

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 2014–2015.¹ The year did not see substantial regulatory developments. The New York State Department of Environmental Conservation's (DEC) environmental review of a 2012 proposal to amend its SEQRA regulations remains pending, with the final scoping for that review having been completed in late 2012.² As noted in the prior *Survey*, regulatory activity in the 2013–2014 *Survey* period was more eventful, marked by New York City's issuance of new regulations aiming to expedite the environmental review of certain types of special permit approvals that are generally understood not to have significant adverse environmental impacts, as well as its issuance of a revised edition of its technical manual regarding SEQRA-mandated environmental review for projects subject to approval by agencies of the City, providing new guidance to developers and agency officials.³

The Court of Appeals decided two cases relating to SEQRA during this *Survey* period, although neither directly addressed SEQRA. One case affirmed an appellate division decision, which upheld the adequacy of the alternatives analysis in an environmental impact statement, without discussion, while focusing on a non-SEQRA aspect of the case.⁴ The other case only indirectly involved SEQRA, addressing the impact on oil and gas leases of an executive order imposing a moratorium on the issuance of any permits for high-volume hydraulic fracturing before the finalization of a revised supplemental generic environmental impact statement assessing such activity.⁵ Other courts, including the lower and intermediate courts of New York, issued SEQRA decisions discussing various legal issues relevant to the SEQRA practitioner, including

1. The *Survey* period covered in this Article is July 1, 2014 to June 30, 2015. A prior *Survey* addresses SEQRA developments in the first half of 2014. See generally Mark A. Chertok & Daniel Mach, *Environmental Law: Developments in the Law of SEQRA, 2013–14 Survey of New York Law*, 65 SYRACUSE L. REV. 749 (2015).

2. *Id.* at 756 (citing N.Y. STATE DEP'T OF ENVTL. CONSERVATION, DIV. OF ENVTL. PERMITS & POLLUTION PREVENTION, FINAL SCOPE FOR THE GENERIC ENVIRONMENTAL IMPACT STATEMENT (GEIS) ON THE PROPOSED AMENDMENTS TO THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) (2012), http://www.dec.ny.gov/docs/permits_ej_operations_pdf/617finalscope.pdf).

3. *Id.* at 750, 758 (citing N.Y.C. MAYOR'S OFFICE OF ENVTL. COORDINATION, CITY ENVIRONMENTAL QUALITY REVIEW TECHNICAL MANUAL (2014), http://www.nyc.gov/html/oec/downloads/pdf/2014_ceqr_tm/2014_ceqr_technical_manual.pdf).

4. *Glick v. Harvey*, 25 N.Y.3d 1175, 1181, 36 N.E.3d 640, 645, 15 N.Y.S.3d 733, 738 (2015), *aff'g* 121 A.D.3d 498, 500, 994 N.Y.S.2d 118, 120 (1st Dep't 2014).

5. See *Beardslee v. Inflection Energy, L.L.C.*, 25 N.Y.3d 150, 152–53, 31 N.E.3d 80, 81, 8 N.Y.S.3d 618, 619 (2015).

ripeness, standing, and mootness requirements; the interaction of SEQRA with other state and federal laws; the concepts of segmentation and supplementation; and other procedural and substantive requirements that SEQRA imposes on agencies.⁶

Part I of this Article provides a brief overview of SEQRA's statutory and regulatory requirements. Part II reviews the Court of Appeals's SEQRA-related decisions issued during the *Survey* period, *Glick v. Harvey* and *Beardslee v. Inflection Energy, L.L.C.*⁷ Part III discusses the more important of the numerous SEQRA decisions during the *Survey* period from the appellate divisions and supreme courts. Part IV describes a notable action taken under SEQRA during the *Survey* period, the conclusion of DEC's review of high-volume hydraulic fracturing.

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.⁸ "The primary purpose of SEQRA is 'to inject environmental considerations directly into governmental decision making.'"⁹ 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.¹⁰ SEQRA charges DEC with promulgating general SEQRA regulations, but it also authorizes other agencies to adopt their own regulations and procedures, provided that the regulations and procedures are consistent with and "no less protective of environmental values" than those issued by DEC.¹¹

6. See *infra* Sections III.A.1 (discussing standing), III.A.2 (discussing ripeness, standing, and administrative exhaustion), and III.A.3 (discussing mootness).

7. *Glick*, 25 N.Y.3d 1175, 36 N.E.3d 640, 15 N.Y.S.3d 733; *Beardslee*, 25 N.Y.3d 150, 31 N.E.3d 80, 8 N.Y.S.3d 618 (2015).

8. SEQRA is codified at Environmental Conservation Law sections 8-0101 to 8-0117. N.Y. ENVTL. CONSERV. LAW §§ 8-0101–8-0117 (McKinney 2005 & Supp. 2016); 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).

9. *Akpan v. Koch*, 75 N.Y.2d 561, 569, 554 N.E.2d 53, 56, 555 N.Y.S.2d 16, 19 (1990) (quoting *Coca-Cola Bottling Co. of N.Y., Inc. v. Bd. of Estimate*, 72 N.Y.2d 674, 679, 532 N.E.2d 1261, 1263, 536 N.Y.S.2d 33, 35 (1988)). For a useful overview of the substance and procedure of SEQRA, see *Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 414–17, 494 N.E.2d 429, 434–35, 503 N.Y.S.2d 298, 303–04 (1986).

10. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2 (2015) (defining actions and agencies subject to SEQRA).

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

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.¹²

Actions are grouped into three categories in DEC’s SEQRA regulations: Type I, Type II, or Unlisted.¹³ 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.¹⁴ Type I actions, also specifically enumerated, “are more likely to require the preparation of an EIS than Unlisted actions.”¹⁵ Unlisted actions are not enumerated, but rather are a catchall of those actions that are neither Type I nor Type II.¹⁶ 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 “determinat[ion] of significance.”¹⁷ To reach its determination of significance, the agency must prepare an environmental assessment form (EAF).¹⁸ For Type I actions, preparation of a “[F]ull EAF” is required, whereas for Unlisted actions, project sponsors may opt to use a “[S]hort EAF” instead.¹⁹ SEQRA regulations provide models of each form,²⁰ but allow that the

12. 6 NYCRR 617.9(b)(1)–(2), (5).

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

14. 6 NYCRR 617.5(a) (Type II actions).

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

16. 6 NYCRR 617.2(ak).

17. *Id.* §§ 617.6(a)(1)(i), 617.7.

18. *Id.* § 617.6(a)(2)–(3).

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

20. *See id.* § 617.20 (appendices consisting of the model EAFs). DEC also maintains EAF workbooks to assist project sponsors and agencies in using the forms. *See Environmental Assessment Form (EAF) Workbook*, N.Y. ST. DEP’T ENVTL. CONSERVATION,

forms “may be modified by an agency to better serve it in implementing SEQRA, 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” pursuant to which a designated lead agency makes the determination of significance.²²

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.²³ If the answer is affirmative, the lead agency may in certain cases impose conditions on the proposed action to sufficiently mitigate the potentially significant adverse impacts or, more commonly, the lead agency issues a positive declaration requiring the preparation of an EIS.²⁴

If an EIS is prepared, typically the first step is the scoping of the contents of the Draft EIS. Although scoping is not actually required under SEQRA or DEC’s implementing regulations, it is recommended by DEC and commonly undertaken when an EIS is required.²⁵ 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.²⁶ 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.²⁷ Although not required, the lead agency typically holds a legislative hearing with respect to the Draft EIS.²⁸ That hearing may be, and often

<http://www.dec.ny.gov/permits/90125.html> (last visited Apr. 21, 2016).

21. 6 NYCRR 617.2(m).

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

23. *Id.* § 617.7(a)(2), (d).

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

25. DIV. OF ENVTL. PERMITS, N.Y. STATE DEP’T OF ENVTL. CONSERVATION, THE SEQRA HANDBOOK 104–05 (3d ed. 2010), http://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf. Scoping, when it occurs, is governed by section 617.8. *See id.* at 104; 6 NYCRR 617.8. SEQRA is an alternate acronym for the process of review under SEQRA.

26. 6 NYCRR 617.8(a), (e).

27. *Id.* § 617.8(b), (d)–(e).

28. *Id.* § 617.9(a)(4).

is, combined with other hearings required for the proposed action.²⁹

A Draft EIS must include an alternatives analysis comparing the proposed action to a “range of reasonable alternatives . . . that are feasible, considering the objectives and capabilities of the project sponsor.”³⁰ This analysis includes a “no action alternative,” which evaluates the “changes . . . that are likely to occur . . . in the absence of the proposed action.”³¹

In addition to “analyz[ing] the significant adverse impacts and evaluat[ing] all reasonable alternatives,”³² the Draft EIS should include:

[W]here applicable and significant:

- (a) reasonably related short-term and long-term impacts, cumulative impacts and other associated environmental impacts;
- (b) those adverse environmental impacts that cannot be avoided or adequately mitigated if the proposed action is implemented;
- (c) any irreversible and irretrievable commitments of environmental resources that would be associated with the proposed action should it be implemented;
- (d) any growth-inducing aspects of the proposed action;
- (e) impacts of the proposed action on the use and conservation of energy . . . ; [and]
- (f) impacts of the proposed action on solid waste management and its consistency with the state or locally adopted solid waste management plan.³³

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

29. *See id.* § 617.3(h) (authorizing “combined or consolidated proceedings”).

30. *Id.* § 617.9(b)(5)(v).

31. 6 NYCRR 617.9(b)(5)(v). The “no action alternative” does not necessarily reflect current conditions, but rather the anticipated conditions without the proposed action. In New York City, where certain development is allowed as-of-right (and does not require a discretionary approval), the no action alternative would reflect such a development and other changes that could be anticipated in the absence of the proposed action. *See Uptown Holdings, L.L.C. v. City of N.Y.*, 77 A.D.3d 434, 436, 908 N.Y.S.2d 657, 660 (1st Dep’t 2010).

32. 6 NYCRR 617.9(b)(1).

