ENVIRONMENTAL LAW: DEVELOPMENTS IN THE LAW OF SEQRA

Mark A. Chertok & Jonathan Kalmuss-Katz†

CONTENTS

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 2011-2012.[1] For the first time since 2009,[2] the Court of Appeals decided two SEQRA cases in a single year, affirming the environmental review for the rezoning of the Sunset Park neighborhood in

† Mark A. Chertok is a partner, and Jonathan Kalmuss-Katz an associate, at Sive, Paget & Riesel, P.C., in New York, NY (www.sprlaw.com). Both authors practice environmental law at the firm.

1. The *Survey* period covered in this Article is July 1, 2011 to June 30, 2012. A prior *Survey* addresses SEQRA developments in the first half of 2011. *See generally* Mark A. Chertok & Jonathan Kalmuss-Katz, *Environmental Law, 2010-11 Survey of New York Law*, 62 SYRACUSE L. REV. 661 (2011).

2. *See generally* Save the Pine Bush, Inc. v. Common Council of Albany, 13 N.Y.3d 297, 918 N.E.2d 917, 890 N.Y.S.2d 405 (2009); Anderson v. Town of Chili Planning Bd., 12 N.Y.3d 901, 913 N.E.2d 407, 885 N.Y.S.2d 21 (2009).

Brooklyn[3] and remanding the analysis of a public school campus in the Bronx back to the School Construction Authority for supplemental review.[4] In addition, a number of appellate division and supreme court decisions over the *Survey* period have updated and clarified critical issues for SEQRA practitioners, including standing requirements, the support required for the threshold determination of a project's environmental significance, the "hard look" standard applied to a lead agency's SEQRA review, and more.[5]

In addition, in 2012 the New York State Department of Environmental Conservation ("DEC"), which promulgates the regulations for SEQRA (although other agencies may adopt their own, non-conflicting provisions), began the process of amending its SEQRA regulations, the first major regulatory changes since 1996. The forthcoming regulations, which will be subject to their own SEQRA review over the coming year, are based upon DEC's outreach to SEQRA practitioners and other stakeholders. They are intended to streamline the environmental analysis for many types of actions, subject others to increased government scrutiny, and codify recent developments and trends in SEQRA practice.

Part I of this Article provides a brief overview of SEQRA's statutory and regulatory requirements. Part II describes how DEC's forthcoming proposed regulatory changes are anticipated to affect SEQRA practice, and the rationale provided for such changes. Part III analyzes the Court of Appeals' two recent SEQRA decisions and their impact on SEQRA practice. Finally, Part IV discusses other developments in SEQRA case law over the *Survey* period, from the appellate divisions and supreme courts.

I. SUMMARY OVERVIEW OF SEQRA

SEQRA requires governmental agencies to consider the potential environmental impacts of their actions prior to rendering certain defined discretionary decisions, called "actions," under SEQRA.[6] "The primary

3. Chinese Staff & Workers' Ass'n v. Burden, 19 N.Y.3d 922, 924, 973 N.E.2d 1277, 1280, 950 N.Y.S.2d 503, 506 (2012).

4. Bronx Comm. for Toxic Free Sch. v. N.Y.C. Sch. Constr. Auth., 20 N.Y.3d 148, 156, 981 N.E.2d 766, 778, 958 N.Y.S.2d 65, 77 (2012). While the *Bronx Committee* appeal was decided outside the *Survey* period, it follows up on a discussion in the prior annual *Survey* and is thus included in this year's Article, as opposed to waiting for 2014.

5. *See infra* Point IV.

6. SEQRA is codified at Environmental Conservation Law sections 8-0101 to 8-0117. *See generally* N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 2005); *see also*

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

Actions are grouped into three categories in the SEQRA regulations: Type I, Type II, or Unlisted.[10] 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 are not subject to review under SEQRA.[11] Type I actions, also specifically enumerated, "are more likely to require the preparation of an EIS than Unlisted actions."[12] Unlisted Actions are not enumerated, but rather are a catchall of those actions that are neither Type I nor Type II.[13] In practice, the vast majority of actions are Unlisted.

Before undertaking an action (except for a Type II action), an

Mark A. Chertok & Ashley S. Miller, *Environmental Law*, *2007-08 Survey of New York Law*, 59 SYRACUSE L. REV. 763, 764-65 (2009).

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

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

9. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(b)(1)-(2), (5) (1995).

10. *Id.* § 617.2(ai)-(ak).

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

12. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.4(a) (2000) (Type I actions). This presumption may be overcome, however, if an Environmental Assessment demonstrates the absence of significant, adverse environmental impacts. 6 NYCRR 617.4(a)(1); *see, e.g.*, Hells Kitchen Neighborhood Ass'n v. City of New York, 81 A.D.3d 460, 461-62, 915 N.Y.S.2d 565, 567 (1st Dep't 2011) ("[W]hile Type I projects are presumed to require an EIS, an EIS is not required when, as here, following the preparation of a comprehensive Environmental Assessment Statement (EAS), the lead agency establishes that the project is not likely to result in significant environmental impacts or that any adverse environmental impacts will not be significant.").

13. 6 NYCRR 617.2(ak).

agency must determine whether the proposed action may have one or more significant adverse environmental impacts, called a "determination of significance."[14] 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.[15] 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.[16] 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.[17]

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.[18] Scoping involves focusing the EIS on relevant areas of environmental concern, generally though 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.[19] 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.[20] Although not required, the lead agency typically holds a legislative hearing with respect to the Draft EIS.[21] That hearing is often

14. *See id.* § 617.7; N.Y. COMP. CODES R. & REGS. tit. 6, § 617.6(a)(1)(i) (1995).

15. 6 NYCRR 617.6(b)(2)(i), (3)(ii).

16. *Id.* § 617.7(a)(2), (d).

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

18. DIV. ENVTL. PERMITS, N.Y. DEP'T ENVTL. CONSERVATION, THE SEQR HANDBOOK 102-03 (3d ed. 2010), *available at* http://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf [hereinafter SEQR HANDBOOK]. Scoping, when it occurs, is governed by N.Y. COMP. CODES R. & REGS. tit. 6, § 617.8 (1995). SEQR is an alternate acronym for SEQRA. *Id.* § 618.

19. 6 NYCRR 617.8(a).

20. *Id.* § 617.8(b), (d), (e).

21. *Id.* § 617.9(a)(4).

combined with other hearings required for the proposed action.[22]

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."[23] This analysis includes a "no action alternative," which evaluates the changes that are likely to occur in the absence of the proposed action.[24]

In addition to "analyz[ing] the significant adverse impacts and evaluat[ing] all reasonable alternatives,"[25] the Draft EIS should include,

> where applicable and significant:
>
> (a) reasonably related short-term and long-term impacts, cumulative impacts and other associated environmental impacts;
>
> (b) those adverse environmental impacts that cannot be avoided or adequately mitigated if the proposed action is implemented;
>
> (c) any irreversible and 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 . . . .[26]

The next step is the preparation of a Final Environmental Impact Statement ("FEIS"), which addresses any project changes, new information and/or changes in circumstances, and responds to all substantive comments on the Draft EIS.[27] After preparation of the FEIS, and prior to undertaking or approving an action, each acting agency must issue findings that the provisions of SEQRA and the DEC

22. N.Y. COMP. CODE R. & REGS. tit. 6, § 617.3(h) (2000).

23. *Id.* § 617.9(b)(5)(v).

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

25. 6 NYCRR 617.9(b)(1).

26. *Id.* § 617.9(b)(5)(iii)(a)-(f).

27. *Id.* § 617.9(viii)(8).

implementing regulations have been met and, "consider[ing] the relevant environmental impacts, facts and conclusions disclosed in the final EIS," must "weigh and balance relevant environmental impacts with social, economic and other considerations . . . ."[28] 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.[29]

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.[30]

II. REGULATORY DEVELOPMENTS

A. DEC Scope for Proposed Amendments to SEQRA Regulations

In July 2012, following a series of meetings with SEQRA practitioners and other stakeholders, DEC released the Draft Scope for the Generic Environmental Impact Statement Proposed Amendments to SEQRA.[31] As noted earlier, a scoping document is used under SEQRA to identify the range of potentially significant impacts that will be assessed in a Draft EIS.[32] The Draft Scope for the SEQRA regulatory

28. N.Y. COMP CODES R. & REGS. tit. 6, § 617.11(a), (d)(1)-(2) (2012).

29. *Id.* § 617.11(d)(5).

30. 42 U.S.C. §§ 4321-4370(f) (2006); *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) (citing Phillip H. Gitlen, *The Substantive Impact of the SEQRA*, 46 ALB. L. REV. 1241, 1248 (1982)).

