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) for the *Survey* period of 2021–2022.[1] This year and early 2023 have seen significant legislative development aimed at injecting environmental justice concerns into agencies' decision-making process, particularly the New York Department of Environmental Conservation (DEC).[2]

As noted in a recent *Survey*,[3] the DEC made significant amendments to the SEQRA regulations in 2018, with the goal of streamlining the environmental review process and aligning SEQRA with state initiatives such as increasing renewable energy and green infrastructure development and evaluating climate change impacts.[4] In March 2020, DEC incorporated these regulatory developments into its SEQR Handbook, a helpful guidance for SEQRA practitioners.[5]

1. The *Survey* period covered in this Article is July 1, 2021 to June 30, 2022. A prior *Survey* addresses SEQRA developments in the first half of 2021. *See* Mark A. Chertok et al., *2020–21 Survey of New York Law: Environmental Law: Developments in the Law of SEQRA*, 72 SYRACUSE L. REV. 93 (2021) [hereinafter *2020–21 Survey of Environmental Law*].

2. N.Y. Senate Bill No. S8830, 245th Sess. (2022); N.Y. Assembly Bill No. A2103D, 245th Sess. (2022); N.Y. Senate Bill S1317, 246th Sess. (2023), N.Y. Assembly Bill No. A1286, 246th Sess. (2023).

3. *See* Mark A. Chertok et al., *2017–18 Survey of New York Law: Environmental Law: Developments in the Law of SEQRA*, 69 SYRACUSE L. REV. 773, 774 (2019) [hereinafter *2017–18 Survey of Environmental Law*].

4. 6 N.Y.C.R.R. § 617.1 (2021).

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

During this year's *Survey* period, 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 the interaction of towns and counties in the land use planning and development process; the adequacy of agency's determination of significance (particularly when issuing a negative declaration); the sufficiency of an agency's Environmental Impact Statement (EIS); and supplementing a determination of significance and impact statements.[6] 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 legislative developments. Part III reviews the most noteworthy of the numerous SEQRA decisions issued during the *Survey* period.

I. SUMMARY OVERVIEW OF SEQRA

SEQRA requires governmental agencies to consider the environmental impacts of their actions prior to rendering certain defined discretionary decisions, called "actions."[7] "The primary purpose of SEQRA is 'to inject environmental considerations directly into governmental decision making.'"[8] The law applies to discretionary actions by New York State, its subdivisions, or local agencies that have the potential to impact the environment, including actions undertaken by agencies, funding determinations, promulgation of regulations, zoning amendments, permits, and other approvals.[9] SEQRA charges DEC with promulgating general SEQRA regulations, but it also authorizes other agencies to adopt their own regulations and procedures,

6. *See infra* Part III.

7. SEQRA is codified at N.Y. ENV'T CONSERV. LAW §§ 8-0101–8-0117 (McKinney 2022). *See* Mark A. Chertok et al., *2007–08 Survey of New York Law: Environmental Law: Climate Change Impact Analysis in New York Under SEQRA*, 59 SYRACUSE L. REV. 763, 764 (2009) [hereinafter *2007–08 Survey of Environmental Law*].

8. Akpan v. Koch, 554 N.E.2d 53, 56 (N.Y. 1990) (quoting Coca-Cola Bottling Co. v. Bd. of Estimate, 532 N.E.2d 1261, 1263 (N.Y. 1988). For a useful overview of the substance and procedure of SEQRA see Jackson v. N.Y. State Urb. Dev. Corp., 494 N.E.2d 429, 434–36 (N.Y. 1986).

9. *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* 6 N.Y.C.R.R. § 617.5(c)(46)); *see also* SEQRA HANDBOOK, *supra* note 5, at 8.

provided those regulations and procedures are consistent with and "no less protective of environmental values" than those issued by DEC.[10]

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.[11]

Actions are grouped into three categories in DEC's SEQRA regulations: Type I, Type II, or Unlisted.[12] Type II actions are enumerated specifically and include only those actions that have been determined not to have the potential for a significant impact and thus are not subject to review under SEQRA.[13] Type I actions, also specifically enumerated, "are more likely to require the preparation of 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."[14] Unlisted actions are not enumerated, but rather are a catchall of those actions that are neither Type I nor Type II.[15] In practice, the vast majority of actions are Unlisted.[16]

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

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

11. 6 N.Y.C.R.R. § 617.9(b)(1)–(2), (5).

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

13. 6 N.Y.C.R.R. § 617.5(a), (c).

14. *Id.* § 617.4(a), (a)(1) (presumption that Type I actions are likely to have a significant adverse impact on the environment). 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, 984 N.Y.S.2d 468, 473 (App. Div. 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.") (quoting 6 N.Y.C.R.R § 617.7(a)(2)) (internal quotation marks omitted) (citing Shop-Rite Supermarkets, Inc. v. Planning Bd., 918 N.Y.S.2d 647, 650 (App. Div. 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).

15. 6 N.Y.C.R.R. § 617.2(al).

16. *See* SEQRA HANDBOOK, *supra* note 5, at 4.

"determination of significance."[17] To reach its determination of significance, the agency must prepare an environmental assessment form (EAF).[18] For Type I actions, preparation of a "Full EAF" is required, whereas for Unlisted actions, project sponsors may opt to use a "Short EAF" instead.[19] 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 warranted.[20] SEQRA regulations provide models of each form,[21] but allow that the forms "may be modified by an agency to better serve it in implementing SEQR[A], provided the scope of the modified form is as comprehensive as the model."[22] 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.[23] A coordinated review is required for Type I actions involving more than one agency,[24] and the issuance of a negative declaration in a

17. 6 N.Y.C.R.R. §§ 617.6(a)(1)(i), (b), 617.7(a)(1)–(2). See *id.* § 617.7(c) for a list of the criteria considered when determining significance.

18. *Id.* § 617.6(a)(2)–(3).

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

20. *Id.*

21. 6 N.Y.C.R.R. § 617.20 (establishing model EAFs: "Appendices A and B are model environmental assessment forms that may be used to help satisfy this Part or may be 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 (EAF) Workbooks,* N.Y. STATE DEP'T OF ENV'T. CONSERVATION, http://www.dec.ny.gov/permits/90125.html (last visited Mar. 14, 2023).

22. 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. N.Y.C., 915 N.Y.S.2d 565, 567 (App. Div. 1st Dep't 2011).

23. *See* 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." *Id.* § 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." *Id.* § 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." *Id.* § 617.2(u).

24. *Id.* § 617.4(a)(2).

coordinated review (for Type I or Unlisted actions) binds other involved agencies.[25]

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.[26] 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[27] or, more commonly, the lead agency issues a positive declaration requiring the preparation of an EIS.[28]

If an EIS is prepared, the first step is the scoping of the contents of the Draft EIS (DEIS).[29] Until recently, scoping had been commonplace, but not required.[30] Under the 2018 SEQRA amendments, effective January 1, 2019, scoping is now mandatory for all EISs, except for supplemental EISs.[31] Scoping involves focusing the EIS on relevant areas of environmental concern, with the goal (not often achieved) of eliminating inconsequential subject matters.[32] 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.[33] The project sponsor must incorporate the information submitted during the scoping process into the DEIS or include the comments as an appendix to the document, depending on the relevancy of the information or comment.[34]

25. 6 N.Y.C.R.R. §§ 617.4(a)(2), 617.6(b)(3)(iii).

26. *Id.* § 617.7(a)(2), (d).

27. *Id.* §§ 617.2(h), 617.7(d)(2)(i). This is known as a conditioned negative declaration (CND). For a CND, the lead agency must issue public notice of its proposed CND and, if public comment identifies "potentially significant adverse environmental impacts that were not previously" addressed or were inadequately addressed, or indicates the mitigation measures imposed are substantively deficient, an EIS must be prepared. *Id.* § 617.7(d)(1)(iv), (2)(i), (3). CNDs cannot be issued for Type I actions or where there is no applicant. *See id.* § 617.7(d)(1). "In practice, CNDs are not favored and not frequently employed." Mark A. Chertok et al., *2014–15 Survey of New York Law: Environmental Law: Developments in the Law of SEQRA,* 67 SYRACUSE L. REV. 897, 909 n.27 (2017) [hereinafter *2014–15 Survey of Environmental Law*].

28. 6 N.Y.C.R.R. § 617.2(n); *see id.* § 617.7(a).

29. *See* SEQRA HANDBOOK, *supra* note 5, at 100.

30. *See id.*

31. *Id.*; 6 N.Y.C.R.R. § 617.8(a).

32. 6 N.Y.C.R.R. § 617.8(a).

33. *Id.* § 617.8(b), (c)–(d).

34. *Id.* § 617.8(f)–(g); Shapiro v. Plan. Bd., 65 N.Y.S.3d 54, 55–57 (App. Div. 2d Dep't 2017) (failure to follow scope can result in judicial invalidation of EIS).

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."[35] 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.[36]

In addition to "analyz[ing] the significant adverse impacts and evaluat[ing] all reasonable alternatives,"[37] the DEIS should include an assessment of "impacts only where they are relevant and significant," with the SEQRA regulations outlining said assessment to include:

> (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]
>
> (g) 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.[38]

35. 6 N.Y.C.R.R. § 617.9(b)(5)(v). For private applicants, alternatives might reflect different configurations of a project on the site. *Id.* § 617.9(b)(5)(v)(g). They also might include different sites if the private applicant owns or has option for other parcels. *Id.* The applicant should identify alternatives that might avoid or reduce environmental impacts. *Id.* § 617.9(b)(5)(iii)(i).

36. *Id*. § 617.9(b)(5)(v) "The 'no action alternative' does not necessarily reflect current conditions, but rather the anticipated conditions without the proposed action." *2020–21 Survey of Environmental Law, supra* note 1, at 778–79. 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. N.Y.C., 908 N.Y.S.2d 657, 660 (App. Div. 1st Dep't 2010) (citing 6 N.Y.C.R.R. § 617.9(b)(5)(v)).

37. 6 N.Y.C.R.R. § 617.9(b)(1).

38. *Id.* § 617.9(b)(5)(iii)(a)–(f), (i).

Although not required, the lead agency typically holds a legislative hearing regarding the DEIS.[39] That hearing should, and often is, combined with other hearings required for the proposed action.[40] 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.[41] After preparing the FEIS, and before undertaking or approving an action, each acting involved agency must issue findings that the provisions of SEQRA (as reflected in DEC's implementing regulations) have been met, and "consider[ing] the relevant environmental impacts, facts and conclusions disclosed in the FEIS," must "weigh and balance relevant environmental impacts with social, economic and other considerations."[42] 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.[43]

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).[44]

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).[45] 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"; (2) the agency action consists of "a sequence of actions" over time; (3) separate actions under consideration

39. *Id.* § 617.9(a)(4).

40. *Id.* § 617.3(h) ("Agencies must . . . provid[e], where feasible, for combined or consolidated proceedings . . .").

41. *See id.* § 617.11(a).

42. 6 N.Y.C.R.R. § 617.11(a), (d)(1)–(2), (4).

43. *Id.* § 617.11(d)(5).

44. *See* 42 U.S.C. §§ 4321-70(h) (2012) (establishing federal responsibilities for protecting and enhancing the quality of the environment); *see also* Jackson v. N.Y. State Urb. Dev. Corp., 494 N.E.2d 429, 434 (N.Y. 1986) (quoting Philip H. Gitlen, *The Substantive Impact of the SEQRA*, 46 ALB. L. REV. 1241, 1248 (1982)).

