing *Niagara Pres. Coal.*, 121 A.D.3d at 1510, 994 N.Y.S.2d at 492). As a practical matter, it is unclear how one would establish that certain people use a particular area of a park more than others, given the general absence of usage statistics and other reliable means for doing so.

93. *Id.* (citing Kindred v. Monroe Cty., 119 A.D.3d 1347, 1348, 989 N.Y.S.2d 732, 733 (4th Dep't 2014)).

94. 149 A.D.3d 1316, 53 N.Y.S.3d 213 (3d Dep't 2017).

95. Chertok et al., *supra* note 1, at 937–98.

96. *Morabito*, 149 A.D.3d at 1317, 53 N.Y.S.3d at 215 (first citing Ass'n for a Better Long Island, Inc. v. N.Y. State Dep't of Envtl. Conservation, 23 N.Y.3d 1, 9, 11 N.E.3d 188, 194, 988 N.Y.S.2d 115, 121 (2014); and then citing Soc'y of Plastics Indus. v. Cty. of Suffolk, 77 N.Y.2d 761, 778, 573 N.E.2d 1034, 1044, 570 N.Y.S.2d 778, 788 (1991)). The court explained: "At the time of commencement of this proceeding, [the] petitioner had not applied for a permit nor offered any proof that he met any of the requirements to obtain a permit. He offered no proof of any plans to move forward with the process and conceded that any plans

In *Mutual Aid Ass'n of the Paid Fire Department of Yonkers v. City of Yonkers*, the court found that a union of active firefighters of the City of Yonkers Fire Department had standing to compel the implementation of a mitigation measure identified in the FEIS for a mixed use residential and commercial development: the construction and staffing of a new firehouse.[97] The court recounted the purposes of SEQRA, as set forth in *Society of Plastics*: "[T]o encourage productive and enjoyable harmony with our environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state."[98] The court found that "[f]ire fighters are clearly within the ambit of danger when called upon to extinguish fires, as are the civilians who are affected" by the fire in the event there are insufficient resources available for protection.[99] In addition, "the injuries that may befall [the] plaintiff's members are not necessarily the same as may befall non-members who are nevertheless affected by the same potential peril."[100] The court therefore held that the plaintiff had standing to pursue the action, and denied (in relevant part) the defendants' motion to dismiss, noting that it would be "unjust" to dismiss the complaint at the pre-answer stage without allowing the parties to further develop the facts.[101]

At least three 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.[102] In challenges to rezoning decisions,

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would necessarily involve commitments by oil and gas exploration companies, of which he had none." *Id.*

97. No. 66024/2016, 2017 N.Y. Slip Op. 50645(U), at 3–4 (Sup. Ct. N.Y. Cty. May 11, 2017).

98. *Id.* at 3 (internal quotations omitted) (quoting *Soc'y of Plastics*, 77 N.Y.2d at 777, 573 N.E.2d at 1043, 570 N.Y.S.2d at 787).

99. *Id.* at 4.

100. *Id.*

101. *Id.* at 4–5. The fifth cause of action seeking a declaratory judgment that the City, City Council, and/or Building Department failed to meet their duty to the public of providing fire protection was dismissed on the ground that the plaintiff represented only its members and not the general public. *Id.* at 6–7. The sixth cause of action seeking a permanent injunction barring the City from issuing any additional temporary certificates of occupancy or permits also was dismissed. *Mutual Aid Ass'n*, 2017 N.Y. Slip Op. 50645(U), at 6–7. The court also denied the plaintiff's motion for a preliminary injunction. *Id.* at 6.

102. 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) (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)); Laughlin v. Pierce, 121 A.D.3d 1249, 1250, 995 N.Y.S.2d 619, 620–21 (3d Dep't 2014); Shinnecock Neighbors v. Town of Southampton, 53 Misc. 3d 874, 879, 37 N.Y.S.3d 679, 684 (Sup. Ct. Suffolk Cty. 2016) (citing Sun-Brite Car Wash, Inc. v.

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.[103] This principle was reaffirmed in *Shinnecock Neighbors v. Town of Southampton*, in which the petitioners challenged a rezoning that would allow the rehabilitation of an inn and the development of a luxury waterfront townhouse community and wastewater treatment facility.[104] The court found that three of the individual petitioners' proximity to the proposed development provided a "presumption that each will be adversely affected in a manner different from the public at large."[105] Their allegations regarding traffic, noise, air pollution, degradation of the community due to the new wastewater treatment plant, and lack of compliance with the Town's comprehensive plan were concerns within the zone of interests protected by SEQRA and the Town's zoning laws.[106]

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.[107] 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 presumption, the existence of an actual and specific injury."[108] For example, in *Rochester Eastside Residents for Appropriate Development, Inc. v. City of Rochester*, the court found that adverse effect could be inferred from proximity where the petitioner owned property three

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Bd. of Zoning & Appeals, 69 N.Y.2d 406, 413−14, 508 N.E.2d 130, 133, 515 N.Y.S.2d 418, 421−22 (1987)).

103. *See Gernatt Asphalt Prods., Inc.*, 87 N.Y.2d at 687, 664 N.E.2d at 1238, 642 N.Y.S.2d at 176 (citing *Sun-Brite Car Wash*, 69 N.Y.2d at 413−14, 508 N.E.2d at 133, 515 N.Y.S.2d at 421−22).

104. 53 Misc. 3d at 876, 37 N.Y.S.3d at 681–82.

105. *Id.* at 879, 37 N.Y.S.3d at 684 (citing *Sun-Brite Car Wash*, 69 N.Y.2d at 413–14, 508 N.E.2d at 133, 515 N.Y.S.2d at 421–22).

106. *Id.* (citing McGrath v. Town Bd., 254 A.D.2d 614, 616, 678 N.Y.S.2d 834, 836 (1998), *lv. denied*, 93 N.Y.2d 803, 710 N.E.2d 1092, 688 N.Y.S.2d 493 (1999)).

107. *See, e.g.*, Radow v. Bd. of Appeals, 120 A.D.3d 502, 502–03, 989 N.Y.S.2d 914, 915 (2d Dep't 2014) (citing Riverhead Neighborhood Pres. Coal. v. Town of Riverhead Town Bd., 112 A.D.3d 944, 944–45, 977 N.Y.S.2d 382, 383–84 (2d Dep't 2013)) (stating the petitioners of zoning variances could establish standing by showing they were in close proximity to the subject property).

