ENVIRONMENTAL LAW: DEVELOPMENTS IN THE LAW OF SEQRA

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INTRODUCTION

This Article discusses notable developments in the law relating to the New York State Environmental Quality Review Act (SEQRA)

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for the *Survey* period of 2020–2021.[1] As noted in a recent *Survey*,[2] the New York State Department of Environmental Conservation (DEC) made significant amendments to SEQRA in 2018, which were intended to streamline the environmental review process and align SEQRA with state initiatives, including "the advancement of renewable energy and green infrastructure, and the consideration of climate change impacts."[3] In March 2020, these regulatory developments were integrated into the DEC's SEQRA Handbook, which serves as guidance for SEQRA practitioners.[4]

Although this year did not see significant regulatory developments, lower and intermediate courts issued decisions involving various legal issues relevant to the SEQRA practitioner—including standing, ripeness, mootness, and the statute of limitations; procedural issues, including lead agency designation; the adequacy of agencies' determinations of significance (particularly whether the agency took a "hard look" at environmental impacts when issuing a negative declaration); the sufficiency of agencies' Environmental Impact Statements (EISs); and supplementation of determinations of significance and impact statements.[5] The Court of Appeals did not issue any decisions concerning SEQRA during this most recent *Survey* period.

Part I of this Article provides a brief overview of SEQRA's statutory and regulatory requirements. Part II discusses the more pertinent of the numerous SEQRA decisions issued during the *Survey* period.

I. SUMMARY OVERVIEW OF SEQRA

SEQRA requires governmental agencies to consider the potential environmental impacts of their actions prior to rendering certain

1. The *Survey* period covered in this Article is July 1, 2020, to June 30, 2021. A prior *Survey* addresses SEQRA developments in the first half of 2020. *See* Mark A. Chertok et al., *2019–2020 Survey of New York Law: Environmental Law: Developments in the Law of SEQRA*, 71 SYRACUSE L. REV. 93, 94 n.1 (2021) [hereinafter *2019-2020 Survey*].

2. *See* Mark A. Chertok et al., *2017–2018 Survey of New York Law: Environmental Law: Developments in the Law of SEQRA*, 69 SYRACUSE L. REV. 773, 774 (2019).

3. *Id.* at 782; 6 N.Y.C.R.R. § 617.1(e) (2018).

4. *See* N.Y. STATE DEP'T OF ENV'T CONSERVATION, THE SEQRA HANDBOOK 4 (4th ed. 2020), http://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf [hereinafter SEQRA HANDBOOK].

5. *See* discussion *infra* Part II.

defined discretionary decisions, called "actions."[6] "The primary purpose of SEQRA is 'to inject environmental considerations directly into governmental decision making.'"[7] The law applies to discretionary actions by New York State, its subdivisions, or local agencies that have the potential to impact the environment, including direct agency actions, funding determinations, promulgation of regulations, zoning amendments, permits, and other approvals.[8] SEQRA charges DEC with promulgating general SEQRA regulations, but it also authorizes other agencies to adopt their own regulations and procedures, provided that those regulations and procedures are consistent with and "no less protective of environmental values" than those issued by DEC.[9]

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

Actions are grouped into three categories in DEC's SEQRA regulations: Type I, Type II, or Unlisted.[11] Type II actions are enumerated specifically and include only those actions that have been determined not to have the potential for a significant impact and thus not to be subject to review under SEQRA.[12] Type I actions, also specifically enumerated, "are more likely to require the preparation of

6. *See* Mark A. Chertok & Ashley S. Miller, *2007–2008 Survey of New York Law: Environmental Law: Climate Change Impact Analysis in New York Under SEQRA*, 59 SYRACUSE L. REV. 763, 764 (2009). SEQRA is codified at N.Y. ENV'T CONSERV. LAW §§ 8-0101–0117 (McKinney 2021).

7. Akpan v. Koch, 75 N.Y.2d 561, 569, 554 N.E.2d 53, 56, 555 N.Y.S.2d 16, 19 (1990) (quoting Coca-Cola Bottling Co. v. Bd. of Estimate, 72 N.Y.2d 674, 679, 532 N.E.2d 1261, 1263, 536 N.Y.S.2d 33, 35 (1988)). For a useful overview of the substance and procedure of SEQRA, see Jackson v. New York State Urb. Dev. Corp., 67 N.Y.2d 400, 414–17, 494 N.E.2d 429, 434–36, 503 N.Y.S.2d 298, 303–05 (1986).

8. *See* 6 N.Y.C.R.R. § 617.2(b)–(c) (defining actions and agencies subject to SEQRA). Actions of the Governor of New York (as opposed to executive agencies) and the state legislature are not subject to SEQRA. *See* N.Y.C.R.R. § 617.5(c)(46); SEQRA HANDBOOK, *supra* note 4, at 8.

9. *See* N.Y. ENV'T CONSERV. LAW § 8-0113(1), (3)(a) (McKinney 2021); 6 N.Y.C.R.R. § 617.14(b).

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

11. *See* 6 N.Y.C.R.R. § 617.2(aj)–(al); ENV'T CONSERV. LAW § 8-0113(2)(c)(i) (requiring the DEC to identify Type I and Type II actions).

12. *See* 6 N.Y.C.R.R. § 617.5(a).

an EIS than Unlisted actions" and, most importantly, "the fact that an action or project has been listed as a Type I action carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS."[13] Unlisted actions are not enumerated but rather are a catchall of those actions that are neither Type I nor Type II.[14] In practice, the vast majority of actions are Unlisted.[15]

Before undertaking an action (except for a Type II action), an agency must determine whether the proposed action may have one or more significant adverse environmental impacts, called a "determination of significance."[16] To reach its determination of significance, the agency must prepare an environmental assessment form ("EAF").[17] For Type I actions, preparation of a "Full EAF" is required, whereas for Unlisted actions, project sponsors may opt to use a "Short EAF" instead.[18] While the Short and Full EAFs ask for similar information, the Full EAF is an expanded form that is used for Type I actions or other actions when more rigorous documentation and analysis is appropriate.[19] SEQRA regulations provide models of each form,[20] but allow that the forms "may be modified by an agency to

13. 6 N.Y.C.R.R. § 617.4(a)(1) (Type I actions). This presumption may be overcome, however, if an environmental assessment demonstrates the absence of significant, adverse environmental impacts. *See, e.g.*, Gabrielli v. Town of New Paltz, 116 A.D.3d 1315, 1316, 984 N.Y.S.2d 468, 473 (3d Dep't 2014) ("[A] type I action does not, per se, necessitate the filing of an EIS. A negative declaration may be issued, obviating the need for an EIS, if the agency . . . determines that no adverse environmental impacts [will result] or that the identified adverse environmental impacts will not be significant.") (first quoting Shop-Rite Supermarkets, Inc. v. Plan. Bd., 82 A.D.3d 1384, 1386, 918 N.Y.S.2d 647, 650 (3d Dep't 201); then quoting 6 N.Y.C.R.R. § 617.7(a)(2) (internal quotation marks omitted)) (first citing Gabrielli v. Town of New Paltz, 93 A.D.3d 923, 924, 939 N.Y.S.2d 641, 642–43 (3d Dep't 2012); then citing City of Watervliet v. Town of Colonie, 3 N.Y.3d 508, 520, 822 N.E.2d 339, 345, 789 N.Y.S.2d 88, 94 (2004); and then citing Troy Sand & Gavel Co., Inc. v. Town of Nassau, 82 A.D.3d 1377, 1378, 918 N.Y.S.2d 667, 669 (3d Dep't 2011)). It is commonplace for a lead agency to determine that a Type I action does not require an EIS. *See* 6 N.Y.C.R.R. § 617(a)(2).

14. *See* 6 N.Y.C.R.R. § 617.2(al).

15. *See* SEQRA HANDBOOK, *supra* note 4, at 4.

16. 6 N.Y.C.R.R. §§ 617.6(a)(1)(i), 617.7(a)(1)–(2), (b).

17. *See* 6 N.Y.C.R.R. § 617.6(a)(2)–(3).

18. *See* 6 N.Y.C.R.R. § 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 potential adverse environmental impacts, and discussing part 3, which constitutes the agency's determination of significance).

19. *Id.*

20. *Id.* (establishing model EAFs: "Appendices A and B are model environmental assessment forms that may be used to help satisfy this Part or may be

better serve it in implementing SEQR[A], provided the scope of the modified form is as comprehensive as the model."[21] Where a proposed action involves multiple decision-making agencies, there is usually a "coordinated review" with these "involved agencies" pursuant to which a designated lead agency makes the determination of significance.[22] A coordinated review is required for Type I actions,[23] and the issuance of a negative declaration in a coordinated review (for Type I or Unlisted actions) binds other involved agencies.[24]

If the lead agency "determine[s] either that there will be no adverse environmental impacts or that the . . . impacts will not be significant," no EIS is required, and instead the lead agency issues a negative declaration.[25] If the answer is affirmative, the lead agency may in certain cases impose conditions on the proposed action to sufficiently mitigate the potentially significant adverse impacts[26] or,

modified in accordance with sections 617.2(m) and 617.14 of this Part."). DEC also maintains EAF workbooks to assist project sponsors and agencies in using the forms. *See* ENVIRONMENTAL ASSESSMENT FORM WORKBOOKS, N.Y. STATE DEP'T OF ENV'T CONSERVATION, http://www.dec.ny.gov/permits/90125.html (last visited May 10, 2022).

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

22. 6 N.Y.C.R.R. §§ 617.6(b)(2)(i), (b)(3)(i)–(ii). An "involved agency" is "an agency that has jurisdiction by law to fund, approve or directly undertake an action," and a "lead agency" is also an "involved agency." 6 N.Y.C.R.R. § 617.2(t). A "lead agency" is the "involved agency principally responsible for undertaking, funding or approving an action, and therefore responsible for determining whether an environmental impact statement is required in connection with the action, and for the preparation and filing of the statement if one is required." N.Y.C.R.R. § 617.2(v). An agency that "lacks the jurisdiction to fund, approve or directly undertake an action but wishes to participate in the review process because of its specific expertise or concern about the proposed action" is known as an "interested agency." 6 N.Y.C.R.R. § 617.2(u).

23. *See* 6 N.Y.C.R.R. § 617.4(a)(2).

24. *See* 6 N.Y.C.R.R. §§ 617.4(a)(2), 617.6(b)(3)(iii).

25. 6 N.Y.C.R.R. § 617.7(a)(2), (d).

26. *See* 6 N.Y.C.R.R. §§ 617.2(h), 617.7(d)(2)(i). This is known as a conditioned negative declaration (CND). See N.Y.C.R.R. § 617.2(h). For a CND, the lead agency must issue public notice of its proposed CND and, if public comment identifies "potentially significant adverse environmental impacts that were not previously" addressed or were inadequately addressed, or indicates the mitigation measures imposed are substantively deficient, an EIS must be prepared. 6 N.Y.C.R.R. § 617.7(d)(1)(iv), (2)(i), (3). CNDs cannot be issued for Type I actions or where there is no applicant. *See* 6 N.Y.C.R.R. § 617.7(d)(1). "In practice, CNDs are not favored and not frequently employed." Mark A. Chertok et al., *2015–2016*

more commonly, the lead agency issues a positive declaration requiring the preparation of an EIS.[27]

If an EIS is prepared, the first step is the scoping of the contents of the Draft EIS (DEIS).[28] Until recently, scoping had been commonplace but not required.[29] Under the 2018 SEQRA amendments effective January 1, 2019, scoping is now mandatory for all EISs, except for supplemental EISs.[30] Scoping involves focusing the EIS on relevant areas of environmental concern, with the goal (not often achieved) of eliminating inconsequential subject matters.[31] A draft scope, once prepared by a project sponsor and accepted as adequate and complete by the lead agency (which may, as noted, be an agency project sponsor), is circulated for public and other agency review and comment.[32] The project sponsor must incorporate the information submitted during the scoping process into the DEIS or include the comment as an appendix to the document, depending on the relevancy of the information or comment.[33]

A DEIS must include an alternatives analysis comparing the proposed action to a "range of reasonable alternatives . . . that are feasible, considering the objectives and capabilities of the project sponsor."[34] This analysis includes a "no action alternative," which evaluates the "changes that are likely to occur . . . in the absence of the proposed action" and generally constitutes the baseline against which project impacts are assessed.[35]

Survey of New York Law: *Environmental Law: Developments in the Law of SEQRA*, 67 SYRACUSE L. REV. 897, 901 n.27 (2017) [hereinafter *2015–2016 Survey*].

27. 6 N.Y.C.R.R. §§ 617.2(n), 617.7(a).

28. *See* SEQRA HANDBOOK, *supra* note 4, at 100.

29. *See id.*

30. *See id.*; 6 N.Y.C.R.R. § 617.8(a).

31. *See* SEQRA HANDBOOK, *supra* note 4, at 100; 6 N.Y.C.R.R. § 617.8(a).

32. *See* 6 N.Y.C.R.R. § 617.8(b)–(d).

33. *See* 6 N.Y.C.R.R. § 617.8(f)–(g).

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

35. 6 N.Y.C.R.R. § 617.9(b)(5)(v). "The 'no action alternative' does not necessarily reflect current conditions, but rather the anticipated conditions without the proposed action." *2019-2020 Survey*, *supra* note 2, at 778–79 n.32. In New York City, where certain developments are allowed as-of-right (and do not require a discretionary approval), the no action alternative would reflect any such developments as well as other changes that could be anticipated in the absence of the proposed action. *See* Uptown Holdings, LLC v. City of New York, 77 A.D.3d

In addition to "analyz[ing] the significant adverse impacts and evaluat[ing] all reasonable alternatives,"[36] the DEIS should include an assessment of "impacts only where they are relevant and significant," which the SEQRA regulations define as:

> (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 . . . ;
>
> (f) impacts of the proposed action on solid waste management and its consistency with the state or locally adopted solid waste management plan; [and]
>
> (i) measures to avoid or reduce both an action's impacts on climate change and associated impacts due to the effects of climate change such as sea level rise and flooding.[37]

Although not required, the lead agency typically holds a legislative hearing with respect to the DEIS.[38] That hearing may be, and often is, combined with other hearings required for the proposed action.[39] The next step is the preparation of a Final EIS ("FEIS"), which addresses any project changes, new information and/or changes in circumstances, and responds to all substantive comments on the DEIS.[40] After preparation of the FEIS, and prior to undertaking or approving an action, each acting (i.e., involved) agency must issue findings that the provisions of SEQRA (as reflected in DEC's implementing regulations) have been met, and "consider[ing] the

434, 436, 908 N.Y.S.2d 657, 660 (1st Dep't 2010) (citing 6 N.Y.C.R.R. § 617.9(b)(5)(v); and then citing Cnty. of Orange v. Vill. of Kiryas Joel, 44 A.D.3d 765, 769, 844 N.Y.S.2d 57, 62 (2d Dep't 2007)).

36. 6 N.Y.C.R.R. § 617.9(b)(1).

37. 6 N.Y.C.R.R. § 617.9(b)(5)(iii)(a)–(f), (i).

38. *See* 6 N.Y.C.R.R. § 617.9(a)(4).

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

40. 6 N.Y.C.R.R § 617.11(a).

relevant environmental impacts, facts and conclusions disclosed in the FEIS," must "weigh and balance relevant environmental impacts with social, economic and other considerations."[41] The agency must then,

> [C]ertify that consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts 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.[42]

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).[43]

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 ("GEIS").[44] Preparation of a GEIS 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";[45] (2) the agency action consists of "a sequence of actions" over time;[46] (3) separate actions under consideration may have "generic or common impacts";[47] or (4) the action consists of an "entire program [of] . . . wide application or restricting the range of future alternative policies or projects."[48] GEISs commonly relate to common or program-wide impacts and set forth criteria for when further environmental review will be required for site-specific or subsequent actions that follow approval of the initial program.[49]

41. 6 N.Y.C.R.R. §§ 617.11(c), (d)(1)–(2), (4).

42. 6 N.Y.C.R.R. § 617.11(d)(5).

43. *See* 42 U.S.C. § 4321 (2021) (establishing federal responsibilities for protecting and enhancing the quality of the environment); Jackson v. New York State Urb. Dev. Corp., 67 N.Y.2d 400, 415, 494 N.E.2d 429, 434, 503 N.Y.S.2d 298, 303 (1986) (quoting Philip H. Gitlen, *The Substantive Impact of the SEQRA*, 46 ALB. L. REV. 1241, 1248 (1982)).

44. 6 N.Y.C.R.R. § 617.10(a).

45. 6 N.Y.C.R.R. § 617.10(a)(1).

46. 6 N.Y.C.R.R. § 617.10(a)(2).

47. 6 N.Y.C.R.R. § 617.10(a)(3).

48. 6 N.Y.C.R.R. § 617.10(a)(4).

49. 6 N.Y.C.R.R. § 617.10(c) (requiring GEISs to set forth such criteria for subsequent SEQRA compliance).

The City of New York has promulgated separate regulations implementing the City's and City agencies' environmental review process under SEQRA, which is known as City Environmental Quality Review (CEQR).[50] As previously explained, SEQRA grants agencies and local governments the authority to supplement DEC's general SEQRA regulations by promulgating their own.[51] Section 192(e) of the New York City Charter delegates that authority to the City Planning Commission.[52] In addition, to assist "city agencies, project sponsors, [and] the public" in navigating and understanding the CEQR process, the New York City Mayor's Office of Environmental Coordination has published the *CEQR Technical Manual* ("the *Manual*")*.*[53] First published in 1993, the *Manual*, as now revised, is about 800 pages long and provides an extensive explanation of CEQR legal procedures; 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; and identifying thresholds for both detailed studies and significance.[54]

II. CASELAW DEVELOPMENTS

A. Threshold Requirements in SEQRA Litigation

SEQRA litigation invariably arises as a special proceeding under Article 78 of Civil Practice Law and Rules (CPLR).[55] Article 78

50. *See* N.Y.C. RULES tit. 43, § 6-01 (2021); N.Y.C. RULES tit. 43, § 6-15 (2021); N.Y.C. RULES tit. 62, § 5-01 (2021); N.Y.C. Rules tit. 62, § 5-02 (2021).

51. *See* N.Y. ENV'T CONSERV. LAW § 8-0113(1), (3) (McKinney 2021). That authority extends to the designation of specific categories of Type I and Type II actions. *See* 6 N.Y.C.R.R. §§ 617.4, 617.5, 617.14.

52. *See* N.Y.C. Charter § 192(e) (2021); N.Y.C. RULES tit. 62, § 5-01 (2021).

53. N.Y.C. MAYOR'S OFF. OF ENV'T COORDINATION, CEQR: CITY ENVIRONMENTAL QUALITY REVIEW TECHNICAL MANUAL (2020), https://www1.nyc.gov/assets/oec/technical-manual/2020_ceqr_technical_manual.pdf. [hereinafter CEQR MANUAL]. Limited revisions were added to the Manual in 2016 to incorporate changes to the City's Waterfront Revitalization Program related to climate change. *See* N.Y.C. MAYOR'S OFF. OF ENV'T COORDINATION, CITY ENVIRONMENTAL QUALITY REVIEW TECHNICAL MANUAL 2014 EDITION REVISIONS (Apr. 27, 2016), http://www.nyc.gov/html/oec/downloads/pdf/2014_ceqr_tm/2014_ceqr_tm_revisions_04_27_2016.pdf [hereinafter 2016 CEQR REVISIONS].