45. 6 N.Y.C.R.R. § 617.10(a).

may have "generic or common impacts"; or (4) the action consists of an "entire program [of] . . . wide application or restricting the range of future alternative policies or projects."[46] GEISs commonly relate to common or program-wide impacts and should set forth criteria for when further environmental review will be required for site-specific or subsequent actions that follow approval of the initial program.[47]

The City of New York has promulgated separate regulations implementing City agencies' environmental review process under SEQRA, which is known as City Environmental Quality Review (CEQR).[48] As previously explained, SEQRA grants agencies and local governments the authority to supplement DEC's general SEQRA regulations by promulgating their own.[49] Section 192(e) of the New York City Charter delegates that authority to the City Planning Commission (CPC).[50] In addition, to assist "city agencies, project sponsors, [and] the public" with navigating and understanding the CEQR process, the New York City Mayor's Office of Environmental Coordination has published the *CEQR Technical Manual*.[51] First published in 1993, the *Manual*, as now revised, is about 800 pages long and provides an extensive explanation of the following: (1) CEQR legal procedures; (2) 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 (3) identifying thresholds for both detailed studies and significance.[52]

46. *Id.* § 617.10(a)(1)–(4).

47. *Id.* § 617.10(c) (requiring GEISs to set forth such criteria for subsequent SEQRA compliance).

48. *See* N.Y.C. RULES tit. 43, §§ 6-01to 6-15 (2020); *id.* tit. 62, §§ 5-01–6-15 (2020).

49. N.Y. ENV'T CONSERV. LAW § 8-0113(1), (3) (McKinney 2022). 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(a)(2), 617.5(b), 617.14(e).

50. N.Y.C. CHARTER § 192(e) (2018); *see also* N.Y.C. RULES tit. 62 § 5.01.

51. N.Y.C. MAYOR'S OFF. OF ENV'T COORDINATION, CEQR: CITY ENVIRONMENTAL QUALITY REVIEW TECHNICAL MANUAL (2020) (available at https://www1.nyc.gov/assets/oec/technical-manual/2020_ceqr_technical_manual.pdf) [hereinafter CEQR MANUAL].

52. *See* CEQR MANUAL, *supra* note 51, at Introduction-1. As further discussed *infra*, courts equate compliance with the *Manual* with compliance with SEQRA and CEQR. *See* Rimler v. N.Y.C., No. 506046/2016, slip op. at 18 (Sup. Ct. Kings Cnty. July 7, 2016), aff'd, 101 N.Y.S.3d 54 (App. Div. 2d Dep't 2019) (holding that "[A]n EAS prepared consistent with the guidance in the CEQR Technical Manual demonstrates compliance with SEQRA/CEQR."); *see also* Friends of P.S. 163, Inc. v. Jewish Home Lifecare, 46 N.Y.S.3d 540 (App. Div. 1st Dep't 2017), aff'd, 90 N.E.3d 1253 (2017) (Agency "is entitled to rely on the accepted methodology set forth in

II. SUMMARY OVERVIEW OF LEGISLATIVE DEVELOPMENTS

There were two legislative developments in 2022 and early 2023. While technically not within the scope of this Article, these legislative developments are discussed briefly below.

The initial legislation, Senate Bill 8830 of 2022 (SB 8830), injected environmental justice considerations into SEQRA for certain actions and DEC permitting. It was signed by Governor Hochul on December 30, 2022 and would have become effective on June 28, 2023[53], but the Governor's approval was accompanied by a memorandum that reflected pending amendments.[54] Those amendments, adopted in March 2023, narrowed the scope of the legislation and deferred its effectiveness until December 2024.[55] However, even as narrowed, SB 8830 positions New York as one of the leading jurisdictions to incorporate environmental justice considerations and protection of "disadvantaged communities" into the environmental review and permitting processes.[56]

SB 8830 injects environmental justice considerations early in the SEQRA process by obligating lead agencies, when making a determination of significance, to consider whether a proposed action "may cause or increase a disproportionate pollution burden on a disadvantaged community that is directly or significantly indirectly affected by such action."[57] While the term "pollution" is defined broadly to mean pollution as defined in Section 1-0303 of the Environment Conservation Law[58], the term "pollution burden" is not defined. However, reference to a "pollution burden" within the description of a "burden

the City Environmental Quality Review Technical Manual (CEQRTM)" in preparing EIS).

53. *See* N.Y. Senate Bill No. 8830, 245th Sess. (2022) (enacted); Env't Conserv. §§ 8-0105, 8-0109, 8-0113, 70-0107, 70-0118.

54. *See* N.Y. Senate Bill No. 8830, Approval Memorandum No. 115, ch. 840, 245th Sess. (2022).

55. *See* N.Y. Senate Bill No. 8830, §9, 246th Sess. (2023) (enacted); Env't Conserv. §§ 8-0105, 8-0109, 8-0113, 70-0107, 70-0118.

56. *See New York Legislature Passes Cumulative Impacts Bill*, NAT'L CAUCUS OF ENV'T LEGISLATORS (June 7, 2022), http://www.ncelenviro.org/articles/new-york-legislature-passes-cumulative-impacts-bill/ (noting similar legislation in New Jersey and Maryland); *see also* Michael B. Gerrard & Edward McTiernan, *Annual Survey of SEQRA Cases: Bad for Plaintiffs, But Important Bill Pending*, N.Y. L.J. (July 13, 2022), https://www.law.com/newyorklawjournal/2022/07/13/annual-survey-of-seqra-cases-bad-for-plaintiffs-but-important-bill-pending/?slreturn=20230214105044.

57. N.Y. Senate Bill No. 1317 § 4, 246th Sess. (2023) (amending ENV'T CONSERV. § 8-0109(4)).

58. *Id.* at § 2 (amending ENV'T CONSERV. § 8-0105).

report," explained below, indicates that a pollution burden is the totality of existing environmental and health stresses on a disadvantaged community. Where an agency must prepare an EIS, SB 8830 mandates an analysis of the "effects of any proposed action on disadvantaged communities, including whether the action may cause or increase a disproportionate pollution burden on a disadvantaged community."[59]

The initial legislation had a number of ambiguities, including the extent of its applicability to NYSDEC permitting.[60] This Article will briefly describe the current legislation. However, given the likelihood of regulations that will augment the legislation, next year's Survey will cover this topic in more detail.

Initially, the legislative intent of SB 8830[61] was modified to eliminate references to the state's obligation to "insure equality of treatment" for "disadvantaged communities" from the siting of environmental facilities, and limits the state's responsibility "to establish requirements for the consideration of such decisions [regarding the siting environmental facilities] by state and local governments in order to ensure no community bears a disproportionate pollution burden, and to actively reduce any such burden for all communities."[62] The amendments shifted the focus from "inequitable *or* disproportionate impacts" from such facilities to a disproportionate burdening of disadvantaged communities; this approach is more consistent with the federal Executive Order on Environmental Justice than was the initial legislation, although the legislation, like the federal executive order, does not define the meaning of "disproportionate."[63]

SB 8830 adopts the same definition of "disadvantaged communities" as the 2019 Climate Leadership and Community Protection Act (CLCPA), which is "communities that bear burdens of negative public health effects, environmental pollution, impacts of climate change, and possess certain socioeconomic criteria, or comprise high-concentrations of low- and moderate- income households."[64]

59. *Id.* at § 3 (emphasis added) (amending ENV'T CONSERV. § 8-0109(2)).

60. *See generally* Amy Cassidy, *Hochul Approves Environmental Justice Amendments to SEQRA*, Sive, Paget & Riesel, P.C. Blog (Jan. 25, 2023), https://sprlaw.com/governor-hochul-approves-environmental-justice-amendments-to-seqra/.

61. Unless otherwise noted, further references to SB 8830 are to the 2023 amendments to the legislation.

62. See N.Y. Senate Bill No. 1317 § 1, 246th Sess. (2023).

63. Exec. Order No. 12898, 59 C.F.R. 7629 (Feb. 11, 1994).

64. See N.Y. Senate Bill No. 8830 § 2, 245th Sess. (2022) (incorporating the CLCPA's definition of "disadvantaged communities" by reference); ENV'T CONSERV. § 75-0101(5) (2022) (CLCPA definition of "disadvantaged

However, the CLCPA does not identify the socioeconomic or income criteria for qualifying as a "disadvantaged community," but instead creates a "Climate Justice Working Group" (CJWG) and charges it with establishing the criteria for identifying disadvantaged communities, and mandates an annual review of the criteria.[65] On March 27, 2023, the CJWG finalized criteria for identifying disadvantaged communities.[66] Generally, the CJWG developed the criteria on forty-five indicators, which take into account environmental and climate change burdens and risks, as well as population characteristics and health vulnerabilities. [67]

These indicators include pollution exposure, historical discrimination and disinvestment, climate change risks, health outcomes, income, ethnicity, housing cost burdens, and proximity to remediation sites and solid waste facilities.[68] The CJWG then used a scoring approach to rank each of New York's 4,918 census tracts based on relative burden, risk, vulnerability, and sensitivity.[69] Tracts were assigned a percentile rank based on these indicators, relative to other tracts in their region and the state as a whole.[70] Tracts with higher relative scores for the criteria's two broad categories of indicators—(i) Environmental Burdens and Climate Change Risks and (ii) Population Characteristics and Health Vulnerabilities—were identified as disadvantaged communities. Using this methodology, the CJWG identified 1,736 census tracts as disadvantaged communities.[71]

In addition to imposing greater SEQRA obligations, SB 8830 also creates additional obligations for all DEC-permit actions—except

communities," also referencing CJWG's task of identifying criteria). This provision was not amended in 2023.

65. *See* ENV'T CONSERV. § 75-0111(1)(b), (3).

66. See *New York State Climate Justice Working Group Finalizes Disadvantaged Communities Criteria to Advance Climate Justice*, N.Y. STATE DEP'T OF ENV'T CONSERVATION, https://www.dec.ny.gov/press/127364.html (last accessed Mar. 28, 2023).

67. See *Disadvantaged Communities Criteria*, N.Y. STATE DEP'T OF ENV'T CONSERVATION, https://climate.ny.gov/resources/disadvantaged-communities-criteria/ (last accessed Mar. 28, 2023).

68. *Id.*

69. N.Y. STATE CLIMATE JUST. WORKING GRP., DISADVANTAGED COMMUNITIES CRITERIA AND LIST: TECHNICAL DOCUMENTATION 8 (2022) (available at https://climate.ny.gov/-/media/project/climate/files/Technical-Documentation-on-Disadvantaged-Community-Criteria.pdf).

70. *See id.* at 8–25. Please note that the two regions used for this relative ranking were New York City and the "Rest of [New York] State."

71. N.Y. STATE CLIMATE JUST. WORKING GRP., LIST OF DISADVANTAGED COMMUNITIES (2022) (available at https://climate.ny.gov/-/media/project/climate/files/List-of-Disadvantaged-Communities.pdf).

for general permits—under Environmental Conservation Law Title 15 of Article 15 (facility withdrawing and using over 20 million gallons per day of water for cooling); Article 17 (water pollution control); Article 19 (air pollution control); Title 17 of Article 23 (liquified natural and petroleum gas); and Titles 3 (conservation easements), 7 (solid waste), 9 (toxic chemicals in children's product), and 11 (fish and wildlife) of Article 27.[72] For permit applications under these provisions that "*may* cause of contribute more than a de minimis amount of pollution to any disproportionate pollution burden on a disadvantaged community," DEC or the applicant must prepare an "existing burden report."[73] However, the term "de minimis" is not defined.