108. *Id.* at 503, 989 N.Y.S.2d at 915 (internal quotations omitted) (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).

hundred feet from a proposed construction project.[109] The court also found that an organization had standing because two of its members owned property less than five hundred feet from the construction project, and the other two requirements for organizational standing were met.[110]

The proximity presumption also was applied in an annexation case during this *Survey* period. In *Village of South Blooming Grove v. Village of Kiryas Joel Board of Trustees*, the court found that two individual petitioners had standing to challenge the annexation of property, explaining that:

> [The petitioners] have alleged facts sufficient to support their standing to pursue their SEQRA claims because they are in sufficient proximity to the annexation territories as their properties adjoin them and given that there is an automatic change in the zoning upon annexation from Town of Monroe zoning to no zoning, and given the clear acknowledgment from the Village in the DGEIS and FGEIS that there will be increased density following the annexations, Cerqua and Allegro have established an injury to their community's character that is different in kind from that suffered by the general public and, therefore, that they have standing.[111]

The court also found that the municipalities that adjoined the land sought to be annexed had standing.[112] The court explained that, "[a] municipality can be found to have standing where a 'specific municipal interest' is articulated,"[113] which in this case was the municipalities'

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109. 150 A.D.3d 1678, 1679, 54 N.Y.S.3d 484, 486 (4th Dep't 2017) (quoting Ontario Heights Homeowners Ass'n v. Town of Oswego Planning Bd., 77 A.D.3d 1465, 1466, 908 N.Y.S.2d 514, 515 (4th Dep't 2010)) (citing Shapiro v. Town of Ramapo, 98 A.D.3d 675, 677, 950 N.Y.S.2d 154, 156 (2d Dep't 2012)). In another case from this *Survey* period, the court found that the unrebutted evidence in the record showed that the individual petitioners did not live close enough to the project at issue to satisfy the proximity presumption, and they otherwise did not establish injury-in-fact. City of Rye v. Westchester Cty. Bd. of Legislators, No. 61197/16, at *14 (Sup. Ct. Westchester Cty. Mar. 21, 2017). The court said that proximity is measured from the site of the project at issue to a petitioner's property, not from the nearest boundary line of the parcel of property on which the site is located, and 1,735 feet was too far. *Id.* at 13–14 (citing Tuxedo Land Trust, Inc. v. Town Bd., 112 A.D.3d 726, 728, 977 N.Y.S.2d 272, 274 (2d Dep't 2013)). This decision is being appealed.

110. *Rochester Eastside Residents for Appropriate Dev.*, 150 A.D.3d at 1679, 54 N.Y.S.3d at 486 (quoting Soc'y of Plastics Indus. v. Cty. of Suffolk, 77 N.Y.2d 761, 775, 573 N.E.2d 1034, 1042, 570 N.Y.S.2d 778, 786 (1991)) (first citing *Shapiro*, 98 A.D.3d at 677, 950 N.Y.S.2d at 156; and then citing *Ontario Heights*, 77 A.D.3d at 1466, 908 N.Y.S.2d at 515).

111. No. 7410/2015, at 67 (Sup. Ct. Orange Cty. Oct. 11, 2016).

112. *Id.* at 70.

113. *Id.* at 69 (citing Vill. of Chestnut Ridge v. Town of Ramapo, 45 A.D.3d 74, 90–91, 841 N.Y.S.2d 312, 337 (2d Dep't 2007)). In *City of Rye v. Westchester Cty. Bd. Of Legislators*, the court found that the municipality failed to establish standing because it did not articulate a specific municipal interest in the potential environmental impacts of the action being challenged. No. 61197/2016, at 16–17. Specifically, the court found that the City of Rye's allegations that the Board of Legislators' actions diminished Rye's "ability to promote, protect

"unique prerogative" to define community character.[114] Because the annexation would result in a change in zoning, which could have a significant detrimental impact on the character of the adjoining municipalities, those municipalities had standing.[115] However, those municipalities located more remotely could not establish standing on this ground; the court found their claims of community character impacts to be "conclusory and speculative, at best."[116] The court also denied standing to those municipalities that asserted potential strain on existing water and sewer services, increased traffic, and impacts on village and town operations, because these purported impacts were speculative and were not different from the injury that would be suffered by the public at large.[117]

Several decisions during this *Survey* period addressed the types of injuries that fall within SEQRA's zone of interests. In one case, the court differentiated between socioeconomic injury, which falls within the zone of interests, and purely economic injury, which does not. In *Fraydun Realty Co. v. New York City Department of Transportation*, two business owners challenged the installation of a bike share station outside of their building on Third Avenue.[118] The court found that the petitioners' allegations of lower revenues and a drop or loss in business were purely economic injuries that did not fall within the SEQRA/CEQR zone of interests, but that they had established standing based on "the allegations that their businesses are being negatively socioeconomically impacted in that there is a danger that they will be displaced."[119] However, the court

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and improve the quality of life for its residents and to protect and, where possible, enhance the environment," and undermined Rye's plans to "enhance and promote its status as a coastal city on Long Island Sound by protecting natural resources through application of its codes and regulations governing development" constituted speculative, "conclusory assertions" that did not demonstrate how potential environmental impacts would adversely affect the City's municipal interests. *Id.* at 17.

114. *Vill. of S. Blooming Grove*, No. 7410/2015, at 70 (quoting *Vill. of Chestnut Ridge*, 45 A.D.3d at 94, 841 N.Y.S.2d at 339).

115. *Id.* at 70–71 (first citing Nat'l Merritt v. Weist, 41 N.Y.2d 438, 444, 361 N.E.2d 1028, 1033, 393 N.Y.S.2d 379, 384 (1977); and then citing Holmes v. Brookhaven Town Planning Bd., 137 A.D.2d 601, 604, 524 N.Y.S.2d 492, 494 (2d Dep't 1988)).

116. *Id.* at 71 (citing *Vill. of Chestnut Ridge*, 45 A.D.3d at 90–91, 841 N.Y.S.2d at 336). The court also found that the Monroe Joint Fire District, a volunteer force whose service area included the annexation area, had standing because they sufficiently demonstrated an environmental injury that fell within the zone of interest protected by SEQRA. *Id.* (first citing City Council of Watervliet v. Town Bd., 3 N.Y.3d 508, 516, 822 N.E.2d 339, 342, 789 N.Y.S.2d 88, 91 (2004); and then citing *Vill. of Chestnut Ridge*, 45 A.D.3d at 91, 841 N.Y.S.2d at 336).