33. *Id.* § 617.9(b)(5)(iii)(a)–(f).

social, economic and other considerations”³⁴ The agency must then certify that consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable.³⁵

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).³⁶

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.³⁷ 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.”³⁸ 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.³⁹

The City of New York has promulgated separate regulations implementing the City’s, and its agencies’, environmental review process under SEQRA, which is known as City Environmental Quality Review (CEQR).⁴⁰ As previously explained, SEQRA grants agencies and local governments the authority to supplement DEC’s general SEQRA regulations by promulgating their own.⁴¹ Section 192(e) of the New York

34. *Id.* § 617.11(a), (d)(1)–(2).

35. *Id.* § 617.11(d)(5).

36. *See generally* 42 U.S.C. §§ 4321–4370(h) (2012); *see also* Jackson v. N.Y. State Urban Dev. Corp., 67 N.Y.2d 400, 415, 494 N.E.2d 429, 434, 503 N.Y.S.2d 298, 303 (1986).

37. 6 NYCRR 617.10(a).

38. *Id.* § 617.10(a)(1)–(4).

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

40. CEQR regulations are contained in Chapter 5 of Title 62 of the Rules of the City of New York. *See* 62 R.C.N.Y. § 5 (Lexis through Sept. 2015).

41. N.Y. ENVTL. CONSERV. LAW § 8-0113(1), (3) (McKinney Supp. 2016). That authority extends to the designation of specific categories of Type I and Type II actions. 6 NYCRR 617.4(a)(2), 617.5(b), 617.14(e) (2015).

City Charter delegates that authority to the planning commission.⁴² To assist “city agencies, project sponsors, [and] the public” in navigating and understanding the CEQR process, the New York City Mayor’s Office of Environmental Coordination has published the *CEQR Technical Manual*.⁴³ 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.⁴⁴

II. SEQRA IN THE COURT OF APPEALS

The Court of Appeals issued two rulings in SEQRA-related cases during the *Survey* period, but neither addressed a substantive SEQRA issue. The first case was the subject of both a First Department and a Court of Appeals decision during this *Survey* period. In *Glick v. Harvey*, which was discussed in our prior *Survey* article,⁴⁵ the First Department upheld the lower court’s rejection of the petitioners’ challenge to New York City’s approval of New York University’s (NYU) proposal to expand its campus facilities in the Washington Square area of Manhattan.⁴⁶ The petitioners argued that the Final EIS should have considered the alternative of building new facilities in another area, but the First Department affirmed the lower court’s decision that it was not necessary to consider an alternative that would not meet the purpose of the project: NYU’s expansion of its facilities in the Washington Square area.⁴⁷ The Court of Appeals did not address the SEQRA claims; it focused exclusively on whether four parcels of land were impliedly dedicated as public parkland and therefore protected by the public trust doctrine.⁴⁸ The Court of Appeals affirmed the lower court’s decision that

42. N.Y.C., N.Y., CHARTER § 192(e) (Westlaw through Local Law 68).

43. N.Y.C. MAYOR’S OFFICE OF ENVTL. COORDINATION, CITY ENVIRONMENTAL QUALITY REVIEW TECHNICAL MANUAL intro. 1 (2014), http://www.nyc.gov/html/oec/downloads/pdf/2014_ceqr_tm/2014_ceqr_technical_manual.pdf.

44. *See generally id.*

45. Chertok & Mach, *supra* note 1, at 777.

46. *Glick v. Harvey*, 121 A.D.3d 498, 498–99, 994 N.Y.S.2d 118, 119 (1st Dep’t 2014), *aff’d*, 25 N.Y.3d 1175, 1177, 36 N.E.3d 640, 642, 15 N.Y.S.3d 733, 735 (2015).

47. *Id.* at 500, 994 N.Y.S.2d at 120 (citing *Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 417, 503 N.Y.S.2d 298, 305, 494 N.E.2d 429, 436 (1986)).

48. Pursuant to the public trust doctrine, municipal parkland requires approval of the State Legislature before the land can be alienated. *Id.* at 1177, 36 N.E.3d at 642, 15 N.Y.S.3d at 735 (first citing *Union Square Park Cmty. Coal., Inc., v. N.Y.C. Dep’t of Parks & Recreation*, 22 N.Y.3d 648, 654, 8 N.E.3d 797, 800, 985 N.Y.S.2d 422, 425 (2014); and then

they were not.⁴⁹

The second case only indirectly involved SEQRA. *Beardslee v. Inflection Energy, L.L.C.* was a case involving a moratorium created by the Governor's order that DEC engage in further SEQRA review before issuing permits for high-volume hydraulic fracturing (HVHF) and horizontal drilling (commonly known as "fracking").⁵⁰ The Court of Appeals considered the effect of the moratorium on oil and gas leases between New York landowners and energy companies.⁵¹ By way of background, in 2008, "then-Governor Paterson directed . . . the DEC to update and supplement its 1992 generic environmental impact statement (GEIS) on conventional oil and gas exploration" (the "2008 Directive" or "Directive").⁵² In response to this Directive, the DEC issued a draft Supplemental GEIS (SGEIS), and in December 2010, Governor Paterson issued Executive Order No. 41, which instructed DEC to revise the SGEIS.⁵³ That Executive Order also declared that, pursuant to SEQRA, "no [HVHF] permits [could] be issued" by the State before "the completion of a Final SGEIS."⁵⁴ In September 2011, "the DEC released a Revised Draft SGEIS, and issued a press release informing the public that '[n]o permits for [HVHF] will be issued until the SGEIS is finalized and [the DEC] issues the required Findings Statement.'"⁵⁵

Then, in February of 2012, after the primary term of the leases had expired, the landowners commenced a declaratory judgment action against three energy companies in the Northern District of New York. The action sought a declaration that the leases had expired. The energy companies counterclaimed for a declaration to the contrary, arguing that each lease was extended by operation of the *force majeure* clause.⁵⁶ The companies argued that the State's "moratorium on the use of horizontal drilling and HVHF triggered the *force majeure* clause," which stated:

If and when drilling . . . [is] delayed or interrupted . . . as a result of some order, rule, regulation, requisition or necessity of the government

citing *Friends of Van Cortlandt Park v. City of N.Y.*, 95 N.Y.2d 623, 630, 750 N.E.2d 1050, 1053, 727 N.Y.S.2d 2, 5 (2001)).

49. *Id.* at 1181, 36 N.E.3d at 644–45, 15 N.Y.S.3d at 737–38.

50. 25 N.Y.3d 150, 153, 31 N.E.3d 80, 81, 8 N.Y.S.3d 618, 619 (2015).

51. *Id.*

52. *Id.* at 154, 36 N.E.3d at 82, 15 N.Y.S.3d at 620.

53. *Id.* at 155, 36 N.E.3d at 82, 15 N.Y.S.3d at 620 (citing Governor's Memorandum of Approval of ch. 376, reprinted in 2008 McKinney's Sess. Laws of N.Y. 1658, 1659 (approving amendments to the Environmental Conservation Law)).

54. *Id.* (citing N.Y. Executive Order No. 41, N.Y. COMP. CODES R. & REGS., tit. 9, § 7.41 (2015)).

55. *Beardslee*, 25 N.Y.3d at 155, 31 N.E.3d at 83, 8 N.Y.S.3d at 621.

56. *Id.*

or as the result of any other cause whatsoever beyond the control of Lessee, the time of such delay or interruption shall not be counted against Lessee, anything in this lease to the contrary notwithstanding.⁵⁷

The parties filed cross motions for summary judgment for declarations that the leases expired, and that their primary terms were extended by the *force majeure* event, respectively.⁵⁸ The District Court granted the landowners' motion and "declined to rule on whether a *force majeure* event occurred, stating that even if it did, [it] would have no effect on the habendum clause and the lease terms because the energy companies did not have an obligation to drill."⁵⁹ "The District Court also concluded that the 2008 Directive did not frustrate the purposes of the leases" because conventional drilling methods could be used and the "Directive was foreseeable."⁶⁰ The energy companies appealed.

The Second Circuit found that "this case turns on significant and novel issues of New York law concerning the interpretation of oil and gas leases, a legal field that is both relatively undeveloped in the State and of potentially great commercial and environmental significance to State residents and businesses."⁶¹ It certified to the Court of Appeals, and the Court accepted, two questions:

Under New York law, and in the context of an oil and gas lease, did the State's Moratorium amount to a *force majeure* event?

If so, does the *force majeure* clause modify the habendum clause and extend the primary terms of the leases?⁶²

The Court of Appeals answered the second question in the negative and did not reach the first question.⁶³ Guided by basic principles of contract law, the Court held that "the *force majeure* clause [did] not modify the primary term of the habendum clause (addressing lease expiration), and therefore [did] not extend the leases."⁶⁴ In response to the energy companies' argument that the "notwithstanding any other provision" language in the *force majeure* clause superseded all other

57. *Id.* at 156, 31 N.E.3d at 83, 8 N.Y.S.3d at 621.

58. *Id.*

59. *Id.*

60. *Beardslee*, 25 N.Y.3d at 156, 31 N.E.3d at 83, 8 N.Y.S.3d at 621.

61. *Id.* (quoting *Beardslee v. Inflection Energy L.L.C.*, 761 F.3d 221, 224 (2d Cir. 2004)).

62. *Id.* at 156–57, 31 N.E.3d at 83–84, 8 N.Y.S.3d at 621–22 (first quoting *Beardslee v. Inflection Energy, L.L.C.*, 761 F.3d at 232; and then quoting *Beardslee v. Inflection Energy, L.L.C.*, 23 N.Y.3d 1047, 1047, 16 N.E.3d 1261, 1261, 992 N.Y.S.2d 782, 782 (2014) (granting leave to appeal)).

63. *Id.* at 160, 31 N.E.3d at 86, 8 N.Y.S.3d at 624.

64. *Id.* at 157, 31 N.E.3d at 84, 8 N.Y.S.3d at 622.

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clauses in the lease, the Court disagreed, finding that it only superseded those with which it was in conflict.⁶⁵ Because the clause conflicted only with the secondary term in the habendum clause (addressing conditions under which the leases would terminate), the *force majeure* clause modified only the secondary term of the habendum clause, and not the primary term.⁶⁶

III. SEQRA IN THE LOWER COURTS AND APPELLATE COURTS

A. Thresholds and Procedural Requirements in SEQRA Litigation

SEQRA litigation is invariably a special proceeding under Article 78 of the New York Civil Practice Law and Rules.⁶⁷ 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. A number of decisions during the *Survey* period addressed questions arising from these threshold and procedural requirements.