The scope of an existing burden report will be developed by DEC, in consultation with the State Department of Health, following a minimum 30-day comment period on the scope of the report.[74] The report must assess relevant baseline data, environmental or public health stressors already borne by the disadvantaged community, the potential or projected contribution of the proposed action to that existing pollution burden, and benefits to the community from the proposed project.[75]

Perhaps most significant of all SB 8830's obligations is the requirement that DEC, after considering the application and the existing burden report, "not issue an applicable permit for a new project if it determines that the project will cause or contribute more than a de minimis amount of pollution to a disproportionate pollution burden on the disadvantaged community."[76]

SB 8830 directs DEC to undertake rulemaking to amend SEQRA and uniform permit review regulations to effectuate the new

72. N.Y. Senate Bill No. 1317 § 7, 246th Sess. (2023).

73. *Id.* at § 7 (emphasis added). For a permit renewal or modification, the DEC may not require such a report if the permit would "serve an essential environmental, health, or safety need of the disadvantaged community for which there is no reasonable alternative." *Id*. Further, no report is required for an application for a permit renewal if a report has been prepared with regard to such permit within the past ten years. *Id*.

74. *Id*. This comment period is presumably in addition to other public comment periods already required by SEQRA, although if an EIS is required, this comment period could logically be part of the public scoping process.

75. *Id.* § 7. The potential project benefits that must be assessed under the report can include increased housing supply, alleviation of existing pollution burdens, and operational changes to the project that would reduce the pollution burden. *Id.*

76. *Id.* (emphasis added). There are lesser burdens for permit modifications and renewals. DEC is prohibited from modifying or renewing an existing permit if it "would significantly increase the existing disproportionate pollution burden on the disadvantaged community." *Id*.

legislation.[77] That rulemaking may provide clarity with regard to the new legislative requirements.

III. 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).[78] Article 78 imposes upon petitioners in such proceedings certain threshold requirements, separate and distinct from the procedural requirements imposed by SEQRA.[79] A number of decisions during the *Survey* period addressed questions arising from these threshold requirements, as well as obligations arising solely from SEQRA.[80]

1. Standing

Standing is one of the more frequently litigated issues in SEQRA case law.[81] To establish standing, a SEQRA petitioner must demonstrate that the challenged action is likely to cause an environmental 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 or promoted by SEQRA.[82] The harm must be "different in kind or degree from the public at large, but it need not be unique."[83] To fall within SEQRA's "zone of interests," the alleged

77. *Id.* at §§ 5, 6, 12 (amending ENV'T CONSERV. § 8-0113(2), which obligates the Commissioner of Environmental Conservation to promulgate SEQRA regulations, and ENV'T CONSERV. § 70-0107(1), which obligates the Commissioner to promulgate regulations for the uniform review of regulatory permits).

78. *See* N.Y. C.P.L.R. 7803 (McKinney 2022).

79. *See id.* at 7801(1).

80. *See, e.g.*, Troy Sand & Gravel Co. v. Town of Sand Lake, 128 N.Y.S.3d 677 (App. Div. 3d Dep't 2020) (standing); Hart v. Town of Guilderland, 151 N.Y.S.3d 700 (App. Div. 3d Dep't 2021) (standing); Town of Waterford v. N.Y. State Dep't of Env't Conservation, 134 N.Y.S.3d 545 (App. Div. 3d Dep't 2020) (standing); Peachin v. City of Oneonta, 149 N.Y.S.3d 258 (App. Div. 3d Dep't 2021) (standing); Roger Realty Co. v. N.Y. State Dep't of Env't Conservation, No. 907550-28, slip. op at 18–19 (Sup. Ct. Albany Cnty. Nov. 30, 2020) (standing, mootness, and statute of limitations); Mensch v. Planning Bd. of Warwick, 138 N.Y.S.3d 621 (App. Div. 2d Dep't 2020) (statute of limitations); Beer v. N.Y. State Dep't of Env't Conservation, 138 N.Y.S.3d 684 (App. Div. 3d Dep't 2020) (statute of limitations).

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

82. Save the Pine Bush, Inc. v. Common Council of Albany, 918 N.E.2d 917, 924 (N.Y. 2009) (Pigott, J., concurring) (quoting Soc'y of Plastics Indus., Inc. v. Cnty. of Suffolk, 573 N.E.2d 1034, 1040–41 (N.Y. 1991)).

injury must be "environmental and not solely economic in nature."[84] Five noteworthy SEQRA decisions addressed standing during this *Survey* period.[85]

A. Where Standing May Be Presumed

While SEQRA typically requires that individuals make a showing of a particularized harm, there are certain circumstances where other factors will give rise to a presumption of standing. A recent Putnam County Supreme Court case reaffirmed this presumption in relation to neighbors entitled to receive notice in connection with land use actions. In *Gondolfo v. Town of Carmel,* a group of residents challenged the approval of a building permit for a cell tower in connection with a long-running dispute concerning wireless infrastructure in the Putnam County town.[86] The town, which had previously denied special permit applications from two cellular telephone companies, had agreed to grant the building permit as a settlement condition of a consent order issued in federal litigation. Petitioners challenged the approval, as the town conducted no additional SEQRA review and allegedly did not comply with required zoning processes prior to permit issuance.[87] The wireless companies subsequently moved to dismiss, asserting that the neighbors failed to allege any special damages sufficient for standing.

The court disagreed, finding that the neighbors of the proposed cellular tower facility were within the zone of interest for both SEQR and land use law. In reaching this conclusion, the court credited the fact that the town's zoning code required that the petitioners receive notice of site plan and zoning variance applications due to their

83. Sierra Club v. Village of Painted Post, 43 N.E.3d 745, 749 (N.Y. 2015) (quoting *Soc'y of Plastics*, 573 N.E.2d at 1044).

84. Mobil Oil Corp. v. Syracuse Indus. Dev. Agency, 559 N.E.2d 641, 644 (N.Y. 1990) (citing Niagara Recycling, Inc. v. Town Bd., 443 N.Y.S.2d 951, 955 (App. Div. 4th Dep't 1981)).

85. *See* Sierra Club v. Town of Torrey, 167 N.Y.S.3d 727 (Sup. Ct. Yates Cnty. 2022) (petitioners failed to allege specific noise or discharge-related injuries sufficient for standing); *Hart*, 151 N.Y.S.3d at 706 (private litigants lack standing to challenge lead agency determinations); *Town of Waterford*, 134 N.Y.S.3d 545 at 550 (petitioners alleged sufficiently particularized harm for standing); *Peachin*, 149 N.Y.S.3d 258 at 261 (petitioners did not have standing where they alleged harms indistinct from the public at large and economic harms); *Roger Realty*, 134 N.Y.S.3d 694 (petitioner alleged "numerous adverse effects" which were sufficient for standing).

86. Gondolfo v. Town of Carmel, 76 Misc. 3d 521, 528 (Sup. Ct. Putnam Cnty. 2022).

87. *Id.* at 529.

proximity.[88] Citing to long-standing precedent that individuals entitled to "mandatory notice of an administrative hearing because it owns property adjacent or very close to the property in issue gives rise to a presumption of standing in a zoning case," the court ultimately held that the neighbors did not need to allege specific harm or damages.[89]

B. Standing to Challenge Lead Agency Status

Courts also reaffirmed, regardless of injury alleged, that certain claims under SEQRA cannot be brought by members of the public, as they fall outside of the zone of interest of the statute. In *Hart v. Town of Guilderland*, the Third Department reversed a lower court's grant of a petition challenging a Town Planning Board's site plan approval of a proposed retail facility.[90] Petitioners, neighboring landowners and businesses, alleged that the town planning board failed to adequately consult with another interested or involved agency, the zoning board of appeals, prior to assuming lead agency status. Supreme Court, Albany County agreed that this created a procedural infirmity, which, along with alleged deficiencies in the board's substantive review, justified vacating the EIS, Findings Statement and underlying approval.

The Third Department reversed, reaffirming that under prior precedent, "a challenge to lead agency status may only be commenced by another involved agency."[91] Expanding further through a footnote, it determined that because the zoning board of appeals had been included an involved agency, "the Planning Board's failure to involve the ZBA in the lead agency status determination was inconsequential to the SEQRA review process."[92] As a result the court dismissed the petition.[93]

C. Sufficiently "Particularized" Harm

As explained by the Court of Appeals, the proximity of a petitioner's property to the location that is the subject matter of the proposed action permits an inference "that the challenger possesses an

88. *Id.* at 528.

89. *Id.* at 531.

90. Hart v. Town of Guilderland, 151 N.Y.S.3d 700 (App. Div. 3d Dep't 2021).

91. *Id.* at 706 (quoting King v. Cnty. of Saratoga Indus. Dev. Agency, 622 N.Y.S.2d 339, 344 (App. Div. 3d Dep't 1995)).

92. *Id.* at n. 3 (citing Cade v. Stapf, 937 N.Y.S.2d 673, 676 (App. Div. 3d Dep't 2012)).

93. *Id.* at 714. In a proceeding challenging the same approval by different petitioners, the Third Department similarly found that the Town Board took a "hard look" at relevant environmental issues, dismissing the petition. Save the Pine Bush, Inc. v. Town of Guilderland, 168 N.Y.S.3d 561, 568 (App. Div. 3d Dep't 2022).

interest different from other members of the community."[94] This rule led to dismissal of a petitioner's Article 78 suit challenging a town's adherence to SEQRA when permitting a parking facility. In *Airport Parking Associates, LLC v. Town of North Castle*, the town adopted a local law amending its zoning ordinance to allow structured parking as a special permitted use in its industrial zoning district adjacent to the Westchester County Airport.[95]

The town adopted the local law in conjunction with a developer's application to construct a multilevel parking garage for the airport. Petitioner held a lease at the airport, under which it was the exclusive operator of parking facilities. After the Supreme Court dismissed the petition due to lack of standing, the parking-facility lessee appealed. On appeal, the Second Department affirmed the lower court's ruling, noting that the parking-facility lessee failed to meet its burden of coming forward with evidence that its leasehold was located in sufficient proximity to the proposed parking development to support standing.[96]

D. Zone of Interests

Discussed above, the *Airport Parking Associates* decision presents the SEQRA practitioner with a timely warning on the importance of petitioners' meeting their burden of proof on proximity-based standing.[97] That court also found independent grounds for affirming the appealed dismissal based on lack of standing, holding that the parking-facility lessee failed to prove that it would suffer any harm aside from ordinary economic injury due to increased competition.[98] As noted in previous *Surveys*, New York courts have been clear that mere economic injury does not fall within the zone of interests protected by SEQRA.[99]

94. Gernatt Asphalt Prods., Inc. v. Town of Sardinia, 664 N.E.2d 1226, 1238 (N.Y. 1996).

95. Airport Parking Assocs., LLC v. Town of N. Castle, 154 N.Y.S.3d 839, 840 (App. Div. 2d Dep't 2021); *see also* Barnes Rd. Area Neighborhood Ass'n. v. Planning Bd., 171 N.Y.S.3d 245, 249 (App. Div. 3d Dep't 2022) (Petitioners, who lived near subject property and alleged that they would be impacted by increased noise, light, and traffic alleged sufficient injury for standing).

96. *Airport Parking Assocs.*, 154 N.Y.S.3d at 841 ("Here, the Supreme Court correctly found that the petitioner failed to satisfy its burden of coming forward with probative evidence . . . .").

97. *See supra* text accompanying notes 90–93.

98. *See Airport Parking Assocs.*, 154 N.Y.S.3d at 841 (discussing ordinary economic injury, as opposed to particularized environmental injury, as a result of increased competition).

99. See *2017–18 Survey of Environmental Law, supra* note 3, for a discussion of caselaw concerning solely economic injuries and standing.