54. *See* CEQR MANUAL, *supra* note 53. As further discussed infra, courts equate compliance with the Manual with compliance with SEQRA and CEQR. *See* Rimler v. City of New York, 50 N.Y.S.3d 28, 54 (Sup. Ct. Kings Cty. 2016) (holding that "an EAS prepared consistent with the guidance in the *CEQR Technical Manual* demonstrates compliance with *SEQRA/CEQR*").

55. *See* N.Y. C.P.L.R. 7804 (McKinney 2021).

imposes upon petitioners in such proceedings certain threshold requirements, separate and distinct from the procedural requirements imposed by SEQRA.[56] A number of decisions during the *Survey* period addressed questions arising from these threshold requirements, as well as obligations arising solely from SEQRA.[57]

1. Standing

Standing is one of the more frequently litigated issues in SEQRA case law.[58] To establish standing, a SEQRA petitioner must demonstrate that the challenged action is likely to cause injury that (1) is different from any generalized harm caused by the action to the public at large; and (2) falls within the "zone of interests" sought to be protected by the statute.[59] The harm must be "different in kind or degree from the public at large," but it need not be unique.[60] To fall within SEQRA's "zone of interests," the alleged injury must be "environmental and not solely economic in nature."[61] Five SEQRA

56. *See* N.Y. C.P.L.R. 7801 (McKinney 2021).

57. *See, e.g.*, Troy Sand & Gravel Co., Inc. v. Town of Sand Lake, 185 A.D.3d 1306, 1312–13, 128 N.Y.S.3d 677, 685 (3d Dep't 2020) (standing); Hart v. Town of Guilderland, 196 A.D.3d 900, 909, 151 N.Y.S.3d 700, 710–11 (3d Dep't 2021) (discussing standing); Town of Waterford v. New York State Dep't of Env't Conservation, 187 A.D.3d 1437, 1442–43, 134 N.Y.S.3d 545, 551–52, (3d Dep't 2020) (discussing standing); Peachin v. City of Oneonta, 194 A.D.3d 1172, 1175, 149 N.Y.S.3d 258, 262 (3d Dep't 2021) (discussing standing); Roger Realty Co. v. New York State Dep't of Env't Conservation, No. 907550-18, 2020 N.Y. Slip Op. 51442(U) at 6, 9 (Sup. Ct. Albany Cty. 2020) (discussing standing, mootness, and statute of limitations); Mensch v. Plan. Bd. of the Vill. of Warwick, 189 A.D.3d 1245, 1247–49, 138 N.Y.S.3d 621, 624 (2d Dep't 2020) (discussing statute of limitations); Beer v. New York State Dep't of Env't Conservation, 189 A.D.3d 1916, 1921, 138 N.Y.S.3d 684, 689 (3d Dep't 2020) (discussing statute of limitations).

58. *See generally* Charlotte A. Biblow, Courts Tackle Standing and SEQRA Review, 251 N.Y.L.J. (May 22, 2014) https://www.farrellfritz.com/wp-content/uploads/CAB-Courts-Tackle-Standing-SEQRA-Review-052214.pdf.

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

60. Sierra Club v. Vill. of Painted Post, 26 N.Y.3d 301, 310–11, 43 N.E.3d 745, 749, 22 N.Y.S.3d 388, 392 (2015) (citing *Soc'y of Plastics Indus., Inc.*, 77 N.Y.2d at 774–75, 573 N.E.2d at 1042, 570 N.Y.S.2d at 786).

61. Mobil Oil Corp. v. Syracuse Indus. Dev. Agency, 76 N.Y.2d 428, 433, 559 N.E.2d 641, 644, 559 N.Y.S.2d 947, 950 (1990) (first citing Niagara Recycling, Inc. v. Town Bd., 83 A.D.2d 335, 341, 443 N.Y.S.2d 951, 955 (4th Dep't 1981); and then citing Webster Assocs. v. Town of Webster, 112 Misc. 2d 396, 402, 447 N.Y.S.2d 401, 405 (Sup. Ct. Monroe Cty. 1981)).

decisions substantively addressed standing during this *Survey* period.[62]

A. Where Standing May Be Presumed

One of these decisions applied a well-recognized exception to the general prerequisite that a petitioner must allege that they will suffer a particularized harm differing from the public at large to have standing under SEQRA.[63] In *Troy Sand & Gravel Co., Inc. v. Town of Sand Lake*, the Third Department recognized that the typical standing requirements of a SEQRA challenge are relaxed when the petitioner owns real property subject to a municipal zoning enactment.[64] The lower court had found that two of the petitioners, who were residents and owners of real property in the Town of Sand Lake, lacked standing to challenge the Town Board's compliance with SEQRA in its enactment of Local Law 4, which revised zoning districts and allowed mining on properties with existing permits.[65]

The Third Department reversed, finding that the petitioners had standing to bring the SEQRA challenge to the zoning law.[66] The Third Department noted that when petitioners bring a SEQRA challenge to "a zoning enactment to which [their] property is subject, 'ownership of the subject property confers a legally cognizable interest in being assured that the Town satisfied SEQRA before taking action to rezone its land.'"[67] It was not necessary for these two property owner petitioners to assert a special injury or a noneconomic environmental

62. *See Troy Sand*, 185 A.D.3d at 1308, 128 N.Y.S.3d at 682 (petitioners owning property subject to zoning enactment have standing); *Hart*, 196 A.D.3d at 903, 151 N.Y.S.3d at 706 (private litigants lack standing to challenge lead agency determinations); *Town of Waterford*, 187 A.D.3d at 1439–40, 134 N.Y.S.3d at 549 (petitioners alleged sufficiently particularized harm for standing); *Peachin*, 194 A.D.3d 1174–75, 149 N.Y.S.3d at 262 (petitioners did not have standing where they alleged harms indistinct from the public at large and economic harms); *Roger Realty Co.*, 2020 N.Y. Slip Op. 51442(U) at 7 (petitioner alleged "numerous adverse effects" which were sufficient for standing).

63. *See* Har Enters. v. Town of Brookhaven, 74 N.Y.2d 524, 529, 548 N.E.2d 1289, 1293, 549 N.Y.S.2d 638, 642 (1989) (holding that a property owner whose property is subject to a municipal zoning enactment "has a legally cognizable interest in being assured that the town satisfied SEQRA before taking action to rezone its land" sufficient to confer standing).

64. 185 A.D.3d at 1308, 128 N.Y.S.3d at 682.

65. *Id.*

66. *Id.*

67. *Id.* (first citing Wir Assocs. v. Town of Mamakating, 157 A.D.3d 1040, 1044, 69 N.Y.S.3d 130, 134 (3d Dep't 2018); and then citing Mombaccus Excavating, Inc. v. Town of Rochester, 89 A.D.3d 1209, 1210, 932 N.Y.S.2d 551, 552 (3d Dep't 2011)).

harm; all that was necessary to challenge the zoning enactment to which the petitioners' real property would be subject was a demonstration of ownership of the property.[68]

B. Standing to Challenge Lead Agency Status

A recent Third Department decision held that only involved agencies have standing to challenge lead agency status determinations.[69] In *Hart v. Town of Guilderland*, petitioners, residents and property owners close to a proposed development, commenced an Article 78 proceeding to, *inter alia*, annul a determination of respondent Planning Board of the Town of Guilderland that approved the site plan for the development.[70] The Planning Board had declared itself the lead agency to review the site plan and associated EAF under SEQRA, and thereafter issued a positive declaration, triggering preparation of an EIS.[71] The Supreme Court Albany County had vacated the resulting DEIS, FEIS, a findings statement, and the planning board's site plan approval, holding in part that "the Planning Board failed to coordinate Lead Agency determination with the Zoning Board of Appeals," which "vitiate[d] the SEQRA review process."[72] On appeal, the Third Department reversed and dismissed the petition, finding that a challenge to lead agency status "may only be commenced by another involved agency."[73] Accordingly, private litigants, like the petitioners in *Hart*, lack standing to challenge lead agency designations.

68. *Troy Sand*, 185 A.D.3d at 1309,128 N.Y.S.3d at 682 (first citing Gernatt Asphalt Prods. v. Town of Sardinia, 87 N.Y.2d 668, 687, 664 N.E.2d 1226, 1238, 642 N.Y.S.2d 164, 176 (1996); and then citing *Wir Assocs.*, 157 A.D.3d at 1044, 69 N.Y.S.3d at 134).

69. *See* Hart v. Town of Guilderland, 196 A.D.3d 900, 902–03, 151 N.Y.S.3d 700, 706 (3d Dep't 2021) (first citing King v. Cnty. of Saratoga Indus. Dev. Agency, 208 A.D.2d 194, 201, 622 N.Y.S.2d 339, 344 (3d Dep't 1995); then citing Inc. Vill. of Poquott v. Cahill, 11 A.D.3d 536, 539, 782 N.Y.S.2d 823, 827 (2d Dep't 2004)).

70. *Id.* at 902, 151 N.Y.S.3d at 705.

71. *Id.* at 901, 151 N.Y.S.3d at 704–05.

72. See Hart v. Town of Guilderland., No. 906179-20, at 53 (Sup. Ct. Albany Cnty. Nov. 20, 2020).

73. *See Hart*, 196 A.D.3d at 902–03, 151 N.Y.S.3d at 706, (internal quotation marks omitted) (first citing *King*, 208 A.D.2d at 201, 622 N.Y.S.2d at 344; and then citing *Inc. Vill. Of Poquott*, 11 A.D.3d at 539, 782 N.Y.S.2d at 827).

C. Sufficiently "Particularized" Harm

In another case, the Third Department elaborated on when a petitioner crosses the threshold from generalized harm insufficient to confer standing into sufficiently particularized and distinct harms sufficient to establish standing. In *Town of Waterford v. New York State Department of Environmental Conservation*, the Town of Waterford and eleven of its residents, as well as the Town of Halfmoon and five of its residents, brought two Article 78 challenges to, among other things, the DEC's SEQRA review and findings for a proposed landfill expansion in the Town of Colonie; the landfill is located across the Mohawk River from many of the individual petitioners' residences.[74] The lower court had determined that the petitioners lacked standing and dismissed both proceedings.[75]

On appeal, the Third Department credited the petitioners' claim that the lack of immediate proximity of some residents to the proposed landfill expansion did not preclude them from having standing.[76] However, many of the petitioners' alleged impacts were deemed to be either economic in nature and insufficient to confer standing under SEQRA or expressions of general displeasure with the sights and smells of the landfill that were not distinct from the public at large.[77] At least a few of the petitioners claimed distinct environmental harms arising from the landfill: some residents had unobstructed views of the landfill and described how they were personally impacted by the sights, sounds, odors, and dust from it; others alleged impacts

74. Town of Waterford v. New York State Dep't of Env't Conservation, 187 A.D.3d 1437, 1438, 134 N.Y.S.3d 545, 547 (3d Dep't 2020).

75. *Id*. at 1438–39, 134 N.Y.S.3d at 547.

76. *Town of Waterford*, 187 A.D.3d at 1439, 134 N.Y.S.3d at 549 (first citing Save the Pine Bush, Inc. v. City of Albany, 13 N.Y.3d 297, 304–05, 918 N.E.2d 917, 921, 890 N.Y.S.2d 405, 409 (2009); then citing Hohman v. Town of Poestenkill, 179 A.D.3d 1172, 1173–74, 115 N.Y.S.3d 572, 574 (3d Dep't 2020)).

77. *Id*. (first citing Ass'n for a Better Long Island, v. New York State Dept. of Env't Conservation, 23 N.Y.3d 1, 8–9, 11 N.E.3d 188, 194, 988 N.Y.S.2d 115, 121 (2014); then citing Soc'y of Plastics Indus. v. County of Suffolk, 77 N.Y.2d 761, 777, 573 N.E.2d 1034, 1044, 570 N.Y.S.2d 778, 788 (1991); then citing Vill. of Canajoharie v. Plan. Bd. of Town of Fla., 63 A.D.3d 1498, 1502, 882 N.Y.S.2d 526, 529 (3d Dep't 2009); then citing Sierra Club v. Vill. of Painted Post, 26 N.Y.3d 301, 311, 43 N.E.3d 745, 749, 22 N.Y.S.3d 388, 392 (2015); then citing *Save the Pine Bush, Inc*., 13 N.Y.3d at 306, 918 N.E.2d at 922, 890 N.Y.S.2d at 410; then citing Finger Lakes Zero Waste Coal., v. Martens, 95 A.D.3d 1420, 1422, 944 N.Y.S.2d 336, 338; then citing Save Our Main St. Bldgs. v. Greene Cnty. Legislature, 293 A.D.2d 907, 908, 740 N.Y.S.2d 715, 717 (3d Dep't 2002)) (quoting *Soc'y of Plastics Indus*., 77 N.Y.2d at 778, 573 N.E.2d at 1044, 570 N.Y.S.2d at 788).

concerning their use and enjoyment of a public park, trails, and boat launches across the river from the landfill.[78]

The Third Department reversed the lower court's dismissal of the proceedings on standing grounds, instead finding that "at least some of the petitioners . . . will suffer environmental impacts distinct from those experienced by the general public so as to confer standing to sue."[79] Accordingly, "although not every petitioner may have established standing," the Third Department held that the lower court erred in dismissing the proceedings, stating that "[s]tanding rules are not to be applied in a manner so restrictive that agency actions are insulated from judicial review. . . ."[80]

In contrast, the Third Department found that the petitioners did not allege a sufficiently particularized harm for standing in *Peachin v. City of Oneonta*.[81] There, the petitioners were a group of local business owners who challenged the City Planning Commission's site plan approval for a proposed mixed-use development near their properties.[82] The petitioners alleged that they would be negatively impacted by increased traffic resulting from the development, as well as suffer the loss of scenic views that would be obstructed by the project.[83] The Third Department affirmed the lower court's dismissal of the petition based on standing grounds, finding that the petitioners' alleged harm resulting from increased traffic "fail[ed] to demonstrate an environmental injury different from that suffered by the public at

78. *Id*. at 1440, 134 N.Y.S.3d at 549 (first citing *Sierra Club*, 26 N.Y.3d at 311, 43 N.E.3d at 749, 22 N.Y.S.3d at 392; then citing Arthur M. v. Town of Germantown Plan. Bd., 184 A.D.3d 983, 985–86, 126 N.Y.S.3d 543, 546 (3d Dep't 2020); and then citing Humane Soc'y of U.S. v. Empire State Dev. Corp., 53 A.D.3d 1013, 1017, 863 N.Y.S.2d 107, 111 (3d Dep't 2008)).

79. *Town of Waterford*, 187 A.D.3d at 1440, 134 N.Y.S.3d at 549–50 (first citing *Sierra Club*, 26 N.Y.3d at 311, 43 N.E.3d at 749–50, 22 N.Y.S.3d at 392–93; then citing *Save the Pine Bush, Inc*., 13 N.Y.3d at 306, 918 N.E.2d at 922, 890 N.Y.S.2d at 410; then citing Vill. of Woodbury v. Seggos, 154 A.D.3d 1256, 1259, 65 N.Y.S.3d 76, 81 (3d Dep't 2017); and then citing Town of Amsterdam v. Amsterdam Indus. Dev. Agency, 95 A.D.3d 1539, 1541–42, 945 N.Y.S.2d 434, 438 (3d Dep't 2012)).

80. *Id*. (first citing *Sierra Club*, 26 N.Y.3d at 311, 43 N.E.3d at 749–50, 22 N.Y.S.3d at 392–93; then citing *Save the Pine Bush, Inc*., 13 N.Y.3d at 306, 918 N.E.2d at 922, 890 N.Y.S.2d at 410; then citing *Village of Woodbury*, 154 A.D.3d at 1259, 65 N.Y.S.3d at 81; and then citing *Town of Amsterdam*, 95 A.D.3d at 1541–42, 945 N.Y.S.2d at 438).

81. 194 A.D.3d 1172, 1174, 149 N.Y.S.3d 258, 261 (3d Dep't 2021).

82. *Id*. at 1172–73, 149 N.Y.S.3d at 260–61.

83. *Id*. at 1174–75, 149 N.Y.S.3d at 262.

large."[84] And the petitioners' concerns about potential scenic impacts were "undeveloped and otherwise too speculative to establish standing in these circumstances."[85]

D. Zone of Interests

Another decision in the *Survey* period reiterated the types of environmental interests that would be sufficient to confer standing under SEQRA's zone of interests. In *Roger Realty Co. v. New York State Department of Environmental Conservation*, the petitioner Roger Realty Company ("Roger Realty") filed a SEQRA challenge to DEC's issuance of a Consent Order Barge Plan, which would have permitted the recipient, Inwood Realty Associates ("Inwood" or "Inwood Realty"), to use barges to facilitate the removal of construction and demolition debris from its property in the Town of Hempstead.[86] Moreover, the Consent Order Barge Plan contained provisions which implicitly permitted Inwood to continue its barge operations as a part of its proposed commercial soil separation business following the completion of construction and demolition debris removal.[87]

Typically, a third party cannot challenge a DEC consent order, which is exempt from SEQRA as a form of prosecutorial discretion.[88] However, the Supreme Court, Albany County, found that DEC had overstepped its statutory authority under the statutes establishing goals for a remedial program—"namely the elimination of the significant threat and of the imminent danger of irreversible or irreparable damage to the environment"—and effectively granted Inwood Realty a permit for its proposed soil separation business through the Consent

84. *Id*. at 1175, 149 N.Y.S.3d at 262 (first citing Bd. of Fire Comm'r v. Town of Poughkeepsie Plan. Bd., 156 A.D.3d 621, 623, 67 N.Y.S.3d 30, 32 (2d Dep't 2017); then citing Shelter Island Ass'n. v. Zoning Bd. of Appeals, 57 A.D.3d 907, 908, 869 N.Y.S.2d 615, 616 (2d Dep't 2008)).

85. *Id*. (citing Brummel v. Town of N. Hempstead Town Bd., 145 A.D.3d 880, 882, 43 N.Y.S.3d 495, 497 (2d Dep't 2016)).

86. No. 907550-18, 2020 N.Y. Slip Op. 51442(U), at 1 (Sup. Ct. Albany Cnty. Nov. 30, 2020).

87. *See id*. at 8. Petitioner also challenged the Consent Order Barge Plan as a form of improper segmentation; further discussion of the improper segmentation claims relating to the Consent Order Barge Plan is found *infra* at Part II.B.1.b.

88. *See* N.Y. ENV'T CONSERV. LAW § 8-0105(5)(i) (McKinney 2021) ("Actions" do not include "(i) enforcement proceedings or the exercise of prosecutorial discretion in determining whether or not to institute such proceedings; . . .").

