

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 in 2010.¹ While early 2010 saw no major cases from the Court of Appeals or groundbreaking law from appellate division courts, it did see the potential emergence from lower court decisions of the practical contours of the Court of Appeals' 2009 standing decision in *Save the Pine Bush, Inc. v. Common Council of the City of Albany*.² Two cases address the unusual issue of what types of agencies are subject to SEQRA, several deal with issues of ripeness, prematurity, and equitable remedies, and other decisions concern challenges to major

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1. The period covered in this Article is January 1, 2010 to June 30, 2010; the authors' prior *Survey* addresses SEQRA developments in 2009. Mark A. Chertok & Ashley S. Miller, *Environmental Law: Developments in the Law of SEQRA 2009, 2008-09 Survey of New York Law*, 60 SYRACUSE L. REV. 925 (2010). It should be noted that in August 2010 the New York State Department of Environmental Conservation released a revised SEQRA handbook; because it is outside the survey period the revised handbook will not be discussed in this Article. DIV. OF ENVTL. PERMITS, N.Y. STATE DEP'T OF ENVTL. CONSERVATION, THE SEQRA HANDBOOK (3d ed. 2010), available at http://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf [hereinafter SEQRA HANDBOOK].

2. 13 N.Y.3d 297, 918 N.E.2d 917, 890 N.Y.S.2d 405 (2009).

New York City rezoning and developments. While no court addressed climate change/greenhouse gas emissions (GHG) analysis under SEQRA, early 2010 saw significant technical guidance issued by New York City on the issue that may shape future practice in that area, particularly within New York City, while raising significant questions regarding mitigation.

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.³ “The primary purpose of SEQRA is ‘to inject environmental considerations directly into governmental decision making.’”⁴ The law applies to discretionary actions by the State of New York, its subdivisions, or local agencies that have the potential to impact the environment, including direct agency actions, funding determinations, promulgation of regulations, zoning amendments, permits and similar approvals.⁵ A primary component of SEQRA is the environmental impact statement (EIS), which—in the event 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.⁶

Actions are grouped into three categories in the SEQRA regulations issued by the New York State Department of Environmental Conservation (NYSDEC): Type I, Type II, or Unlisted. 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

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

4. Akpan v. Koch, 75 N.Y.2d 561, 569, 554 N.E.2d 53, 56, 555 N.Y.S.2d 16, 19 (1990) (quoting *In re Coca-Cola Bottling Co. of N.Y., Inc. v. Bd. of Estimate of the City of N.Y.*, 72 N.Y.2d 674, 680, 532 N.E.2d 1261, 1263, 536 N.Y.S.2d 33, 36 (1988)). For a useful overview of the substance and procedure of SEQRA, see *In re Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 414-15, 494 N.E.2d 429, 434-35, 503 N.Y.S.2d 298, 303-04 (1986).

5. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2 (2008) (defining actions and agencies subject to SEQRA).

6. *Id.* § 617.9(b)(1).

thus are not subject to review under SEQRA.⁷ Type I actions, also specifically enumerated, are “more likely to require the preparation of an EIS than Unlisted actions.”⁸ Unlisted actions are not enumerated, but rather are a catchall of those actions that are neither Type I nor Type II.⁹ In practice, the vast majority of actions are Unlisted.

Before undertaking an action (except for a Type II action), an agency must determine whether the proposed action may have one or more significant adverse environmental impacts, called a determination of significance.¹⁰ Where multiple decision-making agencies are involved, there is usually a “coordinated review” pursuant to which a designated “lead agency” makes the determination of significance.¹¹ 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.¹² If the answer is affirmative, the lead agency may in certain cases impose conditions on the proposed action to sufficiently mitigate the potentially significant adverse impacts¹³ or, more commonly, the lead agency issues a Positive Declaration requiring the preparation of an EIS.

If an EIS is prepared, typically the first step is the scoping of the contents of the Draft EIS. Although scoping is not actually required under SEQRA or NYSDEC’s implementing regulations, it is “recommended” by NYSDEC and commonly undertaken when an EIS is required.¹⁴ Scoping involves focusing the EIS on relevant areas of environmental concern, with the goal (not often achieved) of

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

8. *Id.* § 617.4(a) (Type I actions).

9. *Id.* § 617.4(a)(1).

10. 6 NYCRR 617.6-617.7.

11. *Id.* § 617.6(b)(3)(i)-(ii).

12. *Id.* § 617.7(a)(2). Before an agency makes its determination of significance for a Type I action, it is required to prepare, or have prepared by the project sponsor, a full environmental assessment form (EAF) and consider specific enumerated criteria as listed in the SEQRA regulations. *Id.* §§ 617.7(b)(2), 617.7(c). A short form EAF may be prepared for an unlisted action, although it is more common to utilize the full EAF for most actions of potential consequence or controversy.

13. *Id.* §§ 617.2(h), 617.7(d). This is known as a Conditioned Negative Declaration (CND). For a CND, the lead agency must issue public notice of its proposed CND and, if public comment identifies potentially significant adverse environmental impacts that were not previously addressed or were inadequately addressed, or indicates the mitigation measures imposed are substantively deficient, an EIS must be prepared. 6 NYCRR 617.2(h), 617.7(d). CNDs cannot be issued for Type I actions or where there is no applicant. *Id.* § 617.7(d)(1).

14. SEQR HANDBOOK, *supra* note 1, at 103. Scoping, when it occurs, is governed by title 6 of the New York Codes, Rules and Regulations section 617.8.

eliminating inconsequential subject matters. The Draft EIS, once prepared and accepted as adequate and complete by the lead agency, is then circulated for public and other agency review and comment. Although not required, under NYSDEC's implementing regulations the lead agency typically holds a legislative hearing with respect to the Draft EIS.¹⁵ That hearing is typically combined with other hearings required for the proposed action.¹⁶ A Draft EIS, in addition to "analyz[ing] the significant adverse impacts and evaluat[ing] all reasonable alternatives," 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 plan¹⁷

The next step is the preparation of a Final EIS, which addresses any project changes, new information and/or changes in circumstances, and responds to all substantive comments on the Draft EIS. After preparation of the Final EIS, and prior to undertaking or approving an action, each acting agency must issue findings that the provisions of SEQRA and the NYSDEC implementing regulations have been met and considering 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"¹⁸ The agency must then:

[c]ertify 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

15. 6 NYCRR 617.9(a)(4).