117. *Id.* at 71 (citing *Vill. of Chestnut Ridge*, 45 A.D.3d at 90–91, 841 N.Y.S.2d at 336).

118. No. 158295/2016, 2017 N.Y. Slip Op. 31070(U), at 4 (Sup. Ct. N.Y. Cty. May 16, 2017).

119. *Id.* at 11.

denied the petition in its entirety, finding that the respondents took the requisite "hard look" at the socioeconomic impact of the bike share program, and the petitioners did not offer any evidence otherwise.[120]

Nonenvironmental and speculative injuries are insufficient to establish SEQRA standing. In *Person v. New York City Department of Transportation*, an individual petitioner alleged that the Department of Transportation's congestion-related initiatives violated SEQRA.[121] He alleged that DOT's initiatives caused him to spend additional time stuck in vehicular traffic and to lose recreational time as a result.[122] The court found that these were not environmental injuries supporting standing under SEQRA.[123] The petitioner also alleged that the increased congestion would result in greater air pollution and consequent risk of adverse health consequences, delayed ambulance times, and delayed access to bathroom facilities while sitting in traffic.[124] The court found these alleged injuries to be "purely speculative and therefore insufficient to establish injury for the purposes of standing."[125] The court added that the petitioner's alleged injuries were no different than those of the public at large.[126] Thus, the petitioner failed to establish standing, and the petition was dismissed.[127]

2. Ripeness and Statute of Limitations

In addition to standing, a SEQRA petitioner also must satisfy several threshold requirements, including that the claim be ripe, that

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120. *Id.* at 12–13.

121. 143 A.D.3d 424, 425, 38 N.Y.S.3d 547, 548 (1st Dep't 2016).

122. *Id.* (first citing Ass'n for a Better Long Island, Inc. v. N.Y. State Dep't. of Envtl. Conservation, 23 N.Y.3d 1, 8–9, 11 N.E.3d 188, 194, 988 N.Y.2d 115, 121 (2014); then citing Widewaters Route 11 Potsdam Co. v. Town of Potsdam, 51 A.D.3d 1292, 1294, 858 N.Y.2d 820, 822 (3d Dep't 2008); and then citing Turner v. Cty. of Erie, 136 A.D.3d 1297, 1297, 24 N.Y.S.3d 812, 814 (4th Dep't), *lv. denied*, 27 N.Y.3d 906, 56 N.E.3d 899, 36 N.Y.S.3d 619 (2016)).

123. *Id.* (citing *Turner*, 136 A.D.3d at 1297, 24 N.Y.S.3d at 814).

124. *Id.*

125. *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), *lv. denied*, 4 N.Y.3d 709, 830 N.E.2d 320, 797 N.Y.S.2d 421 (2005)).

126. *Person*, 143 A.D.3d at 425, 38 N.Y.S.3d at 548 (citing Shelter Island Ass'n v. Zoning Bd. of Appeals, 57 A.D.3d 907, 909, 869 N.Y.S.2d 615, 617 (2d Dep't 2008), *lv. dismissed in part*, *denied in part*, 12 N.Y.3d 797, 906 N.E.2d 1077, 879 N.Y.S2d 43 (2009)).

127. *Id.* The court also noted that the petition was untimely, as he did not commence the proceeding until long after the four-month statute of limitations had run. *Id.* at 425–26, 38 N.Y.S.3d at 548 (citing N.Y. C.P.L.R. 217(1) (McKinney 2003)).

administrative remedies be exhausted,[128] and that the claim be timely brought within the statute of limitations period.[129]

A. Ripeness

With respect to ripeness, only final agency actions are subject to challenge in a SEQRA (or any other Article 78) challenge.[130] 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."[131]

Several court decisions during this *Survey* period addressed ripeness. Two cases confirmed that the lead agency designation is not a final action ripe for review.[132] As the court in *Preserve Hudson Valley v. New York State Department of Environmental Conservation* explained, "it is well settled that a lead agency determination is 'a preliminary step in the decision-making process' and, therefore, not ripe for judicial review . . . . To hold otherwise would subject the entire SEQRA process to unrestrained review which could necessarily result in significant delays in what is already a detailed and lengthy process."[133] In addition to ruling that a lead agency challenge was premature, in *Village of Islandia v. Martens*, the court found that the mere classification of a sewer project as an "unlisted action" was not "a final determination . . . subject to Article 78 review."[134] The court noted that the "petitioners not only have the opportunity to participate in the environmental review process, but may

128. 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." 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., 204 A.D.2d 548, 550, 611 N.Y.S.2d 917, 918–19 (2d Dep't 1994); then citing Harriman v. Town Bd., 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)).

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

130. *Id.*

131. Essex Cty. 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)).

132. Preserve Hudson Valley v. N.Y. State Dep't of Envtl. Conservation, No. 1707/2015, at 5 (Sup. Ct. Orange Cty. 2016); Vill. of Islandia v. Martens, No. 5874/15, at 3 (Sup. Ct. Suffolk Cty. May 5, 2016) (first citing 6 N.Y.C.R.R. § 617.6(a)(1)(i) (2016); then citing Town of Coeymans v. City of Albany, 237 A.D.2d 856, 857, 655 N.Y.S.2d 172, 173 (3d Dep't), *lv. denied*, 90 N.Y.2d 803, 683 N.E.2d 1053, 661 N.Y.S.2d 179 (1997); and then citing Young v. Bd. of Trs., 221 A.D.2d. 975, 977, 634 N.Y.S.2d 605, 608 (4th Dep't 1995)).

133. *Preserve Hudson Valley*, No. 1707/2015, at 5 (first quoting *Town of Coeymans*, 237 A.D.2d at 857, 655 N.Y.S.2d at 173; and then quoting *Young*, 221 A.D.2d. at 977, 634 N.Y.S.2d at 608).