Order Barge Plan without complying with SEQRA.[89] Thus, DEC exceeded the permissible bounds of its prosecutorial discretion and instead undertook a *permitting* action subject to SEQRA, which the petitioner could challenge under Article 78.[90]

As a successor owner of the property, petitioner Roger Realty alleged a number of environmental injuries that would result from the implementation of Inwood's Consent Order Barge Plan.[91] For one, the petitioner alleged that the Consent Order Barge Plan would require Inwood to spray water to control dust at its site and that the run-off from the dust control measures would not be fully captured due to an insufficient number of dry wells at the site. The run-off would instead migrate across the petitioner's property before discharging into a nearby creek, where the petitioner had riparian rights and through which it accessed Jamaica Bay.[92] The petitioner also asserted that dust and air emissions from the trucks and other equipment used to move the debris would impact its property.[93] In addition, a designated Superfund site existed within 150 feet of Inwood's property; the petitioner claimed that the trucks and heavy equipment used to move the debris would disturb the underground petroleum hydrocarbon and volatile organic compound ("VOC") plume, with resulting negative impacts to petitioner's property.[94] The court found that these alleged injuries "and numerous other adverse effects" were "in sum, sufficient to confer standing."[95]

But beyond environmental interests, New York courts have continued to insist that purely economic interests do not fall within

89. *See Roger Realty*, 2020 N.Y. Slip Op. 51442(U), at 9 (citing New York State Superfund Coal., Inc. v. New York State Dep't of Env't Conservation, 68 A.D.3d 1588, 1589, 892 N.Y.S.2d 594, 595 (3d Dep't 2009)).

90. *See id*. at 9.

91. *See id*. at 7.

92. *See id*.

93. *See id*.

94. *See Roger Realty*, 2020 N.Y. Slip Op. 51442(U), at 7.

95. *Id*.

SEQRA's zone of interest.[96] Accordingly, assertions of standing based on a petitioner's status as taxpayer have been roundly rejected.[97]

2. Ripeness, Mootness & Statute of Limitations

In addition to standing, a SEQRA petitioner also must satisfy several threshold requirements, including that the claim be ripe, that administrative remedies be exhausted,[98] that the claim is not moot,[99] and that the claim be timely brought within the statute of limitations period.[100]

96. *See*, e.g., Beckerman v. Liguori, No. 617294/18 at 8 (Sup. Ct. Nassau Cnty. July 8, 2019); Peachin v. City of Oneonta, 194 A.D.3d 1172, 1173–74, 149 N.Y.S.3d 258, 261 (3d Dep't 2021) (finding that petitioners lacked standing as, inter alia, their alleged injuries from a loss of available parking spaces if proposed development were constructed to be "largely hinged on economic business concerns").

97. *See* Schulz v. Town Bd. of the Town of Queensbury, 178 A.D.3d 85, 88, 111 N.Y.S.3d 732, 734 (3d Dep't 2019) (first citing Tilcon New York, Inc. v. Town of New Windsor, 172 A.D.3d 942, 944, 102 N.Y.S.3d 35, 38 (2d Dep't 2019); and then citing Kopald v. Town of Highlands, 34 A.D.3d 810, 810, 823 N.Y.S.2d 901, 902 (2d Dep't 2006)); *see also Beckerman*, No. 617294/18 at 7 (Sup. Ct. Nassau Cnty. July 8, 2019).

98. *See* Miller v. Kozakiewicz, 300 A.D.2d 399, 400, 751 N.Y.S.2d 524, 526–27 (2d Dep't 2002) (first citing Long Island Pine Barrens Soc'y. v. Plan. Bd., 204 A.D.2d 548, 550, 611 N.Y.S.2d 917, 918–19 (2d Dep't 1994); then citing Harriman v. Town Bd. of Monroe, 153 A.D.2d 633, 635, 544 N.Y.S.2d 860, 862 (2d Dep't 1989); and then citing Aldrich v. Pattison, 107 A.D.2d 258, 267–68, 486 N.Y.S.2d 23, 30 (2d Dep't 1985)). 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." But see Jackson v. New York State Urb. Dev. Corp., 67 N.Y.2d 400, 427, 494 N.E.2d 429, 442, 503 N.Y.S.2d 298, 311 (1986) ("No one raised the issue [of impairment of archaeological resources] during the lengthy hearing and comment periods before the FEIS was issued. Petitioners themselves participated actively in the administrative process, submitting several oral and written statements on the DEIS, yet failed to mention any impact on archaeology. While the affirmative obligation of the agency to consider environmental effects, coupled with the public interest, lead us to conclude that such issues cannot be foreclosed from judicial review, petitioners' silence cannot be overlooked in determining whether the agency's failure to discuss an issue in the FEIS was reasonable. The EIS process is designed as a cooperative venture, the intent being that an agency have the benefit of public comment before issuing a FEIS and approving a project; permitting a party to raise a new issue after issuance of the FEIS or approval of the action has the potential for turning cooperation into ambush." [internal citations omitted]).

99. *See* Friends of Flint Mine Solar v. Town Bd. of Coxsackie, 2019 N.Y. Slip Op. 19-0216, at 7 (Sup. Ct. Greene Cnty. Sept. 13, 2019).

100. *See* N.Y. C.P.L.R. 7801(1) (McKinney 2021).

A. Ripeness

With respect to ripeness, only final agency actions are generally subject to challenge in a SEQRA (or any other Article 78) challenge.[101] Court of Appeals decisions issued in prior years have held that, in most instances, a positive SEQRA declaration of significance is not a final agency action ripe for review; instead, it is an initial step in the decision-making process.[102] A Court of Appeals decision from 2003, *Gordon v. Rush*, did allow a challenge to a positive declaration, holding that a positive declaration is ripe for judicial review in limited circumstances: when (1) the action imposes an obligation, denies a right, or fixes "some legal relationship as a consummation of the administrative process";[103] and (2) when there is "a finding that the apparent harm inflicted by the action may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party."[104]

Gordon, though, is the exception to the rule, which the Court of Appeals made clear in its 2016 decision *Ranco Sand & Stone Corp. v. Vecchio*.[105] There, the Court held that a positive declaration was not ripe for review under the *Gordon* framework because it did not satisfy the second prong of the *Gordon* inquiry—that the harm could not be ameliorated in the future.[106] The Court clarified that its holding in *Gordon* "was never meant to disrupt the understanding of appellate courts that a positive declaration imposing a DEIS requirement is

101. *Id.*; *See* Essex Cnty. v. Zagata, 91 N.Y.2d 447, 452–53, 695 N.E.2d 232, 235, 672 N.Y.S.2d 281, 284 (1998) (first citing N.Y. C.P.L.R. 7801(1) (McKinney 2021); then citing N.Y. EXEC. LAW § 818(1) (McKinney 2021); Vill. of Kiryas Joel v. Cnty. of Orange, 181 A.D.3d 681, 685, 121 N.Y.S.3d 102, 106 (2d Dep't 2020) (holding that petitioner's claim was ripe because respondent's completion of the SEQRA process constituted a final agency decision).

102. *See* Ranco Sand & Stone Corp. v. Vecchio, 27 N.Y.3d 92, 100, 49 N.E.3d 1165, 1170, 29 N.Y.S.3d 873, 878 (2016) (citing Rochester Tel. Mobile Commc'ns v. Ober, 251 A.D.2d 1053, 1054, 674 N.Y.S.2d 189, 190 (4th Dep't 1998)). *But see* 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.*, 91 N.Y.2d at 453, 695 N.E.2d at 235, 672 N.Y.S.2d at 284).

103. *Gordon*, 100 N.Y.2d at 242, 792 N.E.2d at 172, 762 N.Y.S.2d at 22 (citing Essex Cnty., 91 N.Y.2d at 453, 695 N.E.2d at 235, 672 N.Y.S.2d at 284) (quoting Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 112–13 (1987)).

104. *Id.* (quoting *Essex Cnty.*, 91 N.Y.2d at 453, 695 N.E.2d at 235, 672 N.Y.S.2d at 284).

105. 27 N.Y.3d at 100, 49 N.E.3d at 1170, N.Y.S.3d at 878 (citing Guido v. Town of Ulster, 902 N.Y.S.2d 701, 712 (3d Dep't 2010)).

106. *Id.* at 100–01, 49 N.E.3d at 1170, 29 N.Y.S.3d at 878.

usually not a final agency action, and instead is an initial step in the SEQRA process."[107] No reported cases during the *Survey* period addressed ripeness.

B. Mootness

The mootness doctrine requires that, if "during the pendency of a proceeding to review an agency determination, there has been a subsequent action taken which has resolved the issue in dispute, the proceeding should be dismissed as moot."[108] An exception to the mootness doctrine may apply if three common factors are met: "(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 issues not previously passed on, i.e. substantial and novel issues."[109] In other words, a matter is not moot where it "presents a live controversy and enduring consequences potentially flow" from the determination that is challenged.[110] And in the case of an agency, the reviewing court must also analyze whether the agency's determination will have the potential to affect a petitioner's future rights.[111]

One reported case during the *Survey* period addressed mootness. In *Roger Realty Co. v. New York State Department of Environmental Conservation*, also discussed above regarding the zone of interests test for standing, the petitioner challenged DEC's approval of a Consent Order and Consent Order Barge Plan relating to the removal of construction and demolition debris at 180 Roger Avenue in the Town

107. *Id.* at 100, 49 N.E.3d at 1170, 29 N.Y.S.3d at 878 (citing *Rochester Tel. Mobile Commc'ns,* 251 A.D.2d at 1054, 674 N.Y.S.2d at 190). Similarly, a decision addressed in an earlier Survey period rejected a challenge to a positive declaration for failure to satisfy the first step of the Gordon inquiry. *See 2019-2020 Survey*, *supra* note 1, at 340.

108. Mehta v. New York City Dep't of Consumer Affs., 162 A.D.2d 236, 237, 556 N.Y.S.2d 601, 602 (1st Dep't 1990) (citing Flacke v. Onondaga Landfill Sys. Inc., 69 N.Y.2d 873, 874, 507 N.E.2d 316, 316, 514 N.Y.S.2d 723, 723 (1987)).

109. 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).

110. New York State Comm'n on Jud. Conduct v. Rubenstein, 23 N.Y.3d 570, 576, 16 N.E.3d 1156, 1160, 992 N.Y.S.2d 678, 682 (2014) (first citing Saratoga Cnty. Chamber of Com. v. Pataki, 100 N.Y.2d 801, 811, 798 N.E.2d 1047, 1051, 766 N.Y.S.2d 654, 658 (2003); then citing Bickwid v. Deutsch, 87 N.Y.2d 862, 863, 662 N.E.2d 250, 250, 638 N.Y.S.2d 932, 932 (1995); and then citing Williams v. Cornelius, 76 N.Y.2d 542, 546, 563 N.E.2d 15, 17, 561 N.Y.S.2d 701, 703 (1990)).

111. *See* Rukenstein v. McGowan, 273 A.D.2d 21, 22, 709 N.Y.S.2d 42, 43 (1st Dep't 2000).

of Hempstead by respondent Inwood.[112] On December 12, 2018, the petitioner had timely filed its Article 78 petition challenging the August 2018 Consent Order Barge Plan approved by DEC, and on October 15, 2020, Inwood (also named a respondent in the proceeding) informed the parties that a closure report for 180 Roger Avenue had been submitted to and accepted by DEC.[113] Approximately two weeks after providing notice of the closure report, Inwood moved to dismiss the petition, arguing that the DEC's approval of Inwood's closure report rendered the Article 78 proceeding moot.[114]

Analyzing the three factors that would permit an exception to the mootness doctrine, the Supreme Court Albany County denied the motion to dismiss on grounds of mootness.[115] First, the court found that "the issue of DEC avoiding its responsibilities for SEQRA review, for whatever reason, and by putting a clearly environmentally sensitive Barge Plan into a remediation consent order, is a matter that will likely recur."[116] As to the second factor, DEC's "determination to place Inwood's Barge Plan into a remediation order, namely the Consent Order Barge Plan, is also an issue that will likely evade judicial review."[117] And third, the court found that DEC's actions and the events that occurred with respect to the 180 Roger Avenue Consent Order and Barge Plan were "substantial and novel."[118]

Moreover, the court stated that it viewed Inwood's claim of mootness "with a bit of scepticism [*sic*]."[119] Inwood's closure report for 180 Roger Avenue claimed that the removal of all materials on the site occurred by March 16, 2018—months prior to petitioner filing the Article 78 challenge.[120] The court stated that, "if Inwood had remediated 180 Roger Avenue by March 16, 2018, and its Barge Plan was no longer required to complete the March 5, 2018 Consent Order, [Inwood] should have stated much earlier in these proceedings. For example, in Inwood's April 1, 2019 Verified Answer."[121] The court

112. No. 907550-18, 2020 N.Y. Slip Op. 51442(U), at 1 (Sup. Ct. Albany Cnty. 2020).

113. *Id.* at 5.

114. *Id*. at 6.

115. *Id*. at 6.

116. *Id*. at 6.

117. *Roger Realty Co.*, 2020 N.Y. Slip Op. 51442(U), at 6.

118. *Id.*

119. *Id.* at 6 n.6.

120. *Id.* at 6.

121. *Id.*

noted that Inwood's "lack of sooner candor" gave greater credence to petitioner's claims that the Consent Order Barge Plan was "less about the remediation of [construction and demolition materials] at 180 Roger Avenue and more about Inwood's business plans for a barge facility sans compliance with SEQRA, or a proper permit by DEC."[122] Further discussion of the petitioner's claim of unlawful segmentation of the project is found *infra*, Part II.B.1.b.

C. Statute of Limitations

In accordance with the statute of limitations applicable to Article 78 proceedings, a SEQRA challenge must generally be made "within four months after the determination to be reviewed becomes final and binding upon the petitioner," and that period begins to run when the agency has taken a "definitive position on the issue that inflicts an actual, concrete injury."[123] As a practical matter, it can be difficult to identify that point in time when the statute of limitations begins to run, and the trigger point has become an area of some confusion.[124]

122. *Id.* Respondent Inwood Realty subsequently cross-appealed to the Third Department the portion of the Supreme Court's decision that denied its motion to dismiss for mootness. *See* STATE OF NEW YORK, SUPREME COURT, APELLLATE DIVISION THIRD DEPARTMENT, MATTERS DEEMED DISMISSED PURSUANT TO 22 NYCRR 1250.10(A) AND 850.10, Index No. 532661 (June 2021).

123. N.Y. C.P.L.R. 217(1) (McKinney 2021); Stop-The-Barge v. Cahill, 1 N.Y.3d 218, 223, 803 N.E.2d, 361, 363, 771 N.Y.S.2d 40, 42 (2003) (quoting Essex Cnty. v. Zagata, 91 N.Y.2d 447, 452, 695 N.E.2d 232, 235, 672 N.Y.S.2d 281, 284 (1998); *see* Young v. Bd. of Trs., 89 N.Y.2d 846, 848–49, 675 N.E.2d 464, 466, 652 N.Y.S.2d 729, 731 (1998) ("[T]he Statute of Limitations was triggered when the Board committed itself to 'a definite course of future decisions.'") (first citing 6 N.Y.C.R.R. § 617.2(b)(2)–(3) (2018); then citing Save the Pine Bush Inc. v. Albany, 70 N.Y.2d 193, 202, 512 N.E.2d 526, 528–29, 518 N.Y.S.2d 943, 945–46 (1987)). However, SEQRA litigants should also be aware that courts will look to the substance of the underlying claim, whether it is styled as an Article 78 claim or a claim for declaratory judgment, in determining what statute of limitations will apply. *See* Schulz v. Town Bd. Of the Town of Queensbury, 178 A.D.3d 85, 89, 111 N.Y.S.3d 732, 735 (3d Dep't 2019) (finding that although the plaintiff couched his requested relief in the form of a declaratory judgment action, which is subject to a longer statute of limitations, the four-month statute of limitations under Article 78 applied since the plaintiff's SEQRA claims could have been addressed in an Article 78 proceeding) (citing N. Elec. Power Co. v. Hudson River-Black River Regulating Dist., 122 A.D.3d 1185, 1187, 997 N.Y.S.2d 793, 795–96 (3d Dep't 2014); Bango v. Gouverneur Volunteer Rescue Squad, Inc., 101 A.D.3d 1556, 1557, 957 N.Y.S.2d 769, 770 (3d Dep't 2012)).

124. The confusion stems from two Court of Appeals decisions, *Stop-The-Barge*, 1 N.Y.3d at 221, 803 N.E.2d at 361, 771 N.Y.S.2d at 41, and Eadie v. Town

Decisions discussed in more detail in previous *Surveys* illustrate the difficulties in determining when an agency reaches its "definitive position that inflicts an actual, concrete injury" to petitioners, thereby commencing the limitations period.[125] Adding to the confusion, a shorter statute of limitations may apply pursuant to statute, often in challenges to certain land use approvals.[126]

In *Stop-The-Barge*, for example, petitioners commenced an Article 78 proceeding to set aside actions taken by the DEC and the New York City Department of Environmental Protection (DEP) concerning an application for permits to install a power generator on a floating barge in Brooklyn, New York.[127] DEP, as lead agency, issued three CNDs in response to various project modifications, concluding that the project posed no significant adverse impact to the environment and therefore did not require an EIS.[128] The third CND became final on February 18, 2000, thereby concluding SEQRA review of the proposed project.[129] The project sponsor later applied for an air permit to DEC, which was issued (after public comment and a legislative hearing) on December 18, 2000.[130] Petitioners commenced the Article 78 challenge on February 20, 2001—approximately one year after the CND became final, and two months after the air permit was issued.[131] The Court of Appeals held that the CND was a final agency action for purposes of judicial review of petitioners' SEQRA claim, as the DEP reached a definitive position on February 18, 2000 since "DEP conducted no further SEQRA investigation, and issued no further SEQRA declaration on the project."[132] Moreover, the CND "essentially gave the developer the ability to proceed with the project

Bd. of N. Greenbush, 7 N.Y.3d 306, 317, 854 N.E.2d 464, 469, 821 N.Y.S.2d 142, 147 (2006).

125. *See 2015–2016 Survey*, *supra* note 26, at 856.

126. A plaintiff may be subject to a shorter statute of limitations period for challenging SEQRA decisions by statute. For example, New York Town Law section 267-c prescribes a thirty-day statute of limitations for persons aggrieved by a decision of a town's Zoning Board of Appeals regarding a use or area variance, N.Y. TOWN LAW § 267-c (McKinney 2021), and New York Town Law section 274-a prescribes a thirty-day statute of limitations for persons aggrieved by a decision regarding a site plan approval. N.Y. TOWN LAW § 274-a (McKinney 2021).

127. *See Stop-The-Barge*, 1 N.Y.3d at 221, 803 N.E.2d at 361–62, 771 N.Y.S.2d at 40–41.

128. *See id.* at 221, 803 N.E.2d at 362, 771 N.Y.S.2d at 41.