16. *Id.* § 617.3(h).

17. *Id.* §§ 617.9(b)(1), (b)(5)(iii).

18. *Id.* § 617.11(d)(1)-(2).

to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable.¹⁹

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).²⁰

II. CASELAW DEVELOPMENTS IN 2010

Generally, court decisions in the first half of 2010 did not break substantial new ground on fundamental SEQRA issues. For example, there were no reported court decisions in emerging areas such as climate change or the interaction of SEQRA with the New York State Brownfield Cleanup program (BCP).²¹ A significant 2009 case on BCP and SEQRA issues, *Bronx Committee for Toxic Free Schools v. New York City School Construction Authority*, remains on appeal and no appellate decision has yet been rendered.²²

However, 2010 did see the first applications of the Court of Appeals’ decision on standing to sue in *Pine Bush*, shedding some light on how lower courts may apply this case in the future. These and the other cases referenced in the Introduction are discussed below.

A. Standing after Pine Bush

In 2009, the Court of Appeals in *Pine Bush* held that petitioners who demonstrated “repeated, not rare or isolated” recreational use of a natural resource (more than the public at large) had standing to challenge under SEQRA a government action that threatened that resource.²³ *Pine Bush* was perceived as broadening the scope of standing under SEQRA, which has long been governed by the requirement that a SEQRA challenger demonstrate injury “different in kind or degree from the public at large”—a test set forth in *Society of*

19. *Id.* § 617.11(d)(5).

20. 42 U.S.C. §§ 4321-4370f (2006). *See also In re Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 414-15, 494 N.E.2d 429, 434, 503 N.Y.S.2d 298, 303 (1986).

21. For a review of prior developments in analysis of climate impacts under SEQRA, see the authors’ prior two survey articles. Chertok & Miller, *supra* note 1, at 943; Chertok & Miller, *supra* note 3, at 768.

22. No. 0013800-07 (Sup. Ct. Bronx Cnty. Oct. 16, 2009) (on file with authors). *Bronx Committee* is discussed further in Chertok & Miller, *supra* note 1, at 935.

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

Plastics Industry, Inc. v. County of Suffolk.²⁴

In practice, the “different in kind or degree” test from *Society of Plastics* had often been simplified and limited by lower courts into a requirement that a petitioner live in close proximity to the challenged project.²⁵ Thus, under lower court applications of *Society of Plastics*, standing was often limited to nearby residents; in the Third Department, in particular, proximity to the proposed action had been the de facto standing test.²⁶ *Pine Bush* clarified that injury “different in kind or degree” may be established through repeated recreational uses of a resource, and allowed lower courts to go beyond a simple inquiry into how close a petitioner lives to a project. When it was decided, *Pine Bush* was predicted to expand the number of potential plaintiffs who could establish standing, while leaving open the question of whether the injury “different in kind or degree” requirement would remain intact, or begin to erode.²⁷

The first two post-*Pine Bush* decisions suggest that standing will be more easily obtained where the use of natural resources are involved, but the proximity standard may not so readily dissipate when the challenge is based on exposure to increased traffic or other effects of a project.

The first apparent lower court case to apply *Pine Bush* fulfills the expectation that more petitioners can garner standing. The Supreme Court, Suffolk County applied *Pine Bush* in *Peconic Baykeeper, Inc. v. Board of Trustees of the Freeholders & Commonalty of the Town of Southampton*, providing a window into how future standing disputes involving natural resources may be decided.²⁸

In *Peconic Baykeeper*, petitioner challenged a permit for the expansion of a marina on Shinnecock Bay in the Town of Southampton, a project that involved construction of sixteen boat slips, reconstruction

24. 77 N.Y.2d 761, 778, 573 N.E.2d 1034, 1044, 570 N.Y.S.2d 778, 788 (1991). See Chertok & Miller, *supra* note 1, at 931; Michael B. Gerrard, *Court of Appeals Expands SEQRA Standing After an 18-Year Detour*, N.Y.L.J., Nov. 27, 2009, at 1-2.

25. See Chertok & Miller, *supra* note 1, at 932.

26. See, e.g., *Schulz v. Warren Cnty. Bd. of Supervisors*, 206 A.D.2d 672, 674, 614 N.Y.S.2d 809, 811 (3d Dep’t 1994); *Otsego 2000, Inc. v. Planning Bd. of Town of Otsego*, 171 A.D.2d 258, 260, 575 N.Y.S.2d 584, 586 (3d Dep’t 1991).

27. *Schulz*, 206 A.D.2d at 674, 614 N.Y.S.2d at 811. *Pine Bush* by its terms reaffirmed the “different injury” rule. *Pine Bush*, 13 N.Y.3d at 305, 918 N.E.2d at 921, 890 N.Y.S.2d at 409. However, given the apparent over-application of the *Society of Plastics* standard by lower courts, *Pine Bush* may nonetheless cause an erosion of the different injury rule as a practical matter.