31. DIV. ENVTL. PERMITS & POLLUTION PREVENTION, N.Y. DEP'T ENVTL. CONSERVATION, DRAFT SCOPE FOR THE GENERIC ENVIRONMENTAL IMPACT STATEMENT (GEIS) ON PROPOSED AMENDMENTS TO THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (July 11, 2012), *available at* http://www.dec.ny.gov/docs/permits_ej_operations_pdf/drftscope617.pdf [hereinafter DRAFT SCOPE]. DEC finalized this scoping document, without material revisions, in November 2012. DIV. ENVTL. PERMITS & POLLUTION PREVENTION, N.Y. DEP'T ENVTL. CONSERVATION, FINAL SCOPE FOR THE GENERIC ENVIRONMENTAL IMPACT STATEMENT (GEIS) ON PROPOSED AMENDMENTS TO THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (November 28, 2012), *available at* http://www.dec.ny.gov/docs/permits_ej_operations_pdf/617finalscope.pdf [hereinafter FINAL SCOPE].

32. SEQRA HANDBOOK, *supra* note 18, at 102.

changes thus identifies, and solicits public comment on, the anticipated content of a forthcoming Generic Environmental Impact Statement on DEC's regulatory revisions.

DEC characterizes its upcoming amendments as an attempt to "streamline the SEQR[A] process without sacrificing meaningful environmental review."[33] Toward that end, DEC "proposes to broaden the list of [Type II] actions that will not require review under SEQRA . . . allow[ing] agencies to focus their time and resources on those projects likely to have significant adverse impacts on the environment . . . and encourag[ing] environmentally compatible development."[34] The new Type II actions include:

Reuse of commercial or residential structures that (a) do not requiring a change in zoning, (b) do not require a variance and (c) do not exceed certain size thresholds, in order to promote the development of vacant structures;

- Infill development of certain sites that had been previously disturbed and already have infrastructure connections;
- Lot line adjustments and area variances not involving a change in allowable density;
- Minor subdivisions that do not involve the construction of new roads, water infrastructure, or sewer infrastructure,
- Installation of rooftop solar arrays or solar arrays of less than 25 megawatts on closed landfills;
- Installation of "green infrastructure" (e.g., green roofs) during repair, replacement or reconstruction activities.[35]

In addition to expanding the Type II list, DEC is also considering a number of revisions to the list of Type I activities that presumptively require the preparation of an EIS.[36] These changes include reductions in the Type I threshold for residential projects, so smaller developments would be more likely to trigger Type I scrutiny.[37] The residential units thresholds vary based upon the size of the municipality, but DEC has found that the existing levels are rarely triggered "because they were set too high in 1978" and have not been changed since.[38]

33. DRAFT SCOPE, *supra* note 31, at 1.

34. *Id.* at 4.

35. *See id.* at 4-5. "Green infrastructure" is not defined in the Draft Scope, but would be defined in the forthcoming regulatory changes.

36. *Id.* at 3-4.

37. *Id.*

38. DRAFT SCOPE, *supra* note 31, at 3.

DEC is also proposing revisions to the current Type I classifications for all Unlisted Actions that occur within or contiguous to a site on the National or State Register of Historic Places. The new regulations would exclude minor actions that do not exceed 25% of Type I size thresholds, thereby exempting minor alternations to historic properties and contiguous sites, but would also enlarge the Type I list to include sites proposed for historic listing.[39]

The revised SEQRA regulations would make scoping required for all EISs.[40] Scoping is currently voluntary under SEQRA, but it has become fairly standard practice and is required for projects in New York City under the parallel City Environmental Quality Review ("CEQR") process.[41] Since the Draft Scope of an EIS must be made available for public comment, mandatory scoping has the potential to "ensure that . . . substantive issues are identified prior to the preparation of the draft EIS."[42]

DEC also intends to propose changes in the timeframes provided for completion of SEQRA review. SEQRA regulations currently require a FEIS to be prepared and filed within forty-five days from the close of hearings or sixty days from the filing of the DEIS,[43] but these timeframes are generally viewed as directory as opposed to mandatory, and the regulations provide for an extension "if it is determined that additional time is necessary to prepare the statement adequately."[44] The revised regulations would require an FEIS to be filed within 180 days of the filing of the DEIS.[45] If no FEIS is filed by the deadline, "the EIS shall be deemed complete on the basis of the draft EIS, public comment and the response to comments prepared and submitted by the project sponsor to the lead agency."[46]

These proposed changes could address concerns faced by project applicants like Costco Wholesale Corp., which submitted three different

39. DRAFT SCOPE, *supra* note 31, at 4.

40. *Id.* at 5.

41. *See* R. CITY N.Y. tit. 62, § 5-07 (1991).

42. DRAFT SCOPE, *supra* note 31, at 5-6.

43. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(a)(5) (1995).

44. *Id.* § 617.9(a)(5)(ii); *see also* DRAFT SCOPE, *supra* note 31, at 7 ("Rarely, if ever, are these timeframes met."); Mattocks v. Town Bd. of Amherst, No. 5615-95, 1996 N.Y. Misc. LEXIS 66, at *29-30 (Sup. Ct. Erie Cnty. 1996) ("[T]ime limits for SEQRA review are directory, not mandatory . . . , and can be excused if there is a reasonable explanation for the delay." (quoting Omabuild USA No. 1 v. State, 207 A.D.2d 335, 335, 615 N.Y.S.2d 424, 425 (2d Dep't 1994)) (internal quotation marks omitted))).

45. DRAFT SCOPE, *supra* note 31, at 7.

46. *Id.*

versions of an FEIS for a new store to the Town Board of Oyster Bay over a period of almost two years without any of them being accepted and filed.[47] More than a decade after Costco's initial application, the Appellate Division, Second Department, recently affirmed the supreme court's mandamus order directing the Town to issue the FEIS and reach a decision on the special use permit and site plan applications.[48]

Finally, DEC has proposed regulatory changes designed to "provide clearer language on the ability to target an EIS."[49] These revisions, which state that EISs should be "only focused on relevant, significant, adverse impacts," are intended to counter "the defensive approach agencies and project sponsors take in developing the EIS record. In pursuit of the 'bullet proof EIS' the tendency is to include the information even though the environmental assessment has already concluded that the issue is not substantive or significant."[50]

Despite undeniable appeal from a public policy perspective, particularly given the voluminous length of many current EISs, DEC's ability to promote "targeted EISs" via regulation alone may be limited. While only a potentially significant effect on the environment will trigger SEQRA's requirement to prepare an EIS,[51] once that threshold is crossed, the statute requires the EIS to set forth, inter alia, "the environmental impact of the proposed action" and "*any* adverse environmental effects which cannot be avoided should the proposal be implemented."[52] Thus, the statute appears to contemplate at least some consideration of even nonsignificant environmental impacts. Courts have held that such consideration is bounded by a "rule of reason,"[53] however, and the statute also provides that an EIS "should not contain more detail than is appropriate considering the nature and magnitude of the proposed action and the significance of its potential impacts."[54] The extent to which discussion of non-significant impacts can be minimized or avoided altogether may be addressed by DEC's forthcoming regulations, but ultimately will likely be decided by the courts.

47. Costco Wholesale Corp. v. Town Bd. of Oyster Bay, 90 A.D.3d 657, 658, 934 N.Y.S.2d 430, 432 (2d Dep't 2011).

48. *Id.* at 658, 934 N.Y.S.2d at 431.

49. DRAFT SCOPE, *supra* note 31, at 6.

50. *Id.*

51. N.Y. ENVTL. CONSERV. LAW § 8-0109(2) (McKinney 2005).

52. *Id.* § 8-0109(2)(b)-(c) (emphasis added).

53. Neville v. Koch, 79 N.Y.2d 416, 425, 593 N.E.2d 256, 260, 583 N.Y.S.2d 802, 807 (1992) (internal quotation marks omitted).