134. No. 5874/15, at 4.

still seek to challenge the County's final determination regarding the environmental impact of the sewer project, including the County's designation as lead agency" after that determination is made.[135]

While a negative declaration may be a final agency action subject to review, the rescission of a negative declaration is not. In *Leonard v. Planning Board of Union Vale*, the court held that the rescission of a negative declaration on a subdivision application was not ripe for review, reasoning that the owners could further pursue their project by filing an EIS responding to the Planning Board's concerns.[136] The court also rejected the plaintiffs' argument that a "futility exception" applied to the final decision requirement in this case, reasoning that the allegations in the complaint did not "compel the conclusion that the Board [already had] determined that it [would] deny [the] plaintiffs' subdivision application" or that it was using "unfair procedures" to "avoid a final decision."[137] The court also noted that the plaintiffs' challenges to the Board's substantive concerns could be raised with the Board during the EIS process, before they become ripe for adjudication.[138]

B. Statute of Limitations

"A related procedural issue in SEQRA litigation concerns the timeliness of a SEQRA challenge under the applicable statute of limitations."[139] 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 petitioner,"[140] and that period begins to run when the agency has taken a "definitive position on the issue that inflicts an actual, concrete injury."[141] As a practical matter, it can be difficult to identify that point

135. *Id.* (citing Niagara Mohawk Power Corp. v. Pub. Serv. Comm'n, 218 A.D.2d 421, 425, 637 N.Y.S.2d 987, 989 (3d Dep't 1996)).

136. 659 Fed. Appx. 35, 39 (2d Cir. 2016). The plaintiffs in *Leonard* filed a lawsuit in federal court because they alleged that the Planning Board violated their substantive and procedural due process claims under 42 U.S.C. § 1983 when the Board rescinded the negative declaration for their proposed subdivision. *Id.* at 38; *see* Leonard v. Planning Bd. of Union Vale, 154 F. Supp. 3d 59, 68 (S.D.N.Y. 2016). On appeal, the Second Circuit held that the due process claims were not "ripe for adjudication because the Board's rescission of the negative declaration [was] not . . . a 'final decision . . . .'" *Leonard*, 659 Fed. Appx. at 37.

137. *Leonard*, 659 Fed. Appx. at 39–40.

138. *Id.*

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

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

141. 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) (quoting Essex Cty. 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) (quoting 6 N.Y.C.R.R. § 617.2(b)(2)–(3) (2016)) (citing Save the Pine Bush v. City of Albany, 70 N.Y.2d 193, 203, 512 N.E.2d 526, 529, 518

in time when the statute of limitations begins to run, and the trigger point has become an area of some confusion.[142]

During this *Survey* period, the court grappled with the question of the trigger point in *Rimler v. City of New York*.[143] In *Rimler*, the petitioners challenged the respondents' approval for a mixed-use residential tower in Brooklyn that would feature affordable housing units and the largest branch library in Brooklyn.[144] In order to develop the project, the City of New York had to: (1) sell the project site to the developer; (2) acquire a condominium unit for use as a branch of the Brooklyn Public Library; and (3) modify a special permit to apply it to the proposed merged lot containing the project site.[145] The disposition of City-owned property required SEQRA review and was subject to the Uniform Land Use Review Procedure (ULURP).[146] The ULURP process concluded with City Council approval on December 16, 2015.[147] "The Brooklyn Borough Board approved the [p]roject's disposition of City-owned property pursuant to [the] Charter . . . on March 1, 2016," and the Mayor approved it on March 21, 2016.[148]

The petitioners filed an Article 78 petition challenging the project's SEQRA/CEQR compliance on April 15, 2016, and they served the respondents about three weeks after filing the petition.[149] The respondents moved to dismiss, alleging (in relevant part) that the claims were barred by the statute of limitations because the four-month period ended April 16, 2016 and service was not received within the fifteen-day deadline set forth in CPLR 306-b.[150] The petitioners argued that the operative trigger

N.Y.S.2d 943, 946 (1987)) ("[T]he Statute of Limitations was triggered when the Board committed itself to 'a definite course of future decisions.'").

142. The confusion stems from two Court of Appeals decisions, *Stop-The-Barge*, 1 N.Y.3d at 221, 803 N.E.2d at 362, 771 N.Y.S.2d at 41, and *Eadie v. Town Bd.*, 7 N.Y.3d 306, 317, 854 N.E.2d 464, 469, 821 N.Y.S.2d 142, 147 (2006). See Chertok et al., *supra* note 1, at 921–22 for a discussion of these cases.

143. *See* No. 506046/2016, 2016 N.Y. Slip Op. 51627(U), at 16 (Sup. Ct. Kings Cty. July 7, 2016) (first citing Throggs Neck Resident Council v. Cahill, 290 A.D.2d 324, 324, 736 N.Y.S.2d 358, 359 (1st Dep't 2002); then citing Jones v. Amicone, 27 A.D.3d 465, 468, 812 N.Y.S.2d 111, 113 (2d Dep't 2006); then citing Metro. Museum Historic Dist. Coal. v. De Montebello, 20 A.D.3d 28, 35, 796 N.Y.S.2d 64, 68 (1st Dep't 2005); then citing *In re* City of New York (Grand Lafayette Props. LLC), 6 N.Y.3d 540, 574, 847 N.E.2d 1166, 1170, 814 N.Y.S.2d 592, 596 (2006); and then citing Gordon v. Rush, 100 N.Y.2d 236, 244, 792 N.E.2d 168, 173, 792 N.Y.S.2d 18, 123 (2003)).

144. *Id.* at 1–2.

145. *Id.* at 3.

146. *Id.* at 12.

147. *Id.*

148. *Rimler*, 2016 N.Y. Slip Op. 51627(U), at 12.

149. *Id.*

150. *Id.* at 13. N.Y. C.P.L.R. 306-b provides that,

instead was the Brooklyn Borough Board's approval on March 1, 2016, so the statute of limitations had not yet run and service therefore was timely.[151]

The court agreed with the respondents, explaining that:

> When a government action is subject to review under both SEQRA and ULURP, the [s]tatute of [l]imitations for any SEQRA claims begins to commence upon the completion of the ULURP process . . . .
>
> . . . .
>
> . . . . Subsequent determinations that do not reopen the environmental review have no impact on the environmental decisions that aggrieve [the] petitioners and therefore are not triggers for the running of the Statute of Limitations.[152]

As a result, the statute of limitations began to run on December 16, 2015 when ULURP was completed, and service was untimely.[153] The court noted that the Brooklyn Borough Board's later approval of the sales contract pursuant to the Charter did not extend the statute of limitations for the SEQRA claims because the Board "was bound by the prior negative declaration of the lead agency and had no authority to revisit the . . . environmental analysis" because it was a coordinated review.[154] The court added that, "when one or more agencies make successive determinations on a project to which SEQRA may be applicable, the [s]tatute of [l]imitations will run from the first such determination."[155] The court also found no merit in the petitioners' request for an extension

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> where the applicable statute of limitations is four months or less, service shall be made not later than fifteen days after the date on which the applicable statute of limitations expires. If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.

N.Y. C.P.L.R. 306-b (McKinney 2010).

