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 2022–2023.[1] 2022 and early 2023 have been years of 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 the 2017-18 *Survey*,[3] the DEC made significant amendments to the SEQRA regulations in 2018. They had a 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 SEQRA Handbook, a helpful guidance for SEQRA practitioners.[5]

1. The *Survey* period covered in this Article is July 1, 2022, to June 30, 2023. A prior *Survey* addresses SEQRA developments in the first half of 2022. *See generally* Mark A. Chertok et al., *2021–22 Survey of New York Law: Environmental Law: Developments in the Law of SEQRA*, 73 SYRACUSE L. REV. 717 (2023) [hereinafter *2021–22 Surv. of Env't. L.*].

2. *See* N.Y. Senate Bill No. 8830, 245th Sess. (2022); N.Y. Assembly Bill No. 2103D, 245th Sess. (2022); N.Y. Senate Bill No. 1317, 246th Sess. (2023), N.Y. Assembly Bill No. 1286, 246th Sess. (2023) (enacted).

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, 782 (2019) [hereinafter *2017–18 Surv. of Env't. L.*].

4. *See* 6 N.Y.C.R.R. § 617.1 (2024).

5. *See generally* N.Y. STATE DEP'T OF ENV'T CONSERVATION, THE SEQR HANDBOOK (4th ed. 2020), 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; the adequacy of agency's determination of significance (particularly when issuing a negative declaration); and the sufficiency of an agency's Environmental Impact Statement (EIS).[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, provided those regulations and procedures are consistent with and "no less protective of environmental values" than those issued by DEC.[10]

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6. *See infra* Part III.

7. SEQRA is codified at N.Y. ENV'T CONSERV. LAW §§ 8-0101–8-0117 (McKinney 2023). *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 Surv. of Env't. L.*].

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 id.* § 617.5(c)(46); *see also* SEQRA HANDBOOK, *supra* note 5, at 8.

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

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] The categorization of a particular action is typically made by the agency designated as responsible for the SEQRA process – the "lead agency."[13] Type II actions are enumerated specifically and include only those actions that have been determined not to have the potential for a significant impact and thus are not subject to review under SEQRA.[14] Type I actions, also specifically enumerated, "are more likely to require the preparation of an EIS than Unlisted actions" 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."[15] Unlisted actions are not enumerated, but rather are a catchall of those actions that are neither Type I nor Type II.[16] In practice, the vast majority of actions are Unlisted.[17]

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

12. *See id.* § 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. 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." 6 N.Y.C.R.R. § 617.2(v).

14. *See id.* § 617.5(a), (c).

15. *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 lead 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. Plan. 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. § 617.7(a)(2).

16. *See id*. § 617.2(al).

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

Before undertaking an action (except for a Type II action), an agency must determine whether the proposed action may have one or more significant adverse environmental impacts, called a "determination of significance."[18] To reach its determination of significance, the agency must prepare an environmental assessment form (EAF).[19] 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.[20] 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.[21] SEQRA regulations provide models of each form,[22] 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."[23] 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.[24] A coordinated review is required for Type I actions involving more than one agency,[25] and the issuance of a negative declaration in a coordinated

18. *See* 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.

19. *See id.* § 617.6(a)(2)–(3).

20. *See id. See generally id.* § 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).

21. *See* 6 N.Y.C.R.R. § 617.6(a)(3).

22. *See id.* § 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 Sept. 18, 2023).

23. 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).

24. *See* 6 N.Y.C.R.R. § 617.6(b)(2)(i), (b)(3)(i)–(ii)*; see also id.* § 617.2(t) (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."); *see also id.* § 617.2(u) (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.").

25. *See id.* § 617.4(a)(2).

review (for Type I or Unlisted actions) binds other involved agencies.[26]

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.[27] 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[28] or, more commonly, the lead agency issues a positive declaration requiring the preparation of an EIS.[29]

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

26. *See id.*; *see also* 6 N.Y.C.R.R. § 617.6(b)(3)(iii). Note that a coordinated review may also be done for unlisted actions involving more than one agency.

27. 6 N.Y.C.R.R. §§ 617.7(a)(2), (d).

28. *See id.* §§ 617.2(h), 617.7(d)(2). This is known as a conditioned negative declaration (CND). For a CND, the lead agency must issue public notice of its proposed CND and, if public comment identifies "potentially significant adverse environmental impacts that were not previously" addressed or were inadequately addressed, or indicates the mitigation measures imposed are substantively deficient, an EIS must be prepared. *Id.* § 617.7(d)(1)(iv), (2)(i)–(ii), (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, 901 n.27 (2017) [hereinafter *2014–15 Survey of Environmental Law*].

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

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

31. *See id.*

32. *See id.*; *see also* 6 N.Y.C.R.R. § 617.8(a).

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

34. *See id.* at 101–02; *see also* 6 N.Y.C.R.R. § 617.8(b)–(d).

comments as an appendix to the document, depending on the relevancy of the information or comment.[35]

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."[36] 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.[37]

In addition to "analyz[ing] the significant adverse impacts and evaluat[ing] all reasonable alternatives,"[38] 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] . . .

35. *See* SEQRA HANDBOOK, *supra* note 5, at 102; *see also* 6 N.Y.C.R.R. § 617.8(f)–(g); *see also* Shapiro v. Plan. Bd., 65 N.Y.S.3d 54, 56–57 (App. Div. 2d Dep't 2017) (failure to follow scope can result in judicial invalidation of EIS).

36. 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*).

37. *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 723. 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)).

38. 6 N.Y.C.R.R. § 617.9(b)(1).

> (i) measures to avoid or reduce both an action's impacts on climate change and associated impacts due to the effects of climate change such as sea level rise and flooding.[39]

Although not required, the lead agency typically holds a legislative hearing regarding the DEIS.[40] That hearing should, and often is, combined with other hearings required for the proposed action.[41] 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.[42] 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."[43] 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.[44]

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).[45]

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).[46] Preparation of a GEIS is

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

40. *Id.* § 617.9(a)(4).

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

42. *See id.* § 617.11(a).

43. 6 N.Y.C.R.R. § 617.11(a), (d)(1)–(2), (4).

44. *Id.* § 617.11(d)(5).

45. *See* 42 U.S.C.A. §§ 4321, 4370h (West 2023) (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)).

46. 6 N.Y.C.R.R. § 617.10(a).

appropriate if (1) "a number of separate actions [in an area] which, if considered singly, may have minor impacts, but if considered together may have significant impacts;" (2) the agency action consists of "a sequence of actions" over time; (3) separate actions under consideration may have "generic or common impacts;" or (4) the action consists of an "entire program [of] . . . wide application or restricting the range of future alternative policies or projects."[47] 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.[48] 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).[49] As previously explained, SEQRA grants agencies and local governments the authority to supplement DEC's general SEQRA regulations by promulgating their own.[50] Section 192(e) of the New York City Charter delegates that authority to the City Planning Commission (CPC).[51] 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*.[52] 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.[53]

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47. *Id.* § 617.10(a)(1)–(4).

48. *See id.* § 617.10(c) (requiring GEISs to set forth such criteria for subsequent SEQRA compliance).

49. *See generally* N.Y.C. CHARTER §§ 6-01, 5-01, 6-15 (2023).

50. *See* N.Y. ENV'T CONSERV. LAW § 8-0113(1), (3) (McKinney 2023). 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€.

51. *See* N.Y.C. CHARTER § 192(e) (2024); *see also* N.Y.C. CHARTER § 5-01.

52. N.Y.C. MAYOR'S OFF. OF ENV'T COORDINATION, CEQR: CITY ENVIRONMENTAL QUALITY REVIEW TECHNICAL MANUAL Introduction-1 (2021), https://www.nyc.gov/site/oec/environmental-quality-review/technical-manual.page [hereinafter CEQR MANUAL].

53. *See id*. 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, 2016 N.Y. Slip Op. 51627(U), at 18 (Sup. Ct. Kings Cnty. July 7, 2016), *aff'd*, 101 N.Y.S.3d 54, 56 (App. Div. 2d Dep't 2019) (holding that "[A]n EAS prepared consistent with the guidance in the CEQR Technical Manual

II. SUMMARY OVERVIEW OF LEGISLATIVE DEVELOPMENTS

There were two legislative developments in 2022 and early 2023.

The initial legislation, Senate Bill 8830 of 2022 (SB 8830), injected environmental justice considerations into SEQRA for certain actions and DEC permitting.[54] It was signed by Governor Hochul on December 30, 2022, and would have become effective on June 28, 2023[55], but the Governor's approval was accompanied by a memorandum that reflected pending amendments.[56] Those amendments, adopted in March 2023 (SB 1317), narrowed the scope of the legislation and deferred its effectiveness until December 2024.[57] 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.[58]

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

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demonstrates compliance with SEQRA/CEQR."); *see also* Friends of P.S. 163, Inc. v. Jewish Home Lifecare, 46 N.Y.S.3d 540, 545 (App. Div. 1st Dep't 2017), *aff'd*, 90 N.E.3d 1253, 1256 (N.Y. 2017) (Agency "is entitled to rely on the accepted methodology set forth in the City Environmental Quality Review Technical Manual (CEQRTM)" in preparing EIS).