54. N.Y. E.C.L. § 8-0109(2)(j).

III. SEQRA IN THE COURT OF APPEALS

A. Chinese Staff & Workers' Association v. Burden

The first SEQRA case to come before the Court of Appeals in 2012 involved the rezoning of a 128-block area in the Sunset Park neighborhood of Brooklyn.[55] While rezoning of more than twenty-five acres is a Type I action under the SEQRA regulations that "carries with it the presumption that it is likely to have a significant adverse impact on the environment,"[56] in this case the New York City Department of City Planning ("DCP") prepared an Environmental Assessment Statement ("EAS")[57] analyzing the rezoning and concluded that no such impacts were likely.[58] On the basis of that assessment, DCP issued a negative declaration, and the rezoning was approved without a full EIS.[59]

A community organization with offices in Sunset Park, five churches with congregants in Sunset Park, and two local residents challenged the approvals, claiming that the EAS was flawed and additional SEQRA review was required.[60] Specifically, in challenging the City's finding of no significant residential displacement or impacts on community character, Petitioners claimed that the EAS had improperly "failed to consider lots under 5,000 square feet as targets for development" and overlooked the potential redevelopment of buildings with more than six residential units.[61]

The City Respondents submitted expert affidavits defending both of those exclusions, explaining that, due to other zoning restrictions, lots under 5,000 square feet are rarely able to take advantage of their full development potential, and that the residential buildings were covered

55. Chinese Staff & Workers' Ass'n v. Burden, 88 A.D.3d 425, 427-28, 932 N.Y.S.2d 1, 2-3 (1st Dep't 2011), *aff'd*, 19 N.Y.3d 922, 923, 973 N.E.2d 1277, 1279, 950 N.Y.S.2d 503, 505 (2012).

56. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.4(a)(1) (2000). As the First Department recently clarified, however, an activity's coverage under multiple Type I categories does not heighten the presumption that an EIS is required. *See* Hells Kitchen Neighborhood Ass'n v. City of New York, 81 A.D.3d 460, 461, 915 N.Y.S.2d 565, 567 (1st Dep't 2011) ("There is no basis . . . for [the] argument that a project that falls into multiple Type I categories requires some sort of heightened scrutiny or that there is a greater presumption that an environmental impact statement (EIS) is required.").

57. The EAS is the New York City equivalent of the Environmental Assessment Form ("EAF") used by most agencies not subject to CEQR.

58. *Chinese Staff & Workers' Ass'n*, 88 A.D.3d at 428, 932 N.Y.S.2d at 2.

59. *Id.*

60. Chinese Staff & Workers' Ass'n v. Burden, No. 111575/09, 2010 NY Slip Op. 50804(U), at 3, 6 (Sup. Ct. N.Y. Cnty. 2010).

61. *Id.* at 6-7.

by rent regulations and thus difficult to demolish or redevelop.[62] In response to Petitioners' claims that "the rezoning will allow for more opportunities for market-rate development, thereby increasing rental prices and accelerating displacement of low-income tenants," the Respondents emphasized the expansion of the City's Inclusionary Housing Program ("IHP") to the rezoned neighborhood, which offers additional density bonuses in exchange for a provision of 20% affordable housing.[63]

The supreme court denied Petitioners' challenge, holding:

> [R]espondents, through the EAS and supporting documentation, including affidavits by those intimately involved in the project, have adequately demonstrated that DCP identified the relevant areas of environmental concern, took a hard look at them, and made a reasonable elaboration of the basis for the negative declaration. Thus, to grant the petition, the court would be impermissibly . . . resolving disagreements among experts, and substituting its judgment for that of the agency.[64]

In September 2011, the First Department affirmed the denial of the petition in a split, 3-2 decision.[65] The primary area of contention between the majority and dissent, however, was not the significance of potential impacts, but whether the affirmations submitted by the City Respondents explaining the assumptions used in the EAS were properly before the court.[66] The dissent argued that the adequacy of Respondents' SEQRA review had to be determined on the basis of the EAS alone, and not the "post hoc explanation" provided in response to the lawsuit.[67] It concluded that "the EAS, standing on its own without benefit of the supplemental submissions . . . does not set forth a reasoned elaboration of DCP's determinations and fundamental assumptions."[68]

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62. *Id.*

63. *Id.* at 8.

64. *Id.* (citing Fisher v. Giuliani, 280 A.D.2d 13, 19-20, 720 N.Y.S.2d 50, 54 (1st Dep't 2001)).

65. Chinese Staff & Workers' Ass'n v. Burden, 88 A.D.3d 425, 428, 441, 932 N.Y.S.2d 1, 2-3, 11 (1st Dep't 2011), *aff'd*, 19 N.Y.3d 922, 923, 973 N.E.2d 1277, 1279, 950 N.Y.S.2d 503, 505 (2012).

66. *Id.* at 433, 932 N.Y.S.2d at 6.

67. *Id.* at 439, 932 N.Y.S.2d at 10.

68. *Id.* at 440, 932 N.Y.S.2d at 11. The dissent also argued that the supreme court had mistakenly believed the provision of affordable housing under the IHP to be mandatory, when it is actually a voluntary program that provides zoning incentives for participation therein. *Id.* at 441, 932 N.Y.S.2d at 11. The majority found that "a review of the order and

The majority, on the other hand, held that the EAS provided ample support for the City Respondent's negative declaration, and that "speculative" development scenarios set forth in the petition were not required to be analyzed under SEQRA.[69] The majority relied upon the full appellate record—including DCP's affidavits—in reaching its decision, finding that "DCP could rely on the supplemental affidavits to explain the analyses and assumptions set forth in the EAS in response to the specific critiques petitioners raised in this proceeding."[70]

Because of the 3-2 split, the challengers were entitled to an appeal as of right to the Court of Appeals, as opposed to having to move for leave of the Court.[71] The Court of Appeals, however, did not address the disputes that had divided the intermediate court.[72] Instead, after reiterating the deferential standard of review under SEQRA, it held, without additional explanation that "[i]n its EAS, DCP identified the relevant areas of environmental concern, took a hard look at them and made a reasoned elaboration of the basis for its determination."[73] The Court thus avoided reaching the issue of whether the supplemental affidavits could be submitted to support the agency's determination under SEQRA, leaving the First Department's majority opinion with the final word on that issue.[74]

B. Bronx Committee for Toxic Free Schools v. New York City School Construction Authority

Lower court opinions in the *Bronx Committee for Toxic Free Schools* ("*Bronx Committee*") litigation have been analyzed in prior *Surveys* of New York Environmental Law, following earlier decisions in the Bronx County Supreme Court and Appellate Division, First Department.[75] The necessary regulatory and factual background is

judgment on appeal demonstrates that the court understood that the program provided a developer with a FAR bonus in exchange for providing affordable housing, and that the program was optional." *Chinese Staff & Workers' Ass'n*, 88 A.D.3d at 435, 932 N.Y.S.2d at 7-8.

69. *Id.*, 88 A.D.3d at 433, 932 N.Y.S.2d at 6 (citing Real Estate Bd. of N.Y., Inc. v. City of New York, 157 A.D.2d 361, 364, 556 N.Y.S.2d 853, 854 (1st Dep't 1990)).

70. *Chinese Staff & Workers' Ass'n*, 88 A.D.3d at 433, 932 N.Y.S.2d at 6 (citing Greenberg v. City of New York, 2007 N.Y. Misc. LEXIS 8579, at *18-19 (Sup. Ct. N.Y. Cnty. 2007)).

71. N.Y. C.P.L.R. 5601(a) (McKinney 1995).

72. *See generally* Chinese Staff & Workers' Ass'n v. Burden, 19 N.Y.3d 922, 973 N.E.2d 1277, 950 N.Y.S.2d 503 (2012).

73. *Id.* at 924, 973 N.E.2d at 1280, 950 N.Y.S.2d at 506 (2012).

74. See generally id.

75. *See* Chertok & Kalmuss-Katz, *supra* note 1, at 671-75; *see also* Mark A. Chertok

briefly summarized below, to provide context for the recent Court of Appeals opinion.

The New York Brownfield Cleanup Program was enacted in 2003 "to encourage persons to voluntarily remediate brownfield sites for reuse and redevelopment," through a combination of tax credits and liability protections.[76] Remediation of BCP sites generally begins with a remedial investigation ("RI") that samples and analyzes the contamination on site, a remedial investigation report that sets forth the results of the RI, and a remedial action work plan ("RAWP") that sets the parameters of the proposed cleanup.[77]

At a typical brownfield site, however, not all of the contamination is removed or treated during the remediation process. Instead, long-term engineering controls ("ECs") and institutional controls ("ICs") are imposed in order to prevent exposure to any residual contamination that remains on site.[78] These controls can include physical barriers to prevent the migration of contamination, limitations on the future use of the property, and/or ground water use restrictions.[79] The use of ECs or ICs requires the preparation of a Site Management Plan ("SMP"), which sets forth, inter alia, the maintenance and monitoring obligations relating to those continuing controls.[80]

Bronx Committee arose as a challenge to the New York City School Construction Authority's ("SCA") remediation of a 6.6-acre site for use as public schools, athletic fields, and open space.[81] The northwestern part of the site was accepted into the Brownfield Cleanup Program ("BCP"), and the RAWP provided for a cap to prevent contact with residual contamination, a hydraulic barrier to prevent contaminated groundwater from entering the site, a vapor barrier and sub-slab depressurization system to prevent infiltration of contaminated soil

& Ashley S. Miller, *Environmental Law, 2008-09 Survey of New York Law*, 60 SYRACUSE L. REV. 925, 935-39 (2010).