In *Amper v. Town of Southampton Zoning Board of Appeals*, the petitioners included both individuals and a civic association. Petitioners alleged environmental injury, principally harm to groundwater, resulting from Southampton's approval of the construction of an eighteen-hole golf course and cited their proximity to the development to establish standing.[100]

Citing well-established precedent, the court noted that the first requirement for an association to have standing is a determination that one or more of the association's members have standing to sue.[101] For the individual plaintiffs, the court focused on the distance of their residences from the boundary of the proposed project. The court relied on a series of cases that established "the relevant distance is the distance between the petitioner's property and the actual structure or development itself, not the distance between the petitioner's property and the property line of the site."[102]

Looking to the precise distances of the residential properties from the development and the existence of permanent buffer zones, the court found that none of the individual petitioners' properties were sufficiently proximate to the development.[103] Furthermore, some of the petitioners had no ownership interest in the properties they relied on for standing. The court further held that in addition to the lack of proximity, none of the petitioners showed any actual and specific injury that was different in kind or degree from that alleged to be suffered by the general public. Petitioners cited only a generalized harm to the groundwater, which the court found to be perfunctory and inadequate to establish individual suffering of an environmental injury.[104]

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

100. Amper v. Town of Southampton Zoning Bd. of Appeals, No. 6685/18, 2021 N.Y. Misc. LEXIS 6154, at *9 (N.Y. Sup. Ct. Suffolk Cnty. Nov. 4, 2021). The first named petitioner was previously Fred W. Thiele, Jr., however, the judge stated his name could be stricken from the caption of the matter because at oral argument it was determined that he lived more than 16 miles from the project site and therefore could not allege any injury in fact. *Id*. at *5–*6.

101. *Id*. at *5 (citing Soc'y of the Plastics, Inc. v. County of Suffolk, 573 N.E.2d 1034, 1042 (N.Y. 1991)).

102. *Id*. at *7 (citing Tuxedo Land Tr., Inc. v. Town Bd., 977 N.Y.S.2d 272, 274 (App. Div. 2d Dep't 2013)).

103. *Id.* at *6.

104. *Amper*, 2021 N.Y. Misc. LEXIS 6154, at *9–*10.

administrative remedies be exhausted,[105] that the claim is not moot,[106] and that the claim be timely brought within the statute of limitations period.[107]

A. Ripeness

With respect to ripeness, only final agency actions are generally subject to challenge in a SEQRA (or any other Article 78) challenge.[108] 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.[109] 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"; 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."[110]

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*. There, the court held that a positive declaration was not ripe

105. Under the doctrine of administrative exhaustion, "courts generally refuse to review a determination on environmental or zoning matters based on evidence or arguments that were not presented during the proceedings before the lead agency." Miller v. Kozakiewicz, 751 N.Y.S.2d 524, 526–27 (App. Div. 2d Dep't 2002) (citations omitted). *But see* Jackson v. N.Y. State Urb. Dev. Corp., 494 N.E.2d 429, 442 (N.Y. 1986) ("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[. P]ermitting 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." (citing Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 553–54 (1978))).

106. *See* Friends of Flint Mine Solar v. Town Bd. of Coxsackie, No. 19-0216, slip op. at 7 (N.Y. Sup. Ct. Greene Cnty. 2019).

107. *See* N.Y. C.P.L.R. 7801(1) (McKinney 2022).

108. *Id.*; *see* Essex County v. Zagata, 695 N.E.2d 232, 235 (N.Y. 1998) (citing N.Y. C.P.L.R. 7801(1) (McKinney 2022)); N.Y. EXEC. Law § 818(1) (McKinney 2022)); *see also* Village of Kiryas Joel v. County of Orange, 121 N.Y.S.3d 102, 106–07 (App. Div. 2d Dep't 2020) (holding that petitioner's claim was ripe because respondent's completion of the SEQRA process constituted a final agency decision).

109. *See* Ranco Sand & Stone Corp. v. Vecchio, 49 N.E.3d 1165, 1170 (N.Y. 2016) (citing Rochester Tel. Mobile Commc'ns v. Ober, 674 N.Y.S.2d 189, 190 (App. Div. 4th Dep't 1998)). *But see* Gordon v. Rush, 792 N.E.2d 168, 172 (N.Y. 2003) (citing Essex Cnty., 695 N.E.2d at 235).

110. Gordon, 792 N.E.2d at 172 (quoting Zagata, 695 N.E.2d at 235).

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.[111] 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 usually not a final agency action, and instead is an initial step in the SEQRA process."[112]

Three noteworthy cases[113] during the *Survey* period addressed ripeness. In *Remauro v. City of New York*,[114] the petitioners asserted that the Department of Homeless Services (DHS) violated SEQRA by failing to conduct an appropriate environmental review before deciding to open several homeless shelters.[115] The petitioners contended that the agency had issued a final determination when it published an announcement of the proposed shelters in the *Staten Island Advance*.[116] The news article included the names of vendors who would operate the sites and an anticipated opening by Fall 2021. The respondent agency sought to dismiss the petitioners' complaint for lack of ripeness, noting that the decision to open the proposed shelters was not finalized. In support of this argument, respondent noted that DHS had not completed any of the necessary reviews, nor entered any contracts regarding the operation of the proposed shelters, and that construction had not yet begun.[117] The Richmond County Supreme court sided with the respondents, concluding that the petitioners' claims were not ripe for judicial review because the proposed shelters were still in the planning phases.[118]

In *Glaser v. Gowanus Cubes LLC*, community members active in the arts and culture sector moved for a preliminary injunction on their petition to enjoin a property owner from demolishing Grand Prospect

111. *Ranco Sand & Stone Corp.,* 49 N.E.3d at 1170.

112. *Id*. 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* Mark A. Chertok et al., *2018–19 Survey of New York Law: Environmental Law: Developments in the Law of SEQRA*, 70 SYRACUSE L. REV. 329, 340 (2020) (discussing Lewis Homes of N.Y., Inc. v. Bd. of Site Plan Rev., No. 40966/2009, slip op. at 5–6 (Sup. Ct. Suffolk Cnty. 2019)) [hereinafter *2018–19 Survey of Environmental Law*].

113. For discussion of the ripeness considerations in Arntzen v. N.Y.C., 209 A.D.3d 404 (App. Div. 1st Dep't 2022), see *infra* text accompanying notes 250–55.

114. Remauro v. N.Y.C., No. 80019/2021, 2021 NYLJ LEXIS 838 (Sup. Ct. Richmond Cnty. Aug 10, 2021).

115. *Id*. at *1.

116. *Id.* at *3–5.

117. *Id.* at *5–6.

118. *See id.* at *6.

Hall in Brooklyn's South Park Slope neighborhood.[119] The respondent property owner obtained a permit from New York City's Department of Buildings to demolish the interior of the building and completed the limited demolition before the community members filed their petition. At the time, petitioners were awaiting a decision from New York City's Landmarks Preservation Commission (LPC). After the commencement of the suit, the LPC denied petitioners' application to designate the exterior of the music and performance venue as a historic landmark.[120] In denying the motion and dismissing the petition for lack of ripeness, the court observed that there was no "SEQRA/CEQR review, much less any final determination by any governmental agency as to how respondent may use the property."[121]

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."[122] An exception to the mootness doctrine may apply if three 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."[123] 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.[124] 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.[125]

119. Glaser v. Gowanus Cubes LLC, No. 522392/2021, 2021 WL 4868411, at *1 (Sup. Ct. Kings Cnty. Oct. 18, 2021).

120. *Id.* at *2.

121. *Id.* (citing to ripeness precedent from Patel v. Bd. of Trustees, 982 N.Y.S.2d 142, 144 (App. Div. 4th Dep't 2014); Young v. Bd. of Trustees, 634 N.Y.S.2d 605 (App. Div. 4th Dep't 1995), *aff'd* 675 N.E.2d 464, 466 (N.Y. 1996)).

122. Mehta v. N.Y.C. Dep't of Consumer Affs., 556 N.Y.S.2d 601, 602 (App. Div. 1st Dep't 1990) (quoting Flacke v. Onondaga Landfill Sys., Inc., 487 N.Y.S.2d 651, 654 (Sup. Ct. Onondaga Cnty. 1985).

123. Hearst Corp. v. Clyne, 409 N.E.2d 876, 878 (N.Y. 1980).

124. N.Y. State Comm'n on Jud. Conduct v. Rubenstein, 16 N.E.3d 1156, 1160 (N.Y. 2014) (quoting Saratoga Cnty. Chamber of Com. v. Pataki, 798 N.E.2d 1047, 1051 (N.Y. 2003)).

125. *See* Rukenstein v. McGowan, 709 N.Y.S.2d 42, 43 (App. Div. 1st Dep't 2000).

In a return of a case discussed in last year's *Survey*[126] (*Villenova I*), in *Davis v. Town Board of Villenova* (*Villenova II*), petitioners challenged a local law passed by the town during the pendency of the prior litigation. During the pendency of the petitioner's prior challenge to the town's authorization of a special use permit, the town passed a new resolution addressing the alleged SEQR deficiencies. In passing the new resolution, the town expressly provided that the resolution, and its resultant new special use permit, would be invalid if the challenged special use permit was upheld.[127] Given the town's success in *Villenova I*, the Fourth Department found that the new special use permit at issue in *Villenova II* was rescinded under its own terms, rendering the appeal moot. The court further found that petitioner's challenge of the implementing legislation was also moot, reasoning that even if the court "annulled those 2019 local laws, we conclude that the identical 2018 local laws remain valid and in effect, and thus annulling the 2019 local laws will not affect the rights of the parties."[128]

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."[129] As a practical matter, it can be difficult to

126. *See 2020–21 Survey of Environmental Law*, *supra* note 1, at 340–41.

127. Davis v. Town Bd. of Villenova, 155 N.Y.S.3d 911, 912 (N.Y. App. Div. 4th Dep't 2021).

128. *Id.* (citing Coleman v. Daines, 979 N.E.2d 1158, 1159 (N.Y. 2012) ("[A]n appeal is moot unless an adjudication of the merits will result in immediate and practical consequences to the parties.").

129. N.Y. C.P.L.R. 217(1) (McKinney 2022). Stop-The-Barge v. Cahill, 803 N.E.2d 361, 363 (N.Y. 2003) (quoting Essex Cnty v. Zagata, 695 N.E.2d 232, 235 (N.Y. 1998)); *see* Young v. Bd. of Trs., 675 N.E.2d 464, 466 (N.Y. 1996) ("[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 v. City of Albany, 512 N.Ed.2d 526, 529 (N.Y. 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., 111 N.Y.S.3d 732, 734 (App. Div. 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., L.P. v.

identify that point in time when the statute of limitations begins to run, and the trigger point has become an area of some confusion.[130] 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.[131] Adding to the confusion, a shorter statute of limitations may apply pursuant to statute, often in challenges to certain land use approvals.[132]

Three noteworthy cases from this *Survey* period addressed the statute of limitations in SEQRA proceedings.[133] In *Tonawanda Seneca Nation v. Hyde*, petitioners sought to void two determinations of the Genesee County Economic Development Center (GCEDC) allowing the development of a liquid hydrogen production plant on the Science Technology and Advanced Manufacturing Park site. Respondents sought dismissal of the petition, claiming that the action was filed after the four-month limitation period.[134] Petitioners only named GCDEC in their original June 4, 2021 petition, and subsequently added Plug Power, Inc.—the business entity which was granted the lease to develop the property and which applied to develop the liquid hydrogen production plant—in an amended petition two weeks later. GCEDC issued a resolution relative to Plug Power's application on February 4, 2021, stating that "all potential issues associated with Project Gateway had been adequately addressed" and "no further SEQRA compliance is required."[135] Although subsequent action was taken on the application by the agency, the court noted that no further consideration of the environmental impact of the project took place after the initial

Hudson River-Black River Regulating Dist, 997 N.Y.S.2d 793, 796 (App. Div. 3d Dep't 2014); Bango v. Gouvernour Volunteer Rescue Squad, Inc., 957 N.Y.S.2d 769, 770 (App. Div. 3d Dep't 2012)).