54. *See generally* N.Y. Senate Bill No. 8830, 245th Sess. (2022) (enacted).

55. *See id.* (amending ENV'T CONSERV. §§ 8-0105, 8-0109, 8-0113, 70-0107, 70-0118).

56. *See* Executive Memorandum relating to Ch. 840, *reprinted in* 2022 McKinney's Sess. Laws of N.Y. no. 115, ch. 840, at 1 (June 28, 2023) (approving an act to amend the environmental conservation law, in relation to the location of environmental facilities with a note that this act will require significant State and local government resources to implement and could lead to widespread confusion among the regulation community).

57. *See generally* N.Y. Senate Bill No. 1317, 246th Sess. (2023) (enacted); (amending N.Y. ENV'T CONSERV. §§ 8-0105, 8-0109, 8-0113, 70-0107, 70-0118 (McKinney 2023)).

58. *See New York Enacts Cumulative Impacts Bill*, NAT'L CAUCUS OF ENV'T LEGISLATORS (Jan. 3, 2023), 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.

such action."[59] While the term "pollution" is defined broadly to mean pollution as defined in Section 1-0303 of the Environment Conservation Law[60], the term "pollution burden" is not defined. However, reference to a "pollution burden" within the description of a "burden 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."[61]

The initial legislation had a number of ambiguities, including the extent of its applicability to DEC permitting.[62] 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[63] 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."[64] 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 1994 federal Executive Order on Environmental Justice and the newly adopted 2023 federal Executive Order on Revitalizing Our Nation's Commitment to Environmental Justice for All than was the initial legislation,

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

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

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

62. *See generally* Amy Cassidy, *Governor 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/ (discussion the legislation that would amend the SEQRA review process).

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

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

although the legislation, like the federal executive orders, does not define the meaning of "disproportionate."[65]

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."[66]

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.[67] On March 27, 2023, the CJWG finalized criteria for identifying disadvantaged communities.[68] 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.[69]

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.[70] 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.[71] Tracts were assigned a percentile rank based on these indicators, relative to other tracts in

65. *See* Exec. Order No. 12898, 59 C.F.R. 7629 (1994); Exec. Order No. 14096, 88 C.F.R. 25251 (2023).

66. *See* N.Y. Senate Bill No. 8830 § 2, 244th Sess. (2022) (incorporating the CLCPA's definition of "disadvantaged communities" by reference); N.Y. ENV'T CONSERV. LAW § 75-0101(5) (McKinney 2023) (CLCPA definition of "disadvantaged communities," also referencing CJWG's task of identifying criteria). This provision was not amended in 2023.

67. *See* N.Y. ENV'T CONSERV. LAW § 75-0111(1)(b), (3) (McKinney 2023).

68. *See New York State Climate Justice Working Group Finalizes Disadvantaged Communities Criteria to Advance Climate Justice*, N.Y. STATE DEP'T OF ENV'T CONSERV. (Mar. 27, 2023), https://www.dec.ny.gov/press/127364.html.

69. *See Disadvantaged Communities Criteria*, N.Y. STATE DEP'T OF ENV'T CONSERV., https://climate.ny.gov/resources/disadvantaged-communities-criteria/ (last visited Sept. 25, 2023).

70. *See id.*

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

their region and the state as a whole.[72] 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.[73]

In addition to imposing greater SEQRA obligations, SB 1317 also creates additional obligations for all DEC-permit actions—except 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.[74] For permit applications under these provisions that "*will* cause or 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."[75] 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 thirty day comment period on the scope of the report.[76] 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

72. *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."

73. *See* N.Y. STATE CLIMATE JUST. WORKING GRP., LIST OF DISADVANTAGED COMMUNITIES (2022), https://climate.ny.gov/-/media/Project/Climate/Files/Disadvantaged-Communities-Criteria/List-of-Disadvantaged-Communities.pdf.

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

75. *Id.* (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.*

76. *See 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.

pollution burden, and benefits to the community from the proposed project.[77]

Perhaps most significant of all SB 1317's obligations is the requirement that the 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."[78]

SB 1317 directs DEC to undertake rulemaking to amend SEQRA and uniform permit review regulations to effectuate the new legislation.[79] 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).[80] Article 78 imposes upon petitioners in such proceedings certain threshold requirements, separate and distinct from the procedural requirements imposed by SEQRA.[81] A number of decisions during the *Survey* period addressed questions arising from these threshold requirements, as well as obligations arising solely from SEQRA.[82]

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77. *See id*. 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.*

78. *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*.

79. *See* N.Y. Senate Bill No. 1317 §§ 7(3), (5), 12 (amending N.Y. ENV'T CONSERV. LAW § 8-0113(1), which obligates the Commissioner of Environmental Conservation to promulgate SEQRA regulations, and ENV'T CONSERV. LAW § 70-0107(1), which obligates the Commissioner to promulgate regulations for the uniform review of regulatory permits).

80. *See generally,* N.Y. C.P.L.R. 7803 (McKinney 2023).

81. *See id.* at 7803(1)–(5).

82. *See, e.g.* Kogut v. Vill. of Chestnut Ridge, 186 N.Y.S.3d 243 (App. Div. 2d Dep't 2023) (standing); Boise v. City of Plattsburgh, 195 N.Y.S.3d 307 (App. Div. 3d Dep't 2023) (standing); Brorsen v. Lake George Park Comm'n, N.Y.L.J., Aug. 3, 2022, at 5 (Sup. Ct. Warren Cnty. Aug. 3., 2022) (standing); Gaillard v. City of Rye, 2022 NY Sup. Ct. Westchester Cnty. 65743/2022(U) (holding that the defendant's motion to dismiss the plaintiff's complaint based on the lack of standing is denied); 1160 Mamaroneck Ave. Corp. v. City of White Plains, 180 N.Y.S.3d 211, 213 (App. Div. 2d Dep't 2022) (standing); Creda, LLC v. City of Kingston Plan.

1. Standing

Standing is one of the more frequently litigated issues in SEQRA case law.[83] 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.[84] The harm must be "different in kind or degree from the public at large, but it need not be unique."[85] To fall within SEQRA's "zone of interests," the alleged injury must be "environmental and not solely economic in nature."[86] Several noteworthy SEQRA decisions addressed standing during this *Survey* period.[87]

A. Where Standing May Be Presumed

Usually, SEQRA necessitates a demonstration of particularized harm, however, there are certain circumstances where other factors will give rise to a presumption of standing. One such long-standing

Bd., 183 N.Y.S.3d 591 (App. Div. 3d Dep't 2023) (standing); Save Sag Harbor v. Vill. of Sag Harbor, 186 N.Y.S.3d 595 (Sup. Ct. Suffolk Cnty., 2023) (standing); League of Women Voters of Buffalo/Niagara, Inc. v. Erie Canal Harbor Dev. Corp., 192 N.Y.S.3d 812 (App. Div. 4th Dep't 2023) (mootness); 315 Ship Canal Parkway v. Buffalo Urb. Dev. Corp., 178 N.Y.S.3d 658 (App. Div. 4th Dep't 2022) (mootness); Red Wing Properties, Inc. v. Seggos, 2022 NY Sup. Ct. Ulster Cnty. EF2022-681(U) (holding that the defendant's motion to dismiss the plaintiff's complaint based on the lack of standing is denied); Manning v. City Council of N.Y.C., No. 158809/2021, 2022 N.Y. Slip Op. 34190(U) (Sup. Ct. N.Y. Cnty., 2022) (statute of limitations).

83. *See* Charlotte A. Biblow, *Courts Tackle Standing and SEQRA Review*, N.Y.L.J., May 22, 2014, at 1.

84. *See* 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)).

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

86. 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)).