151. *Rimler*, 2016 N.Y. Slip Op. 51627(U), at 16.

152. *Id.* at 14, 16 (first citing Sanitation Garage Brooklyn Dists. 3 & 3A v. City of New York, 32 A.D.3d 1031, 1035, 822 N.Y.S.2d 97, 102 (2d Dep't), *lv. denied*, 7 N.Y.3d 921, 860 N.E.2d 988, 827 N.Y.S.2d 868 (2006); then citing Throggs Neck Resident Council, Inc. v. Cahill, 290 A.D.2d 324, 324–25, 736 N.Y.S.2d 358, 359 (1st Dep't 2002); then citing Jones v. Amicone, 27 A.D.3d 465, 469, 812 N.Y.S.2d 111, 114 (2d Dep't 2006); then citing Metro. Museum Historic Dist. Coal. v. De Montebello, 20 A.D.3d 28, 35, 796 N.Y.S.2d 64, 69 (1st Dep't 2005); then citing *In re* City of New York (Grand Lafayette Props. LLC), 6 N.Y.3d 540, 547–48, 847 N.E.2d 1166, 1170, 814 N.Y.S.2d 592, 596 (2006); and then citing Gordon v. Rush, 100 N.Y.2d 236, 239, 792 N.E.2d 168, 170, 762 N.Y.S.2d 18, 20 (2003)).

153. *Id.* at 16.

154. *Id.* (first citing 6 N.Y.C.R.R. § 617.6(b)(3)(iii) (2016); and then citing *Gordon*, 100 N.Y.2d at 245, 792 N.E.2d at 174, 762 N.Y.S.2d at 24).

155. *Id.* at 16 (citing *Metro. Museum Historic Dist. Coal.*, 20 A.D.3d at 36, 796 N.Y.S.2d at 70).

of service, noting that the delay was prejudicial to the respondents and that it "would not allow meritorious claims to proceed" because the project's environmental review fully complied with SEQRA/CEQR.[156]

In *Sierra Club v. Martens*, the court declined to re-open larger issues involving an underlying permit on statute of limitations grounds.[157] In this case, the petitioners challenged a 2014 Initial Permit that the DEC issued to ConEd to withdraw water from the East River, which incorporated the Best Technology Available (BTA) requirements that the DEC previously had established in a 2010 State Pollutant Discharge Elimination System (SPDES) permit.[158] That 2010 SPDES permit and the negative declaration that preceded it were not challenged, nor was the permit challenged when renewed in 2014.[159] In challenging the 2014 Initial Permit, the petitioners effectively were challenging the BTA determination and "advocating for [the] installation of a closed-cycle cooling system."[160] The court rejected this attempt to circumvent the statute of limitations, declaring:

> [T]his proceeding is time-barred to the extent it seeks to reopen and challenge the 2010 Permit and associated 2010 Negative Declaration, by which [the] DEC concluded that an EIS was not required before allowing Con Edison to commence installation in accordance with the BTA determination . . . it was in these determinations, and not by issuance of the Initial Permit [at issue in the case] (in this court's opinion, a non-discretionary, ministerial act), that [the] DEC found that closed-cycle cooling was not the BTA for the East River Station.[161]

The court therefore limited the analysis to whether the Initial Permit was arbitrary and capricious (determining that it was not) and "decline[d] to re-examine the larger issues which were determined before the Initial Permit was issued (e.g., the soundness of the BTA determination; the feasibility of a closed-cycle system)."[162]

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156. *Rimler*, 2016 N.Y. Slip Op. 51627(U), at 17 (first citing Akpan v. Koch, 75 N.Y.2d 561, 570, 554 N.E.2d 53, 57, 555 N.Y.S.2d 16, 20 (1990); then citing Riverkeeper, Inc. v. Planning Bd., 9 N.Y.3d 219, 234, 881 N.E.2d 172, 178, 851 N.Y.S.2d 76, 82 (2007); and then citing Jackson v. N.Y. State Urban Dev. Corp., 67 N.Y.2d 400, 416, 494 N.E.2d 429, 435, 503 N.Y.S.2d 298, 304 (1986)).

157. No. 100524/15, 2016 N.Y. Slip Op. 51391(U), at 6–7 (Sup. Ct. N.Y. Cty. Sept. 29, 2016).

158. *Id.* at 2, 5.

159. *Id.* at 5.

160. *See id.* at 3.

161. *Id.* at 7 (citing Young v. Bd. of Trs., 89 N.Y.2d 846, 848, 675 N.E.2d 464, 465, 652 N.Y.S.2d 729, 730 (1996)).

162. *Sierra Club*, 2016 N.Y. Slip Op. 51391(U), at 8.

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. Several cases during the *Survey* period concerned agencies' alleged failures to comply with one or more of these procedural mandates.

"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."[163] Most challenges on this subject involve the classification itself, particularly when the action is classified as a Type II action, ending the SEQRA process.[164] In *Incorporated Village of Munsey Park v. Manhasset-Lakeville Water District*, for example, the petitioners challenged a Water District's determination that the replacement of a water storage tank was a "replacement, rehabilitation or reconstruction of a structure or facility, in kind" and therefore a Type II action exempt from SEQRA, even though the replacement was a differently-shaped tank with 250,000-gallon greater capacity than the original.[165] The court affirmed that determination.[166]

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.[167] 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.'"[168] Under Article 78's deferential standard of review for agencies'

163. *See* Chertok et al., *supra* note 1, at 925.

164. As a practical matter, most challenges are to the classification of an action as a Type II action, as that classification avoids any environmental review, whereas a Type I or Unlisted action could (but does not necessarily) trigger an EIS. *See* Vill. of Islandia v. Martens, No. 5874/15, at 4 (Sup. Ct. Suffolk Cty. May 5, 2016) (holding that the designation of a sewer as an unlisted action was not a final action ripe for review).

165. 150 A.D.3d 969, 970–71, 57 N.Y.S.3d 154, 156–57 (2d Dep't 2017) (quoting 6 N.Y.C.R.R. § 617.5(c)(2) (2016)).

166. *Id.* at 971, 57 N.Y.S.3d at 157.

167. *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)).