28. No. 004145/2009, 2010 N.Y. Slip Op. 30182(U), at 3 (Sup. Ct. Suffolk Cnty. 2010).

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of bulkheads, catwalks, ramps, floating docks, and pilings.²⁹ The petitioner, a nonprofit organization with a mission of protecting the aquatic ecosystems of the Peconic and South Shore estuaries on Long Island, asserted that its members included Southampton residents who used Shinnecock Bay for commercial and recreational fishing, as well as a variety of recreational uses such as boating, birdwatching, hiking, boating, and nature study.³⁰

To establish standing, petitioner's president averred that he regularly patrolled the waters of Shinnecock Bay by boat, and that his recreational and scenic enjoyment of the waters would be diminished by the marina expansion.³¹ Potential ecological harm was alleged insofar as the marina would "tend to lead to pollution through vessel discharges and spills as well as prop dredging," (disturbing the shallow sediments of the bay floor by propeller wash).³² It is not clear what level of expert or scientific evidence was presented on the issue of ecological harm, if any. Finally, an affidavit was submitted from a fisherman and clammer stating that the marina expansion would result in pollution, thereby reducing his living and enjoyment of the area.³³

The court cited *Society of Plastics* in articulating the basic test for organizational standing,³⁴ and went on to analogize the petitioners in *Peconic Baykeeper* to the petitioners in *Pine Bush*, both of which had alleged "repeated use of the area in issue . . . and that the threatened harm to the environment is real and would affect them differently from members of the general public."³⁵ Accordingly, the court held, petitioners in *Peconic Baykeeper* had standing to challenge the marina expansion.³⁶

Peconic Baykeeper is notable for what it lacks—there is no assessment of whether the petitioner's members own property or reside in proximity to the marina site, as would have been typical in a pre-*Pine*

29. *Id.* at 1.

30. *Id.* at 2.

31. *Id.*

32. *Id.*

33. *Peconic Baykeeper*, 2010 N.Y. Slip Op. 30182(U), at 2.

34. *Id.* These are: whether the organization's members would have standing; whether the interests asserted by the organization are germane to its purposes so as to be an adequate representative of those interests; and whether individual members of the organization are necessary to participate in the litigation. *Id.* The court was satisfied these elements were met. *Id.* at 3.

35. *Id.* at 3.

36. *Peconic Baykeeper*, 2010 N.Y. Slip Op. 30182(U), at 3.

Bush analysis.³⁷ Instead, the court examined the same issues raised in *Pine Bush*, whether petitioners could establish repeated recreational use of the contested area.³⁸ Thus, the holding in *Peconic Baykeeper* suggests that in practice *Pine Bush* will indeed allow more SEQRA challengers to establish standing—especially nonprofit organizations whose members are engaged in repeated recreational activities in the relevant location.³⁹

It is also notable that the inquiry in *Peconic Baykeeper* does not focus on the technical specifics of how the challenged decision may cause ecological harm—another requirement for maintaining standing. As held in *Pine Bush*, a plaintiff must plead and, if the issue is disputed, prove that alleged environmental harm is “real,” and “perfunctory allegations of harm” will not suffice.⁴⁰ In this inquiry, the *Peconic Baykeeper* court relied on allegations from petitioners’ president that the marina expansion would “tend to lead to” pollution via spills and prop dredging damaging benthic habitat.⁴¹ This language suggests that the likelihood or severity of these harms was not shown to be particularly high, and the quantum of scientific or expert opinion submitted on these issues is not clear. Rather, the court appeared to be more concerned with harms to “recreational enjoyment [and] aesthetic appreciation” of the disputed waters, and did not reach these issues as to the probability or extent of ecological harm.⁴²

Establishing aesthetic and recreational harm (as opposed to the likelihood or degree of ecological harm) may often be far easier in practice for a litigant, and may be achieved through a petitioner’s affidavit rather than through the report(s) of expensive consulting experts. It is not clear that *Peconic Baykeeper* was correct in relying on the allegations of ecological harm from petitioners’ president to satisfy the requirement that “the threatened harm to the environment is real,” without some showing that the witness had an adequate basis to testify as to those facts.⁴³ The apparent low level of proof demanded by *Peconic Baykeeper* for ecological harm and the court’s focus on

37. *Id.* at 2-3. Although it is noted in passing that petitioner owned submerged lands in Great Peconic Bay, this ownership was not the basis of the standing holding.

38. *Id.* at 3.

39. See also Charlotte A. Biblow, *Ruling Expanding SEQRA Standing Begins to Show Impact*, N.Y.L.J., Mar. 30, 2010, at 1.

40. *Save the Pine Bush v. Common Council of the City of Albany*, 13 N.Y.3d 297, 306, 918 N.E.2d 917, 922, 890 N.Y.S.2d 405, 410 (2009).

41. *Peconic Baykeeper*, 2010 N.Y. Slip Op. 30182(U), at 2.

42. *Id.*

43. *Id.* at 3 (construing *Pine Bush*, 13 N.Y.3d at 301, 918 N.E.2d at 917, 890 N.Y.S.2d at 405).

aesthetic and recreational harms further suggest that the standing inquiry under *Pine Bush* has—at least for cases involving the use of natural resources—been meaningfully relaxed.

An appellate division decision, however, reveals that proximity analysis and the “different injury” rule is alive and well post-*Pine Bush* for standing based on typical impacts from a development project (as opposed to petitioners’ use of a natural resource). In *Harris v. Town Board of Town of Riverhead*,⁴⁴ the Second Department held that petitioners challenging a proposed Wal-Mart Supercenter lacked standing where they did “not live close enough to the site to be afforded any presumption of injury-in-fact on the basis of proximity alone” and “failed to demonstrate that the alleged increased traffic congestion and negative effects on the businesses along the [traffic] corridor are injuries specific to them and distinguishable from those suffered by the public at large.”⁴⁵ The *Harris* court took note in passing that, reading *Pine Bush* and *Society of Plastics* together, “proximity to the project site is not dispositive in establishing actual injury,” but nonetheless petitioners must “show that they will suffer a direct injury different from that suffered by the public at large.”⁴⁶ The *Harris* decision suggests that standing post-*Pine Bush* may be more readily achieved when it is based on petitioners’ frequent use of an affected natural resource rather than impacts of a project on the petitioners, as those effects are harder to distinguish from effects on the general public. Further cases may shed light on whether this potential dichotomy in standing law will continue.