1. Standing

Standing is one of the more frequently litigated issues in SEQRA case law. To establish standing, a SEQRA petitioner must demonstrate that the challenged action causes injury that is (a) within the zone of interests sought to be protected by the statute, and (b) different from any generalized harm caused by the action to the public at large.⁶⁸ To fall within SEQRA's "zone of interest," the alleged injury must be "environmental and not solely economic in nature."⁶⁹ 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 claims nor the appropriate relief

65. *Beardslee*, 25 N.Y.3d at 158, 31 N.E.3d at 84–85, 8 N.Y.S.3d at 622–23.

66. *Id.* at 158–59, 31 N.E.3d at 85, 8 N.Y.S.3d at 623. In a decision rendered after the conclusion of the *Survey* period, the Second Circuit applied the Court of Appeals's statement of New York law and affirmed the district court's decision granting the landowners' motion for summary judgment and denying the defendants' cross-motion for summary judgment. *Beardsee v. Inflection Energy, L.L.C.*, 798 F.3d 90, 91 (2d Cir. 2015) (per curiam).

67. *See* N.Y. C.P.L.R. art. 78 (McKinney 2008).

68. *Save the Pine Bush, Inc. v. Common Council*, 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 the Plastics Indus., Inc. v. Cty. of Suffolk*, 77 N.Y.2d 761, 773–74, 573 N.E.2d 1034, 1041, 570 N.Y.S.2d 778, 785 (1991)).

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

requires the participation of the organization's individual members."⁷⁰

Several SEQRA decisions addressed standing during this *Survey* period. At least three of those decisions involved the presumption of standing that arises based on a party's proximity to the project at issue. In challenges to rezoning decisions, there is a well-established presumption that both "aggrievement" or "injury" and "an interest different from other members of the community" may be inferred or presumed if the petitioner resides in or owns property in close proximity to the challenged action.⁷¹ This principle was reaffirmed in *Citizens for St. Patrick's v. City of Watervliet City Council*, which involved a challenge to a city's decision to rezone a parcel from residential to commercial after issuing a negative declaration.⁷² In *Citizens for St. Patrick's*, the court held that the individual plaintiffs "presumptively established their standing to challenge the City's determinations because their residence [was] located immediately across the street from [the parcel at issue] and, accordingly, they [would] suffer direct harm different from the general public, even without allegations of individual harm."⁷³

The proximity presumption developed in the context of rezonings, and its application outside of that context has been inconsistent. The appellate division explicitly limited the principle's application to cases involving a "zoning-related issue" in *Kindred v. Monroe County*.⁷⁴ In *Kindred*, the petitioners challenged the county's decision to permit an organization to operate a four-day agricultural festival in a county-owned park. The court affirmed the supreme court's determination that the petitioners lacked standing, stating that where "the proceeding does not involve a 'zoning-related issue . . . , there is no presumption of standing to raise a SEQRA challenge' based solely on a party's proximity."⁷⁵ The court also found that the petitioners failed to establish an injury different in kind or degree from that suffered by the general public, and the court found that the alleged injuries were too speculative and conjectural to

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

71. See *Gernatt Asphalt Prods., Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 687, 664 N.E.2d 1226, 1238, 642 N.Y.S.2d 164, 176 (1996) (citing *Mobil Oil Corp.*, 76 N.Y.2d at 433, 559 N.E.2d at 644, 559 N.Y.S.2d at 950).

72. 126 A.D.3d 1159, 1159, 5 N.Y.S.3d 583, 583 (3d Dep't 2015).

73. *Id.* at 1160, 5 N.Y.S.3d at 584.

74. 119 A.D.3d 1347, 1348, 989 N.Y.S.2d 732, 733 (4th Dep't 2014) (quoting *Save Our Main St. Bldgs. v. Green Cty. Legis.*, 293 A.D.2d 907, 908, 740 N.Y.S.2d 715, 717 (3d Dep't 2002), *lv. denied*, 98 N.Y.2d 609, 775 N.E.2d 1288, 747 N.Y.S.2d 409 (2002)).

75. *Id.* at 1348, 989 N.Y.S.2d at 733 (quoting *Save Our Main St. Bldgs.*, 293 A.D.2d at 908, 740 N.Y.S.2d at 717, *lv. denied*, 98 N.Y.2d 609, 775 N.E.2d 1288, 747 N.Y.S.2d 409 (2002)).

demonstrate an actual and specific injury-in-fact.⁷⁶

However, in *Green Earth Farms Rockland L.L.C. v. Town of Haverstraw Planning Board*, involving a SEQRA challenge to the Haverstraw Planning Board's determination granting final site plan approval, the court applied the general presumption that "when the premises that are the subject of an administrative agency's action are a party's property or are in close proximity to a party's property, that party may be presumed to be adversely affected by a SEQRA violation and need not allege a specific harm."⁷⁷ The court found that several of the petitioners had standing because they owned property close to the subject property.⁷⁸ However, Green Earth Farms of Rockland, L.L.C., which claimed to be "acting as authorized agent for several property and business owners having businesses and properties located throughout the Towns of Haverstraw and Stony Point, New York," did not satisfy the requirements of standing.⁷⁹ Green Earth did not identify the individual property and business owners it claimed to represent, and it said that the owners were located *throughout* the towns, not just in close proximity.⁸⁰ As a result, Green Earth failed to establish standing.⁸¹

Organizational standing also was addressed by the appellate division in *Niagara Preservation Coalition, Inc. v. New York Power Authority*, a case involving the development and construction of a boat storage facility located over and adjacent to the former Schoellkopf Power Station No. 3, the ruins of which are listed in the National Register for Historic Places.⁸² In *Niagara Preservation Coalition*, the court found that the "petitioner did not have standing" because "it failed to establish . . . an injury or that it [was] the proper party to seek redress."⁸³ Specifically, the member affidavit stating that he had "a longtime personal and professional interest in the gorge trail and the ruins" was insufficient.⁸⁴ The court explained that interest and injury are not synonymous, and "[a] general—or even special—interest in the subject matter is insufficient to confer standing, absent an injury distinct from the public in the particular circumstances

76. *Id.*

77. No. 2465-2012, 2014 N.Y. Slip Op. 51510(U), at 10 (Sup. Ct. Rockland Cty. 2014) (quoting *Stephens v. Gordon*, 202 A.D.2d 437, 438, 610 N.Y.S.2d 531, 532–33 (2d Dep't 1994)).

78. *Id.* at 24–25.

79. *Id.*

80. *Id.*

81. *Id.*

82. 121 A.D.3d 1507, 1508, 994 N.Y.S.2d 487, 490 (4th Dep't 2014), *lv.denied*, 25 N.Y.3d 902, 30 N.E.3d 165, 7 N.Y.S.3d 274 (2015).

83. *Id.* at 1510, 994 N.Y.S.2d at 492.

84. *Id.*

of the case.”⁸⁵ The court added that, “[a]ppreciation for historical and architectural [artifacts] does not rise to the level of injury different from that of the public at large for standing purposes.”⁸⁶ Because the petitioner failed to establish that any of its members suffered “an injury distinct from members of the public who use[d] the gorge trail to access the ruins . . . it lacks standing to contest the SEQRA determination.”⁸⁷

Finally, *Residents for Reasonable Development v. City of New York* also addressed the need to show particularized injury even outside the context of organizational standing.⁸⁸ The court held that certain individual petitioners, neighborhood residents opposing city approvals of a development project to build two buildings for linked hospital and educational purposes at the site of a former municipal sanitation garage, lacked standing because “[t]heir generalized allegations of increased traffic and a disruption to their community [were] insufficient to . . . demonstrat[e] any alleged environmental harm that is different from that suffered by the public at large and that comes within the zone of interest protected by SEQRA.”⁸⁹

The Court of Appeals addressed the “special injury” requirement in a decision issued after the *Survey* period, in *Sierra Club v. Village of Painted Post*,⁹⁰ which will be thoroughly discussed in our next *Survey* article. In short, the Court considered whether the fact that more than one person might be harmed by the contested activity defeats standing and answered in the negative, specifically holding that “[t]he harm that is alleged must be specific to the individuals who allege it, and must be ‘different in kind or degree from the public at large,’ but it need not be unique.”⁹¹

85. *Id.* (quoting *Citizens Emergency Comm. to Pres. v. Tierney*, 70 A.D.3d 576, 576, 896 N.Y.S.2d 41, 42 (1st Dep’t 2010), *lv. denied*, 15 N.Y.3d 710, 936 N.E.2d 917, 910 N.Y.S.2d 36 (2010)).

86. *Id.* at 1510, 994 N.Y.S.2d at 492 (quoting *Heritage Coal. v. City of Ithaca Planning & Dev. Bd.*, 228 A.D.2d 862, 864, 644 N.Y.S.2d 374, 376 (3d Dep’t 1996), *lv. denied*, 88 N.Y.2d 809, 671 N.E.2d 1275, 648 N.Y.S.2d 878 (1996)).

87. *Niagara Preserv. Coal.*, 121 A.D.3d at 1510, 994 N.Y.S.2d at 492 (citing *Save the Pine Bush, Inc. v. Common Council*, 13 N.Y.3d 297, 305–306, 318 N.E.2d 917, 921, 890 N.Y.S.2d 405, 409 (2009)).

88. No. 101624/13, 2014 N.Y. Slip Op. 51171(U) (Sup. Ct. N.Y. Cty. 2014), *aff’d* 128 A.D.3d 609, 11 N.Y.S.3d 116 (1st Dep’t 2015).

89. *Id.* at 4 (citing *Barrett v. Duches County Legislature*, 38 A.D.3d 651, 654, 831 N.Y.S.2d 540, 543 (2d Dep’t 2007)).

90. 26 N.Y.3d 301, 306, 43 N.E.3d 745, 746, 22 N.Y.S.3d 388, 389 (2015).