76. N.Y. ENVTL. CONSERV. LAW § 27-1403 (McKinney 2007).

77. *See* N.Y. COMP. CODES R. & REGS. tit. 6, § 375-3.8(b)(3) (2006).

78. U.S. ENVTL. PROT. AGENCY, OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, ENGINEERING CONTROLS ON BROWNFIELDS INFORMATION GUIDE: HOW THEY WORK WITH INSTITUTIONAL CONTROLS; THE MOST COMMON TYPES USED; AND AN INTRODUCTION TO COSTS (2010), *available at* http://www.epa.gov/swerosps/bf/tools/ec_information_guide.pdf.

79. *See* N.Y. ENVTL. CONSERV. LAW § 27-1415(5).

80. N.Y. STATE DEP'T OF ENVTL. CONSERVATION, SITE MANAGEMENT PLAN (SMP) CHECKLIST FOR BCP, ERP, SSF, AND VCP SITES (2010), *available at* http://www.dec.ny.gov/docs/remediation_hudson_pdf/smptemplate.pdf.

81. Bronx Comm. for Toxic Free Sch. v. N.Y.C. Sch. Constr. Auth., No. 13800/07, at 2 (Sup. Ct. Bronx Cnty. 2008) (on file with authors).

vapor into the overlying buildings, and other ECs/ICs.[82] These controls would require continued monitoring under the BCP to ensure their effectiveness, but the RAWP did not detail those long-term monitoring or maintenance plans because the SCA "believed a choice of maintenance and monitoring methods . . . would be premature . . . [until] after cleanup work has been done, and the post-cleanup soil and groundwater conditions can be assessed."[83]

Following approval of a RAWP, but before the completion of remediation or preparation of an SMP, the SCA began review of its cleanup and redevelopment plans under SEQRA.[84] An FEIS was published in 2009, which described the remedial measures to be undertaken and the anticipated ECs/ICs, but did not set forth the long-term maintenance and monitoring plans for those ongoing controls.[85] Bronx Committee for Toxic Free Schools and other Petitioners challenged the SCA's SEQRA review, alleging that the EIS was inadequate because it lacked a complete description of the "long-term maintenance and monitoring plan and/or objectives for the Site."[86] While the case was pending in Bronx County Supreme Court, the SCA released—for eventual public comment under the BCP—a proposed SMP which outlined the monitoring and maintenance requirements for the ECs and ICs described in the RAWP and EIS.[87]

The supreme court held that this later-arising, proposed SMP did not excuse the requirement to analyze the monitoring and maintenance requirements as part of the SEQRA review process. It thus ordered the SCA to prepare a Supplemental Environmental Impact Statement ("SEIS") "that details a plan for long-term maintenance and monitoring."[88]

In a 2011 decision, the First Department affirmed the lower court upon appeal.[89] Notwithstanding SCA's arguments that decisions regarding maintenance and monitoring requirements are best informed by the completion of remediation and post-remedial testing, the court held "it was impermissible for SCA to omit a known remediation issue from the EIS

82. *Id.* at 7-8.

83. Bronx Comm. for Toxic Free Sch. v. N.Y.C. Sch. Constr. Auth., No. 171, 2012 NY Slip Op. 07051, at 3 (2012).

84. *Bronx Comm. for Toxic Free Sch.*, No. 13800/07, at 8-9.

85. *Id.* at 13-14.

86. *Id.* at 13.

87. *Id.* at 14.

88. *Id.* at 17.

89. Bronx Comm. for Toxic Free Sch. v. N.Y.C. Sch. Constr. Auth., 86 A.D.3d 401, 402, 927 N.Y.S.2d 45, 46 (1st Dep't 2011) (citation omitted).

with the idea of taking up that issue at a later date."[90] The court concluded "it is evident that information about long-term monitoring measures was of sufficient 'importance and relevance' to warrant the preparation of a supplemental EIS."[91]

This decision raised a number of concerns among SEQRA practitioners, particularly as it related to future BCP projects. First, SEISs are only required to address "specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS."[92] In ordering SCA to prepare an SEIS without first finding any new or inadequately addressed environmental impacts, the decision raised concerns that other types of changed circumstances or new information could also trigger supplementation requirements, without a prior analysis of their environmental impact.

Moreover, the Court of Appeals had previously affirmed lead agencies' "broad discretion" to determine whether an SEIS should be prepared, which it described as an inherently "fact-intensive" inquiry.[93] Instead of remanding the case to SCA to assess the need for an SEIS in light of its decision, however, the First Department affirmed the supreme court's order that an SEIS be prepared.[94]

Finally, the First Department's decision created a potential catch-22 for developers. Under SEQRA, project approvals cannot be granted until the environmental review process is complete.[95] If the SEQRA process cannot be completed until the preparation of an SMP that outlines long-term maintenance and monitoring, then developers will be required to conduct expensive and time-consuming remediation without ever knowing if the development for which the remediation is being conducted will be approved. This sequencing is also inefficient, as remedial activities (e.g., excavation of contaminated soil) and ECs (e.g., vapor barriers attached to a building's foundation) often overlap with proposed construction activities that can only be undertaken after approval of an EIS.

While affirming the First Department, the Court of Appeals also

90. *Id.* at 403, 927 N.Y.S.2d at 47.

91. *Id.* at 402, 927 N.Y.S.2d at 46 (citing N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(a)(7)(ii)(a) (1995)).

92. 6 NYCRR 617.9(a)(7)(i).

93. Riverkeeper v. Planning Bd. of Se., 9 N.Y.3d 219, 231, 881 N.E.2d 172, 176, 851 N.Y.S.2d 76, 80 (2007).

94. *Bronx Comm. for Toxic Free Sch.*, 86 A.D.3d at 403, 927 N.Y.S.2d at 47.

95. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.3(a) (2000) ("No agency involved in an action may undertake, fund or approve the action until it has complied with the provisions of SEQR.").

addressed many of the concerns raised by the breadth of the lower courts' *Bronx Committee* decisions. First, the Court of Appeals "assume[d], without deciding, that the [SCA] acted reasonably in postponing a detailed consideration of its long-term maintenance and monitoring measures until after it had completed cleanup work at the site and after its EIS was filed."[96] Thus, the Court indicated that project approvals could be issued based upon an EIS issued prior to site remediation, as long as long-term monitoring and maintenance were subsequently considered under SEQRA.[97]

Second, the Court found that "[i]f the [SCA] had addressed long-term maintenance and monitoring in the draft RAWP, which was subject to public review and comment as part of the formal BCP citizen participation program, there presumably would have been no need to cover the same topic separately in the draft EIS."[98] While the SCA determined that "inclusion of [maintenance and monitoring] details in the draft RAWP was premature," BCP regulations require at least the description of maintenance and monitoring plans in a RAWP,[99] and in other cases it may be possible to include sufficient detail at that stage to satisfy SEQRA's hard look requirement.

Finally, the Court affirmed, stating: "[w]e do not view this case as a dispute over . . . whether events occurring after the EIS was filed were significant enough to call for a supplement. If [that was] the issue[], we would defer to any reasonable judgment made by the Authority."[100] In *Bronx Committee*, the SCA did not dispute that its maintenance and monitoring plans were "essential" to protecting the site's occupants from potential contamination.[101] In future cases, however, an agency—if not able to describe the monitoring and maintenance provisions in the EIS—may be able to consider the environmental significance of monitoring and maintenance in a Supplemental Environmental Assessment or Technical

96. Bronx Comm. for Toxic Free Sch. v. N.Y.C. Sch. Constr. Auth., 20 N.Y.3d 148, 156, 981 N.E.2d 766, 774, 958 N.Y.S.2d 65, 73 (2012).

97. *See id.*

98. *Id.*

99. N.Y. COMP. CODES R. & REGS. tit. 6, § 375-3.8(g)(3)(vi) (2006) (requiring work plan to include an alternatives analysis that contains, inter alia, "an evaluation of the reliability and viability of the long-term implementation, maintenance, monitoring, and enforcement of any proposed institutional or engineering controls. ").

100. *Bronx Comm. for Toxic Free Sch.*, 2012 NY Slip Op. 07051, at 5 (citing Eadie v. Town Bd. of N. Greenbush, 7 N.Y.3d 306, 318-19, 854 N.E.2d 464, 470-71, 854 N.Y.S.2d 142, 148 (2006); Webster Assocs. v. Town of Webster, 59 N.Y.2d 220, 227-29, 451 N.E.2d 189, 191-92, 464 N.Y.S.2d 431, 433-34 (1983)).