87. *See, e.g.* Kogut v. Vill. of Chestnut Ridge, 186 N.Y.S.3d 243 (App. Div. 2d Dep't 2023) (standing); Boise v. City of Plattsburgh, 195 N.Y.S.3d 307 (App. Div. 3d Dep't 2023) (standing); Brorsen v. Lake George Park Comm'n, N.Y.L.J., Aug. 3, 2022, at 5 (Sup. Ct. Warren Cnty. Aug. 3., 2022) (standing); Gaillard v. City of Rye, 2022 NY Sup. Ct. Westchester Cnty. 65743/2022(U) (holding that the defendant's motion to dismiss the plaintiff's complaint based on the lack of standing is denied); 1160 Mamaroneck Ave. Corp. v. City of White Plains, 180 N.Y.S.3d 211, 213 (App. Div. 2d Dep't 2022) (standing); Creda, LLC v. City of Kingston Plan. Bd., 183 N.Y.S.3d 591 (App. Div. 3d Dep't 2023) (standing); Save Sag Harbor v. Vill. of Sag Harbor, 186 N.Y.S.3d 595 (Sup. Ct. Suffolk Cnty., 2023) (standing).

circumstance is where the challenger is the owner of property that was rezoned. A recent appellate affirmance of this principle is found in *Kogut v. Village of Chestnut Ridge*, where petitioners challenged the SEQRA review undertaken as part of a zoning enactment.[88] In this instance, petitioners, who owned property affected by the zoning amendments, presumptively had standing to challenge the Village's local "house of worship law" and alleged failure to comply with SEQRA.[89] The local law was enacted to rezone residential districts to permit additional gathering places and houses of religious worship.[90] On appeal, the Second Department affirmed the supreme court's decision.[91] The court held that while standing to challenge an administrative action generally turns on a showing of a harmful effect on the challenger, such is not the case where the challenge is to a SEQRA review undertaken as part of a zoning enactment that encompasses the challenger's property.[92] Thus, the owner of property need not allege the likelihood of environmental harm as the "property owner has a legally cognizable interest in being assured that the town satisfied SEQRA before taking action to rezone its land."[93] In *Kogut*, the court held that all petitioners who owned property affected by the zoning amendments had standing to challenge the subject amendments and alleged failure to comply with SEQRA's procedural requirements.[94]

B. 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 interest different from other members of the community."[95] Illustrating the application of this established precedent is *Boise v. City of Plattsburgh*, which involved two petitioners who owned real property within 50 and 250 feet, respectively, of a redevelopment site.[96] The Third Department, agreeing with the supreme court, held that the

88. *See Kogut*, 186 N.Y.S.3d at 245–46.
89. *Id*. at 246.
90. *See id*. at 245.
91. *See id.*
92. *See id*. at 246 (citing Gernatt Asphalt Prods., Inc. v. Town of Sardinia, 664 N.E.2d 1226, 1238 (N.Y. 1996)).
93. *Kogut*, 186 N.Y.S.3d. at 246 (citing *Gernatt Asphalt Prods., Inc.*, 664 N.E.2d at 1238).
94. *See id.*
95. *Gernatt Asphalt Prods., Inc*, 664 N.E.2d at 1238.
96. *See* Boise v. City of Plattsburgh, 195 N.Y.S.3d 307, 312 (App. Div. 3d Dep't 2023).

inference that these petitioners, as real property owners in close proximity to the site would endure direct harm, was far from mere conjecture.[97] Petitioners allegation that they would be exposed to "tens of thousands of tons of toxic dirt" being removed during excavation was substantiated by an acknowledgement from the developer that there was a "'risk for contaminated soil' at the project site despite its remediation."[98] Furthermore, the risk was specifically identified by the zoning and planning boards as necessitating measures to protect public health and safety of the "nearby community."[99] While not every petitioner in the proceeding was able to establish standing in those circumstances, the court discerned that these two petitioners, in particular, were able to do so.[100]

Petitioners in *Matter of Brorsen v. Lake George Comm.* were also able to successfully establish that they had a particularized harm.[101] Property owners received notice of an application to construct seven docks along a portion of lakefront property in Lake George.[102] In response to a challenge to their standing, each petitioner submitted an affidavit establishing that they owned lakefront property near the site, regularly walked and jogged along the road, and engaged in recreational activities such as swimming, kayaking, and paddleboarding on a routine basis in the area.[103] The supreme court held that petitioners' relative proximity to the site, combined with their regular and repeated use of the area, established an injury that differed from harm to the public at large.[104]

Similarly, in *Gaillard v. City of Rye*, the Supreme Court held that a petitioner who lived approximately 350 feet from the potential future structure had standing to challenge the project's SEQRA review.[105] The court held given his close proximity to the proposed project, he was entitled to "a presumption of injury different in kind from that suffered from the members of the public at large."[106]

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97. *See id*.

98. *Id*. at 312–13.

99. *Id*. at 313.

100. *See id.*

101. *See* Brorsen v. Lake George Park Comm'n, N.Y.L.J., Aug. 3, 2022, at 11 (Sup. Ct. Warren Cnty. Aug. 3., 2022).

102. *See id.* at 4–5.

103. *See id.* at 10–11.

104. *See id.*

105. *See* Gaillard v. City of Rye, 2022 NY Sup. Ct. Westchester Cnty. 65743/2022(U), at 14.

106. *Id.* at 14.

C. Zone of Interests

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.[107] This was reinforced in *Matter of 1160 Mamaroneck Ave v. City of White Plains*, where petitioners' allegations of injury were deemed insufficient to confer standing to challenge the adequacy of a City's zoning ordinance amendments.[108] Petitioners owned a nonconforming nursery engaged in a myriad of processing activities in a residential district.[109] Upon determining that the "processing activities had various harmful effects that were incompatible with residential districts," the City's Common Council adopted amendments to its zoning ordinance to ban such activities by nurseries in these districts.[110] With the gravamen of the nursery's complaint being that it would suffer economic harm because of the amendments, the Second Department affirmed the Supreme Court's holding that the petitioners did not qualify for standing to raise a SEQRA challenge, despite being entitled to the presumption of standing based on their ownership of land being rezoned.[111]

In *Creda, LLC v. City of Kingston Planning Board.*, petitioners owned property in the Kingston Stockade Historic District.[112] The proposed redevelopment project included the demolition of an outdoor parking lot and defunct municipal parking garage in the historic district.[113] In finding that petitioners had standing, the Third Department noted that the purpose of SEQRA is "to declare a state policy which will encourage productive and enjoyable harmony between [humans] and [their] environment," eliminate environmental damage, enhance community resources, and enrich understanding of ecological systems.[114] In the context of SEQRA, "'environment' encompasses 'resources of agricultural, archeological, historic or aesthetic significance' and 'existing community or neighborhood character,' among

107. *See generally 2017–18 Survey of Env't. L.*, *supra* note 3, for a discussion of caselaw concerning solely economic injuries and standing.

108. *See* 1160 Mamaroneck Ave. Corp. v. City of White Plains, 180 N.Y.S.3d 211, 214 (App. Div. 2d Dep't 2022).

109. *See id.* at 213.

110. *Id.*

111. *See id.* at 214.

112. *See* Creda, LLC v. City of Kingston Plan. Bd., 183 N.Y.S.3d 591, 594 (App. Div. 3d Dep't 2023).

113. *See id*.

114. *Id.* at 595 (quoting N.Y. ENV'T CONSERV. LAW § 8-0101 (McKinney 1976); *see* 6 N.Y.C.C.R. § 617.1 (2024)).

other things."[115] Petitioners' properties and the property in question were located in "a unique and historic district 'listed on the National Register of Historic Places, tracing back more than 300 years to the nation's colonial period and Revolutionary era.'"[116] While proximity to the project was not alone sufficient to grant standing, the Third Department found that owning property within the unique historic district and the connection of those properties to the historical resources and community character was "more than that of the general public" and therefore within the zone of interest sufficient to grant standing to challenge the negative declaration.[117] In doing so, the Third Department affirmed the lower court's holdings.[118]

Similarly, in *Save Sag Harbor v. Village of Sag Harbor*, petitioners consisted of village residents disputing their village's compliance with SEQRA during its review of proposed zoning changes.[119] The court held that it need not reach a zone of interest analysis because it was undisputed that the petitioner owned a business and property within the area of interest, the Village Business District.[120] One petitioner having standing was sufficient for all the petitioners to have standing to challenge the SEQRA determination.[121]

Standing was also at issue in *Crown Castle NG E., LLC, v. City of Rye, et al.* where petitioner's project to install wireless telecommunications equipment within the City of Rye was issued a positive declaration and a subsequent resolution denied the proposal.[122] Respondents claimed that petitioners, who were successors to the original contracting party, failed to comply with Article 10 of the Right-of-Way Use Agreement (RUA) pertaining to assignment of rights.[123] The RUA provided that it would functionally serve as a Type II designation, and the original contracting party would be exempt from review under SEQRA.[124] The rights and obligations of the original

115. *Creda, LLC*, 183 N.Y.S.3d at 595 (quoting 6 N.Y.C.C.R. § 617.2 (2024)).

116. *Id.* (quoting 61 Crown St., LLC v. N.Y. State Off. of Parks, Recreation & Hist. Pres., 172 N.Y.S.3d 164, 166 (App. Div. 3d Dep't 2022)).

117. *Id.* at 596 (quoting Save the Pine Bush, Inc. v. Common Council of Albany, 918 N.E.2d 917, 922 (N.Y. 2009)).

118. *See id.* at 598.

119. *See* Save Sag Harbor v. Vill. of Sag Harbor, No. 202924/2022, 2023 N.Y. Slip Op. 50347(U), at 1 (Sup. Ct. Suffolk Cnty. Apr. 10, 2023).

120. *See id.*

121. *See id.*

122. *See* Crown Castle NG E., LLC v. City of Rye, 173 N.Y.S.3d 13, 15 (App. Div. 2d Dep't 2022).

123. *See id.* at 16.