130. The confusion stems from two Court of Appeals decisions, *Stop-The-Barge*, 803 N.E.2d at 362 and Eadie v. Town Bd., 854 N.E.2d 464, 469 (N.Y. 2006).

131. *See 2014–15 Survey of Environmental Law, supra* note 27, at 921–22 for a discussion of *Stop-The-Barge*, 803 N.E.2d at 362 and *Eadie*, 854 N.E.2d at 469.

132. A party may be subject to a shorter statute of limitations period for challenging SEQRA decisions by statute. For example, New York Town Law § 267-c prescribes a 30-day statute of limitations for persons aggrieved by a decision of a town's Zoning Board of Appeals regarding a use or area variance, and New York Town Law § 274-a prescribes a 30-day statute of limitations for persons aggrieved by a decision regarding a site plan approval.

133. *See also* Greenville Fire Dist. v. Zoning Bd. of Appeals, 163 N.Y.S.3d 551, 554 (App. Div. 2d Dep't 2022) (dismissing action for failure to challenge determination during statutorily prescribed period).

134. Tonawanda Seneca Nation v. Hyde, 2021 Slip Op. E69171 (N.Y. Sup. Ct. Genesee Cnty. Oct. 5, 2021).

135. *Id*. at 3.

resolution, which could reasonably be interpreted as the final SEQRA determination. Therefore, the court held that because the four-month limitation period began to accrue on February 4th, the amended petition (filed on June 18, 2021) was untimely.

In *Town of Copake v. New York State Office of Renewable Energy Siting*, petitioners challenged the legality of the transfer of permitting authority from the Public Service Commission (PSC) to the New York State Office of Renewable Energy (ORES); they further challenged the sufficiency of the SEQRA review of the implementing regulation.[136] Respondents argued that the proceeding, which was commenced four months and six days after the issuance of the negative declaration, was barred by the statute of limitations.[137] At issue was whether the four-month limitations period began to run when the negative declaration was issued or when the regulations were adopted.[138] The court held that because the matter did not become ripe for review until the regulations were adopted, the limitation period did not begin running until that time. Therefore, the action that commenced within four months of the adoption of the regulations was timely.[139] The court reasoned that "[s]ince there was no specific project being approved, adoption of the negative declaration was not the last act of ORES . . ."[140]

Finally, in *Voice of Gowanus v. City of New York*, Kings County Supreme Court dismissed a challenge to New York City's Gowanus Neighborhood Rezoning, where petitioners failed to serve their

136. Town of Copake v. N.Y. State Off. of Renewable Energy Siting, No. 905502-21, slip op. at 2 (N.Y. Sup. Ct. Albany Cnty. Sept. 22, 2021). On April 3, 2020, the Accelerated Renewable Energy Growth and Community Benefit Act (the Act) was enacted. The Executive Law was amended to include section 94-c, which created ORES in order to streamline the approval process for sustainable projects. Under the Act, renewable energy facilities are exempt from SEQRA and ORES has the authority to implement regulations, establishing procedural and substantive requirements for permitting applications.

137. *Id.* at 18.

138. *Id.* at 20–21 ("The negative declaration was adopted on February 23, 2021. The regulations were adopted on March 3, 2021. The action was filed on June 29, 2021." If the date of the negative declaration was chosen as the starting point, the action would not have been timely commenced. If the action became ripe for review by the date the regulations were adopted, the action would be timely commenced.).

139. *Id.* at 22.

140. *Id.* at 21 (holding regulations were ripe for review, as they "charted an immediate and final impact by effectively transferring the siting authority for major renewable energy facilities to ORES, [and therefore,] [p]etitioners need not await for ORES approval of a specific project to establish a justiciable issue.").

petition within the applicable statute of limitations period.[141] While the petition was electronically filed within the statute of limitations, petitioners made no attempt to serve the municipal respondents until nearly twenty days after the allotted time for service.[142] Ultimately, the court found that petitioners failed to demonstrate either good cause for the deficient service or that excusing delayed service was in the interest of justice.[143]

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

1. Notice Requirements

Although SEQRA generally demands strict compliance with its procedural requirements, one case from this year's *Survey* period did excuse an agency's alleged failure to give notice. In *Douglaston Civic Association v. City of New York*, the city approved a zoning application by developers to rezone a block in Douglaston, Queens, in connection with a proposed affordable and senior housing facility.[145] After completing an EAS, the city found that the proposed development's environmental impact was not significant and thus issued a negative declaration.[146] Petitioner, a local civic association, challenged the city's decision in court, arguing *inter alia* that the city failed to provide notice to the applicable community board—a local advisory committee in the City of New York with certain land use functions—as required under both CEQR and the City's Uniform Land Use Review Procedures (ULURP).[147] Citing to the Second

141. Voice of Gowanus v. N.Y.C., No. 50587/2022, 2022 N.Y. Misc. LEXIS 2989, at *21 (Sup. Ct. Kings Cnty. 2022).

142. *Id.* at *1.

143. *Id.* at *21–*22.

144. *See supra* Part I.

145. Douglaston Civic Ass'n v. N.Y.C., 159 N.Y.S.3d 23, 24 (App. Div. 1st Dep't 2021).

146. *Id.*

147. *Id.* (first citing N.Y.C. CHARTER § 197-c[k] (2018); then citing N.Y.C. RULES tit. 62 § 2-06[d][3]).

Department's opinion in *Fine Associates v. Board of Trustees of the Village of Elmsford*, the court in *Douglaston* held that even if notice was deficient, that in and of itself would not vitiate the city's CEQR process.[148] The court also raised standing as a threshold matter for this notice argument, holding that the petitioners could not assert the rights of another, *viz.,* a civic association raising the argument of allegedly insufficient notice to a community board.[149]

2. Classification of the Action

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

DEC sorts types of agency actions into categories by regulation.[150] As noted above, a Type I action carries the presumption that an EIS will be required.[151] 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."[152] Any state or local agency may adopt its own list of additional Type I or Type II actions to supplement those provided by DEC.[153] 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.[154] During the *Survey* period, a number of cursory decisions were issued upholding an agency's classification of its action.[155]

Of note was one decision from the Fourth Department concerning the Great Northern Elevator, a designated historic building and at one

148. *Id.* (citing Fine Assocs. v. Bd. of Trs., 643 N.Y.S.2d 643, 644 (App. Div. 2d Dep't 1996)).

149. *Id.* (citing Soc'y of Plastics Indus. v. County of Suffolk, 573 N.E.2d 1034, 1041 (N.Y. 1991)).

150. *See* 6 N.Y.C.R.R. § 617.4(a) (2022).

151. *Id.* § 617.4(a)(1).

152. *Id.* §617.5(a).

153. *Id*. §§ 617.4(a)(2), 617.5(b) ("An agency may not designate as Type I any action identified as Type II" by DEC at section 617.5 of the SEQRA regulations).

154. *Id.* § 617.2(al).

155. The majority of these decisions were short and uninformative, and courts quite often simply invoke the standard of review without significant discussion. *See, e.g.,* Capitano v. Town Bd., 154 N.Y.S.3d 249, 249–50 (App. Div. 2d Dep't 2021) (affirming town's Type II classification of condemnation of easement for drainage pipe maintenance); Verizon Wireless of the E. LP v. Town of Wappinger, No. 20-CV-8600, 2022 U.S. Dist. LEXIS 17003, at *45–46 (S.D.N.Y. Jan. 31, 2022) (discussing lack of applicability of Type II classification).

point, one of the largest grain elevators in the world. In *Campaign for Buffalo History Architecture & Culture, Inc. v. City of Buffalo*, the grain elevator in question partially collapsed after a windstorm.[156] The city's permits and inspections commissioner and the fire commissioner both inspected the building and found that it posed an imminent threat to the health, safety, and welfare of the public. Accordingly, the city issued an emergency demolition and condemnation order.[157]

The petitioners sought to enjoin the demolition, arguing that the city failed to prepare an EAF and EIS in violation of SEQRA. The city maintained that its determination was consistent with a Type II SEQRA action for emergencies.[158] Although the trial court granted a temporary restraining order for long enough to hold a fact-finding hearing—at which only the city produced expert testimony—it ultimately denied the petitioners' requested injunction.[159] On appeal, the Fourth Department reversed and remanded for further proceedings, holding that the trial court should have afforded petitioners' an opportunity to submit evidence on the issue of whether the city's emergency determination was arbitrary, capricious, or lacking a factual basis, and therefore a Type II action exempt from SEQRA review.[160]

Another decision clarified the classification of action taken pursuant to court order. In *Gondolfo v. Town of Carmel,* discussed further above, the town claimed that its actions, taken pursuant to a consent order in a prior proceeding, were exempt from review under SEQRA as a Type II action. The Court of Appeals disagreed, relying upon Second Department precedent that judicially approved settlements do not

156. *See* Campaign for Buffalo Hist., Architecture, & Culture, Inc. v. City of Buffalo, 168 N.Y.S.3d 202, 203 (App. Div. 4th Dep't 2022).

157. See id.

158. *See id.* at 203–04.; *see also* 6 N.Y.C.R.R. § 617.5(c)(42) (DEC's Type II list entry for emergency actions necessary "for the protection or preservation of life, health, property or natural resources").

159. *See* Campaign for Buffalo, 186 N.Y.S.3d at 203–04.

160. *See id.* at 204–05. On remand, the trial court held another hearing, and after considering testimony from both sides, ultimately determined that the city had a rational factual basis for condemning the building and ordering its demolition. *See* Campaign for Buffalo Hist. Architecture & Culture, Inc. v. City of Buffalo, No. 816904/2021, 2022 N.Y. Misc. LEXIS 3201, at *52 (Sup. Ct. Erie Cnty. July 5, 2022).

qualify under the Type II exemption for actions taken pursuant to court order.[161]

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]."[162] As explained by the Third Department, impermissible segmentation occurs in two situations: (1) "when a project which would have a significant effect on the environment is split into two or more smaller projects, with the result that each falls below the threshold requiring [SEQRA] review;" and (2) "when a project developer wrongly excludes certain activities from the definition of his project for the purpose of keeping to a minimum its environmentally harmful consequence, thereby making it more palatable to the reviewing agency and community."[163] Segmentation is not strictly prohibited by SEQRA, 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."[164]

Four cases from this *Survey* period addressed segmentation. In *Sane Energy Project v. City of New York*, petitioners sought to enjoin a utility company from updating infrastructure at a backup liquefied natural gas (LNG) facility, which they alleged required a discretionary variance from the New York City Fire Department (FDNY).[165] The respondent utility company conceded that although a variance from FDNY, requiring full environmental review, would be needed to operate the LNG truck station, construction activities would only require ministerial building permits that did not trigger SEQRA.[166] In ultimately denying the petition, Kings County Supreme Court took no issue with the separate consideration of construction of the facility from

161. Gondolfo v. Town of Carmel, No. 501385/2020, 2022 N.Y. Misc. LEXIS 3205, at *28 (Sup. Ct. Putnam Cnty June 24, 2022) (citing Abate v. City of Yonkers, 694 N.Y.S.2d 724 (App. Div. 2d Dep't 2000).

162. 6 N.Y.C.R.R. § 617.3(g)(1).

163. Schultz v. Jorling, 563 N.Y.S.3d 876, 879 (App. Div. 3d Dep't 1990).

164. Concerned Citizens for the Env't v. Zagata, 672 N.Y.S.2d 956, 958 (App. Div. 3d Dep't 1998) (citing 6 N.Y.C.R.R. § 617.3(g)(1)).