Another post-*Pine Bush* appellate division decision, *Port of Oswego Authority v. Grannis*, affirms the familiar standing doctrine that purely economic injury does not support standing—an issue not raised in *Pine Bush*.⁴⁷ In *Port of Oswego*, the court held that a coalition of public corporations, shipping companies, and other maritime trade entities lacked standing to challenge certain restrictions on the discharge of ballast water.⁴⁸ The court held that harms alleged were insufficient for standing purposes because they were no more than “economic harm to themselves or speculative ecological injury to the general public”⁴⁹

44. 73 A.D.3d 922, 905 N.Y.S.2d 598 (2d Dep’t 2010).

45. *Id.* at 924, 905 N.Y.S.2d at 600-01.

46. *Id.*, 905 N.Y.S.2d at 600.

47. 70 A.D.3d 1101, 897 N.Y.S.2d 736 (3d Dep’t 2010).

48. *Id.* at 1102, 1104, 897 N.Y.S.2d at 738, 739.

49. *Id.* at 1104, 897 N.Y.S.2d at 739. It is not clear from the decision what speculative ecological injury was alleged.

B. What Agencies Are Subject to SEQRA

In addition to its decision on standing discussed above, *Peconic Baykeeper* is notable for its holding on the seldom-litigated issue of what exactly constitutes an “agency” that is subject to SEQRA. Generally, SEQRA challenges involve actions undertaken directly by, or approvals issued by, a state agency or municipal authority, such as a town or village board or planning board. In such cases there is generally no dispute that SEQRA applies. Two cases decided in 2010 address this issue.

In *Peconic Baykeeper*, petitioners challenged a decision by the Board of Trustees of the Freeholders and Commonalty of the Town of Southampton (the “Board of Trustees”).⁵⁰ This body predates the Town of Southampton and traces its roots back to 1686 and the Dongan Patent issued by the authority of King James II of England, which created the first official government in the Town of Southampton.⁵¹ The Dongan Patent vested title in the Board of Trustees to certain underwater lands and waters, and the Board of Trustees exercises stewardship responsibilities relating to access and rights to these underwater lands, rights of ways to the waters, marshlands, and common areas.⁵²

Accordingly, the Board of Trustees in *Peconic Baykeeper* argued that SEQRA did not apply to their decisions, in an effort to explain the complete failure to comply with SEQRA (e.g., to classify the marina permit under SEQRA, designate a lead agency, or require preparation of an Environmental Assessment Form).⁵³ Specifically, the Board of Trustees argued that it is an “independent [entity] that derives its autonomy from colonial patents, not from the state,”⁵⁴ and therefore falls outside SEQRA’s definition of “agency.” SEQRA defines a “local agency” as “any local agency, board, authority, district, commission or governing body, including any city, county and other political subdivision of the state.”⁵⁵

The court did not dispute that the Board of Trustees was a

50. *Peconic Baykeeper, Inc. v. Bd. of Trustees of Freeholders & Commonalty of the Town of Southampton*, No. 004145/2009, 2010 N.Y. Slip Op. 30182(U), at 1 (Sup. Ct. Suffolk Cnty. 2010).

51. *Town Trustees—Responsibilities of the Board*, TOWN OF SOUTHAMPTON, <http://www.southamptontownny.gov/content/72/837/843/1537/1604/default.aspx> (last visited Mar. 15, 2011).

52. *Id.*

53. *Peconic Baykeeper*, 2010 N.Y. Slip Op. 30182(U), at 3.

54. *Id.*

55. N.Y. ENVTL. CONSERV. LAW § 8-0105(2) (McKinney 2005); *see also* 6 NYCRR 617.2(v).

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proprietary entity under authority of the Dongan Patent, but nonetheless held that it functioned as a body politic and governmental authority and was thus subject to SEQRA. This holding relied on the following facts: the Board of Trustees exercises the right to legislate and control property within its jurisdiction; the Board of Trustees has adopted rules and regulations governing the use and management of its land whose compliance is mandated by the Southampton Town Code; and the Board of Trustees has authority over a permit process mandated under the Town Code.⁵⁶ In addition, the court noted “anecdotal evidence” that the Board of Trustees operates as an agency of the Town of Southampton, by using Town offices and meeting spaces, using the Town attorney for legal matters, and being funded through Town taxes.⁵⁷ In light of the foregoing, the court had no trouble finding the Board of Trustees to be an agency subject to SEQRA.⁵⁸

The other case relating to the definition of a SEQRA agency, *Mitskovski v. Buffalo & Fort Erie Public Bridge Authority*, involved a challenge to an infrastructure project relocating a toll plaza by the Buffalo and Fort Erie Public Bridge Authority (“the Authority”) from the United States’ side of the Peace Bridge in Buffalo, to the Canadian side in Fort Erie.⁵⁹ The Authority was initially created by act of the New York State Legislature as a public benefit corporation, which would typically be subject to SEQRA.⁶⁰ However, the Legislature also authorized the Authority to enter into a compact with Canada, an authorization that was consented to by Congress.⁶¹ Accordingly, while the Authority is a New York State agency, it is also an international “compact entity” subject to different rules regarding whether its host states may regulate it.⁶² Notably, SEQRA does not by its terms define “agency” to specifically include international compact entities.⁶³

The district court held that the Authority, as a state public benefit corporation, was an “agency” of New York State subject to SEQRA;⁶⁴ however, it held that the statute did not apply to the project at issue

56. *Peconic Baykeeper*, 2010 N.Y. Slip Op. 30182(U), at 4.

57. *Id.*

58. *Id.*

59. 689 F. Supp. 2d 483 (W.D.N.Y. 2010).

60. *Id.* at 489.

61. *Id.*

62. *Id.* at 489-90.

63. “State agency” is defined to include “any state department, agency, board, public benefit corporation, public authority or commission.” 6 NYCRR 617.2(ah).