91. *Id.* at 311, 43 N.E.3d at 749, 22 N.Y.S.3d at 392 (citing *Soc’y of the Plastics Indus., Inc. v. Cty. of Suffolk*, 77 N.Y.2d 761, 774, 573 N.E.2d 1034, 1041, 570 N.Y.S.2d 778, 785 (1991)). The Court rejected the appellate division’s determination that the plaintiff did not have standing because multiple Village residents lived along the train line and would suffer

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

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

With respect to ripeness, only final agency actions are subject to challenge in a SEQRA (or any other Article 78) challenge.⁹² 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.”⁹³ In *Ranco Sand & Stone Corp. v. Vecchio*, the appellate division held that the positive declaration was not a final agency action and therefore was not ripe for judicial review.⁹⁴ In *Ranco*, the petitioner, a property owner who filed an application for rezoning, challenged the Town Board’s adoption of a resolution issuing a positive declaration for a proposed rezoning.⁹⁵ The Town Board’s reasoning was that the rezoning required an EIS due to the incompatibility of the proposed use with “existing residential land uses in the vicinity.”⁹⁶ The respondent Town Board argued that the positive declaration was not a final agency determination subject to challenge.⁹⁷ The court agreed with the respondent, noting that “[t]raditionally, a ‘SEQRA determination [has] usually [been] considered to be a preliminary step in the decision-making process and, therefore, . . . not ripe for judicial review until the decision-making process has been completed.’”⁹⁸ The court found that the positive declaration was just the initial step in this case and therefore was not ripe for review, noting that “the expense to be incurred in the preparation and

similar noise impacts. *Id.* at 310, 573 N.E.2d at 749, 570 N.Y.S.2d at 392. It noted that the petitioner was “not alleging an indirect, collateral effect from the increased train noise that will be experienced by the public at large, but rather a particularized harm that may also be inflicted upon others in the community who live near the tracks.” *Id.* at 311, 573 N.E.2d at 749, 570 N.Y.S.2d at 392. The Court reversed the appellate division’s dismissal of the case on standing grounds and remitted the matter to the appellate division. *Id.* at 312, 573 N.E.2d at 750, 570 N.Y.S.2d at 393.

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

93. *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)).

94. 124 A.D.3d 73, 75, 998 N.Y.S.2d 68, 70 (2d Dep’t 2014).

95. *Id.* at 75, 998 N.Y.S.2d at 71.

96. *Id.*

97. *Id.* at 80, 998 N.Y.S.2d at 74.

98. *Id.* at 82, 998 N.Y.S.2d at 75 (quoting *Young v. Bd. of Trs.*, 221 A.D.2d 975, 977, 634 N.Y.S.2d 605, 608 (4th Dep’t 1995), *aff’d*, 89 N.Y.2d 846, 850, 675 N.E.2d 464, 466, 652 N.Y.S.2d 729, 731 (1996)).

circulation of a DEIS, substantial though it may be, is not sufficient, in and of itself, to require us to conclude that the matter is ripe for judicial review.”⁹⁹

In its decision, the court dispelled any notion of a bright line rule, reiterating the Court of Appeals’s holding in *Gordon v. Rush* that a determination of whether a positive declaration is a final agency action must be a case-specific inquiry based on the consideration of a number of factors.¹⁰⁰ In *Rush*, the Court of Appeals held that the SEQRA positive declaration was a final action that imposed an obligation to prepare and circulate a Draft EIS.¹⁰¹ The Court of Appeals determined that the considerable time and expense required to prepare a Draft EIS, under the circumstances, imposed “actual, concrete harm.”¹⁰² However, the Second Department in *Ranco* made clear that it was not solely the resource expenditure required to prepare a Draft EIS that drove the Court of Appeals’s decision.¹⁰³ Furthermore, it was also based on the fact that the *Gordon* petitioners already had been through the coordinated environmental review process for the site, the DEC previously had concluded that no EIS would be required, and there was “confusion” about the which agency was the lead agency for purposes of review.¹⁰⁴ In contrast, in *Ranco*, there was no prior negative declaration nor determination by the lead agency that a Draft EIS was not needed with respect to the proposal to rezone the parcel at issue.¹⁰⁵ Notably, the Court of Appeals granted leave to appeal in *Ranco* in March of 2015.¹⁰⁶

A related procedural issue in SEQRA litigation concerns the timeliness of a SEQRA challenge under the applicable statute of limitations. Pursuant to the general statute of limitations for Article 78 challenges, a SEQRA challenge must be made “four months after the determination to be reviewed becomes final and binding upon the petitioner,”¹⁰⁷ and that period begins to run when the agency has “committed itself to ‘a definite course of future decisions.’”¹⁰⁸ This

99. *Ranco*, 124 A.D.3d at 86, 998 N.Y.S.2d at 79.

100. *Id.* at 83, 86, 998 N.Y.S.2d at 76, 79 (citing *Gordon v. Rush*, 100 N.Y.2d 236, 242, 792 N.E.2d 168, 172, 762 N.Y.S.2d 18, 22 (2003)).

101. *Id.* at 84, 998 N.Y.S.2d at 77.

102. *Id.* (citing *Gordon*, 100 N.Y.2d at 243, 792 N.E.2d at 172, 762 N.Y.S.2d at 22).

103. *Id.* (citing *Gordon*, 100 N.Y.2d at 243, 792 N.E.2d at 173, 762 N.Y.S.2d at 23).

104. *Ranco*, 124 A.D.3d at 84, 998 N.Y.S.2d at 77 (citing *Gordon*, 100 N.Y.2d at 243, 792 N.E.2d at 172, 762 N.Y.S.2d at 22).

105. *Id.* at 85, 998 N.Y.S.2d at 78.

106. *Ranco Sand & Stone Corp. v. Vecchio*, 25 N.Y.3d 902, 30 N.E.3d 165, 7 N.Y.S.3d 274.

107. N.Y. C.P.L.R. 217(1) (McKinney 2015).

108. *Young v. Bd. of Trs.*, 89 N.Y.2d 846, 848–849, 675 N.E.2d 464, 466, 652

principle was reaffirmed in this *Survey* period in *Coney-Brighton Boardwalk Alliance v. New York City Department of Parks & Recreation*.¹⁰⁹

Administrative exhaustion is another threshold requirement that must be met for a challenger to bring suit under Article 78. Under the doctrine of administrative exhaustion, “courts generally refuse to review a determination on environmental or zoning matters based on evidence or arguments that were not presented during the proceedings before the lead agency.”¹¹⁰ However, no case during the *Survey* period involved a significant discussion or ruling relating to this requirement.

3. Mootness

Mootness arises “where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy.”¹¹¹ In SEQRA cases, mootness typically arises when a project that is subject to the agency action progresses to a point at which the court is unable to redress a petitioner’s alleged injuries.¹¹² A typical example is where a petitioner’s alleged injuries arise from the construction impacts of a project, and those impacts already have occurred and ceased by the time the court reaches its decision. Another common scenario is when a project has progressed to a point at which redress of the petitioner’s injuries only can be accomplished through draconian means, such as demolition of the projection, which the court determines is unfairly severe. Mootness may be raised at any time, by a party or by the court sua sponte, because it goes to the existence of an actual controversy, and therefore the court’s jurisdiction.¹¹³

N.Y.S.2d 729, 731 (1996) (quoting N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(b)(2) (2015)) (citing *Save the Pine Bush v. City of Albany*, 70 N.Y.2d 193, 203, 512 N.E.3d 526, 528, 518 N.Y.S.2d 943, 946 (1987)).

109. 122 A.D.3d 924, 925, 998 N.Y.S.2d 114, 115–116 (2d Dep’t 2014) (finding the defendant, New York City Department of Parks and Recreation, “failed to meet its burden of demonstrating that it made a final and binding determination to implement the plan, and that the petitioners were provided notice of such determination more than four months before the proceeding was commenced.”).

110. *Miller v. Kozakiewicz*, 300 A.D.2d 399, 400, 751 N.Y.S.2d 524, 526–27 (2d Dep’t 2002) (citing *Long Island Pine Barrens Soc’y v. Planning Bd.*, 204 A.D.2d 548, 549, 611 N.Y.S.2d 917, 918 (2d Dep’t 1994); *Harriman v. Town Bd. of Monroe*, 153 A.D.2d 633, 544 N.Y.S.2d 860 (2d Dep’t 1989); *Aldrich v. Pattison*, 107 A.D.2d 258, 486 N.Y.S.2d 23 (2d Dep’t 1985)).

111. *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).

112. *See id.*

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

New York's mootness jurisprudence makes clear that a party seeking to halt construction of a project through a court challenge must move for injunctive relief at each stage of the proceeding to preserve a claim for mootness.¹¹⁴ Courts generally will make an exception and hear an otherwise moot case in situations in which at least one of three of the following factors is present: "(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., a substantial and novel issue."¹¹⁵

Citizens for St. Patrick's v. City of Watervliet City Council presented a classic case of mootness.¹¹⁶ In *Citizens for St. Patrick's*, the defendant sought to demolish an unused church, school, and rectory and replace them with a grocery store and two retail commercial buildings.¹¹⁷ After issuing a negative declaration, the City Council rezoned the parcel from residential to commercial.¹¹⁸ The plaintiffs opposed the demolition of the church buildings and challenged the negative declaration and rezoning on SEQRA grounds, among others.¹¹⁹ The Supreme Court denied plaintiffs' motion for preliminary injunction and granted defendants' motions for summary judgment on standing grounds.¹²⁰ On appeal, the Third Department found that the plaintiffs' challenges to the SEQRA and rezoning decisions were moot because they failed to seek any injunctive relief from the court during the pendency of the appeal, the church buildings were demolished, and the grocery store was fully constructed and operational.¹²¹ In addition, the rezoning determination was superseded by the City's adoption of a new zoning code in which the defendant's use of the parcel was permitted as of right, and the plaintiffs did not raise any challenge to that code.¹²²

An exception to the mootness doctrine was found in *In Defense of Animals v. Vassar College*.¹²³ In *In Defense of Animals*, the petitioner

114. *Weeks Woodlands Ass'n, Inc. v. Dormitory Auth.*, 95 A.D.3d 747, 752, 945 N.Y.S.2d 263, 268 (1st Dep't 2012), *aff'd*, 20 N.Y.3d 919, 920, 980 N.E.2d 532, 532, 956 N.Y.S.2d 483, 483 (2012) (explaining the rationale that the petitioner must do so in order "to cast the risk of going forward with the work upon" the developer).