165. Sane Energy Project v. N.Y.C., No. 518354/2021, slip op. at 1–2 (Sup. Ct. Kings Cnty. Oct. 18, 2021).

166. *See id.* at 8.

its operations.[167] The court found that neither of the abovementioned concerns of segmentation were present, and construction of the facility did not foreclose review of environmental concerns pertaining to the project's operations.[168] In turn, considering the construction of the facility on its own involved only non-discretionary ministerial decisions, which do not constitute an action for purposes of SEQRA.[169]

Segmentation was also discussed in *PSC, LLC v. City of Albany Industrial Development Agency*.[170] Petitioners contended that the City of Albany Industrial Development Agency violated SEQRA by improperly segmenting the review of the acquisition of the land from the broader review of a future development proposal. The agency conceded that segmentation occurred, but in its own analysis found the segmentation to be permissible.[171] The agency's SEQRA determination focused "solely o[n] the acquisition of the properties" and found it to be an "'unlisted' action [that] would 'not have a significant adverse impact on the environment.'"[172] The court agreed with the agency, holding that although the review was segmented, it was permissible because it was not done to circumvent SEQRA, but rather to allow for a complete review later.[173]

In *Route 17K Real Estate, LLC. v. Planning Board*, petitioners argued that a planning board engaged in improper segmentation by approving a site plan without proper consideration of signage.[174] The court found the planning board's issuance of a negative declaration contained a reasoned elaboration of the basis for its determination, which indicated that it had taken a hard look at the relevant areas of environmental concern.[175] The court reasoned that the planning board had not treated signage as being an "independent, unrelated activity, but as a part of the entire project."[176] Therefore, review of the plan without signage did not constitute improper segmentation under

167. *Id.* at 18–19.

168. *Id.*

169. *Id.* at 6.

170. *See* PSC, LLC v. City of Albany Indus. Dev. Agency, 158 N.Y.S.3d 379, 383–84 (App. Div. 3d Dep't 2021), *lv. denied*, 190 N.E.3d 568 (N.Y. June 14, 2022).

171. *See id.* at 385–86.

172. *Id*. at 388.

173. *Id*.

174. Route 17K Real Estate, LLC v. Planning Bd., 156 N.Y.S.3d 368, 370 (App. Div. 2d Dep't 2021), *lv. denied*, 38 N.Y.3d 905 (Apr. 26, 2022).

175. 156 N.Y.S. 3d at 371.

176. *Id*.

SEQRA and allowing the applicant to return to the Planning Board with a signage proposal did not distort the approval process.[177]

In *Evans v. City of Saratoga Springs*—the only case in the survey period finding impermissible segmentation—petitioners challenged the city's rezoning for a single parcel on a hospital campus, which was a component of a previously proposed redevelopment plan.[178] Although no formal plans had been submitted for the larger project, prior communications indicated that the rezoning was the first step in the broader development scheme. At the Supreme Court, the board's determination was upheld.[179] However, the Third Department reversed, finding that the reasonably foreseeable future developments, which would be "green li[t]" by the rezoning activity, could not be permissibly segmented.[180]

C. 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.[181] 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."[182]

During this *Survey* period, one noteworthy case dealt with the propriety of lead agency designation for coordinated review. In *Truett v. Oneida County*, petitioners sought to halt a county's condemnation of parcels associated with a hospital redevelopment project, which had previously been assessed in an EIS produced by the local planning

177. *Id*.

178. Evans v. City of Saratoga Springs, 164 N.Y.S.3d 227, 230–31 (App. Div. 3d. Dep't 2022).

179. *Id.* at 229–30.

180. *Id*. at 232.

181. 6 N.Y.C.R.R. §§ 617.2(v), 617.6(b)(3) (2021). Agencies have the option of conducting a coordinated review for Unlisted Actions, but it is not required. *See id*. § 617.6(b)(4).

182. *Id.* § 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 id.* § 617.6(b)(2)(ii).

board.[183] Petitioners argued that the county improperly incorporated the city planning board's SEQRA findings and was instead required to conduct its own independent analysis as lead agency to determine that no significant impacts were likely. In ruling upon a challenge brought directly to the Appellate Division in the Fourth Department,[184] the court rejected the petitioners' argument. Agreeing with the respondent, the court found that the city planning board properly designated itself as lead agency and that as an involved agency in the local planning board's coordinated review, the county was entitled to rely upon the planning board's environmental review.[185]

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.[186] 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.'"[187] With these considerations in mind, and under Article 78's deferential standard of review for agencies' discretionary judgments, a negative declaration or EIS issued in compliance with applicable law and procedures "will only be annulled if it is arbitrary, capricious or unsupported by the evidence."[188] In applying this standard, courts have repeatedly

183. Truett v. Oneida County, 155 N.Y.S.3d 913, 913 (App. Div. 4th Dep't 2021), *lv. denied*, 188 N.E.3d 604 (N.Y. 2022).

184. *See* N.Y. EM. DOM. PROC. LAW § 207(A) (McKinney 2022) (allowing for direct judicial review of condemner's determinations and findings by the appellate division).

185. *Truett*, 155 N.Y.S.3d at 913; *see also* Brief of Respondent, Truett v. Oneida County, 155 N.Y.S.3d 913 (App. Div. 4th Dep't 2021) (OP-21-00853), 2021 App. Div. Briefs LEXIS 3521, at *26 ("[A]n Involved Agency, in rendering its determinations and findings on a project subject to SEQRA, may properly rely upon the Lead Agency's SEQRA findings following review and issuance of an EIS.").

186. *See, e.g.*, Riverkeeper, Inc. v. Planning Bd., 881 N.E.2d 172, 177 (N.Y. 2007) (quoting Jackson v. N.Y. State Urb. Dev. Corp., 494 N.E.2d 429, 436 (N.Y. 1986)).

187. *Id.* at 177 (quoting *Jackson*, 494 N.E.2d at 436).

188. Schaller v. Town of New Paltz Zoning Bd. of Appeals, 968 N.Y.S.2d 702, 704, (App. Div. 3d Dep't 2013) (first citing N.Y. C.P.L.R. 7803(3) (McKinney 2022); then citing *Riverkeeper, Inc.*, 881 N.E.2d at 177; and then citing Troy Sand

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."[189]

This deferential standard of review means that successful challenges to the adequacy of an EIS are rare in the extreme.[190] Although still uncommon, success is marginally 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.[191] As a result, challenges to a negative declaration often attempt to prove that the lead agency's decision was arbitrary and capricious, or unsupported in the record, because the agency failed to consider a relevant subject, the proposed action may have significant adverse environmental impacts, or the agency failed to provide a written, reasoned elaboration for its determination.[192]

As noted above, 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.[193] During the *Survey* period, a few cursory decisions were issued upholding negative declarations by lead agencies, citing primarily to this standard.[194] One case of note was *PSC, LLC v. City of Albany Indus.*

& Gravel Co. v. Town of Nassau, 918 N.Y.S.2d 667, 669 (App. Div. 3d Dep't 2011)).

189. *Riverkeeper, Inc.*, 881 N.E.2d at 177 (first quoting Akpan v. Koch, 554 N.E.2d 53, 57 (N.Y. 1990); then quoting *Jackson*, 494 N.E.2d at 436) (citing Merson v. McNally, 688 N.E.2d 479, 484 (N.Y. 1997)).

190. MICHAEL B. GERRARD ET AL., 2 ENV'T IMPACT REV. IN N.Y. § 7.04(4) (2022).

191. 6 N.Y.C.R.R. §617.5 (2021); GERRARD, *supra* note 190, at § 2.01(3)(b).

192. N.Y. C.P.L.R. 7803(3) (McKinney 2022); *see 2020–21 Survey of Environmental Law, supra* note 1, at 119. Challenges to positive declarations are less common than challenges to negative declarations. *See* GERRARD, *supra* note 190, at § 3.05(2)(e). Part of the reason is that positive declarations generally are not considered final agency actions. *See supra*, notes 108–21 and accompanying text.

193. GERRARD, *supra* note 190, at § 7.04(4).

194. The majority of these decisions were short and uninformative, and courts quite often invoke the standard of review without significant discussion.

Dev. Agency, where petitioners claimed that the City of Albany Industrial Development Agency's (Agency) issuance of a negative declaration should be annulled on procedural grounds because the Agency closed the public hearing before issuing the SEQRA determination of significance and held the hearing on Zoom instead of in-person.[195] The court noted that there is no statutory requirement that a SEQRA determination of significance be made in advance of the public hearing.[196] Furthermore, the court concluded that in-person attendance laws were suspended in response to the COVID-19 pandemic.[197] Therefore, holding meetings via Zoom was permissible so long as "the public ha[d] the ability to view or listen to such proceeding and that such meetings [we]re recorded and later transcribed."[198]

Although courts issued numerous decisions upholding negative declarations,[199] only a few warrant further consideration. In addition to the notice arguments discussed above,[200] the petitioners in *Douglaston* also argued that the city's zoning approval constituted illegal spot zoning solely for the benefit of the developer and that the city's negative determination was arbitrary, capricious, and unsupported by the record. On appeal, the First Department held that the city took a hard look at the relevant areas of environmental concern and made a reasoned elaboration of the basis for its decision.[201] Citing to *Jackson v. New York State Urban Development Corp.*, the court supported its

Accordingly, they are not discussed in great detail. *See, e.g.*, Manocherian v. Zoning Bd. of Appeals, 162 N.Y.S.3d 79, 81 (App. Div. 2d Dep't 2022); Z. Brach & Residents for Preservation of Borough Park Identity v. N.Y.C., No. 154724-21, slip op. at 8 (Sup. Ct. N.Y. Cnty. 2022); Barnes Rd. Area Neighborhood Ass'n v. Planning Bd., 171 N.Y.S.3d 245, 249 (App. Div. 3d Dep't 2022); Stop Irresponsible Frick Dev. v. N.Y.C. Bd. of Standards & Appeals, 162 N.Y.S.3d 32, 33 (App. Div. 1st Dep't 2022).

195. PSC, LLC v. City of Albany Indus. Dev. Agency, 158 N.Y.S.3d 379, 383–84 (App. Div. 3d Dep't 2021), *lv. denied,* 190 N.E.3d 568 (2022).

196. *Id.* at 384.

197. *Id.* at 384.

198. *Id*. at 384 (citing Governor's Executive Order No. 202.1, *reprinted* in 9 N.Y.C.R.R. § 8.202.1 (2020)).

199. *See* Falanga v. Town of Farmington, No. 126079-2019, slip op. at 10 (Sup. Ct. Ontario Cnty. Oct. 18, 2021) (holding that negative declaration's reference to obligatory compliance with stormwater pollution prevention plan did not render the negative declaration a CND, but merely restated procedural process for permitting).

200. *See supra* Section III(B)(1).

201. Douglaston Civic Ass'n. v. N.Y.C., 159 N.Y.S.3d 23, 24 (App. Div. 1st Dep't 2021) (citing Friends of P.S. 163 v. Jewish Home Lifecare, Manhattan, 90 N.E.3d 1253, 1260 (N.Y. 2017).

holding by noting that nothing in SEQRA obligates an agency to reach a particular result or allows courts to second-guess an agency's decision."[202]

Another instructive decision upholding an agency's negative declaration was *Chhaya Community Development Corporation v. New York City Department of City Planning*.[203] This case concerned the redevelopment of twenty-nine acres of waterfront property in downtown Flushing, Queens.[204] Although the site in question has a nuanced history of proposed developments and zoning changes, in relevant part, the Department of City Planning (DCP) previously considered a 2015 proposal to rezone a larger, sixty-two-acre waterfront area, but ultimately placed the zoning process on indefinite hold due to public concern from community groups and elected officials.[205] In 2017, the present developer initiated informational meetings with DCP that resulted in a rezoning application submitted in 2018.[206] The application sought a zoning map and text amendment for the twenty-nine-acre site, which would rezone the site from commercial and heavy manufacturing to light manufacturing and medium-density residential, all of which would allow for the developer's proposed mix-use development.[207] Additionally, the rezoning would establish a new City Planning Commission certification to allow an increase in permitted building heights.[208]

The city conducted a CEQR review and prepared an EAS. The EAS analyzed the twenty-nine-acre site and adjacent properties outside of the site as "potential development sites."[209] These potential development sites included U-Haul's regional headquarters inside of a building with a "historically significant" cupola and a one-story construction supply building.[210] The EAS then compared the incremental changes in development under a reasonable worst case development scenario for the developer and property owners of the potential development sites, with and without the proposed rezoning approval—in

202. *Id.* (quoting Jackson v. N.Y. State Urb. Dev. Corp., 494 N.E.2d 429, 417 (N.Y. 1986).