101. *Bronx Comm. for Toxic Free Sch*., 2012 NY Slip Op. 07051, at 5.

Memorandum, as opposed to a full SEIS.

IV. SEQRA IN THE LOWER AND INTERMEDIATE COURTS

A. Standing Under SEQRA

A number of cases decided during the *Survey* period address the issue of standing under SEQRA, particularly as it relates to neighboring property owners. In addition to generally applicable standing requirements, Petitioners under SEQRA must establish injury that is (a) within the zone of interests sought to be promoted by the statute, and (b) different from harm to the public at large.[102]

In *Cade v. Stapf*, the Third Department affirmed the long-standing rule that proximity to the site of the proposed action gives rise to a presumption of harm under SEQRA.[103] *Cade* involved a resident's challenge to the environmental review of a subdivision application for a neighboring parcel.[104] The supreme court held that the Petitioner's proximity to the project site and "his view of the proposed water tower located 400 feet from his house" supported his standing to challenge the failure to consider the project's visual impacts from his property.[105] The lower court denied Petitioner's standing, however, to challenge the Planning Board's alleged failure to consider other visual impacts from more distant viewpoints.[106]

The Third Department reversed on that latter point, holding that Petitioner's standing to challenge the project's SEQRA review "gives him a significant interest in having all of the mandates of SEQRA enforced."[107] Thus, if a Petitioner has suffered an injury that gives rise to standing under SEQRA, he or she has standing to challenge any and all violations of SEQRA, and not merely those that give rise to his or her particular harm.[108]

The presumption of harm from proximity to the project site is

102. Save the Pine Bush, Inc. v. Common Council of Albany, 13 N.Y.3d 297, 308-09, 918 N.E.2d 917, 924, 890 N.Y.S.2d 405, 412 (2009) (Pigott, J., concurring) (quoting Soc'y of Plastics Indus., Inc. v. Cnty. of Suffolk, 77 N.Y.2d 761, 772-73, 573 N.E.2d 1034, 1040-41, 570 N.Y.S.2d 778, 784-85 (1991)).

103. *See generally* 91 A.D.3d 1229, 937 N.Y.S.2d 673 (3d Dep't 2012).

104. *Id.* at 1230, 937 N.Y.S.2d at 675.

105. *Id.* (citations omitted).

106. *Id.*

107. *Id.*

108. *Cade*, 91 A.D.3d at 1230-31, 937 N.Y.S.2d at 675 (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)).

rebuttable, however, as demonstrated in *Tuxedo Land Trust, Inc. v. Town of Tuxedo*.[109] In that case, which is currently on appeal, a coalition of homeowners and nonprofit organizations challenged amendments to land use permits and development approvals for a planned community of 1,200 residential units and over 100,000 square feet of nonresidential development in Tuxedo, New York.[110] While the Town Board prepared an SEIS for the amendments, Petitioners alleged that the supplemental analysis did not comply with SEQRA.[111]

The supreme court acknowledged the presumption that "[p]ersons or entities whose properties are in close proximity to the site of the project to which the administrative action or noncompliance relates . . . are adversely affected by the alleged SEQRA violation."[112] It concluded, however, that the Petitioners' alleged residences, "less than half a mile away from" and "less than 660 feet from" the borders of the project area, did not fall within "the immediate vicinity of the site(s) . . . to the extent that the owners of said properties would be entitled to the benefit of [such] presumption."[113] That finding was reinforced by the existence of a conservation buffer that further insulated Petitioners' properties from the amended approvals' alleged impacts.[114]

Without reliance upon the presumption of standing based upon proximity, Petitioners were required to "demonstrate that as a result of the Action she or he would suffer an environmental injury which is in some way different from that of the public at large."[115] The court analyzed the harms alleged to in the Petition—including increased traffic, pollution of drinking water, and changes to community character—and found each of them to be either factually unsupported or "precisely the same as would be suffered by every other Village resident."[116] It thus dismissed Petitioners' SEQRA claims for lack of standing.[117]

As set forth above, in addition to establishing particularized harm,

109. No. 13675/10, 2012 NY Slip Op. 50377(U), at 1 (Sup. Ct. Orange Cnty. 2012).

110. *Id.* at 1-3.

111. *Id.* at 3-4.

112. *Id.* at 4 (quoting Long Island Pine Barrens Soc'y, Inc. v. Planning Bd. of Brookhaven, 213 A.D.2d 484, 485, 623 N.Y.S.2d 613, 615 (2d Dep't 1995)).

113. *Tuxedo Land Trust, Inc.*, 2012 NY Slip Op. 50377(U), at 5 (internal quotation marks omitted).

114. *Id.* at 6.

115. *Id.* at 6 (citation omitted).

116. *Id.* at 7.

117. *Id.*

SEQRA plaintiffs must be "within the zone of interests which SEQRA seeks to promote and protect."[118] Thus, "a party must demonstrate that it will suffer an injury that is environmental and not solely economic in nature."[119] Relying in part on that zone of interest test, the New York County Supreme Court recently dismissed a suit by fuel oil companies challenging the New York City Department of Environmental Protection's negative declaration for regulations phasing out high-sulfur types of fuel.[120] The court held that Petitioners' alleged economic injuries "do[] not confer standing under SEQRA," and that their allegations that could fall within SEQRA's zone of interests (e.g., "unfavorable economic conditions . . . may result in the illegal disposal of used fuel oil at some unspecified future time") were too speculative and generalized to satisfy the "injury-in-fact" requirement.[121]

Finally, in recent litigation between two municipalities in Rockland County, the Second Department addressed the issue of municipal standing under SEQRA.[122] The Village of Pomona filed a series of claims against the neighboring Town of Ramapo's rezoning of a parcel along their shared border, which would allow the development of a planned community on a plot previously reserved for single-family residences.[123] Pomona argued that Ramapo had neglected its obligation under SEQRA "to identify and take a 'hard look' at potential significant adverse impacts resulting from the zone change for the subject property, including community character."[124]

Reversing the supreme court, the Second Department held that

> the Village did not have to show, in opposition to the motions [to dismiss], that the proposed development 'would be visible from any particular Pomona neighborhoods['] . . . and the Village did not have to explain in further detail how the significant increase in density would specifically affect the character of the community.[125]

Instead, since "[t]he power to define the community character is a

118. *Tuxedo Land Trust, Inc.*, 2012 NY Slip Op. 50377 (U), at 7 (citation omitted).

119. 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, 951 (1990) (citations omitted).

120. Cnty. Oil Co., v. N.Y.C. Dep't of Envtl. Prot., No. 21750/2011, 2012 NY Slip Op. 50322(U), at 4-11 (Sup. Ct. Queens Cnty. 2012).

121. *Id.* at 5.

122. Vill. of Pomona v. Town of Ramapo, 94 A.D.3d 1103, 1105-06, 943 N.Y.S.2d 146, 149-50 (2d Dep't 2012).

123. *Id.* at 1104, 943 N.Y.S.2d at 148-49.

124. *Id.* at 1106, 943 N.Y.S.2d at 150 (internal quotation marks omitted).

125. *Id.* at 1107, 943 N.Y.S.2d at 151 (citations omitted).

unique prerogative of a municipality acting in its governmental capacity," the court found that the alleged community character impacts from an almost four-fold increase in density were sufficient to confer standing under SEQRA.[126]

B. Agency Determinations of Environmental Significance

As mentioned above, the requirement to prepare an EIS turns upon the identification of potentially significant, adverse impacts. Courts have traditionally deferred to agencies on this threshold determination of significance (or lack thereof), requiring only that the agency identify the relevant areas of concern, take a hard look at them, and provide a "reasoned elaboration" for its decision.[127]

During the *Survey* period, however, several decisions reversed or affirmed the reversal of agency findings of significance and insignificance, notwithstanding SEQRA's deferential standards of review. While each decision was fact-specific, courts were more likely to reverse such determinations when they believed the government had acted in bad faith or was using SEQRA review as a pretext.

In *Bell Atlantic Mobile of Rochester L.P. v. Town of Irondeqouit*, for instance, a Town Board issued a positive declaration for the replacement of an existing work tower with a new cell-phone tower, thus requiring Bell Atlantic to prepare a full EIS.[128] The United States District Court for the Western District of New York, however, examined every purported impact identified by the Town and found them to be "pretextual and unsupported by substantial evidence."[129]

As the federal Telecommunications Act provides, "[n]o State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions."[130] The court held that "concern about the perception that radio frequency transmissions from the tower are harmful, cannot be properly considered" under SEQRA.[131] Unable to

126. *Id.* at 1106, 943 N.Y.S.2d at 150 (quoting Vill. of Chestnut Ridge v. Town of Ramapo, 45 A.D.3d 74, 94, 841 N.Y.S.2d 321, 339 (2007)).