64. *Mitskovski*, 689 F. Supp. 2d at 489. This logic may not be applicable to other agencies that are part of interstate or international compacts, as the organic legislation would need to be assessed for each such entity to determine the applicability of SEQRA.

because it involved infrastructure improvements and relocation of existing infrastructure—activities internal to the Authority.⁶⁵ Therefore, the court reasoned, imposition of New York’s environmental regulations would usurp the rights granted to the Authority via international compact.⁶⁶ The court cited caselaw governing interstate authorities in the United States, which are only subject to “health and safety” laws of their host states governing “external” relations of an authority.⁶⁷

The court did not hypothesize whether SEQRA, an environmental statute, could be considered a health and safety law addressing external relations of an authority. In this regard, the court only stated “it may hardly be gainsaid that the Authority . . . is subject to New York’s laws involving health and safety, insofar as its activities may externally affect the public.”⁶⁸ However, the court did not discuss the parameters of the health and safety laws to which the Authority might be subject, and thus did not suggest that SEQRA would be such a legislation.

Thus, it appears that the holding in *Mitskovski* was primarily motivated by the specific nature of the project at issue; the court took a fact-specific look at the toll plaza relocation, and determined that because the project was “internal” to the Authority’s operations, SEQRA did not apply.⁶⁹

The relevant inquiry for a compact entity under *Mitskovski*, if it is found to be an agency under SEQRA, appears to be a fact-specific determination as to whether the agency’s actions are internal or external, such that they are within the exclusive authority of the entity, or subject to health and safety regulation of the host state. If the actions are subject to health and safety regulations, the next step in the inquiry (not remarked on in *Mitskovski*) is whether that circumstance implicates SEQRA.

C. Ripeness & Mootness Cases

Ever-present in SEQRA litigation are questions of when to sue: i.e., when is too early and when is too late. This issue is particularly nettlesome in light of the uncertainty of when the statute of limitations

65. *Id.* at 491.

66. *Id.*

67. *Id.* at 490 (quoting *Agesen v. Catherwood*, 26 N.Y.2d 521, 525, 260 N.E.2d 525, 526-27, 311 N.Y.S.2d 886, 888 (1970)).

68. *Id.*

69. See *Mitskovski*, 689 F. Supp. 2d at 491.

is triggered for challenges to SEQRA decisions.⁷⁰ Several 2010 cases addressed these issues, and are summarized below.

In *Historic Albany Foundation, Inc. v. Joyce*,⁷¹ the court dismissed as unripe a challenge to a planning board approval of proposed demolition of historic structures, where the approval was still contingent on site plan approval, zoning board approval, historic resources commission approval, and a discretionary determination by the buildings department.⁷² Thus, the court held that petitioners had not yet suffered actual and concrete injury.⁷³ Similarly, in *Guido v. Town of Ulster Town Board*,⁷⁴ the court dismissed as unripe petitioners' challenge to a planning board's issuance of a Final EIS and adoption of SEQRA findings relating to a residential development, where the planning board had not yet issued a special permit, site plan, or subdivision approval.⁷⁵

While the outcome of such challenges might appear to be clear from the outset,⁷⁶ the *Joyce* and *Guido* cases highlight the practical difficulties that project opponents face in the timing of a challenge. For example, waiting until the building department has issued a demolition permit to bring suit—as the *Joyce* case would counsel—creates the risk that demolition would go forward and moot the relief sought or force the petitioners to move for injunctive relief.

This result is confirmed in *Wallkill Cemetery Ass'n, Inc. v. Town of Wallkill Planning Board*, in which the court dismissed as “academic” a challenge to an asphalt plant that had already been in operation for two years.⁷⁷ The court noted that petitioners had failed to protect their rights because they had “failed to move in the Supreme Court for a preliminary injunction to enjoin the construction of the asphalt plant and . . . failed to seek a stay in this Court to preserve the status quo pending the determination of this appeal.”⁷⁸ The court further noted

70. Compare *Stop-the-Barge v. Cahill*, 1 N.Y.3d 218, 803 N.E.2d 361, 771 N.Y.S.2d 40 (2003), with *Eadie v. Town of Greenbush*, 7 N.Y.3d 306, 854 N.E.2d 464, 821 N.Y.S.2d 142 (2006).

71. No. 434-10, 2010 N.Y. Slip Op. 50200(U), at 7 (Sup. Ct. Albany Cnty. 2010).

72. *Id.* at 5.

73. *Id.*

74. 74 A.D.3d 1536, 902 N.Y.S.2d 710 (3d Dep't 2010).

75. *Id.* at 1537-38, 902 N.Y.S.2d at 713.

76. Both cases flow directly from the Court of Appeals' holding in *Eadie*, that the harm at issue must be “not amenable to further administrative review and corrective action.” *Eadie v. Town of Greenbush*, 7 N.Y.3d 306, 316, 854 N.E.2d 464, 468, 821 N.Y.S.2d 142, 146 (2006).

77. 73 A.D.3d 1189, 905 N.Y.S.2d 609 (2d Dep't 2010).

78. *Id.* at 1190, 905 N.Y.S.2d at 610.

that construction did not appear to have proceeded in bad faith or in a “rush to completion,” having begun two years after commencement of the proceeding.⁷⁹

Wallkill Cemetery and *Joyce* together reinforce the notion that project opponents often have a relatively narrow window of time in which to sue and, if suit is timely commenced, they must protect their rights through seeking appropriate injunctive relief throughout the Article 78 and appellate process.

D. Challenges to Large Scale New York City Projects

Several challenges to large-scale projects in New York City were decided in early 2010, including the Atlantic Yards development in Brooklyn and the rezonings of the Coney Island and Sunset Park neighborhoods in Brooklyn. In all three cases, an EIS had been prepared, and the courts in all three dismissed the respective challenges.