129. *See id.*

130. *See id.* at 221–22, 803 N.E.2d at 362, 771 N.Y.S.2d at 41.

131. *See id.* at 222, 803 N.E.2d at 362, 771 N.Y.S.2d at 41.

132. *Stop-The-Barge*, 1 N.Y.3d at 223, 803 N.E.2d at 363, 771 N.Y.S.2d at 42.

without the need to prepare an environmental impact statement" and, therefore, had inflicted concrete injury to petitioners.[133] Accordingly, the Court of Appeals dismissed the SEQRA challenge as time-barred, since the petition was filed more than four months after the DEP's SEQRA review became final.[134]

The Court of Appeals' decision in *Eadie* complicated matters further, as the court distinguished *Stop-The-Barge* and held that petitioners had *not* suffered "concrete injury" when the SEQRA process culminated in the issuing of a findings statement for purposes of determining when the statute of limitations accrued for petitioners' Article 78 petition.[135] In *Eadie*, the Town of North Greenbush rezoned a large area of land to permit retail development and prepared a draft generic environmental impact statement (DGEIS) related to the rezoning.[136] After public comment, the Town "took the last step in the SEQRA process by adopting a findings statement on April 28, 2004."[137] The Town Board later passed the rezoning by a vote on May 13, 2004, and on September 10, 2004—more than four months after the SEQRA process was completed, but fewer than four months after the rezoning was enacted—petitioners commenced their Article 78 challenge.[138] The Court of Appeals held that no concrete injury was inflicted until the rezoning was enacted, since, until that time, "[petitioners'] injury was only contingent; they would have suffered no injury at all if they had succeeded in defeating the rezoning through a valid protest petition, or by persuading one more member of the Town Board to vote their way."[139] Thus, although the SEQRA findings statement concluded the Town's SEQRA review, it did not inflict actual, concrete injury sufficient to commence the statute of limitations.[140] The reviewing court—and SEQRA practitioners—must thus determine which event in a potential series of agency actions

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

134. *See id.* at 224, 803 N.E.2d at 363–64, 771 N.Y.S.2d at 42–43.

135. *See* Eadie v. Town Bd. of Town of N. Greenbush, 7 N.Y.3d 306, 316, 854 N.E.2d 464, 468–69, 821 N.Y.S.2d 142, 146–47 (2006).

136. *See id.* at 312, 854 N.E.2d at 465–66, 821 N.Y.S.2d at 143–44.

137. *Id.* at 313, 854 N.E.2d at 466, 821 N.Y.S.2d at 144.

138. *See id.* at 313, 854 N.E.2d at 467, 821 N.Y.S.2d at 145.

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

140. *See Eadie*, 7 N.Y.3d at 316, 854 N.E.2d at 146–47, 821 N.Y.S.2d at 468–69.

represents the agency's "definitive position . . . that inflicts an actual, concrete injury."[141]

A few cases from this *Survey* period faced this challenge with respect to the statute of limitations in SEQRA proceedings.[142]

In *Beer v. New York State Department of Environmental Conservation*, the petitioners challenged DEC's issuance of a ten-year water withdrawal permit to the Town of New Paltz.[143] The Town had assumed the role of lead agency for a project intended to supply an alternative water source to residents during planned outages of the Catskill Aqueduct; the Town issued a negative declaration for the project in February 2016 and the issuance of the permit soon followed.[144] Petitioners filed their Article 78 challenge against DEC in March 2018, seeking to annul the permit and alleging, among other things, that DEC "failed to adequately explain the basis of its decision to issue the permit" and "failed to review the Town's negative declaration and/or independently review the project under SEQRA."[145] The Third Department summarily dismissed the

141. Stop-The-Barge v. Cahill, 1 N.Y.3d 218, 223, 803 N.E.2d, 361, 363, 771 N.Y.S.2d 40, 42 (2003) (quoting Essex Cnty. v. Zagata, 91 N.Y.2d 447, 453, 695 N.E.2d 232, 235, 672 N.Y.S.2d 281, 284 (1998)).

142. *See, e.g.*, Mensch v. Plan. Bd. of the Vill. of Warwick, 189 A.D.3d 1245, 1247, 1249, 138 N.Y.S.3d 621, 624–25 (2d Dep't 2020) (first citing N.Y. VILLAGE LAW § 7-725-a (McKinney 2021); then citing Greens at Half Hollow, LLC v. Suffolk Cnty. Dep't of Pub. Works, 147 A.D.3d 942, 944, 48 N.Y.S.3d 147, 150 (2d Dep't 2017); then citing Block 3066, Inc. v. City of New York, 89 A.D.3d 655, 656, 932 N.Y.S.2d 130, 131 (2d Dep't 2011); then citing Cloverleaf Realty of New York Inc. v. Town of Wawayanda, 43 A.D.3d 419, 420–21, 843 N.Y.S.2d 335, 336 (2d Dep't 2007); and then citing Ferruggia v. Zoning Bd. of Appeals, 5 A.D.3d 682, 683, 774 N.Y.S.2d 760, 761 (2d Dep't 2004)) (finding thirty-day statute of limitations applied to challenge to site plan approval and that petitioners' late SEQRA claims were time-barred and not saved by the relation-back doctrine); *see also* Beer v. New York State Dep't of Env't Conservation, 189 A.D.3d 1916, 1921, 138 N.Y.3d 684, 689 (3d Dep't 2020) (finding petitioners' SEQRA claims against DEC for failure to independently review Town's SEQRA findings were collaterally estopped by prior, untimely proceeding against Town and that petitioners' SEQRA claims against DEC were also time-barred); *see also* Roger Realty Co. v. New York State Dep't of Env't Conservation, No. 907550-18, 2020 N.Y. Slip Op. 51442(U), at 7 (Sup. Ct. Albany Cnty. Nov. 30, 2020) (finding petitioners' SEQRA claims were timely with respect to Consent Order Barge Plan which implemented prior Consent Order, where the Barge Plan represented the final agency action causing harm to petitioners).

143. *See* 189 A.D.3d 1916, 1916–17, 138 N.Y.S.3d 684, 685–86 (3d Dep't 2020).

144. *See id.* at 1917, 1921, 138 N.Y.3d at 685–86, 689.

145. *Id.* at 1917, 138 N.Y.3d at 686.

petitioners' claims against DEC as untimely and barred by the doctrine of collateral estoppel, insomuch as the petitioners' prior challenge to the Town's 2016 negative declaration for the Town's water withdrawal permit was also dismissed on the merits as untimely.[146] Even if collateral estoppel did not preclude the petitioners from challenging DEC's alleged failure to independently review the Town's SEQRA findings, the Third Department stated that the Town's negative declaration in February 2016 was the "final agency action for purposes of judicial review of petitioners' SEQRA claims."[147] Accordingly, the Third Department held that the petitioners' SEQRA claim against DEC filed in March 2018 was also time-barred.[148]

Another case from the *Survey* period, *Roger Realty Co. v. New York State Department of Environmental Conservation*, addressed which DEC action triggered the four-month statute of limitations for an Article 78 challenge.[149] The DEC entered into a Consent Order with Inwood on March 5, 2018, ordering Inwood to remove the construction and demolition materials present on its site.[150] The March 2018 Consent Order was later supplemented by a Consent Order Barge Plan that DEC approved on August 17, 2018, describing the procedures that Inwood had to implement to dispose of its construction and demolition debris by barge to satisfy the original March 2018 Consent Order.[151] The petitioner subsequently filed its Article 78 petition on December 14, 2018.[152]

The respondents argued that the petitioner's Article 78 challenge was time-barred by the four-month statute of limitations, which they claimed should have commenced upon DEC's approval of the March 2018 Consent Order.[153] The petitioner claimed that its Article 78 petition was timely, because it was filed within four months of the August 2018 Consent Order Barge Plan implementing the work

146. *See id.* at 1921, 138 N.Y.3d at 689 (citing Beer v. Vill. of New Paltz, 163 A.D.3d 1215, 1216–17, 80 N.Y.S.3d 713, 714–16 (3d Dep't 2018)).

147. *Id.* (first citing Best Payphones, Inc. v. Dep't of Info. Tech. & Telecomms., 5 N.Y.3d 30, 34, 832 N.E.2d 38, 40, 799 N.Y.S.2d 182, 184 (2005); then citing Stop-The-Barge v. Cahill, 1 N.Y.3d 218, 223, 803 N.E.2d 361, 363, 771 N.Y.S.2d 40, 42 (2003)).

148. *See Beer*, 189 A.D.3d at 1921, 138 N.Y.3d at 689.

149. *See* Roger Realty Co. v. New York State Dep't of Env't Conservation, No. 907550-18, 2020 N.Y. Slip Op. 51442(U), at 7 (Sup. Ct. Albany Cty. 2020).

150. *See id.* at 1.

151. *See id.* at 1–2.

152. *See id.* at 6 n.6.

153. *See id.* at 4–5.

contemplated by the March 2018 Consent Order.[154] While the December 2018 petition would have been time-barred in relation to the March 2018 Consent Order, the Supreme Court, Albany County found that the petitioner timely filed its petition in relation to the August 2018 Consent Order Barge Plan.[155] The court noted that the petitioner's allegations supported the court's determination that the "final, definitive action by DEC" which caused actual harm to petitioner occurred in August 2018, when DEC approved the Consent Order Barge Plan.[156] The court further found that the petitioner "could not have appreciated the effect of the 2018 Consent Order until DEC approved the Consent Order Barge Plan on August 17, 2018 – it was not until then that the petitioner was advised of the scope of Inwood's Barge Plan."[157]

Mensch v. Village of Warwick involved the application of the "relation-back" doctrine to a SEQRA determination.[158] In *Mensch*, the petitioners commenced a hybrid proceeding challenging the Village Planning Board's negative declaration and subsequent approval of a site plan to develop a restaurant and catering facility.[159] The petition was filed approximately seven months after the negative declaration was issued but only one month since the site plan approval.[160] The Second Department determined that the petitioners' claims with respect to the site plan approval were time-barred, finding that a shorter thirty day statute of limitations for challenges to site plan approvals under Village Law Section 7-725-a(11) applied.[161]

With respect to the SEQRA claim, the court rejected the *Mensch* petitioners' argument that the relation-back doctrine could save their

154. *See Roger Realty Co.*, Slip Op. 51442(U), at 4.

155. *See id.* at 7.

156. *Id.* at 7.

157. *Id.*

158. *See* 189 A.D.3d 1245, 1248–49, 138 N.Y.S.3d 621, 625 (2d Dep't. 2020).

159. *See id.* at 1246, 138 N.Y.S.3d at 623.

160. *See id.*

161. *See id.* at 1246, 138 N.Y.S.3d at 623–24 (citing N.Y. VILLAGE LAW § 7-725- a (11) (McKinney 2021)) "Any person aggrieved by a decision of the authorized board or any officer, department, board or bureau of the village may apply to the supreme court for review by a proceeding under article seventy-eight of the civil practice law and rules. Such proceedings shall be instituted within thirty days after the filing of a decision by such board in the office of the village clerk.") *Id.*

untimely Article 78 challenge.[162] The petitioners had failed to name the owners of the proposed development when they initiated the Article 78 proceeding against the Village Planning Board and project developer, though the petitioners amended their pleadings one month later to name the owners.[163] The court explained that the relation-back doctrine "allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a codefendant for Statute of Limitations purposes where the two defendants are 'united in interest.'"[164] In order for a claim asserted against a new defendant to relate back to a previously asserted claim, the plaintiff must establish that: "(1) both claims arose out of the same conduct, transaction, or occurrence; (2) the new defendant is united in interest with the original defendant, and by reason of that relationship can be charged with notice of the institution of the action such that he or she will not be prejudiced in maintaining a defense on the merits; and (3) the new defendant knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him or her as well."[165] In this case, the court held that the petitioners failed to show that the owners were united in interest with the developer and that there was a mistake as to the identity of the proper parties at the time of the original pleading, which is necessary for the relation-back doctrine to apply.[166] Thus, the Second Department affirmed the lower court's dismissal of the petition.[167]

B. Procedural Requirements Imposed by SEQRA on State Agencies

As explained in Part I, much of SEQRA's mandate is procedural; lead agencies must comply with SEQRA's requirements to identify the type of action at issue, issue a determination of significance, and if the determination is positive, require preparation of an EIS.[168]

162. *See id.* at 1249, 138 N.Y.S.3d at 625 (quoting Ferruggia v. Zoning Bd. of Appeals of Warwick, 5 A.D.3d 682, 683, 774 N.Y.S.2d 760, 761 (2d Dep't 2004)).

163. *See Mensch*, 189 A.D.3d at 1246, 138 N.Y.S.3d at 623.

164. *See id.* at 1248, 138 N.Y.S.3d at 625 (quoting Buran v. Coupal, 87 N.Y.2d 173, 177, 661 N.E.2d 978, 981, 638 N.Y.S.2d 405, 408 (1995)).

165. *Id.* (first citing Mileski v. MSC Indus. Direct Co., Inc., 138 A.D.3d 797, 799–800, 30 N.Y.S.3d 159, 162 (2d Dep't 2016); then citing *Buran*, 87 N.Y.2d at 178, 661 N.E.2d at 981, 638 N.Y.S.2d at 408).

166. *See id.* (citing Ferruggia v. Zoning Bd. of Appeals of Warwick, 5 A.D.3d 682, 683, 774 N.Y.S.2d 760, 761 (2d Dep't. 2004)).

167. *See id.*

168. *See* discussion *supra* Part I.

Several reported cases during the *Survey* period concerned lead agencies' alleged failures to comply with one or more of these procedural mandates.[169]

1. Classification of the Action

A. Classifying an Action as Type I, Type II, or Unlisted

DEC sorts certain types of agency actions into categories by regulation.[170] As noted above, a Type I action is any action or type of action that carries the presumption that an EIS will be required.[171] Conversely, a Type II action is any action or type of action that does not require further SEQRA review, as it "[has] been determined not to have a significant impact on the environment or [is] otherwise precluded from environmental review under Environmental Conservation Law, article 8."[172] Any state or local agency may adopt its own list of additional Type I or Type II actions to supplement those provided by DEC.[173] An "Unlisted" action is any action not identified as Type I or Type II by DEC's regulations or, where applicable, a lead agency's additional classification of actions by type.[174]

169. *See, e.g.*, Buckley v. Zoning Bd. of Appeals of Geneva, 189 A.D.3d 2080, 2082, 139 N.Y.S.3d 732, 735 (4th Dep't 2020) (discussing classification of the action); Islandia v. Ball, 905550/2017E, 2020 N.Y. Slip Op. 33930(U), at 12–16, 18 (Sup. Ct. Albany Cnty. Aug. 21, 2020) (classification of the action) (coordinated review); Ct. St. Dev. Project, LLC v. Utica Urb. Renewal Agency, 188 A.D.3d 1601, 1603, 136 N.Y.S.3d 588, 591 (4th Dep't 2020) (discussing segmentation); Sandora v. New York City, 186 A.D.3d 1225, 1226, 130 N.Y.S.3d 61, 63 (2d Dep't. 2020) (discussing segmentation); Roger Realty Co. v. N.Y. State Dept. of Envtl.Conservation, No. 907550-18, 2020 N.Y. Slip Op 51442(U) at 6 (Sup. Ct. Albany Cnty. November 30, 2020) (discussing segmentation); BT Holdings, LLC v. Chester, 189 A.D.3d 754, 759, 137 N.Y.S.3d 458, 463 (2d Dep't 2020) (discussing coordinated review); Hart v. Town of Guilderland, 196 A.D.3d 900, 902–04, 151 N.Y.S.3d 700, 705 (3d Dep't 2021) (discussing lead agency determination); Coal. For Cobbs Hill v. Rochester, 194 A.D.3d 1428, 1431, 149 N.Y.S.3d 400, 405 (4th Dep't 2021) (discussing lead agency determination); Neighbors United Below Canal et al. v. DeBlasio et al., 192 A.D.3d 642, 643, 146 N.Y.S.3d 79, 80 (1st Dep't 2021) (conclusory opinion finding New York City Planning Commission considered a reasonable range of alternative locations for new jail).

170. *See* 6 N.Y.C.R.R.§ 617.4(a) (2021).

171. *See* 6 N.Y.C.R.R. § 617.4(a)(1).

172. *See* 6 N.Y.C.R.R. § 617.5(a).

173. *See* 6 N.Y.C.R.R. § 617.4(a)(2); 6 N.Y.C.R.R. § 617.5(b). Note that "[a]n agency may not designate as Type I any action identified as Type II" by DEC at section 617.5 of the SEQRA regulations.

174. *See* 6 N.Y.C.R.R. § 617.2(al).

Two courts opined on the classifications applied by lead agencies during this *Survey* period.[175] In *Buckley v. City of Geneva*, the Fourth Department elaborated on the presumption that Type I actions require an EIS.[176] The challenged action in that case was the approval by the Geneva Zoning Board of Appeals ("ZBA") of a use variance for a redevelopment project proposing to convert a church and rectory into an inn with guest rooms, a restaurant, and a parking lot expansion.[177] The ZBA had classified the proposal as a Type I action and issued a negative declaration for the project.[178] The petitioners challenged the ZBA's compliance with the substantive and procedural requirements of SEQRA, including the ZBA's determination that an EIS was not required for the Type I action.[179] The Fourth Department found that the ZBA complied with the requirements of SEQRA and elaborated on the necessity of an EIS for Type I actions.[180] It stated, "it is well settled that the designation as a Type I action does not, per se, necessitate the filing of an [EIS]."[181] Where the SEQRA lead agency, here the ZBA, finds that "there will be no adverse environmental impacts or that such impacts will be insignificant, it can issue a negative declaration without the necessity of an EIS" and it is not the court's role to second-guess the lead agency's determination.[182] The Fourth Department affirmed the lower court's dismissal of the petition, upholding the ZBA's negative declaration for a Type I action without requiring an EIS.[183]

In *Village of Islandia v. Ball* ("*Islandia II*"), the Suffolk County Legislature approved a resolution for the inclusion of additional lots

175. *See, e.g.*, *Buckley*, 189 A.D.3d at 2082, 139 N.Y.S.3d at 735 (finding proposed Use Variance was properly classified as SEQRA Type I action that did not necessarily require EIS, where Zoning Board of Appeals had issued negative declaration); *Islandia*, Slip. Op. 33930(U), at 13–16 (finding the inclusion of new lands into an existing agricultural district to be an Unlisted action).

176. *See id.* at 2082, 139 N.Y.S.3d at 735 (citing Wooster v. Queen City Landing, LLC., 150 A.D.3d 1689, 1692, 54 N.Y.S.3d 812, 816 (4th Dep't 2017).

177. *See id.* at 2080, 139 N.Y.S.3d at 734.

178. *See id.*

179. *See id.*

180. *See Buckley*, 189 A.D.3d at 2082, 139 N.Y.S. at 735 (quoting Campaign for Buffalo Hist. Architecture & Culture, Inc. v. Zoning Bd. of Appeals of Buffalo, 174 A.D.3d 1304, 1306, 105 N.Y.S.3d 731, 733 (4th Dep't 2019)).