127. *See, e.g.*, Aldrich v. Pattison, 107 A.D.2d 258, 265, 486 N.Y.S.2d 23, 29 (2d Dep't 1985) (citations omitted).

128. 848 F. Supp. 2d 391, 396-97 (W.D.N.Y. 2012).

129. *Id.* at 403.

130. 47 U.S.C. § 332(c)(7)(B)(iv) (2006).

131. *Bell Atl. Mobile of Rochester L.P.*, 848 F. Supp. 2d at 401.

identify any record support for the impacts cited by the Town Board, the court concluded that, rather than a lawful exercise of its environmental review authority, "Defendants' invocation of SEQRA's procedures was merely a delaying tactic as a result of a vocal opposition to the placement of a monopole in the one location that would address the lack of coverage."[132]

The court's close scrutiny of the Town Board's explanation may have also been affected by federal regulations governing the citing of cell phone towers. While stopping short of full preemption, federal law requires local officials to "act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time,"[133] which the Federal Communications Commission had defined through regulation as 90 to 150 days.[134] The court found that the Town Board had unlawfully used SEQRA to "delay final ruling on the application beyond the . . . period" provided in those regulations, and thus issued an injunction requiring Defendants to approve Verizon's application for the special permit at issue, without additional SEQRA review.[135]

In a rare, federal appellate ruling on SEQRA, the Second Circuit affirmed another district court's reversal of a Planning Board's finding of environmental significance as unsupported by substantial evidence and "wholly fabricated."[136] The case, which was filed in federal court because it also involved claims under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"),[137] involved the proposed construction of a church in the Town of Greenburgh, New York.

Despite the church's efforts to eliminate potentially significant traffic impacts from its project prior to full SEQRA review and the Town Planning Commissioner's recommendations that a negative

132. *Id.* at 402.

133. 47 U.S.C. § 332(c)(7)(B)(ii).

134. *Bell Atl. Mobile of Rochester L.P.*, 848 F. Supp. 2d at 399.

135. *Id.* at 402, 404.

136. Fortress Bible Church v. Feiner, 694 F.3d 208, 224 (2d Cir. 2012) (citing Fortress Bible Church v. Feiner, 734 F. Supp. 2d 409, 519 (S.D.N.Y. 2010)).

137. *Fortress Bible Church*, 694 F.3d at 215-16 ("RLUIPA bars states from imposing or implementing a 'land use regulation' in a manner that imposes a substantial burden on a person or institution's religious exercise unless it is the least restrictive means of furthering a compelling state interest." (quoting 42 U.S.C. § 2000cc(a)(1) (2006))). While "SEQRA by itself is not a zoning law" within the meaning of RLUIPA, the Second Circuit held "in this case the Town used the SEQRA review process as its vehicle for determining the zoning issues related to the Church's land use proposal," triggering scrutiny under RLUIPA. *Fortress Bible Church*, 694 F.3d at 217.

declaration would be appropriate, the Town Board issued a positive declaration and ordered the preparation of a full EIS.[138] The Town proceeded to delay the SEQRA review process and assumed control over the EIS after it had been substantially completed by the applicants, editing "the FEIS to include a number of additional problems with the proposal."[139] Based upon these revisions, the Town adopted a Findings Statement denying the application due to its purported steep slopes, fire safety, and traffic impacts.[140]

After considering the stated justifications for the Town's denial and finding each one lacking, the district court concluded that "the Town had acted in bad faith and had used the SEQRA review process illegitimately as a way to block the Church's proposal."[141] But it went further in holding that an EIS should never have been prepared, since in its Environmental Assessment the Church had already mitigated all of the potentially significant, adverse impacts.[142] To avoid additional delays upon remand, the court not only annulled the positive declaration, but ordered the Town to adopt a resolution approving the Church's EAF site plan with "no further SEQRA review by the Town or its Boards (including, but not limited to, the Town Board and the Zoning Board of Appeals)."[143] The Second Circuit affirmed this decision, finding that "the record contains ample evidence to support the district court's conclusion that the Town's actions were wholly disingenuous."[144]

The *Fortress Bible Church* litigation arose after the Town's denial of the necessary permits, so ripeness was not at issue. Often, however, courts have characterized the issuance of a positive declaration as "a preliminary step in the decision-making process, and therefore, not ripe for judicial review."[145] As a matter of law:

> A determination is final, and therefore ripe for review, when it 'impose[s] an obligation, den[ies] a right or fix[es] some legal relationship as a consummation of the administrative process[,] . . .

138. *Fortress Bible Church*, 694 F.3d at 213-14.

139. *Id.* at 214.

140. *Fortress Bible Church*, 734 F. Supp. 2d at 453-64.

141. *Fortress Bible Church*, 694 F.3d at 215.

142. *Fortress Bible Church*, 734 F. Supp. 2d at 433, 520.

143. *Id.* at 520.

144. *Fortress Bible Church*, 694 F.3d at 224.

145. Rochester Tel. Mobile Commc'ns v. Ober, 251 A.D.2d 1053, 1054, 674 N.Y.S.2d 189, 190 (4th Dep't 1998) (quoting Town of Coeymans v. City of Albany, 237 A.D.2d 856, 857, 655 N.Y.S.2d 172, 173 (3d Dep't 1997) (internal quotation marks omitted)).

> [which] inflicts an actual, concrete injury . . . [that] may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party.[146]

The Third Department recently addressed the ripeness of a significance determination in *Center of Deposit, Inc. v. Village of Deposit*, reviewing a positive declaration for an application to subdivide one parcel containing two vacant buildings into separate lots.[147] "The application did not include any development plans; it merely requested permission to subdivide one parcel of land into two parcels, allegedly in order to facilitate the ultimate sale of the property to one or more unidentified parties who may, themselves, wish to develop it."[148]

As the Planning Board had not reached a decision on the subdivision application, the supreme court dismissed the petition as unripe (and, in dicta, also found the positive declaration to be neither arbitrary nor capricious).[149] On appeal, while acknowledging that positive declarations are not typically considered final for the purposes of judicial review, the Third Department explained that "even where the 'ultimate resolution of a matter is still pending, a determination within the context of that matter may be 'final' if the governmental entity acts beyond its statutory authority and causes injury.'"[150]

The appellate division found such an injury arising from the positive declaration, since "even if petitioner's request to subdivide the land is ultimately granted, petitioner would have already expended considerable time and money to prepare the DEIS, which it would have no available avenue to recoup."[151] The court thus proceeded to assess whether the positive declaration was "beyond [the Planning Board's]

146. Ctr. of Deposit, Inc. v. Vill. of Deposit, 90 A.D.3d 1450, 1451, 936 N.Y.S.2d 709, 711 (3d Dep't 2011) (alteration in original) (quoting Gordon v. Rush, 100 N.Y.2d 236, 242, 792 N.E.2d 168, 172, 762 N.Y.S.2d 18, 22 (2003)) (citing Essex Cnty. v. Zagata, 91 N.Y.2d 447, 453, 695 N.E.2d 232, 235, 672 N.Y.S.2d 281, 284 (1998); Guido v. Town of Ulster Town Bd., 74 A.D.3d 1536, 1536, 902 N.Y.S.2d 710, 712 (3d Dep't 2010)).

147. 90 A.D.3d at 1451, 936 N.Y.S.2d at 711.

148. *Id.* at 1452, 936 N.Y.S.2d at 712.

149. *Id.* at 1450, 936 N.Y.S.2d at 711.

150. *Id.* at 1452, 936 N.Y.S.2d at 712 (quoting Demers v. N.Y. State Dep't of Envtl. Conservation, 3 A.D.3d 744, 746, 770 N.Y.S.2d 807, 808-09 (3d Dep't 2004)). The Court of Appeals has similarly rejected "a bright-line rule . . . that a positive declaration requiring a DEIS is merely a step in the agency decisionmaking process, and . . . is not final or ripe for review," instead holding that "a pragmatic evaluation [must be made] of whether the 'decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury.'" *Gordon*, 100 N.Y.2d at 242-43, 792 N.E.2d at 172, 762 N.Y.S.2d at 22 (citations omitted).