In *Develop Don't Destroy (Brooklyn), Inc. v. Empire State Development Corp. (DDDB)*,⁸⁰ the Supreme Court, New York County, considered a challenge to a modified general project plan (GPP) approved by the Empire State Development Corporation (ESDC) for the Atlantic Yards project, a twenty-two-acre mixed use development in Brooklyn including a basketball arena and sixteen high rise buildings for commercial and residential uses. ESDC supplemented the EIS for the initial GPP with a technical memorandum, but continued to use a ten-year timeline for build-out.⁸¹ The technical memorandum found no need for a supplemental EIS (SEIS).⁸²

Petitioners argued that the modified GPP should have been the subject of a SEIS, because the GPP and underlying EIS had contemplated a ten-year build-out, while the developer of the project allegedly had more than twenty years—until 2030—to acquire air rights necessary to achieve full build-out under an agreement with the Metropolitan Transportation Authority (MTA).⁸³ The court, with apparent reluctance, upheld ESDC's decision that no SEIS was required for the modified GPP.⁸⁴ The court's holding was based on: (i) the developer's ability under the MTA agreement to purchase air rights before 2030; (ii) an expert opinion that the real estate market could

79. *Id.* at 1191, 905 N.Y.S.2d at 611.

80. No. 114631/09, 2010 N.Y. Slip Op. 50424(U) (Sup. Ct. N.Y. Cnty. 2010). A motion to reargue and renew was later granted, and is discussed below.

81. *Id.* at 4.

82. *Id.*

83. *Id.* at 6-8.

84. *Id.* at 6.

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absorb a planned housing unit by 2019; and (iii) ESDC's statements that a forthcoming agreement with the developer would impose penalties for failure to complete the project after the ten-year build-out year used in the EIS and subsequent technical memorandum.⁸⁵ However, the court admonished ESDC for not directly addressing the significance of the MTA agreement in its technical memorandum, and noted that the basis for ESDC's decision "only minimally" supported it.⁸⁶ It is clear from the opinion that the court felt constrained to sustain ESDC's decision due to the limited role of a court in reviewing a SEQRA lead agency's substantive decision-making.

Petitioners moved for reargument of the decision,⁸⁷ and while the decision on reargument was issued outside the scope of the review period of this Article, its holding will be briefly summarized here. The court granted reargument, and examined the terms of the development agreement between ESDC and the developer (which were now before the court and had not existed at the time of the briefing of the prior decision). Upon examining the agreement terms, the court found that the second phase of the project had an outside deadline for substantial completion of 2035, no "firm commencement dates" for residential construction, and less strict financial penalties for failure to meet the outside deadline work when compared with penalties imposed for the project's first phase.⁸⁸ Accordingly, because the prior EIS and technical memorandum had analyzed impacts out to 2019 at the latest, the court held that ESDC did not provide a reasoned elaboration for its determination not to require an SEIS for the modified GPP, based on a "wholesale failure to address the impact of the complete terms" of the development agreement on the build-out of the Project.⁸⁹ The court remanded to ESDC for additional findings on the issue.⁹⁰

The court in *DDDB* rejected ESDC's argument that a shorter timeframe for the build year analysis would provide a conservative EIS, because all impacts for all phases would be analyzed as occurring in one year and build-out over a longer timeframe would result in reduced

85. *DDDB*, 2010 N.Y. Slip Op. 50424(U), at 6-8.

86. *Id.* at 9.

87. *Id.* at 2.

88. *Id.* at *18-19. The court acknowledged the "well settled tenet of Article 78 review that the court is bound by the facts and record before the agency," but nonetheless relied on the development agreement despite its being outside the record before the agency because "ESDC repeatedly stated that it relied on its terms in approving the [modified GPP]" and "to correct ESDC's incomplete representations concerning the [agreement's] terms . . ." *Id.* at 9.

89. *DDDB*, 2010 N.Y. Slip Op. 50424(U), at 32-33.

90. *Id.* at 33.

intensity of construction.⁹¹ The court rejected ESDC's argument because the technical memorandum did not compare the intensity of construction impacts in a ten-year build-out to a twenty-five-year scenario.⁹²

DDDB is a highly unusual case in the universe of SEQRA case law due to its unique and complicated factual background. Nonetheless, the case highlights the potential risk to a project—and opportunity to opponents—when project documents are drafted in a manner that can be construed as inconsistent with the analysis set forth in the EIS. The *DDDB* decision also suggests that a judicial decision upholding an environmental review may not always be the end of the road for project opposition if subsequent developments provide substantial ammunition to attack the basis of a prior determination and to invoke a claim for supplementation of the EIS.⁹³

In *Save Coney Island, Inc. v. City of New York*, the petitioners challenged a rezoning of forty-seven acres in the Coney Island area of Brooklyn, including a plan for nine acres of dedicated park-land to be utilized as an amusement park.⁹⁴ The case is notable because it highlights the role of an alternative analysis, which commonly becomes a flashpoint for opposition when community groups set forth their own proposal for the development of an area. Petitioners argued that the Final EIS should have studied petitioners' own alternative rezoning plan which dedicated twenty-five acres for park-land—sixteen acres more park than the City-approved plan.⁹⁵ The court rejected this challenge and upheld the alternatives analysis in the EIS, because the City's EIS analyzed an in-between alternative including fifteen acres of parkland, and determined it would not accomplish project goals of creating year round entertainment facilities via private development.⁹⁶ Perforce, the petitioners' proffered alternative with a greater extent of park-land would not achieve those project goals.⁹⁷ Accordingly, the court held, the failure to analyze an alternative with even more park-land was reasonable.⁹⁸

91. *Id.* at 27-28.

92. *Id.*

93. *See generally* *Riverkeeper, Inc. v. Planning Bd. of Town of Southeast*, 9 N.Y.3d 219, 881 N.E.2d 172, 851 N.Y.S.2d 76 (2007). At the time of writing it is not clear whether additional litigation will result from the remand to ESDC, so the ultimate impact of the reargument decision in *DDDB* has yet to be seen.

94. No. 116672/09, 2010 N.Y. Slip Op. 50839(U) (Sup. Ct. N.Y. Cnty. 2010).

95. *Id.* at 7.

96. *Id.* at 9.