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

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."[169] Successful challenges to EISs are uncommon because of this deferential standard of review.[170] Success is relatively more common in challenges to determinations of significance, but as several unsuccessful challenges from the *Survey* period show, the 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.[171] 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 action may have significant adverse environmental impacts, or that the agency failed to provide a written, reasoned explanation for that determination.[172] In several decisions during the *Survey* period, the petitioners asserted challenges to negative declarations, with some success. In *Falco v. Zoning Board of Appeals of Pomfret*, the petitioners challenged the Town of Pomfret Zoning Board of Appeals' (ZBA) negative declaration and issuance of a variance and special use permit for the planned construction of a cell phone tower.[173] The court found that the record was devoid of any factual findings, analysis, or discussion, and there was no support in the record to discern a basis for the negative declaration.[174] The court concluded: "There appears to have been no look, let alone a 'hard look,' at the relevant areas of environmental concern. There was no elaboration, let alone a 'reasoned elaboration' regarding the basis of the ZBA's determination."[175] The court therefore annulled the

169. 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)).

170. *See* GERRARD ET AL., 2 ENVIRONMENTAL IMPACT REVIEW IN NEW YORK § 7.04[4] (2017).

171. 6 N.Y.C.R.R. § 617.5 (2016); *see* GERRARD ET AL., *supra* note 170, at § 2.01[3][b].

172. N.Y. C.P.L.R. 7803(3); *see* Chertok et al., *supra* note 1, at 927, 929–31. Challenges to positive declarations are less common than challenges to negative declarations. *See* GERRARD ET AL., *supra* note 170, at § 3.05[2][e]. The principal reason is that positive declarations generally are not considered final agency actions.

173. No. K1-2016-484, 2016 N.Y. Slip Op. 51257(U), at 3 (Sup. Ct. Chautauqua Cty. Aug. 22, 2016).

174. *Id.* at 2–3.

175. *Id.* at 4.

negative declaration and vacated the variance and the special use permit.[176]

The petitioners were similarly successful in challenging a negative declaration for the proposed construction of an ALDI supermarket in *Rochester Eastside Residents for Appropriate Development, Inc. v. City of Rochester*.[177] In *Rochester*, "despite the undisputed presence of preexisting soil contamination on the project site, the negative declaration set forth no findings whatsoever with respect to that contamination."[178] In addition, the court found that the document purporting to provide the reasoning for the lead agency's determination, which document was prepared *after* the issuance of the negative declaration, was contrary to law.[179] The court added that "the developer's promise to remediate the contamination" prior to commencing construction was insufficient to absolve the lead agency from its SEQRA obligations.[180] It therefore reversed the lower court's decision and granted the petition, thereby annulling the negative declaration and vacating the variances and special use permit issued for the supermarket.[181]

Despite these victories, petitioners were largely unsuccessful in challenging negative declarations during this *Survey* period.[182] In one

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176. *Id.* at 5.

177. *See* 150 A.D.3d 1678, 1679–80, 54 N.Y.S.3d 484, 486–87 (4th Dep't 2017).

178. *Id.* at 1680, 54 N.Y.S.3d at 486.

179. *Id.* at 1680, 54 N.Y.S.3d at 486–87 (first citing Dawley v. Whitetail 414, LLC, 130 A.D.3d 1570, 1571, 14 N.Y.S.3d 854, 855 (4th Dep't 2015); and then citing Hartford/North Bailey Homeowners Ass'n v. Zoning Bd. of Appeals, 63 A.D.3d 1721, 1723, 881 N.Y.S.2d 265, 267 (4th Dep't 2009)).

180. *Id.* at 1680, 54 N.Y.S.3d at 487 (citing Penfield Panorama Area Cmty. v. Town of Penfield Planning Bd., 253 A.D.2d 342, 349–50, 688 N.Y.S.2d 848, 853–54 (4th Dep't 1999)).

181. *Id.*

182. *See, e.g.*, Finn v. City of New York, 141 A.D.3d 436, 436, 33 N.Y.S.3d 892, 892 (1st Dep't 2016) (first citing Riverkeeper, Inc. v. Planning Bd., 9 N.Y.3d 219, 232, 881 N.E.2d 172, 177, 851 N.Y.S.2d 76, 81 (2007); then citing Jackson v. N.Y. State Urban Dev. Corp., 67 N.Y.2d 400, 417, 494 N.E.2d 429, 436, 502 N.Y.S.2d 298, 305 (1986); and then citing Chinese Staff & Workers' Ass'n v. Burden, 88 A.D.3d 425, 429, 932 N.Y.S.2d 1, 3 (1st Dep't 2011)) (upholding New York City Department of Homeless Services' negative declaration for a proposed shelter, finding it "properly adhered" to the CEQR Technical Manual, "took the requisite 'hard look,'" and "provided a 'reasoned elaboration' for [its] negative declaration"); Beekman Delamater Props., LLC v. Vill. of Rhinebeck Zoning Bd. of Appeals, 150 A.D.3d 1099, 1101, 57 N.Y.S.3d 57, 61 (2d Dep't 2017) (upholding the Planning Board's negative declaration for a lodging facility, noting that, contrary to the petitioners' contentions, the Planning Board complied with SEQRA's requirements in finding that the project would not create a material conflict with the community's plans or goals, and "would not result in the impairment of the character or quality of important historical, archaeological, architectural, or aesthetic resources or existing community or neighborhood character") (citing City of Rye v. Korff, 249 A.D.2d 470, 471, 671 N.Y.S.2d 526, 528 (2d Dep't 1998)); Fraydun Realty Co. v. N.Y.C. Dep't of Transp., No. 158295/2016, 2017 N.Y. Slip Op.

particularly notable case, *City Club of New York, Inc. v. Hudson River Park Trust, Inc.*, the Appellate Division, First Department upheld the Hudson River Park Trust's negative declaration for Pier 55, a unique and innovative pier in Hudson River Park that would replace the historic Pier 54 and feature rolling topography, green space, and world-class performing arts uses.[183] The petitioners challenged the Trust's environmental review and negative declaration on the basis that it used the incorrect "no action" baseline condition.[184] The Trust compared Pier 55 to the version of Pier 54 for which the Trust had already obtained valid permits and which the Trust would build in the absence of Pier 55.[185] The petitioners argued that the Trust instead should have used open water (the current condition) as the "no action" condition.[186] The First Department upheld the Trust's SEQRA analysis, holding that the "Trust's use of the previously permitted 2005 Pier 54 rebuild design as the 'no action' alternative in its SEQRA analysis was 'not irrational, an abuse of discretion, or arbitrary and capricious, and, consequently, should not be disturbed.'"[187]

2. Adequacy of Agencies' EIS and Findings Statements

Petitioners have been similarly unsuccessful in challenging the adequacy of EISs during the *Survey* period.[188] In our last *Survey* article,