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

116. 126 A.D.3d 1159, 5 N.Y.S.3d 582 (3d Dep't 2015).

117. *Id.* at 1159, 5 N.Y.S.3d at 583.

118. *Id.*

119. *Id.* at 583–84, 5 N.Y.S.3d at 583.

120. *Id.*

121. *Citizens for St. Patrick's*, 126 A.D.3d 1159 at 1160, 5 N.Y.S.3d at 584.

122. *Id.* at 1160, 5 N.Y.S.3d at 584–85.

123. 121 A.D.3d 991, 994 N.Y.S.2d 412 (2d Dep't 2014).

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challenged the DEC's issuance of a nuisance deer permit to Vassar College to cull sixty-two deer on the Vassar Farm and Ecological Preserve.¹²⁴ The lower court denied a motion for a preliminary injunction, denied the petition, and dismissed the proceeding, finding that DEC met its SEQRA obligations in issuing the permit.¹²⁵ During the pendency of the appeal, Vassar conducted the deer cull, and the permit expired by its own terms.¹²⁶ The Second Department declined to dismiss the appeal, noting that "an exception to the mootness doctrine permits courts to preserve for review important and recurring issues which, by virtue of their relatively brief existence, would be rendered otherwise nonreviewable."¹²⁷ In this case, the court found that the appellants "raise[d] a substantial and novel issue as to whether the DEC [was] fulfilling its statutory responsibilities under SEQRA related to the issuance of nuisance deer permits"—permits that have a short period of validity.¹²⁸ As discussed in section D.3, *infra*, the court upheld the DEC's actions.

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.¹²⁹ While most challenges on this subject involve the classification itself, one case during the *Survey* period involved the agency's failure to make that preliminary classification in the first place. In *Pickerell v. Town of Huntington*, the court found that the Huntington Zoning Board of Appeals (ZBA) failed to comply with both procedural and substantive SEQRA obligations.¹³⁰ When 7-Eleven filed an application with the ZBA for a special use permit, it included with its application a Short Environmental Assessment Form (EAF) for Unlisted

124. *Id.* at 991, 994 N.Y.S.2d at 413.

125. *Id.*

126. *Id.* at 992, 994 N.Y.S.2d at 413.

127. *In Defense of Animals*, 121 A.D.3d at 992, 994 N.Y.S.2d at 414.

128. *Id.* at 993, 994 N.Y.S.2d at 414.

129. *See supra* note 13 and accompanying text.

130. No. 13-18087, 2014 N.Y. Slip Op. 51497(U), at 7 (Sup. Ct. Suffolk Cty. 2014).

Projects.¹³¹ The ZBA conducted two public hearings regarding the application, on January 26 and May 9.¹³² At the second meeting, two residents inquired about the SEQRA review, and one opined that the proposed action might be Type I due to its proximity to an historic home.¹³³ The ZBA's response was that it "was still gathering information," and "had been using . . . the [hearings] as . . . scoping session[s]."¹³⁴

On June 6, the ZBA held a meeting at which it agreed to grant the special use permit, and discussed how a SEQRA determination had not yet been made.¹³⁵ It decided to classify the proposal as a Type I action, due to the historic designation of the home across the street, and to move for the issuance of a negative declaration.¹³⁶ Thereafter, Parts II and III of an EAF were prepared by the Planning and Environmental Department; a new Part I reflecting the decision to classify the project as a Type I was never prepared.¹³⁷ On June 13, the ZBA classified the project as a Type I, voted in favor of issuing a negative declaration, and passed a resolution adopting Parts II and III and issuing the negative declaration.¹³⁸

In short, as the court explained, the process followed was all wrong. First, ZBA did not promptly make its own preliminary classification of the proposed project, nor did it verify the accuracy of the information provided on the EAF Part I, as required by 6 NYCRR section 617.6(a).¹³⁹ Second, the ZBA failed to have the project sponsor complete Part I of a full EAF, as required for Type I actions by 6 NYCRR section 617.6(a)(2) (2015).¹⁴⁰ Third, there was no evidence in the record that the coordinated review required for a Type I action had occurred.¹⁴¹ Fourth, the decision to classify the project as a Type I action and issue a negative declaration was made a week after Parts II and III were completed, without deliberative consideration.¹⁴² Fifth, the Full EAF contained findings of potential significant environmental impacts, but the ZBA nevertheless

131. *Id.* at 2.

132. *Id.* at 2–3.

133. *Id.* at 3.

134. *Id.*

135. *Pickerell*, 2014 N.Y. Slip Op. 51497(U), at 3–4.

136. *Id.*

137. *Id.* at 4.

138. *Id.*

139. *Id.* at 7.

140. *Pickerell*, 2014 N.Y. Slip Op. 51497(U), at 7.

141. *Id.* at 7–8.

142. *Id.* at 8.

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issued a negative declaration without making any further inquiries into the environmental concerns.¹⁴³ Thus, the ZBA failed to take the requisite hard look and failed to provide a reasoned elaboration for its determination of no environmental significance.¹⁴⁴ In sum,

the Huntington ZBA failed to meet the SEQRA procedural obligations imposed on a lead agency. Further, as the Type I designation for the proposed project was made after the public hearing had closed, the Huntington ZBA improperly cut off the public's opportunity to participate in the SEQRA process in a meaningful way. And while it properly investigated the traffic issues that could potentially result from the proposed development, the Huntington ZBA inexplicably failed to give due consideration to the other potential environmental impacts raised in the Full EAF, or to explain in detail the reasons for its determination that no significant adverse environmental impacts will result from the project.¹⁴⁵

The court therefore annulled the ZBA's determination granting the special use permit and area variance.¹⁴⁶

Several decisions addressed the more familiar challenge to the agency's classification decision. In *Trustees of the Freeholders & Commonalty v. Zweig*, discussed further in section C.1, *infra*, the court annulled the Village Zoning Board's determination that the proposed revetment project was a Type II action because the record provided no reasoned elaboration of the basis for that determination.¹⁴⁷

In *DeFalco v. DeChance*, the court upheld the ZBA's determination that the proposed residential construction constituted a Type II action.¹⁴⁸ In this case, the proposal involved the expansion of a single family residence and variances, which typically are Type II actions.¹⁴⁹ However, the property at issue was located within the Fire Island Freshwater Wetlands and a Coastal Erosion Hazard Area.¹⁵⁰ The court noted that "[i]n such cases [where a project impacts environmentally sensitive land], a more detailed preliminary inquiry may be necessary when an administratively predetermined Type II classification conflicts with 'a competing environmental impact.'"¹⁵¹ The plaintiff argued that the ZBA

143. *Id.* at 9.

144. *Id.*

145. *Pickerell*, 2014 N.Y. Slip Op. 51497(U), at 9–10.

146. *Id.* at 10.

147. No. 13-29760, 2014 N.Y. Slip Op 51556(U), at 7 (Sup. Ct. Suffolk Cty. 2014).

148. No. 13-11268, 2014 N.Y. Slip Op. 32848(U), at 7 (Sup. Ct. Suffolk Cty. 2014).

149. *Id.* at 6.

150. *Id.*

151. *Id.* at 6–7 (quoting *Hazan v. Howe*, 214 A.D.2d 797, 800, 625 N.Y.S.2d 670, 672

did not conduct a sufficient environmental review of the application to determine whether it should be classified as a Type II.¹⁵² The court disagreed, finding that the Board's Type II finding, which noted that the application did not "appear to present a significant impact to the environmentally sensitive area and no further environmental review appear[ed] warranted," was not arbitrary and capricious.¹⁵³ Indeed, the construction was approved by the Town's Planning, Environment and Land Management Division after being reviewed twice, by the "New York State Environmental Protection Agency [sic]," and in part by the Town's Zoning Board.¹⁵⁴

Similarly, in *Coney-Brighton Boardwalk Alliance v. New York City Department of Parks & Recreation*, the Second Department affirmed the lower court's dismissal of a petition challenging the New York City Department of Parks and Recreation's determination that replacing a boardwalk was a Type II action under SEQRA and CEQR.¹⁵⁵ The question was whether the use of different materials altered the propriety of classifying the Project as a Type II action.¹⁵⁶ The court answered in the negative, noting that "[t]he fact that different materials were used in the replacement construction did not alter the propriety of classifying the [boardwalk replacement] project as a Type II action."¹⁵⁷

Finally, in *Sierra Club v. Martens*, the court upheld DEC's determination that issuing an "initial" water withdrawal permit to an electric generating facility was a Type II action under SEQRA because issuing the permit was a ministerial act.¹⁵⁸ Under recent amendments to ECL 15-1501, the facility became subject to a statute requiring permits for operators of water withdrawal systems (with "initial permits" applying to water withdrawals that were previously exempt from permit requirements), DEC was required to issue the permit to the facility and had no discretion to deny it based on environmental concerns.¹⁵⁹

Even when an action is properly classified as a Type I action (and therefore is more likely to require an EIS), SEQRA does not require an

(3d Dep't 1995)).

152. *Id.* at 7.

153. *DeFalco*, 2014 N.Y. Slip Op. 32848(U), at 7.

154. *Id.*

155. 122 A.D.3d 924, 925, 998 N.Y.S.2d 114, 115 (2d Dep't 2014).

156. The New York Code of Rules and Regulations title 6, section 617.5(c)(2) provides that the "replacement, rehabilitation or reconstruction of a structure or facility, in kind" is a Type II action. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.5(c)(2) (2015).

157. *Coney-Brighton Boardwalk All.*, 122 A.D.3d at 925, 998 N.Y.S.2d at 115.