97. *Id.*

98. *Id.*

This holding is in accord with the “rule of reason,” by which lead agencies are not obligated to analyze every conceivable project alternative, but only a “reasonable range of alternatives,” and allows agencies to evaluate alternatives in light of project goals.⁹⁹

The court further noted that petitioners had not demonstrated that their alternative would actually reduce environmental impacts, although presumably even if petitioners had made such a showing the EIS could nonetheless have been held valid.¹⁰⁰ Petitioners had argued that their proposal was the only plan that was economically viable—a determination that the court held was properly made by the City.¹⁰¹

Petitioners in *Save Coney Island* also challenged the EIS on the grounds that certain affordable housing portions of the project required demapping and alienation of parkland—actions requiring approval of the State Legislature.¹⁰² Because the Legislature’s decision was not assured in advance, petitioners argued that the EIS should not “take credit for the benefits of the new housing when there was no assurance it could be built.”¹⁰³ The court rejected this argument, because the EIS disclosed the need for alienation and the necessity of approval from the State Legislature, and analyzed an alternative involving no demapping.¹⁰⁴ It is notable that there is no preclusion of an EIS being prepared prior to park alienation being approved—in a manner no different from any other permit or approval needed for a proposed action to be implemented. The key is disclosing the need for the approval.¹⁰⁵

In *Chinese Staff & Workers Ass’n v. Burden*,¹⁰⁶ petitioners challenged a negative declaration and environmental assessment

99. *Save Coney Island*, 2010 N.Y. Slip Op. 50839(U), at 9 (citing *Dryden v. Tompkins Cnty. Bd. of Representatives*, 78 N.Y.2d 331, 333-34, 580 N.E.2d 402, 403, 574 N.Y.S.2d 930, 931 (1991)).

100. *Id.*

101. *Id.*

102. *Id.* at 6.

103. *Id.*

104. *Save Coney Island*, 2010 N.Y. Slip Op. 50839(U), at 7.

105. *See Riverkeeper, Inc. v. Planning Bd. of Town of Southeast*, 9 N.Y.3d 219, 235, 881 N.E.2d 172, 179, 851 N.Y.S.2d 76, 83 (2007) (finding that a lead agency is not required to wait for agency permitting decisions before determining whether SEIS was necessary). *See also Save Coney Island*, 2010 N.Y. Slip Op. 50839(U), at 10-17 (rejecting challenges to the EIS’s assessment of visual resources (including a demand for renderings), open space, historic resources, natural resources and infrastructure, and relying on the EIS’s compliance with the New York City CEQR Technical Manual to buttress the adequacy of the impact statement).

106. No. 111575/09, 2010 N.Y. Slip Op. 50804(U) (Sup. Ct. N.Y. Cnty. 2010).

statement (EAS)¹⁰⁷ for a 128-block rezoning in the Sunset Park neighborhood of Brooklyn, on the grounds that it increased the opportunities for market-rate development, thereby resulting in increased rents and accelerated displacement of low-income tenants. The court dismissed the petition, finding that the EAS had adequately addressed petitioners' claims.¹⁰⁸ The court appeared persuaded by the fact that the majority of the rezoning (seventy-eight percent) was a "downzone" to lower density, in an effort to protect the existing scale of the area, and the rezoned area included affordable housing incentives.¹⁰⁹ In addition, the court noted that the EAS itself contained supporting discussion of over seventy-two pages.¹¹⁰ Accordingly, *Burden* demonstrates that even in the context of a negative declaration where no full EIS has been prepared, project opponents face an uphill battle where the record shows a lead agency has taken the hard look required under SEQRA.

III. REVISED CEQR TECHNICAL MANUAL ADDRESSES CLIMATE IMPACTS

In May 2010, the New York City Mayor's Office of Environmental Coordination (MOEC) issued a revised City Environmental Quality Review (CEQR) Technical Manual applicable to environmental reviews commenced on or after May 17, 2010.¹¹¹ While technically only applicable to proposed actions in the City of New York, the Technical Manual is significant insofar as it is the most detailed technical guidance for the analysis of environmental impacts under SEQRA. The update revises the Technical Manual's organization, memorializes many existing agency practices, updates the data to reflect current information, and provides updates to technical analyses of wind effects, shadows, sewer capacity and traffic.¹¹²

Perhaps most significant is the inclusion in the CEQR Technical

107. *Id.* at 4-5. An EAS is New York City's version of an EAF, but is more detailed than the State form.

108. *Id.*

109. *Id.* at 8.

110. *Id.* at 6. The City in this case used the concept of a "mini-EIS," which is not uncommon as a means of supporting a negative declaration.

111. N.Y. CITY MAYOR'S OFFICE OF ENVTL. COORDINATION, 2010 CEQR TECHNICAL MANUAL (2010) [hereinafter CEQR TECHNICAL MANUAL], available at http://www.nyc.gov/html/oec/html/ceqr/technical_manual.shtml.

112. N.Y. CITY MAYOR'S OFFICE OF ENVTL. COORDINATION, CHANGES IN THE 2010 CEQR TECHNICAL MANUAL (2010), available at http://www.nyc.gov/html/oec/downloads/pdf/2010_ceqr_tm/2010_ceqr_tm_whats_changed.pdf.

Manual of a chapter devoted to GHG emissions.¹¹³ Analysis of climate impacts or GHG emissions under SEQRA has been an emerging topic for a number of years, without consensus on how to deal with difficult issues such as what the significance threshold should be for GHG emissions, and how quantitative and qualitative analyses should be conducted.¹¹⁴ The inclusion of GHG analysis in the CEQR Technical Manual promises to standardize the approach to this issue at least for actions in the city, and strengthen the emerging consensus that GHG impacts should be considered in the context of SEQRA where appropriate.