151. *Ctr. of Deposit, Inc.*, 90 A.D.3d at 1452, 936 N.Y.S.2d at 712.

statutory authority" under SEQRA.[152]

The subdivision application was an Unlisted Action under SEQRA, so it carried no presumption for or against the preparation of an EIS.[153] Instead, "a DEIS was required only if the Board rationally determined that petitioner's proposed action included the potential for at least one significant adverse environmental impact."[154] While the applicant proposed subdividing a single lot into two, it had not solidified plans to physically alter, redevelop, or sell either parcel.[155] The appellate division thus viewed the proposed action as "the simple division of the property on a map," and it found no support in the record for any adverse environmental impacts potentially arising from the subdivision.[156] While one of the buildings was believed to contain asbestos, the court dismissed public concerns about the potential abandonment of that lot as "purely speculative."[157] It thus reversed the positive declaration and remanded the matter to the Planning Board for a determination on the subdivision application without further SEQRA analysis.[158]

C. Segmentation, Supplementation, and Other SEQRA Issues Arising During the Survey *Period*

1. Unlawful "Segmentation" of SEQRA Review

One of the challenges facing SEQRA practitioners is defining the proper boundaries of the action to be analyzed. SEQRA regulations provide that government actions "commonly consist of a set of activities or steps. . . . Considering only a part or segment of an action is contrary to the intent of [SEQRA]."[159] Segmentation often arises in one of two contexts: (1) where an agency divides a larger project into smaller components that do not require preparation of an EIS, thus avoiding preparation of an EIS; and (2) where an agency excludes subsequent phases or stages from a proposed action in order to avoid or limit the scope of an EIS.[160] Both practices are prohibited under SEQRA.

152. *Id.*.
153. *Id.* at 1453, 936 N.Y.S.2d at 713.
154. *Id.* (citations omitted).
155. *Id.*
156. *Ctr. of Deposit, Inc.*, 90 A.D.3d at 1453, 936 N.Y.S.2d at 713.
157. *Id.*
158. *Id.* at 1454, 936 N.Y.S.2d at 713.
159. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.3(g)(1) (2000).
160. *See* Comm. to Stop Airport Expansion v. Town Bd. of E. Hampton, No. 10-

In *Riverso v. Rockland County Solid Waste Management Authority*, a landowner challenged the condemnation of part of his property for the remediation and redevelopment of a closed municipal landfill.[161] The landfill had encroached upon 1.5 acres of the adjacent property, but the landowner refused to sell it or allow access for the implementation of a remedial plan.[162] The Rockland County Solid Waste Management Authority ("Authority") (which purchased the site containing the landfill and other waste management operations in 2009) determined that condemnation of those 1.5 acres would not have a significant adverse impact on the environment, and it authorized such condemnation under the Eminent Domain Procedures Law.[163]

The Second Department found that the Authority had not adequately considered the environmental impacts of its condemnation, relying upon environmental data collected more than a decade ago, without any follow-up analysis.[164] It also found that the Authority had unlawfully segmented its review by failing to consider the impacts of its potential expansion of operations onto the former landfill site.[165] While the Authority had claimed it had no "concrete" plans for such expansion, the Authority had previously tried to purchase Riverso's property in order to expand and reconfigure its operations, and the court held that "deferring such review would result in the very segmentation of environmental review which is disfavored under SEQRA."[166]

The New York County Supreme Court rejected a similar challenge in *Williamsburg Community Preservation Coalition v. Council of New York*.[167] There, a community group sought to annul the rezoning of fifteen lots in Williamsburg, Brooklyn, which were approved following a negative declaration by the DCP. While the rezoning of the lots in question was found to have insignificant environmental impacts,

41928, 2012 NY Slip Op. 31914(U), at 20 (Sup. Ct. Suffolk Cnty. 2012).

161. 96 A.D.3d 764, 764, 946 N.Y.S.2d 175, 176 (2d Dep't 2012).

162. *Id.*, 946 N.Y.S.2d at 177.

163. *Id.* at 765, 946 N.Y.S.2d at 177.

164. *Id.*

165. *Id.*

166. *Riverso*, 96 A.D.3d at 765-66, 946 N.Y.S.2d at 177-78 (citing Save the Pine Bush, Inc. v. City of Albany, 70 N.Y.2d 193, 200, 512 N.E.2d 526, 527-28, 518 N.Y.S.2d 943, 944-45 (1987); 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); Farrington Close Condo. Bd. of Managers v. Inc. Vill. of Southhampton, 205 A.D.2d 623, 626, 613 N.Y.S.2d 257, 260 (2d Dep't 1994); Long Island Pine Barrens Soc'y, Inc. v. Planning Bd. of Brookhaven, 204 A.D.2d 548, 550-51, 611 N.Y.S.2d 917, 918-19 (2d Dep't 1994)).

167. No. 108560/10, 2012 NY Slip Op. 50827(U) at 17-20 (Sup. Ct. N.Y. Cnty. 2012).

Petitioners argued that "the City failed to aggregate the impact on the environment of subsequent rezonings, potentially influenced by the rezoning of the [fifteen] subject lots."[168] The court found that the City Respondents had not improperly segmented their review by focusing exclusively on the applications before them because there was no basis for a finding that the rezoning was a precedent for additional land use changes and "nothing in SEQRA or CEQR requires the City to aggregate possible future zoning changes when evaluating a discrete, small-scale zoning change."[169]

2. SEQRA's "Hard Look" and "Reasoned Elaboration" Requirements

While "it is not the role of the courts to weigh the desirability of any action or choose among alternatives" under SEQRA, courts will require that the government take a hard look at relevant environmental impacts and provide a "reasoned elaboration" for its SEQRA determinations.[170]

This review is typically deferential to the agency's substantive expertise, as reflected in the Second Department's decision in *Kirquel Development, Ltd. v. Planning Board of Cortlandt*.[171] In that case, the Planning Board, after an EIS, approved fewer subdivision lots than a private applicant had requested, citing concerns about the impacts of the proposed development on steep slopes, wetlands, and wildlife habitat and migration corridors.[172] While the applicant submitted testimony and affidavits during the administrative proceedings challenging the conclusions of the Town's environmental advisors, the court held: "the choice between conflicting expert testimony rests in the discretion of the Planning Board."[173] The court also rejected the applicant's arguments that the Planning Board was required to consider the financial impacts of its lot reductions on the project itself, explaining: "SEQRA does not require a lead agency to take a 'hard look' at the

168. *Id.* at 9.

169. *Id.*

170. Jackson v. N.Y. Urban Dev. Corp., 67 N.Y.2d 400, 416-17, 494 N.E.2d 429, 436, 503 N.Y.S.2d 298, 305 (1986) (citations omitted); *see also Williamsburg Cmty. Pres. Coal.*, 2012 NY Slip Op. 50827(U), at 8.

171. 96 A.D.3d 754, 755, 946 N.Y.S.2d 576, 579 (2d Dep't 2012), *appeal denied*, 19 N.Y.3d 813, 813, 978 N.E.2d 601, 601, 954 N.Y.S.2d 8, 8 (2012).

172. *Id.* at 755-56, 946 N.Y.S.2d at 579 (citations omitted).

173. *Id.* at 756, 946 N.Y.S.2d at 579.

economic feasibility of a project."[174]

Judicial deference under SEQRA is not unlimited, however, particularly in circumstances where an agency fails to provide an adequate explanation for its decision. In another case decided around the same time as *Kirquel*, the Town of Amsterdam in Montgomery County, New York, challenged the Amsterdam Industrial Development Agency's ("AIDA") authorization of a new construction and demolition debris landfill and recycling center in an industrial park owned by AIDA.[175] While AIDA had prepared an EIS for the proposed landfill and solicited two rounds of public comment, the Town alleged that the EIS and Findings Statement did not comply with SEQRA.[176] The supreme court accepted those arguments, "declaring the FEIS null and void . . . and invalidating the resolutions that adopted AIDA's findings statement."[177] Amsterdam Materials Recycling, LLC, the private project applicant who sought to build the landfill and recycling center, appealed.[178]

The Second Department found no deficiencies in the EIS itself, ruling that AIDA had adequately responded to public comments and taken a hard look at the relevant areas of environmental concern.[179] However, it found the Findings Statement to be "bereft of any explanation of the FEIS's findings and conclusions, let alone a 'reasoned elaboration' of the basis for AIDA's determination."[180] The failure to provide such an explanation left the court unable "to ascertain whether AIDA met the primary purpose of SEQRA, which is to ensure that the agency gives appropriate respect and due consideration to the environment in deciding whether a proposed project should proceed."[181] The court thus affirmed the supreme court's annulment of AIDA's

174. *Id.* at 755, 946 N.Y.S.2d at 579.

175. Town of Amsterdam v. Amsterdam Indus. Dev. Agency, 95 A.D.3d 1539, 1539, 945 N.Y.S.2d 434, 436 (3d Dep't 2012).

176. *Id.* at 1539-40, 945 N.Y.S.2d at 436-37.