203. Chhaya Cmty. Dev. Corp. v. N.Y.C. Dep't of City Plan., No. 706788/2020, slip op. (Sup. Ct. Queens Cnty. Oct. 14, 2021).

204. *Id.* at 3.

205. *Id.* at 3.

206. *Id.*

207. Id.

208. *Chhaya*, slip op. at 3.

209. *Id.* at 6–7.

210. *Id.* at 5.

other words, a comparison of the likely development by 2025 as-of-right (without-action alternative) versus likely development if CPC approved the rezoning application (with-action alternative).[211]

The comparison revealed that the with-action alternative would result in higher numbers of residential units, commercial office space, community facility space, open space, residents, and workers within the 29-acre site and potential development sites than the without-action alternative.[212] The comparison also revealed a comparative decrease in hotel rooms, retail space, self-storage space, and parking. Additionally, the developer's proposed redevelopment would result in and facilitate the creation of public access to the Flushing waterfront.[213]

After reviewing the incremental differences, the city issued a negative declaration and commenced the Uniform Land Use Review Procedure process,[214] which resulted in City Counsel approving the rezoning application in 2020.[215] Petitioners, a group of non-profit community organizations and local residents, brought suit alleging that the city: (1) failed to take the requisite "hard look;" (2) compared an artificially high baseline development against an artificially low level of anticipated development; (3) improperly assumed that DEC and the U.S. Army Corps of Engineers would grant the developer the necessary permits to create the proposed public waterfront access; and (4) made development assumptions in the with-action and without action alternatives that contradicted corresponding assumptions made in the CEQR review of the previous, 2015 development proposal.[216]

In dismissing the petition and denying the petitioners' request to annul the negative declaration and rezoning approval, the Queens County Supreme Court held that the city had taken the requisite hard look at the relevant areas of environmental concern and provided a reasoned elaboration of the basis for its decision.[217] Beyond noting the city's compliance with the CEQR Technical Manual, the court examined each of petitioners' points. First, the court held that petitioners' attempts to compare the 2015 CEQR review to the instant EAS was

211. *Id.* at 7–8. See CEQR MANUAL, *supra* note 51, at 2-1 and 2-3 for a fuller discussion of reasonable worst case development scenario. *See also 2017–18 Survey of Environmental Law*, *supra* note 3, at 778–79.

212. *Chhaya,* slip op. at 7.

213. *Id.*

214. *See generally* N.Y.C CHARTER § 197-c (2018).

215. *Chhaya,* slip op. 706788, at 8.

216. *Id.* at 8–9.

217. *Id.* at 11–12.

inapposite given the differing geographic area, scope, and real-estate trends.[218] Comparing the twenty-nine-acre site to recent developments in the surrounding area, the court found that the estimated amount of development under the no-action alternative was reasonable.[219] Lastly, the court noted that the developer had been in communication with agencies responsible for issuing permits needed to develop a waterfront public access area, and understood that those agencies were waiting for the results of the instant CEQR challenge.[220]

By contrast, a lead agency's negative declaration was overturned during the *Survey* period in only two cases reflecting procedural and/or substantive SEQRA errors.[221]

As these decisions illustrate, cases overturning a negative declaration are the exception, not the norm. So long as 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 when it decided that the environmental impact is not significant and issued a negative declaration,"[222] then it remains highly unlikely that a negative declaration will be overturned as arbitrary and capricious.

2. Challenges to EISs & Findings Statements

As noted, successful challenges to EISs are very uncommon due to the deferential standard of review. There was just one successful challenges to the adequacy of an EIS during the *Survey* period, which has already been reversed on appeal. The other case related to an effort to enforce mitigation allegedly required by an agency's Findings Statement.

218. *Id.* at 11.

219. Id.

220. *Chhaya*, slip op. at 13. *Accord* Riverkeeper, Inc. v. Planning Bd., 881 N.E.2d 172, 178–79 (N.Y. 2007).

221. *See* Evans v. City of Saratoga Springs, 164 N.Y.S.3d 227, 232 (App. Div. 3d Dep't 2022) (negative declaration improperly segmented single parcel from larger foreseeable development); Arntzen v. N.Y.C., No. 159502/2021, slip op. at 8–9 (Sup. Ct. N.Y. Cnty. Mar. 23, 2022) (city failed to conduct adequate environmental review of Open Restaurants plan by issuing negative declaration). However, as discussed below in Section III(D), the trial court's decision in *Arntzen* was unanimously reversed on appeal.

222. Douglaston, 159 N.Y.S.3d at 24 (quoting Friends of P.S. 163, Inc. v. Jewish Home Lifecare, 90 N.E.3d 1253, 1260 (N.Y. 2017)) (internal quotations omitted).

In *Mutual Aid Association v. City of Yonkers*, the city undertook an environmental review pursuant to SEQRA in connection with a developer's 81.4 acre mixed-use development.[223] The petitioner, a firefighters' union, sought declaratory judgment against the city and the developer for alleged failure to comply with the mitigation measures identified in the city's SEQRA Findings Statement, where these mitigation measures addressed the increased burden on fire-fighting resources caused by the proposed development.[224] Specifically, the firefighters' union argued that the findings conditioned approval of the development upon the city and developer's construction of a new firehouse to serve the development.[225] The Supreme Court, Westchester County, denied the city and developer's motion to dismiss for failure to state a cause of action.[226]

On appeal, the Second Department reversed.[227] The court first noted that firefighters' union failed to allege any procedural and substantive deficiency in the city's determination of significance, EIS, Findings Statement, or any other SEQRA document.[228] After parsing the record, the court observed that the city's fire protection mitigation measures "unambiguously did not include the construction of a new firehouse."[229] The court further noted that the fire protection mitigation measures in the Findings Statement only extended to new firefighting personnel and improvements to infrastructure.[230] Delving into the DEIS, the court noted that infrastructure improvements only referred to items such as mobile air-quality detection units, road improvements for emergency vehicle access, a new water main for adequate water pressure during firefighting, and use of fireproofing in the construction of buildings within the proposed development.[231]

The next case presents a cautionary tale to SEQRA and CEQR practitioners on the importance of developing and presenting

223. Mutual Aid Ass'n of the Paid Fire Dep't of Yonkers v. City of Yonkers, 156 N.Y.S.3d 424, 426 (App. Div. 2d Dep't 2021). A related proceeding with the same parties concerned the jurisdiction of a zoning board of appeals. *See* Mutual Aid Ass'n of the Paid Fire Dep't of Yonkers v. Zoning Bd. of Appeals, 157 N.Y.S.3d 295, 296 (App. Div. 2d Dep't 2021).

224. *Mutual Aid Ass'n*, 156 N.Y.S.3d at 425–26.

225. *Id.* at 426.

226. *Id.* at 425.

227. *Id*.

228. *Id.* at 427.

229. *Mutual Aid Ass'n*, 156 N.Y.S.3d. at 427.

230. *Id*.

231. *Id.*

reasonable alternatives promptly in the environmental review process. In *Franklin Ave. Acquisition, LLC v. City of New York*, a developer proposed an alternate development plan late in the CEQR and ULURP process.[232] The developer sought zoning map and text amendments to waive bulk restrictions in connection with the planned construction of two thirty-nine-story residential towers in Brooklyn's Crown Heights neighborhood.[233] The city advised the developer several times throughout the prolonged period of public review to submit a scaled-back proposal given the overwhelmingly negative response during the public comment period. The developer claimed it did just that in February 2021, the same month that the rezoning application was certified into ULURP, but after the city issued the final scope for the DEIS.[234] The city maintained that the developer did not submit the scaled-back proposal until July 2021, three days before the final public hearing on the ULURP application and DEIS.[235]

The FEIS noted that the building heights under the proposal evaluated would create inconsistencies with the neighborhood's character, obstruct access to light and air access for neighborhood residents, and cast shadows upon sensitive flora at the nearby Brooklyn Botanical Gardens.[236] Ultimately, the city refused to include the scaled-back proposal in the FEIS on the grounds that it was not a reasonable alternative, denied the developer's application, and encouraged it to submit a new application so that the scaled-back proposal could be fully evaluated by the CPC and commented upon by the public.[237]

In its Article 78 petition seeking to reverse the city's refusal to study the scaled-back proposal, the petitioner argued that SEQRA regulations obligated the city to undertake an "evaluation of the range of reasonable alternatives to the action . . . ."[238] In dismissing the petition, the court held that the city identified the relevant areas of concern, took the required "hard look" at those areas, and provided a

232. Franklin Ave. Acquisition, LLC v. N.Y.C., slip op. at 2, 8 (Sup. Ct. N.Y. Cnty. Apr. 21, 2022).

233. *Id.* at 2–4.

234. *Id.* Generally, if a ULURP application is subject to environmental review under CEQR, then the lead agency (typically CPC) under CEQR must issue a negative declaration, CND, or a notice of completion of a DEIS before an application can be certified to ULURP. *See* N.Y.C. CHARTER § 197-c (2022).

235. Franklin Ave. Acquisition, LLC, N.Y. slip op. at 4.

236. *Id.* at 6.

237. *Id.* at 5–6.

238. Brief for Petitioner at 17, Franklin Ave. Acquisition, LLC v. N.Y.C., 2022 N.Y. slip op. 31310(U) (No. 158502) (quoting 6 N.Y.C.R.R. § 617.9(b) (2021)).

reasoned elaboration of the bases for its decision.[239] Specifically, the court relied upon the CPC's prior written statements noting that the developer had multiple opportunities and requests earlier in the CEQR process to submit a scaled-back alternative proposal. The report observed that including the developer's scaled-back proposal into the FEIS at such a late stage would make "a mockery of the public review process" undertaken for the initial proposal.[240]

3. Supplementation

The SEQRA regulations provide for certain enumerated situations in which new information or changes in circumstance require an amendment to the determination of significance.[241] These include: (1) substantive changes proposed for the project; (2) the discovery of new information; or (3) changes in circumstances relating to the project.[242] 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.[243] 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 (see below).[244] 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.[245] 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.[246] Whether issues, impacts, or

239. Franklin Ave. Acquisition, LLC, slip op. at 8.
240. *Id.*
241. 6 N.Y.C.R.R. § 617.7(e)–(f).
242. *Id.* § 617.7(f)(i)–(iii).
243. *See supra*, Parts II(B)(1)(a), II(B)(2).
244. *See infra* text accompanying notes 249–57.
245. 6 N.Y.C.R.R. § 617.7(e)(2).
246. *Id.* § 617.9(a)(7). *See supra* discussion in Part II(C)(2).

project details omitted from an initial EIS require preparation of an SEIS is a frequent subject of litigation.[247]

No case decided in the *Survey* period considered this requirement.