181. *Id.* at 2082, 139 N.Y.S.3d at 735 (quoting *Wooster*, 150 A.D.3d at 1692, 54 N.Y.S.3d at 816) (internal quotations omitted)).

182. *Id.* (quoting Brunner v. Town of Schodack, 178 A.D.3d 1181, 1182–83, 113 N.Y.S.3d 410, 411–12 (3d Dep't. 2019)).

183. *See id.* at 2080, 139 N.Y.S.3d at 734.

to an existing agricultural district, classifying the proposal as an Unlisted action and issuing a negative declaration.[184] The County Legislature then forwarded the resolution to the Commissioner of Agriculture and Markets for a certificate approving the inclusion of lands in the district.[185] The petitioner, the Village of Islandia, brought an Article 78 challenge that, among other things, disputed the classification of the action under SEQRA.[186] The petitioner argued that the County's approval of the inclusion of lands into an agricultural district should have been classified as a Type I action, one requiring a Full EAF and potentially an EIS.[187] The respondent County argued at trial, for the first time, that the County Legislature's approval was a Type II action exempt from SEQRA, despite the consistent prior references to the proposal as an Unlisted action under SEQRA throughout the County's approval process.[188]

The court roundly rejected the County's claim that the County Legislature's approval of the resolution was a Type II action.[189] First, the County's argument was belied by its own record referring to approval of the resolution as an Unlisted action throughout the approval process.[190] Second, local legislative action to add lands to an existing agricultural district do not constitute "agricultural farm management practices," which would be exempt from SEQRA as an enumerated Type II action under the SEQRA regulations.[191] Third, the court again cited the regulations and stated that actions of the *State* Legislature and Governor are exempt from SEQRA, but not those of local legislative bodies.[192] And fourth, the court considered the list of agency-specific Type II actions adopted by the New York State Department of Agriculture and Markets pursuant to 6 NYCRR 617.5(b), which provided that "promotion and marketing assistance to

184. *See* Vill. of Islandia v. Ball, 905550/2017E, 2020 N.Y. Slip Op. 33930(U), at 2–3 (Sup. Ct. Albany Cnty. Aug. 21, 2020).

185. *See id.* at 1.

186. *See id.* at 12.

187. *See id.* at 15.

188. *See id.* at 13 (citing 6 N.Y.C.R.R. § 617.5(c) (2021)).

189. *See Vill. of Islandia*, Slip. Op. 33930(U), at 13.

190. *See id.*

191. *Id.* at 13–14 (first citing Humane Soc'y of U.S. v. Empire State Dev. Corp., 53 A.D.3d 1013, 1018, 863 N.Y.S.2d 107, 112 (3d Dep't 2008); then citing Pure Air & Water, Inc. v. Davidsen, 246 A.D.2d 786, 787–88, 668 N.Y.S.2d 248, 250 (3d Dep't 1998)).

192. *See id.* at 14 (first citing 6 N.Y.C.R.R. § 617.2(b)(3) (2021); and then citing 6 N.Y.C.R.R. § 617.5(c)(46)).

agriculture" constituted a Type II action.[193] The court found that, by its express language, "promotion, and marketing assistance to agriculture" does not include the issuance of a certificate to add land to an existing agricultural district under Agriculture and Markets Law § 303-b.[194]

The court also rejected the petitioner's argument that adding land to an existing agricultural district constituted a Type I action.[195] Inclusion of lands within an agricultural district does not constitute a "change in allowable uses within the zoning district as required by 6 NYCRR 617.4(b)(2), for the lands are still subject to local zoning, albeit with a potential Commissioner [of Agriculture and Markets] override."[196] Ultimately, the court vacated the County Legislature's approval to include the parcels in the agricultural district for the deficiencies described above, as well as other severe deficiencies.[197]

B. Unlawful "Segmentation" of SEQRA Review

Defining the proper parameters 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[A]."[198] 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;"[199] 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."[200] Segmentation is not strictly prohibited by SEQRA,

193. *See id.* at 15.

194. *See Vill. of Islandia*, Slip. Op. 33930(U), at 15.

195. *See id.*

196. *Id.* at 15–16 (citing 6 N.Y.C.R.R. § 617.4(b)(2) (2021)) ("The following actions are Type I if they are to be directly undertaken, funded or approved by an agency: . . . (2) the adoption of changes in the allowable uses within any zoning district, affecting 25 or more acres of the district . . ."). *Id.*

197. *See id.* at 25. Additional discussion of *Islandia II* can found *infra*, Parts II.B.2 and II.C.1.

198. 6 N.Y.C.R.R. § 617.3(g)(1) (2021).

199. Schultz v. Jorling, 164 A.D.2d 252, 255, 563 N.Y.S.2d 876, 879 (3d Dep't 1990) (citing Sutton v. Bd. of Trs., 122 A.D.2d 506, 508–09, 505 N.Y.S.2d 263, 265 (3d Dep't 1986)).

200. *Id.* at 255–56, 563 N.Y.S.3d at 879.

but it is disfavored; DEC's SEQRA regulations provide that a lead agency permissibly may segment review if "the agency clearly states its reasons therefor and demonstrates that such review is no less protective of the environment."[201]

Three reported cases from this *Survey* period addressed segmentation.[202] In *Court Street Development Project, LLC v. Utica Urban Renewal Agency*, the petitioner contended that the Utica Urban Renewal Agency violated SEQRA by improperly segmenting environmental review of its determination to condemn the petitioner's real property "without considering the impact of future unknown aspects of the rehabilitation or reuse project . . . ."[203] The Fourth Department described the prohibition of improper segmentation as being intended to prevent "a project with significant environmental effects from being split into two or more smaller projects, each falling below the threshold requiring full-blown review."[204] The court then summarily rejected petitioner's claim of improper segmentation, because "no specific use had been identified prior to the acquisition of petitioner's property, and thus respondent was not required to consider the environmental impact of anything beyond the acquisition."[205]

The Second Department also rejected a finding of improper segmentation in *Sandora v. New York City*.[206] The petitioner claimed

201. *See* 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).

202. *See* Ct. St. Dev. Project, LLC v. Utica Urb. Renewal Agency, 188 A.D.3d 1601, 1603, 136 N.Y.S.3d 588, 591 (4th Dep't 2020) (rejecting petitioner's claim of improper segmentation where no specific future use was identified); Sandora v. New York City, 186 A.D.3d 1225, 1226, 130 N.Y.S.3d 61, 63 (2d Dep't 2020) (rejecting petitioner's claim of improper segmentation where New York City's anti-homelessness policy report did not commit City to definite course of future action and where said report was not issued until eight months after application for challenged project was filed); Roger Realty Co. v. N.Y. State Dep't of Env't Conservation, No. 907550-18, 2020 N.Y. Slip Op. 51442(U), at 6 (Sup. Ct. Albany Cty. Nov. 30, 2020) (finding improper segmentation occurred where DEC implicitly granted the equivalent of a permit for a solid waste management facility within Barge Plan implementing a prior Consent Order without SEQRA review).

203. *Ct. St. Dev. Project, LLC*, 188 A.D.3d at 1603, 136 N.Y.S.3d at 591.

204. *Id.* (citing Long Island Pine Barrens Soc'y v. Plan. Bd., 204 A.D.2d 548, 550, 611 N.Y.S.2d 917, 919 (2d Dep't 1994)).

205. *See id.* at 1603, 136 N.Y.S.3d at 591 (citing GM Components Holdings, LLC v. Town of Lockport Indus. Dev. Agency, 112 A.D.3d 1351, 1352, 977 N.Y.S. 2d 836, 838 (4th Dep't 2013)).

206. *See Sandora*, 186 A.D.3d at 1226–27, 130 N.Y.S.3d at 63 (citing *Long Island Pine Barrens Soc'y,* 204 A.D.2d at 550, 611 N.Y.S.2d at 919).

that the New York City Department of Homeless Services improperly segmented its SEQRA review of the proposed conversion of two multistory buildings in Ozone Park, Queens, into a drop-in facility and transitional home for homeless adults.[207] The petitioner alleged that the Department of Homeless Services should have also conducted environmental review of the City's broader policy found in a 2017 report entitled "Turning the Tide on Homelessness in New York City," and that the failure to do so constituted improper segmentation.[208]

The Second Department rejected the petitioner's contention for two reasons.[209] First, environmental impact review is not required until a specific project is actually proposed, and the Turning the Tide report did not commit the City to a "sufficiently definite course of future decisions such that it constituted an action pursuant to SEQRA requiring prior environmental review."[210] And second, the Ozone Park project application predated the release of the Turning the Tide report by approximately eight months—this sequence of events weighed against any potential finding of improper segmentation, as the Ozone Park project and the Turning the Tide were not a "single action" for the purposes of environmental review.[211] Taken together, *Court Street Development Project* and *Sandora* stand for the proposition that there must be a definite and committed course of future action for a claim of improper segmentation to be meritorious.

However, a court did find that improper segmentation occurred in *Roger Realty Co. v. New York State Department of Environmental Conservation*.[212] There, the petitioner alleged that respondent DEC conspired with co-respondent Inwood Realty to segment and shield from SEQRA review the significant environmental impacts anticipated to result from Inwood's proposed commercial soil separating business, as implied in a Consent Order Barge Plan approved by DEC to implement an earlier Consent Order to remediate

207. *See id.* at 1225, 130 N.Y.S.3d at 62.

208. *See id.*

209. *See id.* at 1226, 130 N.Y.S.3d at 63 (first citing 6 N.Y.C.R.R. § 617.2(b)(2) (2021); then citing Woodbury v. Cnty. of Orange, 114 A.D.3d 951, 954, 981 N.Y.S.2d 126, 130 (2d Dep't 2014); and then citing *Long Island Pine Barrens Soc'y,* 204 A.D.2d at 550, 611 N.Y.S.2d at 919).

210. *Id.*

211. *See Sandora,* 186 A.D.3d at 1226, 130 N.Y.S.3d at 63 (citing *Long Island Pine Barrens Soc'y,* 204 A.D.2d at 550, 611 N.Y.S.2d at 919).

212. *See* No. 907550-18, 2020 N.Y. Slip Op. 51442(U), at 8 (Sup. Ct. Albany Cty. Nov. 30, 2020).

abandoned construction and demolition debris at Inwood's site.[213] DEC countered that environmental review of the Consent Order Barge Plan was unnecessary because, as a remedial plan, it represented prosecutorial discretion, as noted previously in Part II.A.1.d.[214] Inwood argued against a finding of improper segmentation, claiming that the Barge Plan had only been approved for the removal of the existing construction and demolition debris.[215]

But the record showed that the Consent Order Barge Plan included not only the removal of construction and demolition materials but also "DOT grade Type I materials . . . which do not fall under DEC jurisdiction and do not require manifesting."[216] In essence, the petitioner alleged improper segmentation, because the Barge Plan contemplated that Inwood (d/b/a Russo's) would be permitted to *continue* barge operations for its planned soil separation business even after the Consent Order's purpose of removing all existing construction and demolition debris was complete; the petitioners claimed that the environmental impacts of Inwood's proposed soil separation business were thusly shielded from environmental review due to this improper segmentation.[217] Inwood (d/b/a Russo's) would have been required to acquire a Part 360 permit for a solid waste management facility from DEC, a SEQRA action requiring environmental review.[218] Instead, the Consent Order Barge Plan effectively permitted Inwood to continue barge operations for its proposed soil separation business, with no SEQRA review at all.[219] Moreover, the Consent Order Barge Plan included a Part 360 permit, but it was not Inwood Realty's permit; instead, that Permit belonged to another entity, yet DEC still approved the Barge Plan.[220]

213. *See id.* at 2.

214. *See id.* at 4. DEC also contended that it afforded no extra rights to Inwood beyond what that entity could do without a DEC permit, and thus there was no other action that could create segmentation. As noted, the court rejected this argument. *See id.*

215. *See id.*

216. *See Roger Realty Co.*, Slip. Op. 51442(U), at 2.

217. *See id.* at 5.

218. *See id.* at 5; *see also* N.Y. ENV'T CONSERV. LAW § 8-0105(4)(i) (McKinney 2021) (SEQRA Actions include "projects or activities involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use or permission to act by one or more agencies . . .").

219. *See Roger Realty Co.*, Slip. Op. 51442(U), at 7–8.

220. *See id.* at 9.

The court agreed with petitioners, finding the Town's record showed that DEC's approval of the Consent Order Barge Plan "included a new and continuing use of barges after remediation" of the construction and demolition materials at the site, which constituted the type of segmentation that was prohibited by SEQRA.[221]

2. Lead Agency Designation & 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" is the one "principally responsible for undertaking, funding, or approving an action," and it must conduct a coordinated review.[222] Under SEQRA regulations, if the "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 [other] involved agency may later require the preparation of an EAF, a negative declaration or an EIS in connection with the action," and the lead agency's determination of significance "is binding on all other involved agencies."[223]

Four cases dealt with the propriety of lead agency designation or coordinated review during this *Survey* period.[224] *BT Holdings, LLC v.*

221. *Id.* at 8, 11. Following the entry of the Roger Realty decision in December 2020, DEC moved to reargue the case during Spring 2021. The Supreme Court, Albany County, denied DEC's motion for reargument in April 2021. *See id.*

222. *See* 6 N.Y.C.R.R. § 617.2(v) (2021); 6 N.Y.C.R.R. § 617.6(b)(3). Agencies have the option of conducting a coordinated review for Unlisted Actions, but it is not required. *See* 6 N.Y.C.R.R. § 617.6(b)(4).

223. 6 N.Y.C.R.R. § 617.6(b)(3)(iii). When more than one agency is involved, and the lead agency determines that an EIS is required, it must engage in a coordinated review. *See* 6 N.Y.C.R.R. § 617.6(b)(2)(ii).

224. *See generally* BT Holdings, LLC v. Vill. of Chester, 189 A.D.3d 754, 137 N.Y.S.3d 458 (2d Dep't 2020) (holding that village was not required to enact zoning to allow construction of a proposed project as described in an FEIS and SEQRA findings, where village had entered into stipulation with project sponsor which provided that "[c]onstruction shall be undertaken in the manner described and set forth in the [FEIS] and the Village's SEQRA findings" (internal quotation marks omitted)); *see also* Hart v.Town of Guilderland, 196 A.D.3d 900, 914, 151 N.Y.S.3d 700, 714 (3d Dep't 2021) (reversing lower court and dismissing Article 78 challenge to planning board's approval of site plan under SEQRA); Coal. for Cobbs Hill v. City of Rochester, 194 A.D.3d 1428, 1432, 149 N.Y.S.3d 400, 406 (4th Dep't 2021) (finding that City of Rochester Manager of Zoning properly acted as SEQRA lead agency); Vill. of Islandia v. Ball, No. 905550/2017E, 2020 N.Y. Slip Op. 33930(U), at 18 (Sup. Ct. Albany Cty. Aug. 21, 2020) (finding de facto coordinated review occurred, despite the procedural error of failing to serve lead agency notice).

Village of Chester concerned an annexation petition under consideration by the Town of Chester Town Board and Village of Chester Board of Trustees.[225] A multiyear review pursuant to SEQRA was undertaken by the Village of Chester Board of Trustees as lead agency, and an FEIS was issued outlining the positive benefits of the annexation, which would facilitate development of senior and multifamily housing on the annexed territory.[226] Though the village voted to approve the annexation, the Town of Chester Town Board issued its own SEQRA findings and voted to deny the annexation petition based on "alleged identified adverse environmental impacts" from the size and scale of the proposed project.[227] The Village of Chester Board of Trustees and owner of the parcel commenced an Article 78 proceeding to annul the town's SEQRA findings, which was settled by stipulation.[228] In the stipulation, the parcel owner agreed to reduce the number of residential units to be built on the parcel, and the town agreed that downsizing the development removed its environmental impact concerns.[229] The Town of Chester Town Board therefore adopted the Village Board's SEQRA findings in their entirety.[230]

Another recent decision, *Hart et al. v. Town of Guilderland*, rejected a challenge to the Planning Board of the Town of Guilderland's lead agency status determination.[231] The Third Department held that the Planning Board of the Town of Guilderland's failure to involve the Zoning Board of Appeals (ZBA) in its lead agency determination was inconsequential to the SEQRA review process, where the ZBA was included as an involved agency throughout the Planning Board's SEQRA review, and where the ZBA was provided copies of the positive declaration, DEIS, FEIS and the findings statement and thus had ample opportunity to participate in the SEQRA process.[232]

225. *See BT Holdings, LLC*, 189 A.D.3d at 756, 137 N.Y.S.3d at 461.

226. *See id.* at 756, 137 N.Y.S.3d at 461 (citing N.Y. ENV'T CONSERV. LAW § 8-0101 (McKinney 2021)).

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

228. *See id.* at 757, 137 N.Y.S.3d at 461–62.

229. *See id.* at 757, 137 N.Y.S.3d at 462.

230. *See BT Holdings, LLC*, 189 A.D.3d at 757, 137 N.Y.S.3d at 462.

231. *See* 196 A.D.3d 900, 902–03, 151 N.Y.S.3d 700, 700 (3d Dep't 2021) (quoting King v. Cnty. of Saratoga Indus. Dev. Agency, 208 A.D.2d 194, 201, 622 N.Y.S.2d 339, 344 (3d Dep't 1995).

232. *See id.* at 903, 151 N.Y.S.2d at 700 (citing Cade v. Stapf, 91 A.D.3d 1229, 1231–32, 937 N.Y.S.2d 673, 676 (3d Dep't 2012)).

In *Coalition for Cobbs Hill by Pasteki v. City of Rochester*, the Fourth Department was confronted with a pair of overlapping standing agreements between the various involved agencies for the proposed redevelopment of an affordable housing community in Rochester.[233] First, the Mayor's Office had a standing agreement with the City Council that the Mayor's Office would act as SEQRA lead agency for all projects involving both entities.[234] And second, the Mayor's Office had another standing agreement with the City of Rochester Manager of Zoning that the Zoning Manager would act as SEQRA lead agency for actions involving those entities.[235] The Zoning Manager did indeed act as lead agency on the project, which the petitioners challenged as a violation of SEQRA.[236]

The Fourth Department found that the Zoning Manager's establishment as lead agency pursuant to the overlapping standing agreements was not deficient.[237] Under the SEQRA regulations, a lead agency is "an involved agency principally responsible for undertaking, funding, or approving" a project, and lead agency "may not delegate its responsibilities to any other agency."[238] And an involved agency is "an agency that has jurisdiction by law to fund, approve, or directly undertake an action," which the court paraphrased as "the discretionary authority to make such a determination."[239] The Fourth Department noted that the Mayor's Office was an involved agency, because the Mayor had approval authority over the project's financing; it also could have served as lead agency, because of its standing agreement with the City Council.[240] The Zoning Manager was also an involved agency as the entity responsible for issuing preliminary site plan findings prior to review by City Planning

233. *See* 194 A.D.3d 1428, 1430, 149 N.Y.S.3d 400, 404 (4th Dep't 2021).