158. N.Y.L.J., Oct. 15, 2014, at 25 (Sup. Ct. Queens Cty. Oct. 14, 2014).

159. *Id.*

EIS if the agency properly determines that the action will not have a significant adverse environmental impact.¹⁶⁰

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. 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.’”¹⁶¹ Under Article 78’s deferential standard of review for agencies’ discretionary judgments and evidentiary findings, a negative declaration or EIS issued in compliance with applicable law and procedures “will only be annulled if it is arbitrary, capricious or unsupported by the evidence.”¹⁶² Successful challenges to EISs are uncommon because of this deferential standard of review.¹⁶³ Success is relatively more common in challenges to determinations of significance, but as several unsuccessful challenges from the *Survey* period show, petitioners in such cases face a difficult burden of proof.

1. Adequacy of Determinations of Environmental Significance

The issuance of a negative declaration concludes an agency’s obligations under SEQRA. As a result, challenges to projects for which agencies conclude that no EIS is necessary often seek to show that the agency’s issuance of a negative declaration was unreasonable because, contrary to the agency’s determination, the proposed action may have significant adverse environmental impacts.¹⁶⁴ In several decisions during

160. 6 NYCRR 617.7(a)(2); *see, e.g.*, *Dugan v. Liggan*, 121 A.D.3d 1471, 1471–72, 995 N.Y.S.2d 799, 800–01 (3d Dep’t 2014) (noting that the Planning Board classified the project as a Type I action and then filed a negative declaration).

161. *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)).

162. *Schaller v. Town of New Paltz Zoning Bd. of Appeals*, 108 A.D.3d 821, 823, 968 N.Y.S.2d 702, 704 (3d Dep’t 2013) (citing N.Y. C.P.L.R. 7803(3) (McKinney 2008); *Riverkeeper, Inc. v. Planning Bd. of Southeast*, 9 N.Y.3d 219, 881 N.E.2d 172, 851 N.Y.S.2d 76 (2007); *Troy Sand & Gravel Co. v. Town of Nassau*, 82 A.D.3d 1377, 918 N.Y.S.2d 667 (3d Dep’t 2011)).

163. *See* 2 MICHAEL B. GERRARD ET AL., ENVIRONMENTAL IMPACT REVIEW IN NEW YORK § 7.04(4) (2015).

164. Challenges to positive declarations are less common than challenges to negative declarations. *Id.* § 3.05(2)(e). Part of the reason is that positive declarations generally are not considered final agency actions, as discussed in Section A.2, *supra*.

the *Survey* period, petitioners asserted such a challenge to a negative declaration, largely without success.

In *Lindenthal v. Town of New Castle*, the petitioners challenged the Planning Board of the Town of New Castle's decision to grant a special use permit for a monopole cell tower.¹⁶⁵ One of the petitioners' claims was that the agency failed to comply with SEQRA in issuing a negative declaration because the Planning Board failed to take the requisite hard look, failed to set forth its analysis in writing, and failed to complete Parts 2 and 3 of the EAF. The respondents argued that the Planning Board did take a hard look at the relevant impacts, and the reason elaborated was contained in the resolution granting the special use permit.¹⁶⁶ The court agreed with respondents and denied the petition, finding that the Planning Board conducted a thorough review of the application and provided its written reasoned elaboration in the resolution.¹⁶⁷ Regarding the argument that the SEQRA negative declaration should be annulled based on the Planning Board's failure to complete Parts 2 and 3 of the EAF, the court found that it was without merit, reasoning that "[w]here, as here, the record demonstrates that the P[lanning] B[oard] considered the factors set forth in parts 2 and 3 and took the required 'hard look' at them, the P[lanning] B[oard]'s determination will be upheld, even if it failed to fill out parts 2 and 3 of the EAF."¹⁶⁸

In *Trustees of the Freeholders & Commonalty v. Zoning Board of Appeals*, the ZBA of the Town of East Hampton issued a determination granting variances and a Natural Resources Special Permit for the construction of a revetment.¹⁶⁹ The petitioner, Trustees of the Freeholders and Commonalty of the Town of East Hampton ("the Trustees"), sought to annul the determination on several grounds, including that the ZBA failed to take a hard look at relevant areas of environmental concern and provide a "reasoned elaboration" for the basis of its negative declaration.¹⁷⁰ The court upheld the ZBA's determination, finding that the agency considered the relevant areas of environmental concern, provided the public with ample opportunity for comments, and had experts consider the various concerns.¹⁷¹ The court then said that,

165. No. 14/3069, 2015 N.Y. Slip Op. 51324(U), at 2 (Sup. Ct. Westchester Cty. 2015).

166. *Id.*

167. *Id.* at 4.

168. *Id.* at 5 (citing *Hartford/North Bailey Homeowners Ass'n v. Zoning Bd. of Appeals of Amherst*, 63 A.D.3d 1721, 881 N.Y.S.2d 265 (4th Dep't 2009); *Residents Against Wal-Mart v. Planning Bd. of Greece*, 60 A.D.3d 1343, 875 N.Y.S.2d 691 (4th Dep't 2009)).

169. No. 38647/2012, 2015 N.Y. Slip Op 30414(U), at 1 (Sup. Ct. Suffolk Cty. 2015).

170. *Id.* at 3.

171. *Id.* at 6.

[a]lthough it is generally preferred that the ZBA set forth a reasoned elaboration for the basis of its determination, the degree of detail with which each factor must be discussed varies with the circumstances of each case, the record herein is adequate to determine that the ZBA, as lead agency, strictly complied with SEQRA procedures.¹⁷²

In one case, the court addressed the question of whether the substantial modification of a prior proposal required a new determination of significance, and answered it in the affirmative. In *Beekman Delameter Properties L.L.C. v. Village of Rhinebeck Zoning Board of Appeals*, the petitioner challenged four environmental and land use approvals granted by the Village of Rhinebeck ZBA for a hotel with restaurant and spa.¹⁷³ The petitioner alleged that the ZBA improperly adopted a SEQRA Statement of Consistency in January 2014 rather than making a new determination of significance, arguing that a July 2009 Negative Declaration was no longer applicable because the project had been modified.¹⁷⁴ The court found that the Planning Board failed to properly issue a determination of significance in relation to the current project or amend the previous negative declaration, considering that the project changed from a thirty-six unit residential facility to a commercial facility with lodging, a wine bistro, and meeting rooms.¹⁷⁵ The court said that while it “recognize[d] that the mere circumstance that modifications may have been made to a proposal is an insufficient basis to nullify a negative declaration otherwise properly issued in a Type I action,” the new proposal amounted to “much more than just a mere modification of the previous proposal.”¹⁷⁶ As a result, the court nullified the Statement of Consistency and Reaffirmation of the Statement of Consistency, and remanded to the agency with instructions that the agency either issue a new determination of significance or amend the previous negative determination to denote a significant change to the project.¹⁷⁷ The court noted that “[l]iteral compliance with both the letter and spirit of SEQRA

172. *Id.* (citing *Ellsworth v. Town of Malta*, 16 A.D.3d 948, 950, 792 N.Y.S.2d 227, 230 (3d Dep’t 2005) (explaining that while the preferred practice is more of a reasoned elaboration, the record may be adequate for the court to exercise supervisory review to determine compliance with SEQRA procedures, and “the degree of detail with which each factor must be discussed varies with the circumstances of each case.”)). However, in a Fourth Department case decided just after the conclusion of the *Survey* period, the court annulled a negative declaration and vacated a site plan approval because the Town Board failed to provide the requisite reasoned elaboration. In re *Dawley v. Whitetail 414, LLC*, 130 A.D.3d 1570 (4th Dep’t 2015) *lv. granted*, 132 A.D.3d 1331 (4th Dep’t 2015).

173. No. 7402/13, 2014 N.Y. Slip Op 51354(U), at 2 (Sup. Ct. Dutchess Cty. 2014).

174. *Id.* at 4.

175. *Id.*

176. *Id.*

177. *Id.* at 5.

is required and substantial compliance will not suffice.”¹⁷⁸

Substantive review under SEQRA tends to be a case-specific inquiry. However, these cases support the general principle that courts generally defer to an agency’s negative declaration unless the record fails to show any meaningful, independent review.

2. Adequacy of Agencies’ EISs

Petitioners have been similarly unsuccessful in challenging the adequacy of EISs during the *Survey* period. In addition to *Glick v. Harvey*, discussed above, in *Residents for Reasonable Development v. City of New York*, discussed in further detail below, the First Department found the Final EIS adequate, noting that while the impact statement had to evaluate a “no action” alternative, it did not have to consider the petitioners’ preferred alternative scenario because that scenario would not have met the objectives and capabilities of the project sponsor.¹⁷⁹ In *Committee to Stop Airport Expansion v. Wilkinson*, the Second Department upheld the lower court’s denial of the petition and dismissal of the proceeding.¹⁸⁰ In *Wilkinson*, the petitioners challenged the Town Board of the Town of East Hampton’s determination to adopt the Final Generic Environmental Impact Statement and Findings Statement regarding the East Hampton Airport Master Plan Update and Airport Layout Plan Update.¹⁸¹ The petitioners alleged that the Town Board failed to take a hard look at potential noise impacts and failed to make a reasoned elaboration of the basis for its decision.¹⁸² The court disagreed with the petitioners’ contentions, noting that while the petitioners disagreed with the methodology used to evaluate noise, the Town Board’s determination was “supported by accepted governmental guidelines for measuring noise impacts around airports.”¹⁸³ The court also found that the range of alternatives considered was adequate, saying “[t]he FGEIS need not identify or discuss every conceivable alternative, including the particular alternative proposed by the petitioners.”¹⁸⁴

178. *Beekman*, 2014 N.Y. Slip Op 51354(U), at 5 (citing Bd. of Coop. Educ. Servs. v. Town of Colonie, 268 A.D.2d 838, 840, 702 N.Y.S.2d 219, 223 (3d Dep’t 2000)).

179. 128 A.D.3d 609, 610, 11 N.Y.S.3d 116, 117–18 (1st Dep’t 2015).

180. 126 A.D.3d 788, 788, 5 N.Y.S. 3d 275, 275 (2d Dep’t 2015).

181. *Id.* at 788, 5 N.Y.S.3d at 275.

182. *Id.* at 789, 5 N.Y.S.3d at 276.