124. *See id.* at 15.

contracting party could be transferred to any successor in interest, such as petitioner, would be considered "an 'exempted transfer' and did not require written consent."[125] However, the City was required to receive written notice of the transfer of rights.[126] The Second Department, reversed the lower court's decision, finding that respondent proved that petitioner was not a party to the RUA, had not provided any written consent, and had not adhered to the contractual requirements for an exempted transfer.[127] However, the court also found that petitioner sufficiently rebutted this showing by illustrating that they were not subject to the RUA because they were the same entity as the original contracting party.[128] The Second Department remanded to the Supreme Court.[129]

2. Ripeness, Mootness & Statute of Limitations

In addition to standing, a SEQRA petitioner also must satisfy several threshold requirements, including that the claim be ripe, that administrative remedies be exhausted,[130] that the claim is not moot,[131] and that the claim be timely brought within the statute of limitations period.[132]

A. Ripeness

With respect to ripeness, only final agency actions are generally subject to challenge in a SEQRA (or any other Article 78)

125. *Id.*

126. *See id.*

127. *See Crown Castle NG E., LLC*, 173 N.Y.S.3d at 15, 17.

128. *See id.* at 17.

129. *See id.*

130. 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; permitting a party to raise a new issue after issuance of the FEIS or approval of the action has the potential for turning cooperation into ambush." (citing Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 553–54 (1978))).

131. *See* Friends of Flint Mine Solar v. Town Bd. of Coxsackie, 2019 NY Sup. Ct. Greene Cnty. 19-0216(U), at 5–7 (holding that respondent's adoption of the local law rendered the proceeding moot).

132. *See* N.Y. C.P.L.R. 7801(1) (McKinney 2023).

challenge.[133] 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.[134] 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.'"[135]

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 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.[136] 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 is instead an initial step in the SEQRA process."[137]

One noteworthy case during the *Survey* period addressed ripeness.[138] In *Red Wing Properties, Inc. v. Seggos*, the petitioner

133. *See id.*; *see also* Essex Cnty. v. Zagata, 695 N.E.2d 232, 235 (N.Y. 1998) (citing N.Y. C.P.L.R. 7801(1))); N.Y. EXEC. Law § 818(1) (McKinney 2023)); *see also* Vill. of Kiryas Joel v. Cnty. 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).

134. *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).

135. *Gordon*, 792 N.E.2d at 172 (quoting *Essex Cnty.*, 695 N.E.2d at 235).

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

137. *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*].

138. For discussion of the ripeness considerations in a noteworthy case during this *Survey* period, *see* Arntzen v. N.Y.C., 174 N.Y.S.3d 585 (App. Div. 1st Dep't 2022*); see also infra* Part III.D.

challenged the Milan Town Board serving as lead agency for its application to DEC to modify its Mined Land Reclamation Permit.[139] The petitioner claimed that DEC's decision violated its longstanding policy to assume lead agency for projects involving such permits and that the Milan Town Board lacked jurisdiction over the project and therefore, could not assume the role of lead agency.[140] DEC moved to dismiss the petitioner's challenge to its lead agency determination as unripe, noting that the lead agency designation in the SEQRA process is not a final determination but rather a preliminary step in the decision-making process of SEQRA.[141] The Supreme Court sided with the respondent, concluding that the SEQRA process was still in the beginning stages and therefore, the lead agency designation was not ripe for adjudication.[142] In addition, the court held that the petitioner did not have standing to challenge DEC's determination because there was no evidence the petitioner would suffer an environmental harm if its permit was ultimately not approved, and a showing of economic injury alone does not fall within the zone of interests sought to be protected by SEQRA.[143]

B. Mootness

The mootness doctrine requires that, if "during the pendency of a proceeding to review an agency determination, there has been subsequent action taken which has resolved the issue in dispute, the proceeding should be dismissed as moot."[144] 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."[145] In other words, a matter is not moot where it "presents a live controversy and enduring consequences

139. *See* Red Wing Props., Inc. v. Seggos,. 2022 NY Sup. Ct. Ulster Cnty. EF2022-681(U), at 1–2 (holding that petitioner failed to establish the requisite injury-in-fact necessary for a SEQRA challenge).

140. *See id.* at 2–3.

141. *See id.* at 3.

142. *See id.* (citing N.Y. State Ass'n of Nurse Anesthetists v. Novello, 810 N.E.2d 405, 409 (N.Y. 2004)).

143. *See id.*

144. Mehta v. N.Y.C. Dep't of Consumer Affs., 556 N.Y.S.2d 601, 602 (App. Div. 1st Dep't 1990) (citing Flacke v. Onondaga Landfill Sys., Inc., 507 N.E.2d 316 (N.Y. 1987)).

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

potentially flow" from the determination that is challenged.[146] 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.[147]

Two cases of note from this *Survey* period addressed mootness in SEQRA proceedings, both focusing on a petitioner's failure to take action to preserve the status quo before a final decision could be reached on the merits. In *League of Women Voters of Buffalo/Niagara, Inc. v. Erie Canal Harbor Development Corporation*, petitioners sought to annul the lead agency's determination to issue a negative declaration with respect to a construction project.[148] Respondents sought to dismiss the petition as moot.[149] The Fourth Department granted respondents' motion to dismiss, affirming the lower court's decision.[150] The court found that since work on the construction project had already begun and was substantially completed as a result of the petitioners failing to move for a preliminary injunction or otherwise move to preserve the status quo pending the outcome of the proceeding, there had been a change of circumstance that rendered the petitioners' challenge moot.[151]

In *315 Ship Canal Parkway, LLC v. Buffalo Urban Dev. Corp.*, petitioners challenged the Buffalo Urban Development Corporation's determination with respect to a land sale agreement amendment adding a ground mounted photovoltaic solar energy system to the project description.[152] The Fourth Department once again affirmed the lower court's decision and dismissed the action as moot after learning that the contested solar energy field was already nearly completed.[153] The court further determined that the respondents had not performed the work in bad faith or without authority and that the work could not be

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

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

148. *See* League of Women Voters of Buffalo/Niagara, Inc. v. Erie Canal Harbor Dev. Corp., 192 N.Y.S.3d 812, 813 (App. Div. 4th Dep't 2023), *aff'd* 465 N.Y.S.2d 924 (App. Div. 2d Dep't 1983).

149. *See id.*

150. *See id.* at 813–14.

151. *See id.* at 813 (quoting 315 Ship Canal Parkway, LLC v. Buffalo Urb. Dev. Corp., 178 N.Y.S.3d 658, 658 (App. Div. 4th Dep't 2022)).

152. *See 315 Ship Canal Parkway, LLC*, 178 N.Y.S.3d at 658.

153. *See id.*

readily undone without "substantial hardship."[154] The court once again noted the petitioners' failure to move for a preliminary injunction or otherwise seek to preserve the status quo pending the court's decision on the merits.[155]

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."[156] As a practical matter, it can be difficult to identify that point in time when the statute of limitations begins to run, and the trigger point has become an area of some confusion.[157] 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.[158] Adding to the confusion, a shorter

154. *Id.*

155. *See id.*

156. N.Y. C.P.L.R. 217(1) (McKinney 2023); 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) (2024); then citing Save the Pine Bush v. City of Albany, 512 N.E.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. Hudson River-Black River Regulating Dist, 997 N.Y.S.2d 793, 796 (App. Div. 3d Dep't 2014); Bango v. Gouverneur Volunteer Rescue Squad, Inc., 957 N.Y.S.2d 769, 770 (App. Div. 3d Dep't 2012)).

157. The confusion stems from two Court of Appeals decisions, *Stop-The-Barge*, 803 N.E.2d at 363 and Eadie v. Town Bd. of Town of N. Greenbush, 854 N.E.2d 464, 469 (N.Y. 2006).

158. *See* Mark A. Chertok et al., *2014–15 Survey of New York Law: Environmental Law: Developments in the Law of SEQRA*, 66 SYRACUSE L. REV. 906, 921–22 (2015) (discussing *Stop-The-Barge*, 803 N.E.2d at 362 and *Eadie*, 854 N.E.2d at 469).

statute of limitations may apply pursuant to statute, often in challenges to certain land use approvals.[159]

One important case from this *Survey* period addressed the statute of limitations in SEQRA proceedings.[160] In *Manning v. City Council of City of New York*, petitioner sought an order annulling zoning amendments pertaining to Governors Island approved by the New York City Council on the grounds that such amendments violated restrictive covenants in the deed transferring Governors Island from the federal government to the Trust of Governors Island.[161] Petitioner later sought leave to amend the petition to add a new claim challenging the 2021 zoning amendment's environmental review.[162] Respondents opposed the motion, arguing that the SEQRA claim was barred by the applicable four-month statute of limitations since it was not brought until nine months after the challenged administrative action occurred and the claim did not relate back to the original petition.[163] The court agreed, holding that the SEQRA claims were untimely.[164]

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

159. 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.

160. *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).

161. *See* Manning v. City Council of N.Y.C., No. 158809/2021, 2022 N.Y. Slip Op. 34190(U), at 1, 2 (Sup. Ct. N.Y. Cnty. Dec. 8, 2022)

162. *See id.*

163. *See id.* at 2.

164. *See id.*

165. *See supra* Part I.