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31070(U), at 11–13 (Sup. Ct. N.Y. Cty. May 16, 2017) (upholding negative declaration for bike share station where the DOT performed an environmental review in accordance with the CEQR Manual and the petitioners failed to offer any evidence suggesting that the respondents did not perform an appropriate review); Leone v. City of Jamestown Zoning Bd. of Appeals, No. K1-2016-528, 2016 N.Y. Slip Op. 51256(U), at 1–2, 4 (Sup. Ct. Chautauqua Cty. Aug. 11, 2016) (upholding a negative declaration for use variance to allow the second floor of Sheldon House—a mansion initially donated to Jamestown Community College and now being sold to a development company—to be converted into the company's headquarters, while retaining preexisting community and philanthropic uses); W. Sullivan O.R.E. LLC v. Town of Thompson Planning Bd., No. 0460-16, 2016 N.Y. Slip Op. 51329(U), at 7–9 (Sup. Ct. Sullivan Cty. Sept. 21, 2016) (upholding the Planning Board's negative declaration for a Taco Bell fast food facility); Town of Marilla v. Travis, 151 A.D.3d 1588, 1589, 56 N.Y.S.3d 695, 697 (4th Dep't 2017) (upholding the DEC's negative declaration for a solid waste facility management permit); Heights of Lansing Dev., LLC v. Vill. of Lansing, No. 2016-0775, N.Y. Slip Op. 30410(U), at 6–7 (Sup. Ct. Kings Cty. Mar. 2, 2017) (upholding the Village Board's negative declaration for a proposed rezoning).

183. 142 A.D.3d 803, 804–05, 37 N.Y.S.3d 123, 124–26 (1st Dep't 2016).

184. *Id.* at 804, 37 N.Y.S.3d at 125 (quoting Gordon v. Rush, 100 N.Y.2d 236, 244–45, 792 N.E.2d 168, 173, 762 N.Y.S.2d 18, 23 (2003)).

185. *Id.* (quoting *Gordon*, 100 N.Y.2d at 244–45, N.E.2d at 173, 762 N.Y.S.2d at 23).

186. *Id.*

187. *Id.* (quoting *Gordon*, 100 N.Y.2d at 244–45, N.E.2d at 173, 762 N.Y.S.2d at 23).

188. As discussed further below, in *Shinnecock Neighbors v. Town of Southampton*, No. 15-8276, 2017 N.Y. Slip Op. 50781(U), at 7–9 (Sup. Ct. Suffolk Cty. May 23, 2017), the court found a flaw in the EIS, namely the Town's failure to take a hard look at water supply

we discussed *Friends of P.S. 163, Inc. v. Jewish Home Lifecare*, a case in which the supreme court found that an EIS prepared by the New York State Department of Health (DOH) for a nursing home on the Upper West Side of Manhattan was "inadequate because it failed to take the requisite hard look at noise impacts from construction," even though the EIS complied with the *CEQR Technical Manual*.[189] That decision broke "with a long line of precedent upholding reliance on the CEQR Technical Manual; in fact, it [was] the first court to find that an environmental review conducted in accordance with the CEQR Technical Manual was insufficient."[190]

During this *Survey* period, the Appellate Division, First Department reversed the supreme court's decision.[191] The court held that DOH rationally relied on the *CEQR Technical Manual* for the allowable temporal duration of elevated noise from construction, and the record supported the conclusion that DOH took the requisite "hard look" at the noise issue.[192] Several other decisions during this *Survey* period reaffirmed reliance on the *CEQR Technical Manual* as well.[193] The Court

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and fire flow issues. Rather than striking down the EIS in its entirety, the court required the preparation of an SEIS assessing those limited issues. *Id.*

189. Nos. 100546/15, 100641/15, 2015 N.Y. Slip Op. 51997(U), at 1, 11 (Sup. Ct. N.Y. Cty. Dec. 9, 2015), *rev'd*, 146 A.D.3d 576, 576, 46 N.Y.S.3d 540, 542–43 (1st Dep't 2017); *see* Chertok et al., *supra* note 1, at 939–40.

190. Chertok et al., *supra* note 1, at 942.

191. Friends of P.S. 163, Inc. v. Jewish Home Lifecare, 146 A.D.3d 576, 576, 46 N.Y.S.3d 540, 542–43 (1st Dep't), *aff'd*, 30 N.Y.3d 416, 433 (2017).

192. *Id.* at 578, 580–81, 46 N.Y.S.3d at 544, 546 (quoting 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)) (citing Spitzer v. Farrell, 100 N.Y.2d 186, 191, 791 N.E.2d 394, 397, 761 N.Y.S.2d 137, 140 (2003)). The court also held that the "DOH reasonably relied on federal standards" in determining appropriate mitigation for possible "off-site migration of lead-bearing dust." *Id.* at 580–81, 46 N.Y.S.3d at 546 (citing *Spitzer*, 100 N.Y.2d at 191, 791 N.E.2d at 397, 761 N.Y.S.2d at 140).

193. Rimler v. City of New York, No. 506046/2016, 2016 N.Y. Slip Op. 51627(U), at 18 (Sup. Ct. Kings Cty. July 7, 2016) (first citing Bd. of Managers of the Plaza Condo. v. N.Y.C. Dept. of Transp., 131 A.D.3d 419, 419–20, 14 N.Y.S.3d 375, 375–76 (1st Dep't 2015); then citing Chinese Staff & Workers' Ass'n v. Burden, 88 A.D.3d 425, 433, 932 N.Y.S.2d 1, 6 (1st Dep't 2011); then citing Coal. Against Lincoln W. v. Weinshall, 21 A.D.3d 215, 223, 799 N.Y.S.2d 205, 212 (1st Dep't 2005); then citing Hand v. Hosp. for Special Surgery, 107 A.D.3d 642, 642–43, 968 N.Y.S.2d 482, 482–83, (1st Dep't 2013); and then citing Landmark West! v. Burden, 15 A.D.3d 308, 309, 790 N.Y.S.2d 107, 108 (1st Dep't 2005)) ("[F]or environmental reviews conducted within New York City, courts have long accepted conformance with guidelines in the *CEQR Technical Manual* as establishing compliance with *SEQRA/CEQR* . . . . As a result, this [c]ourt observes that an EAS prepared consistent with guidance in the *CEQR Technical Manual* demonstrates compliance with *SEQRA/CEQR*."); Fraydun Realty Co. v. N.Y.C. Dep't of Transp., No. 158295/2016, 2017 N.Y. Slip Op. 31070(U), at 3, 11 (Sup. Ct. N.Y. Cty. May 16, 2017) (holding that the analysis of socioeconomic impacts of a bike share station conformed to CEQR Technical Manual and therefore conformed to what is required by SEQRA and CEQR); *see* Finn v. City of New

of Appeals affirmed the First Department's decision after the conclusion of the *Survey* period, and that decision will be discussed further in our next *Survey* article.[194]