234. *See id.*

235. *See id.*

236. *See id.*

237. *See id.* at 1431, 149 N.Y.S.3d at 405 (first citing 6 N.Y.C.R.R. § 617.2(v) (2021); then citing Coca-Cola Bottling Co. v. Bd. of Estimate, 72 N.Y.2d 674, 682, 532 N.E.2d 1261, 1265, 536 N.Y.S.2d 33, 37 (1988)).

238. *See Coal. for Cobbs Hill*, 194 A.D.3d at 1431, 149 N.Y.S.3d at 405 (first citing 6 N.Y.C.R.R. § 617.2(v) (2021); then citing Penfield Panorama Area Cmty., Inc. v. Town of Penfield Plan. Bd., 253 A.D.2d 342, 350, 688 N.Y.S.2d 848, 853 (4th Dep't 1999)).

239. *See id.* (citing 6 N.Y.C.R.R. § 617.2(t) (2021)).

240. *See id.* at 1432, 149 N.Y.S.3d at 405 (first citing CITY OF ROCHESTER, CHARTER § 5-8(c) (2021); then citing 6 N.Y.C.R.R. § 617.2(t) (2021); and then citing SEQRA HANDBOOK, *supra* note 4 at 60).

Commission; it too was eligible to serve as lead agency because it was an involved agency pursuant to its standing agreement with the Mayor's Office.[241]

The court concluded that "ultimately, the Zoning Manager properly acted as lead agency on the project based on the overlapping standing agreements between those entities."[242] The court continued that "this is not a case where the establishment of the Zoning Manager as lead agency was an improper attempt to shield the responsible agency to performing the requisite environmental review as part of its decision-making process, or where the proper lead agency abdicated its responsibilities under SEQRA."[243]

And last, the Supreme Court, Albany County, determined in *Islandia v. Ball* ("*Islandia II*") that coordinated review of the challenged expansion of an existing agricultural district—an Unlisted action under SEQRA for which coordinated review is optional—occurred, contrary to petitioners' allegations.[244] The Suffolk County Legislature acted as the SEQRA lead agency for this environmental review, and the New York State Department of Agriculture and Markets was an involved agency in light of a statutory two-step coordinated process for the inclusion of agricultural lands into an existing district; the adoption of a resolution by the county legislature must be followed by the Commissioner of Agriculture and Markets' certification that the proposed inclusion of lands is feasible and in the public interest.[245] However, the Suffolk County Legislature failed to provide a lead agency notice to the Commissioner.[246]

The court noted that "[a] lead agency must strictly comply with SEQRA's mandates" but questioned whether the Suffolk County Legislature's non-compliance with the lead agency notice provision in

241. *See id.* at 1432, 149 N.Y.S.3d at 406 (citing CITY OF ROCHESTER CODE § 120-191(d) (2003)).

242. *Id.*

243. *See Coal. for Cobbs Hill*, 194 A.D.3d at 1432, 149 N.Y.S.3d at 406 (first citing Riverkeeper, Inc. v. Town of Southeast, 9 N.Y.3d 219, 234–35, 881 N.E.2d 172, 178–79, 851 N.Y.S.2d 76, 82–83 (2007); then citing Glen Head-Glenwood Landing Civic Council v. Town of Oyster Bay, 88 A.D.2d 484, 492–93, 453 N.Y.S.2d 732, 738 (2d Dep't 1982)).

244. *See* Vill. of Islandia v. Ball, No. 905550/2017E, 2020 N.Y. Slip Op. 33930(U), at n.45 (N.Y. Sup. Ct. Albany Cty. Aug. 21, 2020).

245. *See id.* at 3–4, 16, 18.

246. *See id.* at 18 (citing 6 N.Y.C.R.R. § 617.6(b)(3)(i) (2021)).

this instance would necessitate reversal.[247] Ultimately, the court determined that "*de facto*" coordinated review did indeed occur, despite the lack of lead agency notice, based on the mandatory two-step statutory scheme and the Commissioner's contention that "it was 'understood' the County would act as Lead Agency in a coordinated review."[248] The Suffolk County Legislature's failure to strictly comply with the procedural lead agency notice requirement was not fatal where "*de facto*" coordinated review occurred.[249]

C. "Hard Look" Review & the Adequacy of Agency Determinations of Environmental Significance

Agency decisions are accorded significant judicial deference when petitioners challenge an agency's substantive conclusions regarding the environmental impacts of a proposal.[250] Courts have long held that "[j]udicial review of an agency determination under SEQRA 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.'"[251] With these considerations in mind, and under Article 78's deferential standard of review for agencies' discretionary judgments, a negative

247. *Id.* at 17 (first citing Vill. of Ballston Spa v. City of Saratoga Springs, 163 A.D.3d 1220, 1222, 82 N.Y.S.3d 179, 182 (3d Dep't 2018); then citing New York City Coal. to End Lead Poisoning, Inc. v. Vallone, 100 N.Y.2d 337, 338, 794 N.E.2d 672, 677, 763 N.Y.S.2d 530, 535 (2003); and then citing Schenectady Chems., Inc. v. Flacke, 83 A.D.2d 460, 463, 446 N.Y.S.2d 418, 420 (3d Dep't 1981); then citing 6 N.Y.C.R.R. 6, § 617.6(b)(3) (2021); then citing N.Y. AGRIC. & MKTS. LAW § 303-b (McKinney 2003); and then citing Cade v. Stapf, 91 A.D.3d 1229, 1232, 937 N.Y.S.2d 673, 676 (3d Dep't 2021).

248. *See id.* at 17.

249. *See Vill. of Islandia*, Slip. Op. 33930(U), at 18. Indeed, though the Court of Appeals in *King v. Saratoga Cnty. Bd. of Supervisors*, held that "strict, not substantial, compliance is required" with SEQRA's mandates, courts have carved out an exception where an agency's failure to strictly comply with SEQRA's procedures was "inconsequential." 89 N.Y.2d 341, 347, 675 N.E.3d 1185, 1188, 653 N.Y.S.3d 233, 234 (1996); *see, e.g., Cade*, 91 A.D.3d at 1232, 937 N.Y.S.2d at 676 (holding that the Planning Board's failure to include the ZBA as an involved agency "was inconsequential for purposes of the Planning Board's SEQRA review" and affirming partial dismissal of Article 78 petition).

250. *See, e.g.*, Riverkeeper, Inc. v. Planning Bd. of Town of Southeast, 9 N.Y.3d 219, 231–32, 881 N.E.2d 172, 177, 851 N.Y.S.2d 76, 81 (2007) (quoting Jackson v. New York Urb. Dev. Corp., 67 N.Y.2d 400, 417, 494 N.E.2d 429, 436, 503 N.Y.S.2d 298, 305 (1986)).

251. *Id.*

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."[252] In applying this standard, courts have repeatedly emphasized that "[w]hile judicial review must be meaningful, the courts may not substitute their judgment for that of the agency for it is not their role to weigh the desirability of any action or [to] choose among alternatives."[253]

This deferential standard of review means that successful challenges to the adequacy of an EIS are very uncommon.[254] Success is relatively more common in challenges to determinations of significance—i.e., the issuance of a negative declaration—but as several unsuccessful challenges from the *Survey* period show, even petitioners in such cases face a difficult burden.

1. Adequacy of Determinations of Environmental Significance

When made in accordance with applicable law and procedures, the issuance of a negative declaration concludes an agency's obligations under SEQRA.[255] As a result, challenges to a project for which an agency concludes that no EIS is necessary often seek to show that the lead agency's issuance of a negative declaration was arbitrary and capricious because it failed to consider a relevant subject, that the proposed action may have significant adverse environmental impacts (contrary to the agency's determination), and/or that the agency failed to provide a written, reasoned elaboration for its determination.[256] As

252. Schaller v. Town of New Paltz Zoning Bd. of Appeals, 108 A.D.3d 821, 823, 968 N.Y.S.2d 702, 703–04 (3d Dep't 2013) (first citing N.Y. C.P.L.R. 7803(3) (McKinney 2021); then citing *Riverkeeper*, 9 N.Y.3d at 232, 881 N.E.2d at 177, 851 N.Y.S.2d at 81; and then citing Troy Sand & Gravel Co. v. Town of Nassau, 82 A.D.3d 1377, 1378, 918 N.Y.S.2d 667, 669 (3d Dep't 2011)).

253. *Riverkeeper*, 9 N.Y.3d at 232, 881 N.E.2d at 177, 851 N.Y.S.2d at 81 (first quoting Akpan v. Koch, 75 N.Y.2d 561, 570, 554 N.E.2d 53, 57, 555 N.Y.S.2d 16, 20 (1990); then quoting *Jackson*, 67 N.Y.2d at 416, 494 N.E.2d at 436, 503 N.Y.S. 2d at 305) (citing Merson v. McNally, 90 N.Y.2d 742, 752, 688 N.E.2d 479, 484, 665 N.Y.S.2d 605, 610 (1997)).

254. MICHAEL B. GERRARD ET AL., ENVIRONMENTAL IMPACT REVIEW IN NEW YORK § 7.04(4) (2020).

255. 6 N.Y.C.R.R. § 617.6 (2021); GERRARD ET AL., supra note 254, at § 2.01(3)(b).

256. N.Y.C.P.L.R. 7803(3) (McKinney 2021); *see* Chertok et al., *supra* note 2, at n.201. Challenges to positive declarations are less common than challenges to negative declarations. *See* GERRARD ET AL., *supra* note 254 at § 3.05(2)(e). Part of the reason challenges to positive declarations are less common is that positive declarations generally are not considered final agency actions. *See supra*, Part II.A.2.

noted, courts afford substantial deference to an agency's determinations under SEQRA and succeeding on an arbitrary and capricious challenge to a negative declaration can be difficult.[257] During the *Survey* period, a number of cursory decisions were issued upholding negative declarations by lead agencies and citing primarily to this standard.[258]

By contrast, a lead agency's negative declaration was overturned during the *Survey* period in only four cases reflecting procedural

257. GERRARD ET AL., *supra* note 254, at § 7.04(4).

258. The majority of these decisions were short and uninformative, and courts quite often simply invoke the standard of review without significant discussion. Accordingly, most of the following cases are not discussed in great detail. *See, e.g.*, Adirondack Council, Inc. v. Town of Clare, EFCV-20-158776, 2020 N.Y. Slip Op. 50381(U), at 10 (Sup. Ct. St. Lawrence Cnty. 2021) (finding that town's negative declaration was not arbitrary, capricious or unsupported by substantial evidence where the town's Full Environmental Assessment considered eighteen separate factors and was "detailed, specific, and supported by evidence in the record."); Buckley v. City of Geneva, 189 A.D.3d 2080, 2081–82, 139 N.Y.S.3d 732, 735 (4th Dep't 2020) (finding that Zoning Board of Appeals as lead agency complied with SEQRA procedural requirements, took the requisite hard look, and made reasoned elaboration in issuing its negative declaration); Favre v. Town of Highlands, 185 A.D.3d 681, 683, 128 N.Y.S.3d 21, 23 (2d Dep't 2020) (affirming planning board's negative declaration); Nat'l Waste & Recycling Ctr. v. Metro. Transfer Station, Inc., 189 A.D.3d 582, 582, 134 N.Y.S.3d 183, 183 (1st Dep't 2020) (affirming that New York City's environmental review of Local Law 152 complied with SEQRA/CEQR); Carnegie Hill Neighbors, Inc. v. New York City, 132 N.Y.S.3d 639, 639, 188 A.D.3d 560, 560 (1st Dep't 2020) (affirming that New York City adequately assessed the impacts of replacing a playground with another playground in a new location on the block); Town of Waterford v. New York State Dept. of Env't Conservation, 187 A.D.3d 1437, 1443, 134 N.Y.S.3d 545, 552, (finding DEC took adequately considered alternatives and took hard look at impacts of proposed landfill expansion); Coal. for Cobbs Hill v. City of Rochester, 194 A.D.3d 1428, 1432, 149 N.Y.S.3d 400, 406 (4th Dep't 2020) (finding that Zoning Manager took hard look and provided reasoned elaboration for negative declaration with respect to traffic impacts and lead contamination); Hygrade Glove & Safety Co. v. New York City, No.528164/2019, 2020 N.Y. Slip Op. 34387(U), at 17 (Sup. Ct. Kings Cnty. Jul. 31, 2020) (dismissing plaintiff's claims); Biggs v. Eden Renewables LLC, 188 A.D.3d 1544, 1548, 137 N.Y.S.3d 515, 519–20 (3d Dep't 2020) (finding Planning Board's negative declaration to have a rational basis and not be arbitrary or capricious).

and/or substantive SEQRA errors.[259] As discussed previously,[260] *Village of Islandia v. Ball* ("*Islandia II*") involved procedural and substantive challenges to the proposed addition of lands into an existing agricultural district.[261] In addition to the Suffolk County Legislature's procedural errors of improperly classifying the action as Type II and failing to provide SEQRA lead agency notices, the court also held that the County Legislature failed to provide any elaboration of its basis for the negative declaration in question.[262] The Legislature violated its obligation to review the EAF and make a determination of significance as lead agency; instead, the Legislature improperly delegated its duty to determine environmental significance to the County's planning staff.[263]

A Senior Planner for the County's Council on Environmental Quality—which was not the SEQRA lead agency—had completed Part three of the EAF form, checked the box for a negative declaration, and signed his name and title before forwarding the EAF and a recommendation to issue a negative declaration to the Legislature.[264] The meeting minutes for the County Legislature's hearing on the resolution containing the EAF indicated a complete absence of

259. *See* Gabe Realty Corp. v. City of White Plains Urb. Renewal Agency, 195 A.D.3d 1020, 1023, 151 N.Y.S.3d 143, 147 (2d Dep't 2021) (cursory opinion finding Urban Renewal Agency failed to identify relevant areas of environmental concern and take a hard look at them); *Vill. of Islandia*, No. 905550/2017E 2020 N.Y. Slip Op. 33930(U), at 22–23 (N.Y. Sup. Ct. Albany Cnty. Aug. 21, 2020) (finding that Suffolk County Legislature failed to take hard look at impacts to community character and to articulate basis for its determination); Boyd v. Cumbo, No. 1518/2019, 2020 N.Y. Slip Op. 51462(U), at 1 (Sup. Ct. Kings Cnty. Dec. 8, 2020) (numerous inconsistencies between Department of City Planning's arguments and the record led court to find that agency failed to take hard look at environmental impacts of proposed Franklin Avenue rezoning); and *Roger Realty*, No. 907550-18, 2020 N.Y. Slip Op. 51442(U), at 9 (Sup. Ct. Albany Cty. Nov. 30, 2020) (finding DEC's approval of Inwood Realty's Consent Order Barge Plan to be arbitrary and capricious without a sound basis in reason and without regard to the facts).

260. *See* discussion *supra* Parts II.B.1.a, II.B.2.

261. 2020 N.Y. Slip Op. 33930(U), at 12 (Sup. Ct. Albany Cnty. Aug. 21 2020).

262. *Id.* at 15, 17, 22.

263. *Id.* at 19 (first citing Coca-Cola Bottling Co. v. Bd. of Estimate of the City of New York, 72 N.Y.2d 674, 681–82, 532 N.E.2d 1261, 1265, 536 N.Y.S.2d 33, 37 (1988); then citing Save Pine Bush, Inc. v. Plan. Bd. of Albany, 96 A.D.2d 986, 988, 466 N.Y.S.2d 828, 831 (3d Dep't 1983); and then citing Glen Head-Glenwood Landing Civic Council, Inc. v. Oyster Bay, 88 A.D.2d 484, 492, 453 N.Y.S.2d 732, 738 (2d Dep't 1982)).

264. *Id.* at 4.

discussion about the EAF by the Legislature prior to its adoption by motion to approve.[265] Indeed, the court found that record was "unclear if the Legislators were *even aware of or ever evaluated* the negative declaration language" that they approved.[266]

Moreover, the County Legislature's approval resolution actually encompassed ten separate approvals for ten distinct parcels to be added to the agricultural district, each with identical EAF and SEQRA language distinguished only "by owner name, tax map number, soils type, fiscal impact, and location."[267] The court found that the "[w]holesale adoption of ten approval resolutions, with identical conclusory language" showed that the Legislature "gave lip service to its SEQRA obligation, and utterly failed to meet its procedural and substantive SEQRA mandate to take a hard look at the community character impact, and to articulate the basis for its determination."[268] The negative declaration was annulled in light of the Suffolk County Legislature's "wholesale failure [] to set forth a record-based elaboration for its conclusion."[269]

In *Boyd v. Cumbo*, the Supreme Court, Kings County, found that the New York City Department of City Planning ("DCP") failed to take a hard look at the impacts and provide reasoned elaboration of its negative declaration for the proposed rezoning of Franklin Avenue in Brooklyn to allow for the development of a new affordable housing project.[270]

The court found numerous inconsistencies between DCP's arguments and the record evidence relating to the proposed project's residential floor area ratio ("FAR"), which called into question "whether the decision of DCP was rational and based on the required

265. *Id.* at 19 (citing to 6 N.Y.C.R.R. § 617(b)(2) (2021)).

266. *Vill. of Islandia*, Slip. Op. 33930(U), at 28 (emphasis added).

267. *Id.* at 3, 22.

268. *Id.* at 22 (quoting Adirondack Hist. Ass'n v. Vill. of Lake Placid, 161 A.D.3d 1256, 1259, 75 N.Y.S.3d 677, 681 (3d Dep't 2018).

269. *Id.* (quoting *Adirondack Hist. Ass'n*, 161 A.D.3d at 1259–60, 75 N.Y.S.3d at 681) (citing *In re* Arthur M. v. Town of Germantown Plan. Bd., 126 N.Y.S.3d 543, 547, 184 A.D.3d 983, 987 (3d Dep't 2020)).

270. No.1518/2019, 2020 N.Y. Slip Op. 51462(U), at 7–8 (Sup. Ct. Kings Cnty. Dec. 8, 2020). The court noted that DCP was the lead agency, but confusingly, stated that the City Planning Commission ("CPC") issued the Revised Negative Declaration. *See id.* at 1. The court may have referred to DCP and CPC interchangeably in the opinion; DCP provides advice to CPC, but the latter is the decision-making agency.

hard look."[271] First, the court observed "an obvious discrepancy in the total buildable floor area" of the Without Action scenarios found in the developer's initial zoning application and its subsequent Revised Environmental Assessment Statement ("REAS"), which DCP adopted.[272] DCP did not address this obvious discrepancy in the total buildable residential floor area stated between the developer's initial application and the REAS.[273]

Second, DCP accepted without justification in the record the developer's reasonable worst case development scenario based on a dwelling unit factor ("DUF") of 1000, which the developer claimed is applicable for new developments in New York City outside of Manhattan.[274] However, the zoning regulations indicated that a DUF of 680 was applicable for this project; DCP provided no record evidence that a DUF of 1000 reflected what was realistically and reasonably likely for new development here.[275] Accordingly, the court was "disinclined to conclude DCP took a hard look at this issue . . . when these inconsistencies were obvious and consequential to whether further study was required."[276]

Third, there was an unaddressed discrepancy whether the proposed development would contain ground floor retail.[277] The REAS stated that the proposed building would be limited to residential use; yet the project's proposed maximum building height of 175 feet would be permissible in that zoning district only if it contained ground floor retail pursuant to New York City's Food Retail Expansion to

271. *Id.* at 6.