1. 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.[166] As noted above, a Type I action carries the presumption that an EIS will be required.[167] 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."[168] Any state or local agency may adopt its own list of additional Type I or Type II actions to supplement those provided by DEC.[169] 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.[170]

Of note was a decision from the New York County Supreme Court involving the proposed development of a 324-foot-tall, 547,000 square-foot building in the South Street Seaport. In *South St. Seaport Coalition, Inc. v. City of New York*, the building was to be erected at 250 Water Street in Manhattan.[171] Petitioners took issue with the fact that the EIS only focused on the 250 Water Street property and did not

166. *See* 6 N.Y.C.R.R. § 617.4 (2024).

167. *See id.* § 617.4(a).

168. *Id.* § 617.5(a).

169. *See 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).

170. *See id.* § 617.2(al); Beyond Type II actions under SEQRA, there exist additional exemptions, such as those under Public Authorities Law §1266-c. In *Mutual Redevelopment Houses v. Metropolitan Transportation Authority*, the Metropolitan Transportation Authority's (MTA's) installation of a high-voltage power station fell "squarely within the [§1266-c (11)], which expressly exempt[ed] this project [from] environmental review, specifically from SEQRA's requirements." Mut. Redevelopment Houses, Inc. v. Metro. Transp. Auth., N.Y.L.J., Mar. 8, 2023, at 10 (Sup. Ct. NY Cnty. Mar. 17, 2023). The MTA has an exemption for most actions the agency takes on land that it already owns. *See supra* note 5, at 8. Additional narrowly focused exist for agencies such as the Long Island Power Authority's exemption "for actions involving the decommissioning of the Shoreham Nuclear Plant" and the New York State Department of Transportation's "exemption for certain actions involving the addition of travel lanes and other projects on the Long Island Expressway." *Id*. at 9.

171. *See* S. St. Seaport Coal., Inc. v. N.Y.C, No. 151186/2022, 2022 N.Y. Slip Op. 32645(U), at 4 (Sup. Ct. N.Y. Cnty. Aug. 5, 2022).

include an existing lease extension application.[172] However, the Department of City Planning (DCP) determined that the lease renewal application only sought to renew and extend the term of the existing lease, and accordingly qualified as a Type II action exempt from SEQRA review.[173] Furthermore, prior to the zoning application approval, the lease extension went through a series of public hearings as part of the Uniform Land Use Review Procedure (ULURP)[174] and the environmental impact of the lease was considered as part of the proposal.[175] The Supreme Court determined that the requisite hard look at relevant areas of environmental concern and reasoned elaboration on the basis were taken.[176]

Matter of 61 Crown St., LLC v. City of Kingston Common Council further emphasizes the significance of appropriate classification of actions.[177] This case involved respondent City of Kingston Common Council's adoption of a code amendment permitting residential development in a mixed-use overlay district (MUOD) as of right. [178] Subsequent amendments also lowered the affordable housing requirement for residential development in the MUOD with five or more housing units from 20% to 10%.[179] Petitioners alleged that the Common Council failed to take the requisite hard look when adopting the amendments.[180] The Third Department, reversing the lower court's decision, found the characterization of the action as Type II to be incorrect.[181] The court determined that the action should have instead been classified as unlisted, as it was neither Type I nor Type II.[182] When reaching this determination, the court relied on the fact that the amendment "made new residential construction in the MUOD permissible as of

172. *See id*. at 17.

173. *See id*.

174. *See id.*; ULURP is a standardized New York City procedure required, inter alia, for certain land use approvals. *Step5: Uniform Land Use Review Procedure (ULURP)*, NYC PLANNING, https://www.nyc.gov/site/planning/applicants/applicant-portal/step5-ulurp-process.page (last visited Feb. 26, 2024).

175. *See id.*

176. *S. St. Seaport Coal., Inc.*, 2022 N.Y. Slip Op. 32645(U), at 17.

177. *See* 61 Crown St., LLC v. City of Kingston Common Council, 192 N.Y.S.3d 270, 273–74 (App. Div. 3d Dep't 2023).

178. *See id*. at 272.

179. *See id*. at 272 (citing KINGSTON, N.Y., CODE § 405-8.1(A)(1) (2021), *amended by* Kingston, N.Y. Common Council Res. 23 (2021)).

180. *See id*.

181. *See id*. at 274 (citing 6 N.Y.C.R.R. § 617.2 (2024); Di Veronica v. Arsenault, 507 N.Y.S.2d 541, 543–44 (App. Div. 3d Dep't 1986)).

182. *See 61 Crown St., LLC*, 192 N.Y.S.3d at 274.

right, as opposed to requiring a special use permit."[183] To the court, such an action could not be categorized as a Type II because the amendment was not a mere interpretation within the meaning of 6 NYCRR 617.5.[184] Furthermore, the action could not be considered a Type I because "it did not change the allowable uses within the MUOD."[185] Finally, during its review, respondent determined that the amendments were "unlisted actions" under SEQRA, warranting no further environmental review.[186] The parties acknowledged that this statement was incorrect, as unlisted actions require environmental review.[187] Having failed to correctly classify the action as unlisted and undertake a review under SEQRA, respondent's resolution adopting the amendment was annulled.[188]

In *In re Andes v. Planning Bd.*, a Type II designation was determined to be arbitrary and capricious.[189] Petitioner property owners constructed a dock, ramps, and floats on a portion of their property pursuant to a building permit.[190] The application for a minor subdivision to divide the property into separate lots was subsequently given a Type II designation and approved pursuant to SEQRA as requiring "no further environmental review."[191] Upon review of SEQRA regulations and the Town Code, the court determined that there was no rational basis in the record to support the Planning Board's conclusion that the application constituted at Type II action.[192] The Second Department found that the lower court properly annulled this determination.[193] This case suggests the benefits of the lead agency documenting the basis for its Type II determination.

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

183. *Id*. (citing KINGSTON, N.Y., CODE § 405-27.1(B), *amended by* Kingston, N.Y. Common Council Res. 23 (2021)).

184. *See id*. (citing 6 N.Y.C.R.R. § 617.5(c)(37) (2024)).

185. *Id*. (citing 6 N.Y.C.R.R. § 617.4(b)(2) (2024)).

186. *Id*. (quoting Kingston, N.Y. Common Council Res. 23 (2021)).

187. *See 61 Crown St., LLC*, 192 N.Y.S.3d at 274.

188. *See id*.

189. *See* Andes v. Plan. Bd., 190 N.Y.S.3d 151, 153 (App. Div. 2d Dep't 2023).

190. *See id.* at 152.

191. *Id*.

192. *See id.* at 153.

193. *See id.* at 153–54.

of an action is contrary to the intent of SEQR[A]."[194] 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."[195] 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."[196]

Three cases from this *Survey* period addressed segmentation. In *Clover/Allen's Creek Neighborhood Assn. v. M&F*, a Whole Foods Project sponsored by respondent, Developer Companies, was located in the Town of Brighton on Monroe Avenue.[197] Petitioners alleged that the lead agency should have considered the cumulative impacts of the Whole Foods Project, along with impacts from implementation of an Access Management Plan, which impacted two parcels of property on the opposite side of the street from the Whole Foods Project.[198] The Monroe County Supreme Court held that no redressable segmentation existed, finding that the two parcels impacted by the Access Management Plan were not part of the project and were subject to their own SEQRA review.[199] The court determined that their geographical proximity to the Whole Foods Project was insufficient to trigger segmentation concerns.[200]

Segmentation was also at issue in *Huntley Power v. Town of Tonawanda*, where petitioner sought to annul the town's determination authorizing the condemnation of petitioner's property, which contained a decommissioned coal-fired electric generation station and

194. 6 N.Y.C.R.R. § 617.3(g)(1) (2024).

195. Schultz v. Jorling, 563 N.Y.S.2d 876, 879 (App. Div. 3d Dep't 1990).

196. 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)).

197. *See* Clover/Allen's Creek Neighborhood Ass'n v. M&F, LLC, Nos. E2018000937, E2018002894, E2018002961, E2018007330, E201807331, 2022 N.Y. Slip Op. 51394(U), at 2 (Sup. Ct. Monroe Cnty. Sept. 28, 2022).

198. *See id.* at 27.

199. *See id.* at 27–28.

200. *See id.* at 28.

water intake structures.[201] The Fourth Department affirmed the lower court's decision, determining that there was no improper segmentation because the Town "was not required to consider the environmental impact of anything beyond the acquisition."[202] Thus the Town's determination that acquiring the property would not have any significant adverse environmental impacts satisfied the requirements of SEQRA, as the Town expressed an understanding that future development would be subject to separate environmental review.[203]

Matter of Forman v. Town of Northumberland Planning Bd. involved a dispute between adjacent landowners where petitioners boarded Irish Wolfhounds, and respondents operated a horse farm.[204] Respondents submitted an application to construct a barn 400 feet from the petitioners' house, and petitioners claimed the development "would have a detrimental effect on their property."[205] Petitioners cited issues such as light pollution and obstructed vision.[206] During the course of hearings, respondents made a statement alluding to the possible construction of a residence along the road in the future.[207] These comments led petitioners to claim that respondents were engaging in improper segmentation.[208] The court found the isolated verbal comments to be too speculative to fall within SEQRA's definition of segmentation.[209] The court relied on the fact that if respondents did construct a home along the road in the undefined future, that activity would be unrelated and require its own individual determination of significance.[210] Ultimately, the Type II characterization of the project was upheld as within the Town's discretion.[211]

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201. *See* Huntley Power, LLC v. Town of Tonawanda, 191 N.Y.S.3d 850, 852 (App. Div. 4th Dep't 2023).