183. *Id.*

184. *Id.* (citing *Save Open Space v. Planning Bd. of Newburgh*, 74 A.D.3d 1350, 1352, 904 N.Y.S.2d 188, 190 (2d Dep’t 2010); *Cty. of Orange v. Village of Kiryas Joel*, 44 A.D.3d 765, 769, 844 N.Y.S.2d 57, 62 (2d Dep’t 2007); *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 777, 809 N.Y.S.2d 98, 108–09 (2d Dep’t 2005)).

These cases demonstrate the difficulty that SEQRA petitioners face in challenging the substance of an agency's procedurally compliant environmental review.

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

1. Unlawful "Segmentation" of SEQRA Review

Defining the proper boundaries of an action can be a difficult task. SEQRA regulations provide that "[c]onsidering only a part or segment of an action is contrary to the intent of SEQR."¹⁸⁵ As explained by the Third Department, impermissible segmentation occurs in two situations: (1) "when a project which would have a significant effect on the environment is split into two or more smaller projects, with the result that each falls below the threshold requiring [SEQRA] review;" and (2) "when a project developer wrongly excludes certain activities from the definition of his project for the purpose of keeping to a minimum its environmentally harmful consequence, thereby making it more palatable to the reviewing agency and community."¹⁸⁶ Segmentation is not strictly prohibited by SEQRA, but it is disfavored; DEC's SEQRA regulations provide that an agency may permissibly segment review if "the agency clearly states its reasons therefor and demonstrates that such review is no less protective of the environment."¹⁸⁷

Several cases from the *Survey* period examined segmentation issues. In *Green Earth*, discussed above, the court considered a SEQRA challenge to the Haverstraw Planning Board's approval of a site plan.¹⁸⁸ One of the petitioners' allegations was that the granting of final site plan approval was arbitrary and capricious because there was unlawful segmentation.¹⁸⁹ As the court explained, impermissible segmentation typically occurs in one of the following situations: (1) "when a project which would have a significant" environmental impact "is split into . . . smaller projects," whereby each smaller project "falls below the threshold" for SEQRA review; and (2) "when [the] project developer" improperly "excludes . . . certain activities from the definition of [the] project" to minimize environmental impacts, "making it more palatable

185. N.Y. COMP.CODES R. & REGS. tit. 6, § 617.3(g)(1) (2015).

186. *Schultz v. Jorling*, 164 A.D.2d 252, 255, 563 N.Y.S.2d 876, 879 (3d Dep't 1990).

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

188. *Green Earth Farms Rockland L.L.C. v. Town of Haverstraw Planning Bd.*, No. 2465-2012, 2014 N.Y. Slip Op. 51510(U), at 1 (Sup. Ct. Rockland Cty. 2014).

189. *Id.* at 8–9.

to the reviewing agency” and the public.¹⁹⁰ The court found that the situation in *Green Earth* did not fall neatly into either scenario, but there nevertheless was impermissible segmentation because the gasoline station component of the site plan was omitted from the project’s definition when it underwent SEQRA review.¹⁹¹ The court found that, “[a]lthough the segmentation may not have been wrongful or intentional, it is apparent to this Court that the addition of the gasoline station and its effects on the environment was [sic] not given the attention it [sic] deserved by the Respondents.”¹⁹² It therefore vacated the final site plan approval and remitted the matter to the Planning Board for the preparation of a supplemental EIS and issuance of a revised Findings Statement.¹⁹³

In *J. Owens Building Co. v. Town of Clarkstown*, the Second Department held that the Town Board of the Town of Clarkstown impermissibly segmented the SEQRA review process.¹⁹⁴ The respondents sought to acquire the petitioners’ property for drainage and storm water management improvements (“the drainage plan”) associated with a larger project known as the West Nyack Downtown Revitalization Project.¹⁹⁵ While the drainage plan was part of the larger project, the Town Board studied only the potential impact of the drainage plan during its SEQRA review.¹⁹⁶ The court noted that if the larger project were speculative or hypothetical, the separate consideration of the drainage plan would not be impermissible segmentation, but that was not the case here.¹⁹⁷ Further, had the Town Board concluded that segmenting the environmental review was warranted under the circumstances, the SEQRA regulations required it to “clearly state in its determination of significance . . . the supporting reasons,” to “demonstrate that such review is clearly no less protective of the environment,” and to identify and discuss related actions to the extent possible, but it failed to do so.¹⁹⁸ Thus, the court remitted the matter to the Town Board to either undertake a review considering the entire project, or (if warranted) to make findings pursuant to New York Code of Rules and Regulations title 6, section

190. *Id.* at 17 (citing *Schultz*, 164 A.D.2d at 255, 563 N.Y.S.2d at 879).

191. *Id.* at 17–18.

192. *Id.* at 18.

193. *Green Earth*, 2014 N.Y. Slip Op. 51510(U), at 18.

194. 128 A.D.3d 1067, 1069, 10 N.Y.S.3d 293, 295 (2d Dep’t 2015).

195. *Id.* at 1068, 10 N.Y.S.3d at 295.

196. *Id.*

197. *Id.* at 1068–69, 10 N.Y.S.3d at 205.

198. *Id.* at 1069, 10 N.Y.S.3d at 295 (alterations in original) (quoting N.Y. COMP. CODES R. & REGS. tit. 6, § 617.3(g)(1) (2015)).

617.3(g)(1).¹⁹⁹

The question of whether the separate review of two actions related by contract only constitutes impermissible segmentation was considered in *Residents for Reasonable Development v. City of New York*.²⁰⁰ In *Residents*, the Project Site previously had been occupied by a New York City sanitation garage, which the City planned to rebuild in place.²⁰¹ The City decided to sell the Project Site in 2011 due to lack of funds, and issued a Request for Proposals (RFP) that solicited proposals for “the expansion or creation of a health care, education, or scientific facility” that would finance and build a new sanitation garage at little or no cost to the City.²⁰² The winning bid, from Memorial Hospital for Cancer and Allied Diseases, the City University of New York, and the City University Construction Fund (collectively, “MSK-CUNY”), proposed that the sanitation garage be built in an alternative location, about fifty blocks from the Project Site.²⁰³ The petitioners challenged the proposal, arguing in part that the Final EIS for the Project Site (involving a twin complex housing and educational institution and hospital facility) was required to address the impact of the replacement garage.²⁰⁴ The court disagreed, finding that the two projects were independent, and “contractual contingencies, standing alone, do not create a geographic or environmental interrelationship between two projects.”²⁰⁵ The court dismissed the petition.²⁰⁶

2. Supplementation

SEQRA provides for the preparation of a Supplemental EIS 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.²⁰⁷ Whether issues, impacts, or project details omitted from an initial EIS require preparation of a Supplemental EIS is a frequent subject of litigation.

In *Green Earth*, discussed above, the court considered whether a Supplemental EIS was required to address impacts due to a change in the

199. *J. Owens Bldg. Co.*, 128 A.D.3d at 1069, 10 N.Y.S.3d at 295.

200. No. 101624/13, 2014 N.Y. Slip Op. 51171(U) (Sup. Ct. N.Y. Cty. 2014), *aff'd*, 128 A.D.3d 609, 11 N.Y.S.3d 116 (1st Dep’t 2015).

201. *Id.* at 1.

202. *Id.* at 2.

203. *Id.* at 2, 4.

204. *Id.* at 4.

205. *Residents for Reasonable Dev.*, 2014 N.Y. Slip Op. 51171(U), at 4.

206. *Id.* at 6.

207. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(a)(7) (2015).

project.²⁰⁸ In *Green Earth*, the site plan that underwent SEQRA review differed in several respects from the plan that received final approval.²⁰⁹ The most notable difference was that one area went from being a 1500 square foot deli/coffee shop to a 7000 square foot convenience store with gasoline and diesel fuel sales for motor vehicles.²¹⁰ The Haverstraw Planning Board found that no additional EIS was necessary.²¹¹ The court disagreed, noting that while there is no definition of “substantial change” in the statutes and regulations, the addition of a gasoline service station was a significant one.²¹² Thus, the court held that, “[d]ue to the substantial change in the site plan after the . . . SEQRA review process” was completed, the Haverstraw Planning Board’s “decision to grant final site plan approval without” a Supplemental EIS was arbitrary and capricious.²¹³ It therefore vacated the final site plan approval and remitted the matter to the Planning Board for the preparation of a Supplemental EIS and issuance of a revised Findings Statement.²¹⁴

In *Residents for Sane Trash Solutions, Inc. v. United States Army Corps of Engineers*, the Southern District of New York²¹⁵ considered whether New York City was required to prepare a Supplemental EIS to reflect the Federal Emergency Management Agency’s issuance of preliminary revised flood elevation maps.²¹⁶ The argument for supplementation was set forth by petitioners seeking to prevent the construction of a marine transfer station for the transportation of municipal garbage.²¹⁷ The court upheld the lead agency’s determination, set forth in a Technical Memorandum, that no supplement was needed because the elevation of garbage loading operations would remain above the level subject to flooding during a Category 4 storm.²¹⁸ The City had

208. *Green Earth Farms Rockland L.L.C. v. Town of Haverstraw Planning Bd.*, No. 2465-2012, 2014 NY Slip Op 51510(U), at 8–9 (Sup. Ct. Rockland Cty. 2014).

209. *Id.* at 7.

210. *Id.*

211. *Id.*

212. *Id.* at 15.

213. *Green Earth*, 2014 NY Slip Op 51510(U), at 16–17.

214. *Id.* at 18.

215. While this *Survey* Article focuses on the court’s ruling on the SEQRA claim presented in this matter, the federal court had jurisdiction over this action due to additional claims brought by the petitioners under the Fourteenth Amendment, the National Environmental Policy Act (NEPA) (SEQRA’s federal analogue), and the Clean Water Act. See *Residents for Sane Trash Sols., Inc. v. U.S. Army Corps of Eng’rs*, 31 F. Supp. 3d 571, 575–76 (S.D.N.Y. 2014).

216. *Id.* at 593.

217. *Id.* at 575.