The CEQR Technical Manual identifies three types of projects for which a GHG analysis is warranted: (i) power generation projects; (ii) substantial changes to the City's solid waste management system; and (iii) projects under review in an EIS involving "development" of 350,000 square feet or more.¹¹⁵ Where energy use for a smaller project may be more intense, such as for data centers or health care facilities, GHG analysis may nonetheless be appropriate despite being below the 350,000 square feet threshold.¹¹⁶ These categories represent MOEC's determination that these "projects . . . have the greatest potential to produce GHG emissions,"¹¹⁷ that may result in inconsistencies with the City's GHG reduction targets of thirty percent below 2005 levels by 2030, which originated in PlaNYC and was subsequently codified in Local Law 22 of 2008.¹¹⁸ Generally, projects that do not trigger an EIS do not require a GHG emissions assessment.¹¹⁹ However, for City capital projects subject to environmental review, the CEQR Technical Manual states that an assessment of consistency with City building GHG reduction targets is "often" appropriate.¹²⁰

Thus, the CEQR Technical Manual sidesteps the technical questions of significance by identifying general categories of actions and a size threshold for projects—thereby focusing resources on those projects that will have the largest potential impacts and concomitant

113. CEQR TECHNICAL MANUAL, *supra* note 111, at 18-1.

114. *See* Chertok & Miller, *supra* note 3, at 764. For a more thorough discussion of the issues presented by analysis of GHG emissions and climate change impacts under SEQRA.

115. CEQR TECHNICAL MANUAL, *supra* note 111, at 18-5. It is not clear whether "development" means creation of new space only, or includes rehabilitation of existing space, though it is presumed here that it is limited to creation of new space.

116. *Id.*

117. *Id.* at 18-4.

118. *Id.* at 18-2.

119. *Id.* at 18-4.

120. CEQR TECHNICAL MANUAL, *supra* note 111, at 18-5.

emissions reductions.¹²¹ The actual assessment of a project's GHG emissions involves estimates of emissions from operations, mobile sources, construction, and solid waste management, in units of carbon dioxide equivalent.¹²² The Technical Manual also contemplates some analysis of climate change impacts on a project, for example, it notes that for certain projects, a qualitative discussion of potential impacts due to the effects of climate change (such as flooding of a hazardous materials storage facility) may be appropriate.¹²³

After quantifying emissions, the Manual provides for a determination of whether a project is consistent with Citywide GHG emissions reduction goals, and seeks to use this determination to impose mitigation measures on projects deemed inconsistent with such goals.¹²⁴ To assess consistency with Citywide reduction goals, the Manual indicates that applicants should assess "consistency with the following goals, as relevant to the project": (1) whether the project is transit-oriented development; (2) generation of clean renewable power and distributed generation; (3) construction of energy efficient buildings and use of sustainable construction practices; and (4) encouragement of sustainable transportation.¹²⁵ Thus, the evaluation of consistency with City-wide emissions reduction goals appears to be qualitative, rather than quantitative in nature.¹²⁶

Although the ultimate determination made under the approach outlined in the Manual is whether the project's emissions are consistent with City-wide GHG reduction goals, this consistency determination is not equated with significance of impacts under SEQRA.¹²⁷ Even if a project is deemed inconsistent with GHG reduction goals, the Manual

121. This approach is consistent with NYSDEC SEQRA guidance on climate change/GHG and to recent guidance issued for NEPA by the Council on Environmental Quality. OFFICE OF AIR, ENERGY & CLIMATE, N.Y. STATE DEP'T OF ENVTL. CONSERVATION, ASSESSING ENERGY USE AND GREENHOUSE GAS EMISSIONS IN ENVIRONMENTAL IMPACT STATEMENTS (2009), *available at* http://www.dec.ny.gov/docs/administration_pdf/eisghgpolicy.pdf; COUNCIL ON ENVTL. QUALITY, DRAFT NEPA GUIDANCE ON CONSIDERATION OF THE EFFECTS OF CLIMATE CHANGE AND GREENHOUSE GAS EMISSIONS (2010), *available at* <http://www.whitehouse.gov/sites/default/files/microsites/ceq/20100218-nepa-consideration-effects-ghg-draft-guidance.pdf>.

122. CEQR TECHNICAL MANUAL, *supra* note 111, at 18-7 to -11.

123. *Id.* at 18-2.

124. *Id.* at 18-13 to -14.

125. *Id.* at 18-11 to -12.

126. The Manual also recognizes that "the contribution of a proposed project's GHG emissions to global GHG emissions is likely to be considered insignificant when measured against the scale and magnitude of global climate change . . ." *Id.* at 18-2.

127. CEQR TECHNICAL MANUAL, *supra* note 111, at 18-13.

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appears to leave open the possibility that its impacts may not be significant, stating “[a] proposed project may or may not be consistent with the City’s GHG emission reduction goal and this potential inconsistency *may* be a significant impact.”¹²⁸

Consequently, the Technical Manual’s language may create a potential gap in the ability to require mitigation, because a project can be both inconsistent with emissions reductions goals, and be found to have no significant GHG impacts. In such a case there may be no legal obligation to impose mitigation measures to reduce GHG emissions, because mitigation is only required of significant adverse impacts.¹²⁹ Nonetheless, despite potentially lacking a legal basis for mitigation, the Manual states that if a project is found to be inconsistent with emissions reduction goals, “reasonable alternatives or efficiency measures should be considered so that the project achieves consistency.”¹³⁰ Clarification of this issue may assist project applicants in achieving greater certainty regarding the scope of their GHG mitigation obligations, as well as promoting City-wide emissions reduction goals.

Overall, the approach in the CEQR Technical Manual appears to rely on consistency with City planning, rather than on a determination of significance of a proposed action’s emissions of GHGs and effects on climate change. Because “consistency” is a flexible concept (akin to the consistency of zoning changes with a municipality’s comprehensive plan), this approach gives project sponsors latitude in preparing a GHG and climate change impact analysis.

128. *Id.* (emphasis added). The guidance in this aspect does not fully promote the goals of City-wide emissions reductions, but rather gives project proponents flexibility in determining significance.

129. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(b)(5)(iii)(e) (2008). *See also* Chertok & Miller, *supra* note 3, at 790. If not imposed via a GHG analysis, mitigation of these impacts may still be achieved, albeit indirectly, via mitigation of significant energy impacts—the subject of a separate chapter under the CEQR Technical Manual.

130. CEQR TECHNICAL MANUAL, *supra* note 111, at 18-14.