202. *Id.* at 854 (quoting Court St. Dev. Project, LLC v. Utica Urb. Renewal Agency, 136 N.Y.S.3d 588, 592 (App. Div. 4th Dep't 2020)).

203. *See id.*

204. *See* Forman v. Town of Northumberland Plan. Bd., No. EF20221409, 2022 N.Y. Slip Op. 51005(U), at 1 (Sup. Ct. Saratoga Cnty. Oct. 14, 2022).

205. *Id.* at 2.

206. *See id*.

207. *See id*.

208. *See id.*

209. *See Forman*, 2022 N.Y. Slip Op. 51005(U), at 2.

210. *See id*. at 2–3.

211. *See id.* at 3.

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.[212] 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."[213]

During this *Survey* period, one noteworthy case addressed lead agency designation and preservation of its determination of significance. In *Colarusso & Son, Inc. v. City of Hudson Planning Bd.,* petitioners sought to prevent the City of Hudson Planning Board from requiring additional environmental review for a haul road construction project for which the Town Board, as the designated lead agency for the SEQRA review, had already issued a negative declaration.[214] The respondent claimed that because the petitioners submitted a subsequent application for a conditional permit related to the repair of a dock that connected to the haul road previously covered by the Town Board's negative declaration, additional environmental review for the haul road application was needed.[215] The Third Department disagreed with the city, finding that the Supreme Court had properly held that the haul road application was complete and that the respondent was precluded from requiring any additional environmental review related to that project.[216]

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212. 6 N.Y.C.R.R. §§ 617.2(v), 617.6(b)(3) (2024). Agencies have the option of conducting a coordinated review for Unlisted Actions, but it is not required. *See id*. § 617.6(b)(4).

213. *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).

214. *See* A. Colarusso & Son, Inc. v. City of Hudson Plan. Bd., 191 N.Y.S.3d 810, 811 (App. Div. 3d Dep't 2023).

215. *See id.*

216. *See id.* at 812–13.

C. "Hard Look" Review and 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.[217] 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.'"[218] 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."[219] In applying this standard, courts have repeatedly emphasized that "[w]hile judicial review must be meaningful, the courts may not substitute their judgment for that of the agency for it is not their role to 'weigh the desirability of any action or [to] choose among alternatives.'"[220]

This deferential standard of review means that successful challenges to the adequacy of an EIS are rare in the extreme.[221] 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.

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217. *See, e.g.*, Riverkeeper, Inc. v. Plan. Bd. of Town of Se., 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)).

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

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

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

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

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.[222] 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.[223]

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.[224] During the *Survey* period, one case of note was *BMG Monroe I, LLC v. Village of Monroe Zoning Board of Appeals,* where a petitioner sought to develop 181 residential units on the nearly 80 acres of land they owned. As lead agency, the Village of Monroe Planning Board "adopted a resolution granting 'cluster subdivision approval, conditional final conditional use approval, [and] conditional final site plan approval' for the project."[225] "The resolution . . . incorporated . . . [a] SEQRA findings statement" by reference and required a myriad of specifics pertaining to acceptable building materials, roofline slope, etc.[226] The Village of Monroe Building Inspector later denied two of petitioner's building permit applications "on the grounds that [they] did not comply with the conditions in the resolution and the SEQRA findings statement."[227] Petitioner's appeal of the Building Inspector's determination was denied by the Village of Monroe Zoning Board of Appeals.[228] "The Supreme Court denied the amended petition and dismissed the proceeding[s]."[229] On appeal, the Second Department

222. *See* 6 N.Y.C.R.R. §617.5(a) (2024); GERRARD, *supra* note 221, at § 2.01(3)(b).

223. N.Y. C.P.L.R. 7803(3) (McKinney 2023); *see 2020–21 Survey of Environmental Law, supra* note 1, at 726. Challenges to positive declarations are less common than challenges to negative declarations. *See* GERRARD, *supra* note 221, 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.

224. *See* GERRARD, *supra* note 221, at § 7.04(4).

225. BMG Monroe I, LLC v. Vill. of Monroe Zoning Bd. of Appeals, 189 N.Y.S.3d 210, 211 (App. Div. 2d Dep't 2023).

226. *Id.*

227. *Id.* at 212.

228. *See id*.

229. *Id.*

upheld the ZBA's determination that the Building Inspector's denial of petitioner's applications was proper, and that the ZBA's reliance on the record was rational, legal and neither arbitrary and capricious nor an "abuse of discretion," affirming the lower court.[230]

In *Tampone v. Town of Red Hook Planning Board,* petitioners sought to annul the Town of Red Hook Planning Board's determination "granting site plan and special use permit approval" to neighboring landowners.[231] Reversing the lower court, which had annulled the Planning Board's determinations, the Second Department found that the record supported the contention that the Planning Board had identified and taken a hard look at potential impacts and deemed them insubstantial or adequately mitigated, therefore warranting the negative declaration to be upheld.[232]

In a second action involving the Town of Red Hook, petitioners alleged that the Town Board's issuance of a negative declaration after declaring the adoption of amendments to its Local Law No. 3 a Type I action violated SEQRA.[233] The Second Department, affirming the lower court, held that the Town Board took the requisite hard look at identified environmental concerns regarding the adoption of the amendments to its local law and upheld the Town Board's negative declaration.[234]

In a partial reversal of the lower court, the Fourth Department upheld a negative declaration where an existing residential building was being repurposed into a mixed-income apartment complex. In *Matter of Williamsville Residents Opposed to Blocher Redevelopment, LLC v. Village of Williamsville Planning & Architectural Review Bd.*, petitioners contended that a negative declaration should be annulled because the Planning Board failed to complete a full EAF pursuant to SEQRA.[235] Affirming the lower court, the Fourth Department determined that the Planning Board's classification of the project as an unlisted action was improper as it would have been more accurately

230. *BMG Monroe I, LLC*, 189 N.Y.S. at 212 (citing N.Y. C.P.L.R. 7803(3) (McKinney 2023)).

231. Tampone v. Town of Red Hook Plan. Bd., 188 N.Y.S.3d 520, 522 (App. Div. 2d Dep't 2023).

232. *See id*. at 523.

233. *See* Tampone v. Town of Red Hook Plan. Bd., 188 N.Y.S.3d 524, 526–27 (App. Div. 2d Dep't 2023).

234. *See id*. at 528.

235. *See* Williamsville Residents Opposed to Blocher Redevelopment, LLC v. Vill. of Williamsville Plan. & Architectural Rev. Bd., 176 N.Y.S.3d 399, 401 (App. Div. 4th Dep't 2022).

classified as Type I.[236] However, the court noted that a "misclassification does not always lead to the annulment of a negative declaration" when a lead agency conducts the equivalent review notwithstanding the misclassification.[237] In *Williamsville,* "the Planning Board conducted a coordinated review and its meeting minutes and the comprehensive 31-page negative declaration demonstrate[d] that it thoroughly addressed the environmental factors that were necessary to issue the SEQRA."[238]

The Supreme Court of Rockland County rejected claims that the Planning Board should have required an EIS for a subdivision application. In *Citizens United to Protect Our Neighborhood-Hillcrest v. Town of Ramapo*, petitioners sought to annul the use variance and area variances issued by the Zoning Board of Appeals.[239] The court meticulously walked through each impact category the Planning Board considered, including traffic and neighborhood character, etc.[240] The court further proffered that it is not the necessity for various approvals that is important, but the environmental impact of the "action."[241] All of these considerations were incorporated into the issuance of the negative declaration.[242]

Another notable decision affirming an agency's negative declaration was *Tampone v. Town of Red Hook Planning Board*.[243] This case involved a challenge to a determination by a Town Zoning Enforcement Officer that a "proposed subsurface sewage disposal system is a permitted nonresidential accessory use that could be located on a lot with split zoning."[244] While the action was pending, the Town Board of the Town of Red Hook amended the Zoning Law to include a "subsurface utility system" within the definition of "accessory structure," expanding and clarifying the definition of "subsurface utility systems."[245] Petitioners amended their petition to assert a new cause

236. *See id*.
237. *Id*.
238. *Id*.
239. *See* Citizens United to Protect Our Neighborhood-Hillcrest v. Town of Ramapo, No. 031155/2022, 2023 N.Y. Slip. Op. 31194(U), at 1 (Sup. Ct. of Rockland Cnty. Apr. 13, 2023).
240. *See id*. at 49–61.
241. *Id*. at 49.
242. *Id*. at 61–62.
243. *See* Tampone v. Town of Red Hook Zoning Bd. of Appeals, 187 N.Y.S.3d 103, 105 (App. Div. 2d Dep't 2023).
244. *Id*.
245. *Id*.

of action, namely, that the Local Law was enacted in violation of SEQRA.[246] On appeal, the Second Department held that the Town Board's Type I designation and negative declaration were not affected by any errors of law, as the Board took a hard look at the relevant areas of environmental concern, upholding the lower court's decision.[247]

As demonstrated above, so long as an 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,"[248] 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. One case of note during this *Survey* period addressed a challenge to the adequacy of an EIS on the grounds that it did not properly consider all reasonably foreseeable catastrophic impacts.