272. *Id.* (The Without Action, as-of-right development described in the developer's application stated that the project would comprise of 54,252 square feet of residential floor area with 69 dwelling units; the Without Action scenario described by DCP's subsequent REAS was stated as 69,524 residential square feet with 69 dwelling units.).

273. *Id.* at 9.

274. *Id.* at 6. The term "dwelling unit factor" is synonymous with "density factor." A DUF is provided by regulation for each zoning district and is used to determine the maximum number of allowable dwelling units on a property. See New York City Zoning Resolution, art. II, ch. 3, § 23-22 (Oct. 31, 2021). The maximum number of allowable dwelling units is calculated by dividing the maximum residential floor area by the DUF. *Id.* The proposed project in Boyd was located in a R6A zoning district, for which the Zoning Regulation prescribes a DUF of 680. *Id.*

275. *Boyd*, Slip Op. 51462(U), at 7–8.

276. *Id.* at 8.

277. *Id.*

Support Health ("FRESH") program.[278] The Supreme Court found that a record "rife with inconsistencies" "call[s] into question the sufficiency of the lead agency's examination, analysis and conclusion regarding the environmental effect of the proposed action."[279] The court annulled DCP's determination on the grounds that it was not rational or supported by the record.[280]

And last, the Supreme Court, Albany County, in *Roger Realty Co. v. New York State Department of Environmental Conservation* held that DEC failed to take a "hard look" or provide "reasoned elaboration" for its determination not to require an EIS for the Consent Order Barge Plan.[281] As discussed previously, the Consent Order Barge Plan in question was also found to violate SEQRA through improper segmentation.[282] Moreover, in a stunning takedown of DEC's putative SEQRA compliance, the court found that DEC's record was "wholly lacking, and in a word, dismal."[283] The court found that DEC's record contained "no documentation or correspondence, reports or evaluations, or discussions of the reason for the barge plan."[284] It contained "no discussion or review of the environmental impacts of allowing Inwood's Barge Plan."[285] There were "no logs of materials removed by Inwood, no testing, or any final environmental review of 180 Roger Avenue."[286] The record indicated that one meeting between DEC officials and Inwood Realty's counsel occurred, but there were "no minutes of that meeting nor any record of what was discussed at the meeting."[287] DEC provided "no substantiation for the need to use barges in Jamaica Bay in order to

278. *Id.* at 8–9 (comparing the maximum allowed height of 40 Crown Street building with ground-floor retail and the proposed maximum height of 931 Carroll Street building).

279. *Id.* at 10.

280. *Boyd*, Slip. Op. 51462(U), at 10. Following the December 8, 2020, Order & Decision of the Supreme Court, Kings County, the New York City respondents filed a Notice of Appeal to the Second Department, seeking reversal of the annulment of DCP's Revised Negative Declaration on January 15, 2021. Appellant's Mot. Appeal, 1, Boyd v. Cumbo, No. 2020-09757 (2d Dep't Oct. 27, 2021).

281. Roger Realty Co. v. New York State Dep't of Env't Conservation, No. 907550-18, 2020 N.Y. Slip Op. 51442(U), at 9 (Sup. Ct. Albany Cnty. 2020).

282. *Id.* at 7–8; *see also* discussion *supra*, Part II.B.1.b.

283. *Roger Realty Co.*, Slip Op. 51442(U), at 9.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

remove the waste identified at 180 Roger Avenue."[288] The court noted that DEC solicited a letter from Inwood Realty's counsel as to whether Town permits would be required for the Barge Plan; that documentation should have been in the record but was not provided.[289] In light of DEC's utter failure to develop and provide a record in support of its determination not to require an EIS for the Consent Order Barge Plan, the court found the Barge Plan to be arbitrary and capricious, without sound basis in reason, and without regard to the facts and vacated it in its entirety.[290]

Although courts issued numerous decisions upholding negative declarations, only a few more warrant further consideration. In *Troy Sand & Gravel Co., Inc. v. Town of Sand Lake*, the Third Department considered a SEQRA lead agency's decision to partially rely on a prior GEIS in issuing a negative declaration for a Type I action.[291] The Town Board of Sand Lake enacted a local law which revised zoning districts and allowed mining on properties with existing permits.[292] During its environmental review of the local law at issue, the Town Board, as lead agency, relied on a GEIS relating to the Town's comprehensive zoning plan issued more than a decade before the enactment of the local law.[293] Prior to adopting the local law, the Town Board held a public hearing, received public comments, prepared an EAF, and issued a negative declaration.[294] The petitioners challenged the Town Board's reliance on what they alleged to be an "outdated" GEIS, which they argued should invalidate its hard look.[295]

The Third Department stated the rule that "where a final GEIS has been prepared in connection with the adoption of a comprehensive [zoning] plan, no further SEQRA 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 GEIS or its findings statement."[296] However, the court warned that an SEIS

288. *Roger Realty Co.*, Slip Op. 51442(U), at 9.

289. *Id.*

290. *Id.* at 10.

291. Troy Sand & Gravel Co. v. Town of Sand Lake, 185 A.D.3d 1306, 1311, 128 N.Y.S.3d 677, 684 (3d Dep't 2020).

292. *Id.* at 1307, 128 N.Y.S.3d at 681.

293. *Id.* at 1311, 128 N.Y.S.3d at 684.

294. *Id.* at 1307, 128 N.Y.S.3d at 681.

295. *Id.* at 1311, 128 N.Y.S.3d at 684.

296. *Troy*, 185 A.D.3d at 1311, 128 N.Y.S.3d at 684 (first citing 6 N.Y.C.R.R. § 617.10(d)(1) (2021); then citing Calverton Manor, LLC v. Town of Riverhead,

must be prepared if a subsequent proposed action was not addressed or was not adequately addressed in the GEIS.[297]

The Third Department ultimately found that it was not arbitrary or capricious for the Town Board to look to the existing GEIS and decline to prepare an SEIS, as the local law implemented relevant portions of the comprehensive plan, an action that the GEIS indicated would require no further environmental review.[298] But more importantly, the court found that the Town Board "did not rely solely on the GEIS in its 'hard look' assessment."[299] The record showed that the Town Board completed a "full and extensive EAF and therein indicated that no significant environmental impacts would result" from the adoption of the local law.[300] The Third Department found that the Town Board's record evinced a thorough environmental assessment of the relevant areas of environmental concern and provided a reasonable and detailed elaboration for the basis of the Town Board's negative declaration.[301] The Town Board thus satisfied its obligation under SEQRA to take a hard look at the potential environmental impacts of the local law.[302]

And in *Van Dyk v. Town of Greenfield Planning Board*, the Third Department also affirmed the lead agency's hard look and negative declaration.[303] In 2003, the Town of Greenfield Planning Board had approved a site plan for a new Stewart's Shops Corporation ("Stewart's") manufacturing and distribution center, which was to be developed in four phases over several years.[304] A stormwater pollution prevention plan ("SWPPP") was submitted, which included a two-cell

160 A.D.3d 838, 840, 75 N.Y.S.3d 232, 235 (2d Dep't 2018) (internal quotation marks omitted)).

297. *Id.* at 1311, 128 N.Y.S.3d at 684 (first citing Eadie v. Town Bd. of Town of N. Greenbush, 7 N.Y.3d 306, 319, 854 N.E.2d 464, 470, 821 N.Y.S.2d 142, 148 (2006) (internal quotation marks omitted)).

298. *Id.* at 1312, 128 N.Y.S.3d at 685 (citing *Calverton Manor*, 160 A.D.3d at 840, 75 N.Y.S.3d at 236).

299. *Id.*

300. *Id.*

301. *Troy*, 185 A.D.3d at 1313, 128 N.Y.S.3d at 685 (citing Brunner v. Town of Schodack Plan. Bd., 178 A.D.3d 1181, 1184, 113 N.Y.S.3d 410, 413 (3d Dep't 2019)).

302. *Id.* (citing *Brunner*, 178 A.D.3d at 1184, 113 N.Y.S.3d at 413).

303. 190 A.D.3d 1048, 1050, 139 N.Y.S.3d 681, 684 (3d Dep't 2021).

304. *Id.* at 1048, 139 N.Y.S.3d at 683.

pond system to manage stormwater runoff from the site; following approval of the SWPPP, the pond system was constructed in 2003.[305]

In 2017, Stewart's applied to modify phase four of the plan to construct a warehouse instead of a parking lot as found in the previously approved site plan.[306] Stewart's application for modification of the site plan included an updated SWPPP and stormwater management report, which disclosed that changing a parking lot to a warehouse would increase the impervious surface area of the site by nearly 20,000 square feet.[307] However, Stewart's proposed to continue using the existing pond system to manage stormwater run-off and to add a grass swale by new the warehouse.[308]

The petitioners challenged the Planning Board's negative declaration for the site plan modification, arguing that the Planning Board failed to adequately address stormwater and wetland impacts.[309] On the issue of stormwater impacts, the Third Department found that the Planning Board's negative declaration was sufficiently supported by the record.[310] After reviewing Stewart's updated SWPPP, the Town Engineer concurred with Stewart's determination that the existing pond system could handle the increased stormwater runoff from the warehouse and advised the Planning Board that Stewart's updated stormwater management plans, including the continued use of the existing pond system, met the relevant DEC standards.[311] The Planning Board, as SEQRA lead agency, subsequently conducted public hearings and prepared a Full EAF prior to issuing a negative declaration that, *inter alia*, Stewart's proposed site plan modification would not have adverse stormwater impacts.[312] The Third Department found that this review process demonstrated that the Planning Board did indeed identify and take a hard look at the stormwater issue and make a reasoned determination that there would be no significant adverse stormwater impacts from the warehouse modification.[313]

And on the issue of wetlands impacts, the petitioners alleged that the warehouse modification would adversely impact federal

305. *Id.*
306. *Id.*
307. *Id.* at 1049, 139 N.Y.S.3d at 683.
308. *Van Dyk*, 190 A.D.3d at 1049, 139 N.Y.S.3d at 683.
309. *Id.* at 1050, 139 N.Y.S.3d at 684.
310. *Id.* at 1051, 139 N.Y.S.3d at 685.
311. *Id.* at 1049–51, 139 N.Y.S.3d at 683–84.
312. *Id.* at 1048–49, 139 N.Y.S.3d at 683.
313. *Van Dyk*, 190 A.D.3d at 1050, 139 N.Y.S.3d at 684.

wetlands.[314] Stewart's had received verification from DEC that a state wetland permit would not be necessary, but it never consulted the United States Army Corps of Engineers ("USACE") whether federal wetlands may be impacted.[315] Instead, Stewart's asserted that the project was designed to avoid delineated federal wetlands.[316] The Town's Environmental Commission questioned this assertion and specifically requested that Stewart's consult the USACE about potential federal wetlands impacts resulting from the additional stormwater run-off generated by the expansion in impervious surface area of the project.[317] Despite this request, Stewart's never involved the USACE, but rather, informed the Planning Board that a wetland delineation performed by its consultant indicated that there were no existing federal wetlands in the project area.[318] The Town Engineer also reviewed the wetland delineation prepared by Stewart's consultant and concurred in this determination, advising the Planning Board accordingly.[319]

In its approval resolution for the site plan modification, the Planning Board stated that it considered the Environmental Commission's concerns about the lack of USACE consultation but referred to the Town Engineer's letter agreeing with Stewart's claim that no federal wetlands existed in the project area; the Planning Board approved the project modification despite the lack of USACE involvement.[320] The Third Department held that the Planning Board could rationally rely on the wetland delineation submitted by Stewart's, as interpreted by the Town Engineer, in issuing its negative declaration that the project modification would have no impact on federal wetlands.[321]

As these decisions illustrate, cases overturning a negative declaration are the exception, not the norm. So long as a "particular record is adequate for [courts] to exercise [their] supervisory review to determine that the [lead agency] strictly complied with SEQRA

314. *Id.*
315. *Id.*
316. *Id.*
317. *Id.*
318. *Van Dyk*, 190 A.D.3d at 1050, 139 N.Y.S.3d at 684.
319. *Id.*
320. *Id.* at 1050–51, 139 N.Y.S.3d at 684.
321. *Id.* at 1051, 139 N.Y.S.3d at 684–85.

procedures,"[322] it remains relatively unlikely that a negative declaration will be overturned as arbitrary and capricious.

2. Adequacy of Agencies' EISs & Findings Statements

As noted, successful challenges to EISs are very uncommon due to the deferential standard of review. The petitioners mounted just one successful challenge to the adequacy of an EIS during the *Survey* period, and that decision was subsequently reversed by the appellate division one week after the *Survey* period closed.[323]

Hart v. Town of Guilderland concerned a multi-family residential development and proposed Costco outlet in Guilderland, New York to be constructed by Pyramid Management Group, LLC and subsidiaries ("Pyramid").[324] The dispute started with Pyramid's application to the Guilderland Planning Board for site plan approval to construct the multi-family residential development on property near Crossgates Mall.[325] The Crossgates Mall is a 1.7 million square foot shopping center that is the centerpiece of a Transit-Oriented Development ("TOD") zoning district the town had established to encourage the concentration of higher-density housing and commercial development within an existing commercial corridor with transit access.[326] After submitting an EAF to the Guilderland Planning Board for the residential development pursuant to SEQRA, Pyramid informed the Planning Board of the potential for a large retail development and gas station on other property it owned within the TOD district.[327] The Guilderland Planning Board, having declared its intent to act as the SEQRA lead agency for the residential project, then proceeded to issue a positive declaration, requiring preparation of an EIS to study the combined impacts of that project (called Site 1), the proposed retail

322. Micklas v. Town of Halfmoon Plan. Bd., 170 A.D.3d 1483, 1486, 97 N.Y.S.3d 339, 342 (3d Dep't 2019) (first quoting Ellsworth v. Town of Malta, 16 A.D.3d 948, 950, 792 N.Y.S.2d 227, 230 (3d Dep't 2005); then citing 6 N.Y.C.R.R. § 617.7(b)(4) (2021); and then citing Friends of Shawangunks, Inc. v. Zoning Bd. of Appeals of Town of Gardiner, 56 A.D.3d 883, 884–85, 867 N.Y.S.2d 238, 240 (3d Dep't 2008)).

323. *See* Hart v. Town of Guilderland, 196 A.D.3d 900, 908, 151 N.Y.S.3d 700, 710 (3d Dep't 2021).

324. *Id.* at 901, 151 N.Y.S.3d at 704.

325. *See id.* at 902, 151 N.Y.S.3d at 705.

326. *See id.* at 907, 151 N.Y.S.3d at 709.

327. *See id.* at 901, 151 N.Y.S.3d at 704–05.

outlet (Site 2), and development that could occur in the future on other nearby property controlled by Pyramid (Site 3).[328]

The resulting EIS examined the potential impacts of the proposed development, including on the Pine Bush Preserve; traffic; visual impacts from the Site 1 development on the nearby historic district and another adjacent neighborhood; and consistency of the developments with the goals of the TOD.[329] As SEQRA review progressed, the developer included a number of project elements designed to address the projects' potential environmental impacts, including dedication of pine bush property to preservation; visual buffers; a new traffic roundabout; and a new transit station.[330] With these elements, the Guilderland Planning Board determined that the projects cumulatively would not have any significant adverse environmental impacts.[331]

Residents of two homes within the residential neighborhood adjacent to Site 1, as well as the owner of a gas station in the area, commenced an Article 78 proceeding to challenge the Planning Board's SEQRA findings and the site plan approval for Site 1.[332] In a lengthy decision, Albany County Supreme Court granted the petition, finding the EIS deficient in several respects, including, *inter alia*, that the record was "barren of any reduced scale alternatives," that the claimed effectiveness of a tree buffer between the proposed project and a nearby historic district "lack[ed] any empirical support," that the proposed Costco was "in contravention of [the goals of the] TOD" district, and that the Planning Board failed to analyze potential impacts on avian species from Site 1 buildings.[333] The Supreme Court concluded that the record was replete with "conclusory self-serving and equally troubling representations made by the project sponsor, without the support of empirical data, which, unfortunately, the Planning Board relied on. That is not the stuff that the SEQRA hard look test is made of."[334]

328. *See Hart*, 196 A.D.3d at 901, 151 N.Y.S.3d at 704–05.

329. *See id.* at 905–07, 151 N.Y.S.3d at 707–09.

330. *See id.* at 913, 151 N.Y.S.3d at 713–14.

331. *See id.* at 913–14, 151 N.Y.S.3d at 713–14 (citing Friends of P.S. 163, Inc. v. Jewish Home Lifecare, Manhattan, 146 A.D.3d 576, 578, 46 N.Y.S.3d 540, 544 (1st Dep't 2017)).

332. *See id.* at 902, 151 N.Y.S.3d at 705.

333. *See* Hart v. Town of Guilderland, No. 906179-20, at 2, 20, 28–30. (Sup. Ct. Albany Cnty. Nov. 20, 2020).

334. *Id.* at 3.

The Third Department panel unanimously reversed all aspects of the lower court's decision.[335] The appellate court found that the EIS took a hard look at impacts on avian species by including surveys that found no evidence of species of special concern on the project sites, and also adequately considered the potential for visual impacts on the nearby historic district and reasonably determined they would not be significant given the large distance between the closest proposed Site 1 building and the closest home in the historic district, as well as Pyramid's commitment to maintain an existing 200-foot-wide wooded buffer between the two communities.[336] The Third Department found that the Planning Board adequately considered the specific elements of the Costco project, and further opined that the project was consistent with the TOD goals.[337] Indeed, the appellate court observed that "it would be difficult to conceive of a use that would simultaneously meet all of the admittedly 'diverse' goals of the transit district," and, in any event, "it is also far beyond our judicial function to try to find such a use. Rather, our review is limited to determining whether the Planning Board took a hard look or whether its determination was arbitrary and capricious."[338]

The court also recognized that, where a project is proposed by a private developer, the lead agency is not required to consider alternatives inconsistent with the developer's business objectives.[339] The Guilderland Planning Board thus reasonably rejected alternative uses for Site 2 given the developer's and the town's objectives; the EIS stated that the Costco project was tenant-driven and had to meet Costco's size specifications to occur, such that a smaller scale alternative would not have been feasible.[340] Accordingly, the Third Department held that "the Planning Board took the requisite hard look at the project's anticipated adverse environmental impacts . . . and

335. *Hart*, 196 A.D.3d at 913–14, 151 N.Y.S.3d at 714 (citing *Friends of P.S. 163, Inc*., 146 A.D.3d at 578, 46 N.Y.S.3d at 544).

336. *See id.* at 905–06, 151 N.Y.S.3d at 707–08 (citing Brunner v. Town of Schodack Plan. Bd., 178 A.D.3d 1181, 1184, 113 N.Y.S.3d 410, 412 (3d Dep't 2019)).