218. *Id.* at 594.

also added additional flood-proofing measures into the project design.²¹⁹

3. *Generic Environmental Impact Statements*

Several cases during the *Survey* period addressed the question of the adequacy of environmental review where the action relied on a prior Programmatic or Generic EIS. In *In Defense of Animals v. Vassar College*, discussed above, the petitioner challenged the DEC's issuance of a nuisance deer permit to Vassar College on the ground that DEC failed to comply with SEQRA.²²⁰ The DEC responded that the permit was issued in accordance with its wildlife game species management program, which was the subject of a 1980 Final Programmatic EIS (now called a Generic EIS) and findings statement, a 1994 supplemental findings statement, and a 1994 declaratory ruling issued by the DEC's general counsel addressing the DEC's authority to issue nuisance deer permits consistent with the 1980 final Generic EIS without further SEQRA review.²²¹ The court agreed with DEC, noting that "[w]hen a final generic EIS has been filed, '[n]o further SEQR compliance is required if a subsequent proposed action will be carried out in conformance with the conditions and thresholds established for such actions in the generic EIS or its findings statement.'" ²²² The court held that DEC's determination that the Vassar permit was consistent with the 1980 Final Generic EIS and that it did not meet any of the criteria in the 1994 Findings Statement requiring a site-specific Supplemental EIS was not arbitrary and capricious, so it affirmed the lower court's dismissal.²²³

The same decision was reached in *Wildlife Preservation Coalition of Long Island v. New York State Department of Environmental Conservation*, wherein the court determined that the DEC's issuance of nuisance deer permits to several towns complied with SEQRA and upheld the DEC's determination that no Supplemental EIS was necessary because "the activities were previously described in the Final Programmatic EIS, did not involve significant departures from established and accepted practice, [and] did not include a substantial change in the authorized uses for land where such change may have a significant environmental impact."²²⁴

Similarly, in two decisions in related actions with the same caption,

219. *Id.* at 594.

220. 121 A.D.3d 991, 991-92, 994 N.Y.S.2d 412, 413 (2d Dep't 2014).

221. *Id.* at 992, 994 N.Y.S.2d at 413.

222. *Id.* at 994, 994 N.Y.S.2d at 415 (quoting N.Y. COMP. CODES R. & REGS. tit. 6, § 617.10(d)(1) (2015)).

223. *Id.*

224. No. 14-8023, 2014 N.Y. Slip Op. 33393(U), at 5 (Sup. Ct. Suffolk Cty. 2014).

Calverton Manor, L.L.C. v. Town of Riverhead, the court found that, where the particular zoning districts at issue were adopted in compliance with the comprehensive plan and the conditions and thresholds established in the Generic EIS for site-specific actions, no further SEQRA review was required, and the Town complied with its SEQRA obligations.²²⁵

4. Coordinated Review

One of the procedural requirements of SEQRA is that, for all Type I actions that involve more than one agency, the lead agency must conduct a coordinated review.²²⁶ Under SEQRA regulations, if the lead agency exercises due diligence, its determination of significance “is binding on all other involved agencies.”²²⁷ A less clearly defined issue is the effect of such a determination of significance on an agency that was not involved in the coordinated review.

In *Troy Sand & Gravel Co., Inc. v. Town of Nassau*, plaintiff Troy Sand and Gravel Company (“Troy Sand”) applied for a mining permit from the DEC, and applied to the Town of Nassau for a special use permit and site plan approval.²²⁸ As lead agency under SEQRA, the DEC issued a positive declaration, Troy Sand prepared an EIS, and DEC ultimately issued its findings statement approving the project and granted the mining permit.²²⁹ Litigation ensued regarding the DEC’s findings (which were upheld) and whether the Town could conduct its own environmental impact review as part of its zoning determination.²³⁰ In this decision, the court held that:

[I]n conducting its own jurisdictional review of the environmental impact of the project, the Town is required by the overall policy goals of SEQRA and the specific regulations governing findings made by “involved agencies” to rely on the fully developed SEQRA record in

225. No. 25551/2004, 2014 N.Y. Slip Op. 31886(U), at 7 (Sup. Ct. Suffolk Cty. 2014); No. 04714/2005, 2014 N.Y. Slip Op. 31883(U), at 6 (Sup. Ct. Suffolk Cty. 2014).

226. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.6(b)(3) (2015). Agencies have the option of conducting a coordinated review for Unlisted Actions, but it is not required. *Id.* § 617.6(b)(4).

227. *Id.* § 617.6(b)(3)(iii) (“If a lead agency exercises due diligence in identifying all other involved agencies and provides written notice of its determination of significance to the identified involved agencies, then no involved agency may later require the preparation of an EAF, a negative declaration or an EIS in connection with the action. The determination of significance issued by the lead agency following coordinated review is binding on all other involved agencies.”). When more than one agency is involved and the lead agency determines that an EIS is required, it must engage in a coordinated review. *Id.* § 617.6(b)(2)(ii).

228. 125 A.D.3d 1170, 1171, 4 N.Y.S.3d 613, 614 (3d Dep’t 2015).

229. *Id.* at 1171, 4 N.Y.S.3d at 615.

230. *Id.* at 1171–72, 4 N.Y.S.3d at 615.

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making the findings that will provide a rationale for its zoning determinations.²³¹

The court explained that, “the review of environmental considerations should be carried out ‘as efficiently as possible.’”²³² The Town was an “involved agency,” and claimed that it was entitled to gather additional information as part of its review of the zoning applications, but “[s]uch a procedure would vitiate the efficiency and coordination goals of SEQRA.”²³³ In short, the Town could make SEQRA findings that differed from the lead agency’s, but it had to rely on the final EIS and could not gather additional information outside the SEQRA record for these findings.²³⁴ In addition, as confirmed in *Lemmon v. Seneca Meadows, Inc.*, an involved agency can comply with its own findings statement requirement by adopting those of the lead agency.²³⁵

IV. NOTABLE ACTIONS TAKEN UNDER SEQRA

On June 29, 2015, DEC issued a Findings Statement concluding seven years of review of high-volume hydraulic fracturing.²³⁶ The Findings Statement was based on the Final SGEIS, released in May 2015,²³⁷ and on the Department of Health’s (DOH) Public Health Review of HVHF, which DEC Commissioner Joseph Martens requested in September 2012 and was completed in December 2014.²³⁸ DOH’s review found that “there are significant uncertainties about the kinds of adverse health outcomes that may be associated with HVHF, the likelihood of the occurrence of adverse health outcomes, and the effectiveness of some of the mitigation measures in reducing or preventing environmental impacts

231. *Id.* at 1172, 4 N.Y.S.3d at 616.

232. *Id.* (citing *Coca-Cola Bottling Co. of N.Y. v. Bd. of Estimate*, 72 N.Y.2d 674, 681, 532 N.E.2d 1261, 1264, 536 N.Y.S.2d 33, 36 (1988)).

233. *Troy Sand & Gravel Co., Inc.*, 125 A.D.3d at 1173, 4 N.Y.S.3d at 616 (citing N.Y. COMP. CODES R. & REGS. tit. 6, § 617.6(b)(3) (2015)).

234. *Id.*

235. No. 48606, 2015 N.Y. Slip Op. 50090(U), at 6–7 (Sup. Ct. Seneca Cty. 2015).

236. N.Y. DEP’T OF ENVTL. CONSERVATION, FINAL SUPPLEMENTAL GENERIC ENVIRONMENTAL IMPACT STATEMENT ON THE OIL, GAS AND SOLUTION MINING REGULATORY PROGRAM: FINDINGS STATEMENT 2 (2015), http://www.dec.ny.gov/docs/materials_minerals_pdf/findingstatehvhf62015.pdf.

237. The 2015 Final SGEIS, Findings Statement, supplemental documents, prior drafts, and scoping session transcripts are available on DEC’s website, at *High Volume Hydraulic Fracturing in NYS*, N.Y. DEP’T ENVTL. CONSERVATION, <http://www.dec.ny.gov/energy/75370.html#2015> (last visited Apr. 21, 2016).

238. N.Y. STATE DEP’T OF HEALTH, A PUBLIC HEALTH REVIEW OF HIGH VOLUME HYDRAULIC FRACTURING FOR SHALE GAS DEVELOPMENT (2014), http://www.health.ny.gov/press/reports/docs/high_volume_hydraulic_fracturing.pdf.

which could adversely affect public health.”²³⁹ In light of the insufficient scientific information available to assess the risk to public health, the DOH concluded that, “[u]ntil the science provides sufficient information to determine the level of risk to public health from HVHF and whether the risks can be adequately managed, HVHF should not proceed in New York State.”²⁴⁰ The Findings Statement similarly concluded that, based on a full and exhaustive evaluation of the environmental impacts of fracking:

In the end, there are no feasible or prudent alternatives that would adequately avoid or minimize adverse environmental impacts and that address the scientific uncertainties and risks to public health from this activity. The Department’s chosen alternative to prohibit high-volume hydraulic fracturing is the best alternative based on the balance between protection of the environment and public health and economic and social considerations.²⁴¹

No major lawsuits challenging the fracking ban were filed within the four month statute of limitations. A single landowner filed suit in May 2015 challenging DEC’s decision to prohibit fracking on his land in Allegheny County, and that litigation is ongoing.²⁴²

CONCLUSION

Case law from the *Survey* period demonstrates that SEQRA continues to present the courts with difficult legal questions related to standing, mootness, and other procedural issues, as well as the adequacy of agencies’ determinations of significance and EISs. These issues will continue to evolve as the courts are presented by new SEQRA challenges. As previously noted, SEQRA practitioners may anticipate DEC’s issuance of a Draft EIS pertaining to its proposal of revisions to the SEQRA regulations, as provided for in the Final Scope issued in 2012. Furthermore, 2016 may see the outcome of the sole challenge to DEC’s fracking ban. These and other developments in the law of SEQRA will be covered in future installments of the *Survey of New York Law*.

239. *Id.* at 12.

240. *Id.*

241. N.Y. DEP’T OF ENVTL. CONSERVATION, *supra* note 236, at 42.

242. Daniel Wiessner, *N.Y. Lawyer Fighting Bid to Relocate First Suit over Fracking Ban*, REUTERS LEGAL (July 9, 2015), <http://www.reuters.com/article/lawsuit-fracking-idUSL1N0ZP2QG20150709>; Evan Dawson, *Connections: Attorney David Morabito on Fracking*, WXXI NEWS (January 21, 2016, 7:43 PM), <http://wxxinews.org/post/connections-attorney-david-morabito-fracking>.