D. 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. 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.[248] 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.[249]

One notable case, *Arntzen v. City of New York*, involved a challenge to the New York City Department of Transportation's (DOT) negative declaration issued for the expanded outdoor dining program.[250] The outdoor dining program, originally enacted under gubernatorial executive order, was reviewed by DOT and determined to have no significant adverse environmental impacts. Reviewing the undisputed facts, the court noted that "there is no question that the program changes zoning regulations, respondent did not prepare an environmental impact statement and, instead, issued a negative declaration that the dining program would not have a significant environmental impact."[251] In invalidating the negative declaration and requiring an EIS, the court found that the possibility of a significant adverse impact was demonstrated through evidence submitted by petitioners during the administrative process.[252] Noting that the program had already been in place for an extended period of time pursuant to gubernatorial executive order, the court credited the increased noise and sanitation complaints as evidence that a permanent program could have a

247. *2017–18 Survey of Environmental Law*, *supra* note 3, at 127.

248. *See* N.Y.C. Executive Order No. 91 of 1977 (as amended); N.Y.C. RULES tit. 43, §§ 6-01–6-15; *Id.* tit. 62, §§ 5-01–6-09.

249. CEQR MANUAL, *supra* note 51.

250. Arntzen, No. 159502/2021, 2022 N.Y. slip op.30955 at 1.

251. *Id.* at 6.

252. *Id.* at 6.

significant adverse impact.[253] The court swiftly dismissed the city's argument that it was not required to prepare an EIS due to the nascent status of the program's rules, which might be amended to ameliorate noise and sanitation complaints.[254]

However, on appeal, the First Department reversed the lower court's order and dismissed the petition on the grounds of ripeness:

> Given the remaining legislative and administrative steps that must be taken by the City before the permanent outdoor dining program is finalized and implemented in place of the presently operating temporary program, the City's issuance of the SEQRA negative declaration was not an act that itself inflicts actual, concrete injury.[255]

In another case from New York City, the sufficiency of the CEQR Technical Manual for satisfying the "hard look" standard was reinforced in relation to a challenge to the City's Gowanus Rezoning. In *Voice of Gowanus v. City of New York*, discussed above, petitioners alleged numerous substantive infirmities with the assessment of a variety of impact categories, ranging from noise to sewer system impacts.[256] The court, in denying petitioners' request for excused service and dismissing the petition, ultimately rejected these claims due to the sufficiency of the FEIS, prepared in compliance with the CEQR Technical Manual.[257]

E. SEQRA in the Federal Courts

For the most part during the *Survey* period, federal courts have been reluctant to adjudicate SEQRA claims, often dismissing such claims due to a lack of supplemental jurisdiction.[258] Instead, on the

253. *Id.* at 7.

254. *Id.* at 7–8 ("Put differently, where the essential components of a program have not yet been established, the agency cannot issue a negative declaration that the potentially changing program will not have significant environmental impacts.").

255. Arntzen, 209 A.D.3d 404, *lv denied*, No. 2022-784, 39 N.Y.3d 908 (Feb. 14, 2023).

256. Voice of Gowanus v. N.Y.C., No. 505874/2022, slip op. at 2 (Sup. Ct. Kings Cnty. 2022).

257. *Id.* at 7.

258. Eisenbach v. Village of Nelsonville, No. 20-CV-8566, 2021 U.S. LEXIS 210639 (S.D.N.Y. Nov. 1, 2021) (declining to exercise supplemental jurisdiction after dismissing federal claims in connection with permitting denial for construction of wireless service generating facility). *See also* City of New Rochelle v Town of Mamaroneck, 111 F. Supp. 2d 353, 370 (S.D.N.Y. 2000) (declining to exercise

rare occasion SEQRA becomes implicated in federal litigation, it is typically in the context of allegedly discriminatory behavior in the land use and zoning review process. This was the case in *Lubavitch of Old Westbury, Inc. v. Village of Old Westbury*, where a religious non-profit and its rabbi brought suit against a municipality for decades-long delays in the zoning approval process.[259] Over the course of more than twenty years, plaintiffs sought approval for the construction of a temple, religious school, and mikvah.[260] Despite plaintiff first applying for permits in 1999, the town had not begun the SEQRA process until 2018, amidst a litany of delays, a new place of worship ordinance, negotiations, denials, and new applications.[261]

At issue was plaintiffs' motion for leave to amend its complaint—which already asserted claims, *inter alia*, for alleged deprivation of First and Fourteenth Amendment Rights and violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA)—to add claims for retaliation and unconstitutional search and seizure.[262] The magistrate judge recommended denial of the motion on the ground of ripeness, namely that the claims asserted would be futile due to a lack of a final position from the town on the plaintiffs' extant permit applications and progress made during periods of time while the case was held in abeyance. In reaching this decision, the magistrate judge relied upon federal precedent concerning a futility exception to the general ripeness requirement.[263]

Upon review, the district court judge rejected the magistrate judge's recommendation, noting that plaintiffs brought both as-applied and facial challenges, and found that the facial challenges were ripe upon passage of the defendant's allegedly discriminatory place of worship ordinance. The court also found that defendant's unfair and

supplemental jurisdiction over SEQRA claim due to "novel and complex state law issues").

259. Lubavitch of Old Westbury v. Inc. Village of Old Westbury, No. 2:08-cv-5081, 2021 U.S. Dist. LEXIS 188915 at *3–*4. (E.D.N.Y. Sept. 30, 2021).

260. *Id*. at *3; *see* Tovia Smith, *Feminist Jews Revive Ritual Bath for Women*, NAT'L PUB. RADIO, (Jul. 9, 2006), https://www.npr.org/2006/07/09/5490415/feminist-jews-revive-ritual-bath-for-women (defining mikvah as a ritual bath).

261. *Lubavitch*, 2021 U.S. Dist. LEXIS 188915, at *6, *16.

262. *Id*. at *23–24 (discussing claims under 42 U.S.C. § 1983 (deprivation of civil rights) and 42 U.S.C. § 2000cc (RLUIPA)).

263. *Id.* at *37 (discussing the futility exception established in Murphy v. New Milford Zoning Comm'n, 402 F.3d 342, 349 (2d Cir. 2005)).

unreasonable treatment of plaintiffs over multiple decades satisfied the futility exception for ripeness.[264]

Federal courts also continued to untangle land use issues surrounding the Telecommunications Act of 1996 and the deployment of cellular towers. In *Verizon Wireless of East LP v. Town of Wappinger*, applicants for permits to construct cell towers challenged excessive delays imposed through the SEQRA process as violating the requirement that municipalities act on any request for authorization to place or modify wireless service facilities.[265] The town, in considering the application, initially indicated that the proposed project would have no significant adverse impacts; however, it subsequently issued a positive declaration because of "potential concerns" of visual impacts.[266] The applicants challenged, arguing that the positive declaration was a pretext to further delay the proceeding and operated to "effectively prohibit" the construction of new wireless facilities.[267]

The Southern District agreed with the applicants, finding that the town had failed to provide adequate justification for its change in position on environmental significance. Reviewing the text, the court found that the positive declaration offered only conclusory statements, in contrast to "detailed explanations provided for a contrary conclusion earlier in the process."[268] The court further rejected the town's proffered explanations, discounting the impact of the COVID-19 pandemic and public opposition on potential delays to the review timeframe.[269] Ultimately, the court found that the town failed to rebut the presumption that the delay was unreasonable.

The last federal case worth noting from this *Survey* period concerns municipal zoning resolutions during the pendency of a county's SEQRA review. In *WG Woodmere LLC v. Town of Hempstead*, three adjoining municipalities adopted similar zoning resolutions, placing a specific moratorium on all zoning and land use approvals that would

264. *Id.* at *39 ("The land-use procedures Plaintiffs have endured are not just merely frustrating but unfair and unreasonable. The Court thus declines to adopt the R&R's recommendation and holds that Plaintiffs need not obtain a final decision before bringing their as-applied challenges in the Land-Use Claims.").

265. Verizon Wireless of the E. LP v. Town of Wappinger, No. 20-CV-8600, 2022 U.S. Dist. LEXIS 17003, at *1–*24 (S.D.N.Y), *dismissed*, 2022 U.S. Dist. LEXIS 54356 (S.D.N.Y. 2022).

266. *Id.* at *23.

267. *Id.* at *57.

268. *Id.* at *56.

269. *Id.* at *40–42.

permit the redevelopment of golf courses for residential uses.[270] Although one of the municipalities adopted its resolution prior to plaintiffs' acquisition of a golf course property lying within the boundaries of all three municipalities, all resolutions were either within their original term or were extended by the date of acquisition.[271]

Amidst a flurry of proposed municipal zoning resolutions increasing lot-size requirements for the plaintiffs' property and state-court litigation challenging the constitutionality of the moratoria, plaintiffs filed a subdivision application with Nassau County officials. This subdivision application was compliant with then-extant county regulations allowing for smaller lot-sizes and thus denser development than the municipalities' proposed municipal zoning changes.[272] The county initiated a SEQRA review as lead agency and issued a positive declaration. As of the date of the court's opinion, plaintiffs had prepared a DEIS.[273]

After the county declared the DEIS complete, the municipalities issued joint zoning resolutions covering the entire property, which created a hospitality district for the current golf course's clubhouse, an open-space district prohibiting residential development, and a single-family residential district with substantially larger minimum lot sizes than those contemplated in the plaintiffs' subdivision application to the county.[274] The municipalities issued a negative declaration in connection with their joint zoning of plaintiffs' property, the only golf course subject to these zoning restrictions, despite it being among a handful of golf courses within the municipalities.[275]

In their seven-count, federal complaint, plaintiffs alleged several causes of action for unlawful deprivation of their constitutional rights, including equal protection, takings, procedural and substantive due process, as well as other land use claims alleging the municipalities' zoning resolutions were *ultra vires*.[276] As regards SEQRA, plaintiffs' seventh cause of action alleges the municipalities' joint zoning resolutions—passed the day before the county's public comment period

270. WG Woodmere LLC v. Town of Hempstead, No. CV 20-3903, 2021 U.S. Dist. LEXIS 160290, at *7 (E.D.N.Y. Aug. 23, 2021), *appeal withdrawn*, 2023 U.S. App. LEXIS 8347 (2nd Cir. Mar. 30, 2023).

271. *Id.* at *7–*8.

272. *Id.* at *11, *18.

273. *Id.* at *19–20.

274. See *id.* at *27.

275. *WG Woodmere LLC*, 2021 U.S. Dist. LEXIS 160290, at *25, *31–34.

276. *Id.* at *35–*36.

on the DEIS closed—constituted unlawful preemption.[277] Recommending dismissal of plaintiffs' SEQRA cause of action for failure to state a claim for relief, the magistrate judge rejected plaintiffs' position that municipalities cannot enact land use regulations concerning a subject property during the pendency of a county's SEQRA review of subdivision applications concerning the same property.[278]

The magistrate judge reasoned, "This argument requires acceptance of the untenable position that any local environmental legislation enacted during an ongoing SEQRA process is unlawful. This cannot be the law."[279] Although not styled as such, the court bolstered this conclusion by noting ripeness concerns, namely that the county's SEQRA evaluation of the subdivision application was still pending, along with challenges to the municipalities' negative declaration for their own zoning resolutions.[280] As of this writing, the court has yet to rule on objections to the magistrate judge's report and recommendation.

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. In addition, major legislative changes addressing inequitable siting and mandating greater consideration of environmental justice issues has the potential to dramatically alter the analysis framework for future environmental reviews. These and other developments in the law of SEQRA will be covered in future installments of the *Survey of New York Law*.

277. *Id.* at *79–*80.
278. *Id.* at *80.
279. *Id*.
280. *See WG Woodmere LLC*, 2021 U.S. Dist. LEXIS 160290, at *80–81.