In *301 E. 66th Street Condominium Corp. v. City of New York*, the city undertook an environmental review pursuant to SEQRA in connection with an application submitted by New York Blood Center, Inc. to replace its blood collection and distribution center.[249] The petitioner sought to annul City Council's approval of the project application, claiming that the EIS did not properly consider how the new facility might handle an accidental release of a dangerous substance, given its use as a laboratory and research facility where harmful substances may be used.[250] Although the Supreme Court expressed sympathy for the petitioner's concerns, the court held that such a risk was not "reasonably foreseeable," and therefore, did not have to be included in the EIS.[251] The court noted that the focus of the EIS should be on "what changes the new building may have and the potential

246. *See id*.

247. *See id.* at 106 (citing Bonacker Prop., LLC v. Vill. of E. Hampton Bd. of Trs., 93 N.Y.S.3d 328, 332 (App. Div. 2d Dep't 2023)).

248. Douglaston Civic Ass'n v. N.Y.C., 159 N.Y.S.3d 23, 24 (quoting Friends of P.S. 163, Inc. v. Jewish Home Lifecare, 90 N.E.3d 1253, 1260 (N.Y. 2017)) (internal quotations omitted).

249. *See* 301 E. 66th St. Condo. Corp. v. N.Y.C., No. 152464/2022, 2022 N.Y. Slip Op. 32829(U), at 1 (Sup. Ct. N.Y. Cnty. Aug. 22, 2022).

250. *See id.* at 1–2.

251. *Id.* at 6.

environmental impact" and that it did not need to address every event that could "conceivably happen."[252]

In another case heard during this *Survey* period, the Supreme Court examined whether the lead agency considered reasonable alternatives and imposed sufficient mitigation measures during the environmental review process. Discussed above, *Clover/Allen's Cr. Neighborhood Assn., LLC v. M&F, LLC*, involved respondents seeking to construct a private development on 10.1 acres in the Town of Brighton.[253] The petitioners, all citizens groups opposed to the project, challenged the Town Board's environmental review of the project, claiming that the Board violated SEQRA by failing to consider what could have been constructed within the existing zoning laws as a baseline comparison and by failing to impose sufficient traffic mitigation measures.[254]

The court disagreed with the petitioners, instead finding that the environmental review was sufficient.[255] Specifically, the court determined that the Town Board had in fact considered a "panoply of eleven project alternatives," including two that did not require a zoning change, and "settled on the one that best suited the conditions," as it was permitted to do.[256] The court went on to hold that the record demonstrated that traffic conditions were mitigated "as much as possible," with the developers having completed seven traffic studies and the Town Board working with experts to analyze the issue.[257]

Similarly, in *Battery Park City Neighborhood Ass'n v. Battery Park City Auth.*, petitioner, a grassroots neighborhood organization, sought to enjoin respondent from undertaking a portion of the South Battery Park City Resiliency Project or conducting any construction in Wagner Park.[258] Petitioner argued the respondent should have selected a different alternative, which respondent rejected after determining it was less protective in regard to resiliency.[259] The Supreme

252. *Id.*

253. *See* Clover/Allen's Creek Neighborhood Ass'n, LLC v. M&F, LLC, Nos.: E2018000937, E2018002894, E2018002961, E2018007330, E201807331, 2022 N.Y. Slip Op. 51394(U), at 2 (Sup. Ct. Monroe Cnty. Sept. 28, 2022).

254. *See id.* at 23, 27.

255. *See id.* at 27.

256. *Id.* at 26.

257. *Id.* at 25.

258. *See* Battery Park City Neighborhood Ass'n v. Battery Park City Auth., No. 160624/2022, 2023 N.Y. Slip Op. 30433(U), at 1–2 (Sup. Ct. N.Y. Cnty. Feb. 8, 2023).

259. *See id.* at 4.

Court denied the petitioner's request for a preliminary injunction, holding that it was not the court's role to pick and choose among alternatives.[260] Rather, the court noted that its role is limited to determining if the agency has satisfied SEQRA by considering reasonable alternatives.[261] Given the court's limited role in evaluating the desirability of alternatives, it determined the petitioners had not established a likelihood of success on the merits (an element for obtaining a preliminary injunction).[262]

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.[263] These include: (1) substantive changes proposed for the project; (2) the discovery of new information; or (3) changes in circumstances relating to the project.[264] 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.[265] 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).[266] 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.[267] No cases in the *Survey* period addressed the requirement to supplement or amend a determination of significance.

Similarly, SEQRA provides for the preparation of a Supplemental EIS, known as a 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

260. *See id.* at 6.

261. *See id.* (citing Jackson v. N.Y. State Urb. Dev. Corp., 494 N.E.2d 429, 436 (N.Y. 1986)).

262. *See id.* at 9–10.

263. *See* 6 N.Y.C.R.R. § 617.7(e)–(f) (2024).

264. *See id.* § 617.7(e)(1)(i)–(iii).

265. *See supra*, Parts II(B)(1)(a), II(B)(2).

266. *See infra* text accompanying notes 267–775.

267. 6 N.Y.C.R.R. § 617.7(e)(2).

adequately addressed, in the original EIS.[268] Whether issues, impacts, or project details omitted from an initial EIS require preparation of a SEIS is a frequent subject of litigation.[269]

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.[270] 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.[271]

One notable case, *Boyd v. Cumbo*, challenged an amendment to a Zoning Map and Zoning Resolution to facilitate the development of two new 16-story buildings in Brooklyn.[272] In holding that the city had complied with SEQRA in issuing a negative declaration for the project, the Second Department reversed the lower court and focused on the city's compliance with the CEQR Technical Manual.[273] Specifically, the court held that the city correctly relied on the criteria and thresholds outlined in the Manual when evaluating the potential adverse impacts of the project on the environment related to water and sewer infrastructure and in developing a reasonable worst case development scenario.[274]

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 a proposed low-income senior

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268. *See* 6 N.Y.C.R.R. § 617.9(a)(7). *See supra* discussion in Part II(C)(2).

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

270. *See* Executive Order, no. 91 (1977) (as amended); N.Y.C., N.Y., CITY ENVIRONMENTAL QUALITY REVIEW (CEQR) RULES §§ 6-01–6-15; N.Y.C., N.Y., CITY ENVIRONMENTAL QUALITY REVIEW (CEQR) RULES §§ 5-01–6-09.

271. *See* CEQR MANUAL, *supra* note 52, at Introduction-1.

272. *See* Boyd v. Cumbo, 177 N.YS.3d 712, 714–15 (App. Div. 2d Dep't 2022).

273. *See id.* at 714–16.

274. *See id.* at 716.

housing development. In *Elizabeth Street Garden, Inc. v. City of New York*, petitioners alleged numerous substantive infirmities with the assessment, including a failure to consider public policy and potential cumulative impacts.[275] The court, in reversing the lower court's decision and dismissing the petition, ultimately rejected these claims due to the sufficiency of the EAS, finding that it was prepared in compliance with the CEQR Technical Manual.[276]

Another 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.[277] The outdoor dining program, originally enacted under gubernatorial executive order, was reviewed by DOT and determined to have no significant adverse environmental impacts.[278] 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."[279] 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.[280] 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 significant adverse impact.[281] 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.[282]

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275. *See* Elizabeth St. Garden, Inc. v. N.Y.C., 192 N.Y.S.3d 102, 105–06 (App. Div. 1st Dep't 2023).

276. *See id.*

277. *See* Arntzen v. N.Y.C., No. 159502/2021, 2022 N.Y. Slip Op. 30955(U), at 1 (Sup. Ct. N.Y. Cnty. Mar. 23, 2022).

278. *See id*. at 1–2.

279. *Id.* at 6.

280. *See id*. at 6–7.

281. *See id.* at 7.

282. *See Arntzen*, 2022 N.Y. Slip Op. 30955(U), 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.").

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.[283]

E. NYS Updates: The Green Amendment

In November 2021, New Yorkers voted to approve a ballot measure to add environmental rights to the Bill of Rights of the New York State Constitution—specifically, the right of each person in the state "to clean air and water, and a healthful environment."[284] Since its approval, courts have begun to grapple with how to incorporate the rights enumerated in the "Green Amendment" into the state's existing environmental protections, including the requirement for lead agencies to conduct environmental reviews under SEQRA for certain projects and the right to challenge the sufficiency of those reviews in court.

For example, in *Fresh Air for the Eastside, Inc. v. State*, residents who live in close proximity to a landfill claimed their constitutional rights under the Green Amendment were being violated as a result of the actions or inactions of multiple players, including the landfill operator, the State of New York, due to its role overseeing the disposal of solid waste, and the City of New York, given its contract with the waste management company to collect and dispose of New York City garbage in the subject landfill.[285] All of the defendants moved to dismiss the claims against them.[286] The court dismissed the claims against the waste management company, finding that the Green Amendment does not reference private entities, and therefore, such entities cannot be sued for a claimed violation of that constitutional right.[287] The court also dismissed the claims against the City of New York, holding that as a customer of the waste management company,

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283. *See* Arntzen v. N.Y.C., 174 N.Y.S.3d 585, 585 (App. Div. 1st Dep't 2022), *lv denied*, 203 N.E.3d 1201 (N.Y. 2023).