177. *Id.*

178. *Id.* at 1540 nn. 1-2, 954 N.Y.S.2d at 436 nn. 1-2. Following the supreme court's decision, AIDA agreed to prepare a new EIS and did not participate in the appellate proceedings.

179. *Id.* at 1544, 945 N.Y.S.2d at 440.

180. *Amsterdam Indus. Dev. Agency*, 95 A.D.3d at 1544, 945 N.Y.S.2d at 440.

181. *Id.* at 1544-45, 945 N.Y.S.2d at 440 (citing Jackson v. N.Y. State Urban Dev. Corp., 67 N.Y.2d 400, 416, 494 N.E.2d 429, 435, 503 N.Y.S.2d 298, 304 (1986); Saratoga Lake Prot. & Improvement Dist. v. Dep't of Pub. Works of Saratoga Springs, 26 A.D.3d 979, 984-85,846 N.Y.S.2d 786, 793-94 (3d Dep't 2007)).

SEQRA determinations.[182]

Amsterdam Industrial Development Agency is best viewed as a case involving procedural, as opposed to substantive, violations of SEQRA. While courts will not second-guess an agency's reasonable explanations for its determinations under SEQRA, they will ensure that the agency complies with SEQRA's requirements to provide such a "reasoned elaboration."

3. Supplementation of SEQRA Analysis

As set forth above, in the discussion of *Bronx Committee*, SEQRA provides for the preparation of an SEIS when proposed project changes, newly discovered information, or changes in circumstances give rise to significant adverse environmental impacts not addressed or inadequately addressed in the EIS.[183] These supplementation provisions have also come to the fore in the long running and ongoing litigation surrounding the Atlantic Yards project, a mixed-use development featuring a professional basketball and hockey arena and the proposed construction of commercial and residential buildings on surrounding lots.

As described in last *Survey* year's SEQRA update, in July 2011, the New York County Supreme Court granted a motion to reconsider its decision upholding the Atlantic Yards EIS, based on the emergence of a previously undisclosed Development Agreement contemplating a potentially longer construction period for the "Phase II" residential and commercial development than was analyzed in the EIS.[184] Holding that the Empire State Development Corporation's ("ESDC") post-EIS Technical Analysis finding no significant impacts from that later build year "fails to undertake a meaningful analysis of the effects, on such important areas of environmental concern as neighborhood character, of the potentially protracted delays," the supreme court ordered ESDC to prepare a SEIS "addressing [the impacts of] the potential delays."[185]

In April 2012, the First Department upheld the supreme court's decision.[186] Rejecting ESDC's argument that its post-EIS analysis

182. *Amsterdam Indus. Dev. Agency*, 95 A.D.3d at 1545, 945 N.Y.S.2d at 445.

183. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(a)(7) (2008).

184. Chertok & Kalmuss-Katz, *supra* note 1, at 679-81 (citing Develop Don't Destroy (Brooklyn), Inc. v. Empire State Dev. Corp., No. 1114631/09, 2011 NY Slip Op. 21239, at 1 (Sup. Ct. N.Y. Cnty. 2011)).

185. *Develop Don't Destroy (Brooklyn) Inc.*, 2011 NY Slip Op. 21239, at 33.

186. Develop Don't Destroy (Brooklyn), Inc. v. Empire State Dev. Corp., 94 A.D.3d 508, 509, 942 N.Y.S.2d 477, 478 (1st Dep't 2012).

adequately analyzed the potential changes and obviated the need for an SEIS, the court held that the Technical Analysis: (a) "is not based . . . on technical studies of the environmental impacts of protracted construction," (b) improperly "assumed that phase II construction would . . . proceed continuously on a parcel-by-parcel basis" and thus "failed to consider an alternative scenario in which years go by before any phase II construction is commenced," and (c) did not consider whether mitigation measures selected to ameliorate environmental impacts identified in the FEIS "were adequate in the case of a protracted period of construction."[187] The court thus affirmed the lower court's requirement that an SEIS be prepared.

Preparation of an SEIS, however, is not the only way to address such changes, as demonstrated in the multiparty litigation over the expansion of the Orange County Sewer District ("OCSD").[188] While that litigation encompassed a number of different suits and a wide range of issues, of particular relevance for this Article is Orange County's 2007 solicitation of five municipalities to purchase treatment capacity from and connect their sewer districts to the OCSD.[189]

The Village of Kiryas Joel, which was already connected to the OCSD, sought an injunction against such expansion, arguing that the County should have analyzed the impacts of its proposed sale of treatment capacity under SEQRA.[190] The Orange County Supreme Court agreed, and enjoined the County from selling additional treatment capacity to any entity outside the OCSD "without first complying with the provisions of SEQRA."[191]

The Orange County Legislature had already prepared an EIS for a prior expansion of the OCSD's treatment capacity.[192] Rather than supplementing that EIS with a new EIS, as suggested by the supreme court, OCSD decided to amend its existing report, issuing an Amended FEIS ("AFEIS") and Amended Findings Statement that incorporated the 2007 expansion plans.[193] Following the adoption of those amended statements, however, another OCSD member (the Town of Woodbury) filed suit, claiming that the County's course of conduct had violated

187. *Id.* at 511-12, 942 N.Y.S.2d at 480-81.

188. Town of Woodbury v. Cnty. of Orange, No. 6024/10, 2012 NY Slip Op. 50890(U), at 1 (Sup. Ct. Orange Cnty. 2012).

189. *Id.* at 2.

190. *Id.* at 3.

191. *Id.* (internal quotation marks omitted).

192. *Id.* at 2-3.

193. *Town of Woodbury*, 2012 NY Slip Op. 50890(U), at 4.

SEQRA and the court's prior order to "[a]t a bare minimum . . . prepare a [SEIS] to evaluate relevant environmental concerns to the OCSD members . . . ."[194] Woodbury thus argued that the County was required to prepare an SEIS.[195]

In its latest decision, the Orange County Supreme Court disagreed, noting that the use of an SEIS under SEQRA regulations is "a matter of discretion" and "there is no prescribed procedure to which a lead agency must adhere in deciding whether to exercise its authority to use a SEIS."[196] The County determined "that amending the 2001 FEIS presented a more effective alternative [to an SEIS] involving 'minimum procedural and administrative delay.'"[197] Effectively finding the AFEIS to be the substantive equivalent to an SEIS, the court held that—notwithstanding its prior Order—"the decision not to use an SEIS did not violate lawful procedure and was neither arbitrary, capricious nor an abuse of discretion."[198] It is difficult to credit the equation of the AFEIS to an SEIS, as the latter involves the preparation of a Draft EIS and the public review and comment period associated with such a document. The SEQRA regulations require an SEIS to follow the same procedure as required for an EIS.[199] The use of an AFEIS in this case served a similar role to a post-EIS Technical Memorandum, which has been upheld as a means of assessing project changes or changed circumstances and determining the need for an SEIS.[200] However, the AFEIS was eventually published and made available to the public, whereas Technical Memoranda need not be. Thus, in this case, the AFEIS effectively served as a compromise between a Technical Memorandum and an SEIS.

CONCLUSION

SEQRA case law is sure to continue developing over the coming year, as many of the preceding cases (as well as others not discussed in this update) work their way through various stages of appeal and new challenges to negative declarations or EISs arise. One of the most anticipated EISs expected in 2013 is the Revised Supplemental Generic

194. *Id.* at 5, 9.

195. *See id.* at 10-12.

196. *Id.* at 10.

197. *Id.* (quoting N.Y. COMP. CODES R. & REGS. tit. 6, § 617.3(h) (2000)).

198. *Town of Woodbury*, 2012 NY Slip Op. 50890(U), at 10.

199. *See* N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(a)(7)(3) (2012).

200. Coal. Against Lincoln W., Inc. v. Weinshall, 21 A.D.3d 215, 222-23, 799 N.Y.S.2d 205, 212 (1st Dep't 2005).

Environmental Impact Statement for Horizontal Drilling and High-Volume Hydraulic Fracturing ("SGEIS"), a comprehensive study of the environmental and health impacts of hydrofracking in the Marcellus and Utica Shale regions of New York. DEC initially released that Revised Draft SGEIS for public comment more than a year ago, and has received more than 66,000 public comments on the document.[201]

In addition, it is anticipated that the DEC will propose revisions to SEQRA, as outlined in its recent Scope, followed by a public comment period and the finalization of new regulations. Those changes and others will be covered in future installments of the *Survey of New York Law*.

201. Lisa Song, *New York Weighs 66,000 Comments on Pending Fracking Regulations*, INSIDECLIMATE NEWS (Apr. 19, 2012), http://insideclimatenews.org/news/20120419/new-york-dec-fracking-regulations-public-comments-natural-gas.