337. *See id.* at 908, 151 N.Y.S.3d at 710.

338. *Id.* (citing Jackson v. New York State Urb. Dev. Corp., 67 N.Y.2d 400, 416–17, 494 N.E.2d 429, 436, 503 N.Y.S.2d 298, 305 (1986)).

339. *See id.* at 910, 151 N.Y.S.3d at 712 (first citing 6 N.Y.C.R.R. § 617.9(b)(5)(v) (2021), then citing Save Open Space v. Town of Newburgh, 74 A.D.3d 1350, 1352, 904 N.Y.S.2d 188, 190 (2d Dep't 2010)).

340. *Hart*, 196 A.D.3d at 912, 151 N.Y.S.3d at 713.

provided a reasoned elaboration of its basis for approving the project."[341]

As the Third Department's *Hart* opinion indicates, it remains the case that courts afford substantial deference to an agency's findings in an EIS. Indeed, courts will often defer to an agency's conclusions in the face of "dubious" assumptions or "seemingly belabored" explanations, so long as the agency's conclusions are not "utterly irrational."[342]

For example, in *Sustainable Port Chester Alliance v. Village of Port Chester,* the Supreme Court, Westchester County dismissed an Article 78 proceeding challenging the SEQRA review of the Village of Port Chester's new form-based zoning code.[343] The Village Board of Trustees, as lead agency, issued a positive declaration, finding that the adoption of the form-based code necessitated the preparation of a GEIS.[344] After public comment and a hearing, the Board of Trustees issued a findings statement adopting the form-based code and committing to certain mitigation measures to evaluate and address residential and commercial displacement.[345] Petitioners sought to annul the findings statement, asserting that the Village Board of Trustees had not quantified the potential displacement impacts from development under the code to residents and businesses and had not identified mitigation for such impacts that was sufficiently specific.[346] Rejecting petitioner's claims, the Supreme Court held that the Village Board took the "hard look" required by SEQRA and that its decision had a rational basis.[347]

D. Supplementation

The SEQRA regulations provide for certain enumerated situations in which new information or changes in circumstance arise

341. *Id.* at 913–14, 151 N.Y.S.3d at 714 (citing Friends of P.S. 163, Inc. v. Jewish Home Lifecare, Manhattan, 146 A.D.3d 576, 578, 46 N.Y.S.3d 540, 544 (1st Dep't 2017)) (internal quotation marks omitted).

342. Lower E. Side Organized Neighbors v. New York City Plan. Comm'n, No. 153024/2019, 2020 N.Y. Slip Op. 30508(U), at 8 (Sup. Ct. N.Y. Cnty. Feb. 21, 2020).

343. Sustainable Port Chester All. v. Vill. of Port Chester, No. 60570/2020, at 1 (Sup. Ct. Westchester Cnty. Mar. 9, 2021).

344. *See id.* at 2.

345. *See id.*

346. *See id.*

347. *See id.* at 4.

that require an amendment to the determination of significance.[348] These include: (1) substantive changes proposed for the project; (2) the discovery of new information; or (3) changes in circumstances relating to the project.[349] Such amendments typically take place in the context of a negative declaration, either through an amendment that retains a negative declaration or amending a negative declaration to a positive one, although neither is particularly common.[350] On the other hand, information that could prompt amendment to a positive declaration usually arises after an EIS has been issued, and thus is typically dealt with through a technical memorandum demonstrating that the change and/or new information does not warrant a supplemental EIS, or through a supplemental EIS. In these instances, the lead agency is required to "discuss the reasons supporting the amended determination" and follow the same filing and publication requirements that apply to the original determination.[351] No cases in the *Survey* period addressed the requirement to supplement or amend a determination as to significance.

Similarly, SEQRA provides for the preparation of a Supplemental EIS, known as an SEIS, when a project changes, there is newly-discovered information, or changes in circumstances give rise to potential significant adverse environmental impacts not addressed, or not adequately addressed, in the original EIS.[352] Whether issues, impacts, or project details omitted from an initial EIS require preparation of an SEIS is a frequent subject of litigation.[353]

One case decided in the *Survey* period considered the requirement to supplement an EIS; the court affirmed the agency's discretion not to supplement. In *McGraw v. Town of Villenova*, petitioners challenged the Town Board's approval of a local law and grant of a special use permit to Ball Hill Wind Energy, LLC ("Ball Hill") to construct wind turbines up to 599 feet in height within the Town of Villenova.[354] The Town Board had prepared and approved a DEIS, a SDEIS, and a FEIS relating to the approval of the local law and the

348. 6 N.Y.C.R.R. § 617.7(e)–(f) (2021).
349. 6 N.Y.C.R.R. § 617.7(e)(1).
350. *See* discussion *supra* Part II(B)(1)(a), II(B)(2).
351. 6 N.Y.C.R.R. § 617.7(e)(2) (2021).
352. 6 N.Y.C.R.R. § 617.7(e)(2); *see* discussion *supra* Part II(D).
353. *2019-2020 Survey*, *supra* note 1, at 126.
354. 186 A.D.3d 1014, 1014, 130 N.Y.S.3d 135, 136 (4th Dep't 2020).

project's special use permit for a maximum turbine of 492 feet; none of these actions were challenged by petitioner.[355]

However, Ball Hill later applied to modify the special use permit and amend the local laws to increase the maximum turbine height to 599 feet and to replace the overhead transmission line with underground circuits.[356] The Town Board determined that a *second* SEIS was unnecessary; it approved the Ball Hill's Full EAF form, issued a negative declaration, and amended the relevant local laws and special use permit accordingly.[357]

The petitioners challenged the Town Board's actions allowing the increase in turbine height, alleging that the Town Board did not take a hard look at the effects of the increase in turbine height on bald eagles and the environmental impact of the undergrounding of the transmission lines.[358] The Fourth Department stated that "[a] lead agency's determination whether to require a SEIS—or in this case a *second* SEIS—is discretionary" and "should only be annulled if it is arbitrary, capricious, or unsupported by the evidence."[359] The court concluded that the Town Board did indeed take a hard look at the potential project impacts on bald eagles; Ball Hill's prior materials concerning bald eagle impacts, combined with updated submissions for the project modification, were sufficient to establish that the proposed change to maximum height would not adversely impact bald eagles.[360] And the record showed that burial of the electrical transmission lines would have a significant *positive* environmental impact by reducing the project's impacts on wetlands.[361] Thus, the court affirmed that a second SEIS was not necessary.[362] The *McGraw* decision illustrates that a lead agency has discretion to decide whether

355. *Id.* at 1014–15, 130 N.Y.S.3d at 135.

356. *Id.* at 1015, 130 N.Y.S.3d at 135.

357. *Id.*

358. *Id.* at 1015, 130 N.Y.S.3d at 137.

359. *McGraw*, 186 A.D.3d at 1015, 130 N.Y.S.3d at 137. (first citing 6 N.Y.C.R.R. § 617.9(a)(7)(ii) (2021); then citing Riverkeeper, Inc, v. Plan. Bd. of Town of Se., 9 N.Y.3d 219, 232, 881 N.E.2d 172, 177, 851 N.Y.S.2d 76, 81 (2007) (emphasis in original)).

360. *Id.* at 1016–17, 130 N.Y.S.3d at 137.

361. *Id*. at 1017, 130 N.Y.S.3d at 137.

362. *Id.*

an SEIS is necessary, and the same "hard look" standard applies to that determination.[363]

E. NYC Updates – CEQR

For the most part, New York City practitioners must stay apprised of the same SEQRA principles that apply to practitioners across the state. However, there are certain aspects of the environmental review process that are unique to New York City.[364] The most obvious of these is the application of CEQR regulations, which contain specific procedures to address SEQRA in the context of the City's unique land use procedures.[365] As addressed in Part I, CEQR is often effectuated with the guidance of the *CEQR Technical Manual*, which is published by the New York City Mayor's Office of Environmental Coordination in order to assist city agencies, project sponsors, and the public in navigating and understanding the CEQR process.[366]

One notable development during this *Survey* period is the First Department's decision in *Northern Manhattan Is Not for Sale v. New York City*, which held that the City is entitled to rely on the *CEQR Technical Manual* when conducting environmental impact review.[367] There, the First Department reversed the lower court's order that granted a petition to annul the New York City Council's resolutions adopting a rezoning plan referred to as the Inwood NYC Action Plan, on the ground that the underlying environmental reviews failed to comply with SEQRA and CEQR.[368] The Inwood NYC Action Plan called for revitalizing Manhattan's Inwood section through

363. *See Riverkeeper*, 9 N.Y.3d at 231–32, 881 N.E.2d at 177, 851 N.Y.S.3d at 81 (citing Jackson v. New York State Urb. Dev. Corp., 503 N.Y.S.3d 298, 305, 494 N.E.2d 429, 436, 67 N.Y.2d 400, 417 (1986).

364. *CEQR Resources*, N.Y.C. MAYOR'S OFFICE OF ENV'T COORDINATION, https://www1.nyc.gov/site/oec/environmental-quality-review/ceqr-basics.page (last visited May 12, 2022).

365. *See* N.Y.C. Exec. Order No. 91 (1977); N.Y.C. RULES tit. 43 § 6-01 (2021); N.Y.C. RULES tit. 43, § 6-15 (2021); N.Y.C. RULES tit. 62, § 5-01 (2021); N.Y.C. RULES tit. 62, § 6-15 (2021).

366. See CEQR MANUAL, supra note 53.

367. 185 A.D.3d 515, 520, 128 N.Y.S.3d 483, 488 (1st Dep't 2020) (citing Friends of P.S. 163, Inc. v. Jewish Home Lifecare, Manhattan, 146 A.D.3d 576, 579, 46 N.Y.S.3d 540, 545 (1st Dep't 2017).

368. *Id.* at 515, 128 N.Y.S.3d at 484–85 (first citing N.Y. ENV'T CONSERV. LAW § 8-0101 (McKinney 2021); then citing N.Y.C. RULES tit. 6, § 617.1 (2021); and then citing N.Y.C. RULES tit. 43, § 6-01 (2021); and then citing N.Y.C. RULES tit. 62, § 5-01 (2021)).

rezoning.[369] The Office of the Deputy Mayor for Housing and Economic Development ("DMHED") was designated lead agency, and DMHED issued a 1,100–page FEIS that addressed 19 impact categories.[370] The City Council's Subcommittee on Zoning and Franchises voted to approve the zoning proposal with modifications, which the DMHED found would not raise any new significant adverse environmental impacts.[371] The City Council then approved the zoning proposal as modified and relied upon the *CEQR Technical Manual* in rendering its decision.[372]

Petitioners then commenced an Article 78 proceeding to annul the resolutions adopting the Inwood rezoning plan, arguing that the City violated SEQRA and CEQR by failing to take a "hard look" at eight issues: (1) impact of rezoning on existing preferential rents and effect on renter displacement; (2) impact on area racial makeup; (3) impact on minority and women-owned businesses (MWBEs); (4) accuracy of prior City FEIS projections on rezoning impacts; (5) impact of loss of the existing Inwood library; (6) impact on emergency response times; (7) cumulative impact of other potential area rezonings, including an adjacent 40-acre MTA railyard; and (8) speculative purchase of residential buildings in the wake of the rezoning.[373]

The lower court held that the City's reliance on the *CEQR Technical Manual* was misguided because the *Manual* is a guideline and not a rule or regulation requiring strict compliance.[374] The First Department reversed, finding that the City's decision was not arbitrary and capricious, and that the City took the requisite "hard look" under SEQRA and CEQR.[375] Indeed, the City was *entitled* to rely on the *CEQR Technical Manual* in rendering its decision, and "it was not unreasonable for the City to determine that [the issues petitioner

369. *Id.* at 515, 128 N.Y.S.3d at 485.

370. *Id.*

371. *Id.*

372. *N. Manhattan Is Not For Sale*, 185 A.D.3d at 516, 128 N.Y.S.3d at 485.

373. *Id.* at 518, 128 N.Y.S.3d at 486–87.

374. *Id.* at 515, 128 N.Y.S.3d at 484–85 (first citing N.Y. ENV'T CONSERV. LAW § 8-0101 (McKinney 2021); then citing N.Y.C. RULES tit. 6, § 617.1 (2021); then citing N.Y.C. RULES tit. 43, § 6-01 (2021); and then citing N.Y.C. RULES tit. 62, § 5-01 (2021)).

375. *Id.* at 518–19, 128 N.Y.S.3d at 487 (citing Friends of P.S. 163, Inc. v. Jewish Home Lifecare, Manhattan, 30 N.Y.3d 416, 430, 90 N.E.3d 1253, 1260, 68 N.Y.S.3d 382, 389 (2017); Riverkeeper, Inc. v. Plan. Bd. of Town of Se., 9 N.Y.3d 219, 231–32, 881 N.E.2d 172, 177, 851 N.Y.S.2d 76, 81 (2007)).

raised] were beyond the scope of SEQRA/CEQR review pursuant to the *CEQR Technical Manual*."[376] In dismissing the petition, the First Department noted that, "[t]o the extent petitioners take umbrage with the limited scope of the SEQRA/CEQR review process, this argument can only be raised to the legislative body that periodically revises the criteria contained in the *CEQR Technical Manual*."[377]

This *Survey* period also reinforced that the purpose of CEQR is to "take[] into account the special circumstances of New York City's urban environment."[378] Indeed, practitioners are advised of a trend that emerged during recent *Survey* periods: namely, when addressing petitioners' claims that potential significant impacts from construction activities were not adequately reviewed, courts took into account whether the activities or potential contaminants in question were typical or ubiquitous in the City.[379] In *Community United to Protect Theodore Roosevelt Park v. New York City*, petitioners challenged the Museum of Natural History's construction of an addition on grounds that included alleged failure of the NYC Parks Department's FEIS to properly review and establish appropriate mitigation measures for construction-related disturbance of soil containing hazardous materials such as metals and volatile organic compounds (VOCs).[380] The Supreme Court, New York County, which was subsequently affirmed by the First Department, found there could be "no dispute that the FEIS met the Park Department's obligation under SEQRA," noting that the FEIS outlined sufficient mitigation procedures for a project site that, "like many construction projects in New York City, contain metals, [VOCs], and other hazardous materials."[381] The

376. *Id.* at 520, 128 N.Y.S.3d at 488 (citing Friends of P.S. 163, Inc. v. Jewish Home Lifecare, Manhattan, 146 A.D.3d, 576, 579, 46 N.Y.S.3d, 540, 545 (1st Dep't 2017)).

377. *N. Manhattan Is Not For Sale*, 185 A.D.3d at 520, 128 N.Y.S.3d at 488. The entity responsible for revising the Manual is not a legislative body, but rather the Mayor's Office of Environmental Coordination.

378. Boyd v. Cumbo, No.1518/2019, 2020 N.Y Slip Op. 51462(U), at 4 (Sup. Ct. Kings Cnty. Dec. 8, 2020).

379. *See* Cmty. United to Protect Theodore Roosevelt Park v. City of New York, 171 A.D.3d 567, 568, 98 N.Y.S.3d 576, 578 (1st Dep't 2019).

380. *See* Cmty. United to Protect Roosevelt Park v. City of New York, No. 152354/2018, 2018 N.Y. Slip Op 33153(U), at 1 (Sup. Ct. N.Y. Cnty. Dec. 10, 2018) (noting that the project site contained metals, VOCs, and other hazardous materials). *See also Cmty. United to Protect Theodore Roosevelt Park*, 171 A.D.3d at 568, 98 N.Y.S.3d at 577.

381. *See Cmty. United to Protect Theodore Roosevelt Park*, 2018 N.Y. N.Y. Slip Op 33153(U), at 12.

court's statement here refers to the use of urban or historical fill in many parts of the City, which often contains contaminants such as metals, VOCs, and semi-volatile organic compounds (SVOCs).[382] In its affirming decision, the First Department similarly noted that "the hazardous vapors cited by petitioners did not violate any code or standard, and the [FEIS] articulated reasonable mitigation plans for toxins located at the project site."[383]

The court's statement that the "typical" environmental impacts from construction in New York City inform the baseline from which potential environmental impacts arising from temporary construction activity should be assessed is a notable outcome for New York City developers.[384] However, this trend does not alter lead agencies' obligations to develop site-specific justifications and conclusions required under SEQRA.[385] It does suggest, however, that challengers cannot assert that construction impacts are significant without demonstrating that they are "atypical" in New York City.[386]

382. *See* 6 N.Y.C.R.R § 375-1.2(x) (2021). "Historic fill material" is defined by DEC as:

> non-indigenous or non-native material, historically deposited or disposed in the general area of, or on, a site to create useable land by filling water bodies, wetlands or topographic depressions, which is in no way connected with the subsequent operations at the location of the emplacement, and which was contaminated prior to emplacement. Historic fill may be solid waste including, but not limited to, coal ash, wood ash, municipal solid waste incinerator ash, construction and demolition debris, dredged sediments, railroad ballast, refuse and land clearing debris, which was used prior to October 10, 1962. Any soil or soil-like wastes from any area which was operated by a municipality or other person as a landfill is not considered historic fill. For purposes of a remedial program, historic fill does not include any material which is chemical production waste or waste produced on the site from processing of metal or mineral ores, residues, slag or tailings. *Id*.

383. *Cmty. United to Protect Theodore Roosevelt Park*, 171 A.D.3d at 568–69, 98 N.Y.S.3d at 578.

384. *See also* Preserve Our Brooklyn Neighborhoods v. New York City, No. 159401/2018, 2019 N.Y. Slip Op. 31751(U), at *7 (Sup. Ct. N.Y. Cnty. June 18, 2019) (rejecting an Article 78 challenge to SEQRA and CEQR negative declaration for commercial development in Fort Greene, noting that the construction would not "pose any risks greater than those ordinarily accompanying construction-related activities in New York City").

385. *See id*. at 6 (citing *Riverkeeper*, 9 N.Y.3d at 232, 881 N.E.2d at 177, 851 N.Y.S.2d at 81).

386. *See* Friends of P.S. 163, Inc. v. Jewish Home Lifecare, 30 N.Y.3d 416, 426–28, 90 N.E.3d 1253, 1257–58, 68 N.Y.S.3d 382, 386–87 (2017) (agency took requisite hard look at potential risk posed by soil-based lead contamination, potential lead dust migration, and construction noise; finding that "lead levels at the site were

CONCLUSION

Case law from this Survey period demonstrates that SEQRA continues to present the courts with difficult legal questions related to standing, ripeness, mootness, and the statute of limitations; procedural issues, including the classification of an action, segmentation, and lead agency designation; the adequacy of agencies' determinations of significance; the sufficiency of agencies' environmental impact statements; and supplementation of determinations of significance and environmental impact statements. These issues will continue to evolve as the courts are presented with new SEQRA challenges. These and other developments in the law of SEQRA will be covered in future installments of the Survey of New York Law.

no higher than those typically found in urban fill" and "external absolute noise levels would be equivalent to those on a heavily trafficked city street").