284. N.Y. CONST., art. I, § 19.

285. *See* Fresh Air for the Eastside, Inc. v. State, No. E2022000699, 2022 N.Y. Slip Op. 34429(U), at 1 (Sup. Ct. Monroe Cnty. Dec. 20, 2022).

286. *See id*. at 11.

287. *See id.* at 12–13.

the city had no duty to police the company's compliance with permits or to abate operational issues at its landfill.[288]

In denying the state's motion to dismiss, the court rejected the argument that the plaintiff had to pursue the action as an Article 78 proceeding as opposed to a declaratory judgement action, holding that "[a] declaration of constitutional rights is most appropriate in a declaratory judgement action . . . ."[289] Here, the court noted that the plaintiff was not challenging the state's issuance of permits, but rather, was "seeking redress for actions, inactions, and/or results that violate the Permits or which otherwise cause unclean air or an unhealthful environment, and thereby violate the Constitution."[290] The court also rejected the state's argument that the claims should be dismissed because mandamus is available only to force a public official to perform a ministerial duty enjoined by law.[291] The court disagreed, finding that it was unnecessary for the Green Amendment to impose such a duty on the state because the state already has a nondiscretionary obligation to comply with the New York State Constitution, including the newly adopted Green Amendment, which would require remedying any ongoing environmental harms caused by the landfill.[292]

In *Marte v. City of New York*, plaintiffs brought a declaratory judgment action seeking an order to compel the defendants to take various actions in connection with a housing development project, claiming the development impinged on their constitutional and environmental rights under the Green Amendment.[293] The Supreme Court dismissed the action, holding that the Green Amendment cannot be used to bring challenges that were already unsuccessful under existing environmental laws or that are time-barred.[294] Specifically, the court found that the Green Amendment cannot revive an expired statute of limitations, and it did not create a new one.[295] Here, the court determined that the plaintiffs' action should have been brought as an Article 78 proceeding to challenge the City's decision to approve the development, and therefore, the four-month statute of limitations applied,

288. *See id.* at 13.
289. *Id.* at 14.
290. *Fresh Air for the Eastside, Inc.,* 2022 N.Y. Slip Op. 34429(U), at 14.
291. *See id*. at 16.
292. *See id.*
293. *See* Marte v. N.Y.C., NYLJ, Apr. 17, 2023, at 1 (Sup. Ct. N.Y. Cnty. Apr. 17, 2023).
294. *See id.* at 9.
295. *See id.* at 10.

which had long since passed.[296] In issuing this decision, the court was careful to note that its decision was "limited" and was not meant to suggest that the Green Amendment does not confer substantive rights.[297]

F. SEQRA in the Federal Courts

In keeping with precedent, throughout the *Survey* period, federal courts have predominantly demonstrated a reluctance towards adjudicating SEQRA claims, often dismissing such claims due to a lack of supplemental jurisdiction.[298] In the few instances where SEQRA claims are 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 *Cedar Dev. E. v. Town Bd. of Hurley*, where a developer sought site plan approval and a special permit to convert an old high school into a 46-unit residential building.[299] After plaintiff submitted the application, the Town enacted a local law seemingly aimed at stopping the project by limiting the development of multi-family homes ("Local Law 4").[300] Plaintiff claimed that the "residents' fear, anger and underlying anti-Semitic and racial biases had been unleashed."[301] In its defense, a member of the Town Board stated that the opposition was an effort to "protect our culture."[302]

Following the enactment of Local Law 4, the Planning Board, the lead agency for the project under SEQRA, issued a negative declaration.[303] Shortly thereafter, plaintiffs filed a lawsuit challenging the defendants' delay of the project.[304] While the case was pending, Local Law 4 was repealed, and the Planning Board subsequently approved

296. *See id.*

297. *See id.* at 14.

298. Eisenbach v. Vill. of Nelsonville, No. 20-CV-8566, 2021 U.S. Dist. LEXIS 210639, at *17 (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, 370–71 (S.D.N.Y. 2000) (declining to exercise supplemental jurisdiction over SEQRA claim due to "novel and complex state law issues").

299. *See* Cedar Dev. E., LLC v. Town Bd. of Hurley, No. 1:21-cv-289, 2022 U.S. Dist. LEXIS 120388, at *2 (N.D.N.Y. July 8, 2022).

300. *Id*.

301. *Id*. at *5.

302. *Id*. at *6.

303. *See id.* at *7.

304. *See Cedar Dev. E.,* 2022 U.S. Dist. LEXIS 120388, at *7.

the plaintiff's application for a site plan and special use permit, thus allowing the project to proceed.[305] Although the project was allowed to proceed, the plaintiffs maintained their request for compensatory and punitive damages under the Fourteenth Amendment's equal protection clause and the Fair Housing Act.[306]

In reaching a determination on the ripeness of plaintiff's claims, which had been brought before plaintiff's site plan and special permit were approved, the Northern District relied on the Second Circuit's routine application of the multi-prong test outlined in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* to equal protection and due process claims.[307] The first prong states that when assessing ripeness, "the government agency must have issued a 'final decision' on the matter," a requirement aimed at maintaining the federal judiciary's appreciation that land use disputes "are uniquely matters of local concern more aptly suited for local resolution."[308]

While the plaintiff contended that seeking a final decision for the project would have been futile, the Court disagreed, emphasizing the point that even if it was unlikely that the project would be approved, it was not inevitable, which is precisely the rationale for the existence of the finality rule.[309] Ultimately, the Court found that the plaintiff failed to satisfy the finality requirement prior to adjudication by opting not to apply for a Local Law 4 variance and for not waiting to bring its lawsuit until the defendants issued a final decision on the project's site plan and special use permit.[310] Defendants' motion to dismiss was granted.[311]

Similarly, the Eastern District of New York applied the *Williamson County* finality requirement to a complaint, including SEQRA claims in the context of a rezoning. The court in *WG Woodmere, LLC v. Town of Hempstead* presided over a matter involving an acquired

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305. *See id*.

306. *See id.* at *8.

307. *See id*. at *13 (citing Williamson Cnty. Plan. Reg'l Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 187–94 (1985)). The Supreme Court created a two-pronged test to determine ripeness: "(1) the government agency must have issued a 'final decision' on the matter and (2) the plaintiff must have sought just compensation through state procedures before resorting to federal court." *Id.*

308. *Id*. at *13–14.

309. *See Cedar Dev. East,* 2022 U.S. Dist. LEXIS 120388, at *17–18.

310. *See id*. at 18.

311. *See id*. at *19.

118-acre parcel of land that was formally a country club.[312] At the time of acquisition, the zoning regulations permitted development of a subdivision plan, but during the SEQRA process, all involved municipalities agreed to adopt zoning ordinances that "when combined, would impose a single zoning scheme on the property" restricting residential development in previously developable areas on the property.[313] Plaintiff's complaint alleged denial of equal protection, violation of takings clause, the imposition of an unconstitutional exaction, violation of due process, unlawful and ultra vires exercise of zoning power, the adoption of local law inconsistent with SEQRA, amongst other things.[314] In applying *Williamson County*'s finality rule, the Eastern District referenced *Pakdel v. City & County of San Francisco* to clarify the standard. While the *Williamson County* rule "has been interpreted as conditioning 'federal review on a property owner submitting at least one meaningful application for a variance,'"[315] *Pakdel* suggests that the rule "does not impose a strict 'one meaningful application' rule in every case."[316] Instead "nothing more than *de facto* finality is necessary," such that when an opportunity to file exists, plaintiffs must avail themselves, but if no such opportunity presents itself, the requirement does not apply.[317] In *WG Woodmere,* plaintiffs did not submit a land use application to any defendant municipalities nor an application for a variance.[318] Therefore, while relying on *Pakdel* and *Williamson County*, the court concluded that plaintiffs' taking claims were not yet ripe for adjudication.[319]

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

312. *See* WG Woodmere LLC v. Town of Hempstead, No. 20-CV-03903, 2022 U.S. Dist. LEXIS 217017, at *3 (E.D.N.Y. Dec. 1, 2022).

313. *Id*. at *4–6.

314. *See id*. at *8–9.

315. *Id*. at *14 (citing Murphy v. New Milford Zoning Comm'n, 402 F.3d 342, 348 (2d Cir. 2005) (citing Williamson Cnty. Plan. Reg'l Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 190 (1985)).

316. *Id*. at *16 (citing Pakdel v. City & Cnty. of S.F., 141 S.Ct. 2226, 2230 (2021)).

317. *WG Woodmere LLC*, 2022 U.S. Dist. LEXIS 217017, at *16.

318. *See id*. at *14.

319. *See id*. at *17.

agency designation; the adequacy of agencies' determinations of significance; and the sufficiency of agencies' 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*.