D. Supplementation

SEQRA provides for the preparation of a 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.[195] "Whether issues, impacts, or project details omitted from an initial EIS require preparation of [a] SEIS is a frequent subject of litigation."[196] One case during this *Survey* period involved this issue. In *Shinnecock Neighbors*, noted above, the petitioners argued that the Town failed to address water supply and fire flow issues in the SEQRA review.[197] The court agreed, finding "no evidence that the Town undertook a hard look at this issue," and remitted the proceeding to the Town to require a supplemental EIS on the limited water issues.[198]

E. Continuing Obligations under SEQRA

The SEQRA process may impose conditions, commitments and/or mitigation measures (collectively, "mitigation measures") on project applicants, either in a conditioned negative declaration or in a SEQRA findings statement.[199] These mitigation measures are typically included in permits or other approval documents, which make them enforceable

York, 141 A.D.3d 436, 436, 33 N.Y.S.3d 892, 893 (1st Dep't 2016) (quoting *Chinese Staff & Workers' Ass'n*, 88 A.D.3d at 429, 932 N.Y.S.2d at 3) ("In preparing the environmental assessment statement (EAS) undergirding the negative declaration, DHS properly adhered to the 'accepted methodology' set forth in the City Environmental Quality Review Manual.").

194. The Court of Appeals affirmed the First Department's decision on December 12, 2017. Friends of P.S. 163, Inc. v. Jewish Home Lifecare, 30 N.Y.3d 416, 433, 90 N.E.3d 1252, 1262, 68 N.Y.S.3d 382, 391 (2017).

195. 6 N.Y.C.R.R. § 617.9(a)(7)(i)(a)–(c) (2016).

196. Chertok et al., *supra* note 1, at 946.

197. No. 15-8276, 2017 N.Y. Slip Op. 50781(U), at 7 (Sup. Ct. Suffolk Cty. May 23, 2017).

198. *Id.* at 8. It is unusual for a court to remand with specific instructions that the agency prepare a supplemental EIS on a limited issue. *See* GERRARD ET AL., *supra* note 170, at § 7.16[3]. In *Develop Don't Destroy (Brooklyn), Inc. v. Empire State Development Corp.*, for example, the court held "that ESDC did not provide a 'reasoned elaboration' for its determination not to require [a supplemental EIS] . . ." to address a particular impact, so the court remanded to ESDC to make findings on that potential impact and to determine "whether a supplemental environmental impact statement [was] required or warranted." 30 Misc. 3d 616, 632–33, 914 N.Y.S.2d 572, 585 (Sup. Ct. N.Y. Cty. 2010). It did not remand to ESDC to prepare a supplemental EIS on the impact at issue. *Id.*

199. *See* 6 N.Y.C.R.R § 617.7(d) (2016) (conditioned negative declarations); 6 N.Y.C.R.R § 617.11(a), (d) (2016) (findings statements).

by the approving agencies.[200] However, it has been an open question as to whether mitigation measures included in a conditioned negative declaration, EIS, or SEQRA Findings can be enforced if not contained in a permit or other approval document, as none of these are decisional documents.[201]

One court, however, has determined that enforcement of those conditions and commitments is the responsibility of the agency that imposed them; "[A] lead agency has a continuing obligation to ensure that restrictions imposed by an EIS are followed."[202] According to that case, members of the public who may be injured by an applicant's failure to comply with SEQRA-imposed conditions may sue to compel lead agencies to enforce them.[203]

While the court did not reach the merits of the firefighter union's claims in Mutual Aid Ass'n, discussed above, it is significant that the court found that the complaint stated causes of action against various entities to compel the completion of mitigation measures set forth in an EIS, i.e., for a declaratory judgment that (i) a "firehouse . . . be constructed and staffed," (ii) the City Council (lead agency) and /or other City defendants "take immediate action to acquire or provide land for the construction of the firehouse and commit to the addition of new . . . personnel," (iii) the City Council (lead agency) "require the immediate construction and staffing of the firehouse," and (iv) the developer defendants construct the firehouse (or pay the City to do so).[204] If the court were to find in favor of the petitioners on any of these causes of action, thereby allowing a private party to enforce the conditions in an EIS directly against the lead agency, a developer/applicant, or a City entity that is not the lead agency, it would expand the enforceability of SEQRA documents and enhance the ability of private citizens to enforce

200. *See* GERRARD ET AL., *supra* note 170, at § 3.14[2] ("[Enforcement of SEQRA commitments] is the responsibility of the agency that imposed those conditions or commitments.").

201. *See Conditioned Negative Declarations (CNDs)*, DEP'T ENVT'L CONSERVATION, http://www.dec.ny.gov/permits/48068.html (last visited May 19, 2018) ("[The conditions for mitigating] potential adverse environmental impacts [must be included in the conditioned negative declaration and] also need to be incorporated into the lead agency's decision document within its underlying jurisdiction. As part of that decision, the mitigating conditions would then be subject to the same enforcement measures that the lead agency possesses for the underlying jurisdiction.").

202. *See* Comm. for Environmentally Sound Dev., Inc. v. City of New York, 190 Misc. 2d 359, 373, 737 N.Y.S.2d 792, 803 (Sup. Ct. N.Y. Cty. 2001).

203. *Id.* at 360, 373–74, 737 N.Y.S.2d at 793, 803–04 (citing GERRARD ET AL., *supra* note 170, at § 3.14[2]) (denying motion to dismiss, but finding a cause of action for the petitioners to compel the City, which took on the responsibilities of lead agency for the project, to enforce the limitations contained in an EIS).

204. No. 66024/2016, 2017 N.Y. Slip Op. 50645(U), at 4–6 (Sup. Ct. N.Y. Cty. 2017).

the conditions and commitments established during the SEQRA process.

CONCLUSION

Case law from this *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. These issues will continue to evolve as the courts are presented with new SEQRA challenges. SEQRA practitioners may anticipate the publication of the final GEIS and adoption of the SEQRA regulations in the coming years. These and other developments in the law of SEQRA will be covered in future installments of the *Survey of New York Law*.