ENVIRONMENTAL LAW: DEVELOPMENTS IN THE LAW OF SEQRA

Mark A. Chertok

Ahlia Bethea

Amy Cassidy[†]

[†] Mark A. Chertok is a partner, and Ahlia Bethea and Amy Cassidy are associates at Sive, Paget & Riesel, P.C. in New York (www.sprlaw.com). The authors practice environmental law at the firm.

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 2023–2024.[1]

As noted in the 2017–18 *Survey*,[2] the Department of Environmental Conservation (DEC) made significant amendments to the SEQRA regulations in 2018. The agency had a goal of streamlining the environmental review process and aligning SEQRA with state initiatives such as increasing renewable energy, green infrastructure development, and evaluating climate change impacts.[3] In March 2020, DEC incorporated these regulatory developments into its SEQRA Handbook, a helpful guidance for SEQRA practitioners.[4]

During this year's *Survey* period, lower and intermediate courts issued decisions involving various legal issues relevant to the SEQRA practitioner—including standing, ripeness, and the statute of limitations; procedural issues; the adequacy of agencies' determinations of significance; and the sufficiency of an agency's Environmental Impact

1. The *Survey* period covered in this Article is July 1, 2023, to June 30, 2024. A prior *Survey* addresses SEQRA developments in the first half of 2023. *See generally* Mark A. Chertok et al., *2022–23 Survey of New York Law: Environmental Law: Developments in the Law of SEQRA*, 74 SYRACUSE L. REV. 563 (2024) [hereinafter *2022–23 Surv. of Env't. L.*].

2. *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. 774, 782 (2019) [hereinafter *2017–18 Surv. of Env't. L.*].

3. *See* 6 N.Y.C.R.R. § 617.1 (2024).

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

Statement (EIS).[5] The Court of Appeals did not issue any decisions concerning SEQRA during this most recent *Survey* period.

Part I of this Article provides a brief overview of SEQRA's statutory and regulatory requirements. Part II discusses 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."[6] "The primary purpose of SEQRA is 'to inject environmental considerations directly into governmental decision making.'"[7] The law applies to discretionary actions by New York State, its subdivisions, or local agencies that have the potential to impact the environment, including actions undertaken by agencies, funding determinations, promulgation of regulations, zoning amendments, permits, and other approvals.[8] SEQRA charges DEC with promulgating general SEQRA regulations, but it also authorizes other agencies to adopt their own regulations and procedures, provided those regulations and procedures are consistent with and "no less protective of environmental values" than those issued by DEC.[9]

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

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5. *See* discussion *infra* Part III.

6. SEQRA is codified at N.Y. ENV'T CONSERVATION LAW §§ 8-0101–8-0117 (McKinney 2024). *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.*].

7. 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).

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

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

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

Actions are grouped into three categories in DEC's SEQRA regulations: Type I, Type II, or Unlisted.[11] The categorization of a particular action is typically made by the agency designated as responsible for the SEQRA process—the "lead agency."[12] Type II actions are enumerated specifically and include only those actions that have been determined not to have the potential for a significant impact and thus are not subject to review under SEQRA.[13] Type I actions, also specifically enumerated, "are more likely to require the preparation of an EIS than Unlisted actions" and, most importantly, "the fact that an action or project has been listed as a Type I action carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS."[14] Unlisted actions are not enumerated, but rather are a catchall of those actions that are neither Type I nor Type II.[15] In practice, the vast majority of actions are Unlisted.[16]

Before undertaking an action (except for a Type II action), an agency must determine whether the proposed action may have one or more significant adverse environmental impacts, called a "determination of significance."[17] To reach its determination of significance, the agency must prepare an environmental assessment form (EAF).[18] For Type I actions, preparation of a "Full EAF" is required, whereas for Unlisted actions, project sponsors may opt to use a "Short EAF"

11. *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).

12. 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).

13. *See id.* § 617.5(a), (c).

14. *Id.* § 617.4(a), (a)(1). 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.'") (first quoting Shop-Rite Supermarkets, Inc. v. Plan. Bd. of the Town of Wawarsing, 918 N.Y.S.2d 647, 650 (App. Div. 3d Dep't 2011); then quoting 6 N.Y.C.R.R. § 617.7(a)(2)). 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).

15. *See* 6 N.Y.C.R.R. § 617.2(al).

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

17. *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.

18. *See id.* § 617.6(a)(2)–(3).

instead.[19] While the Short and Full EAFs ask for similar information, the Full EAF is an expanded form that is used for Type I actions or other actions when more rigorous documentation and analysis is warranted.[20] SEQRA regulations provide models of each form,[21] but allow that the forms "may be modified by an agency to better serve it in implementing SEQR[A], provided the scope of the modified form is as comprehensive as the model."[22]

Where a proposed action involves multiple decision-making agencies, there is usually a "coordinated review" with these "involved agencies," pursuant to which a designated lead agency makes the determination of significance.[23] A coordinated review is required for Type I actions involving more than one agency,[24] and the issuance of a negative declaration in a coordinated review (for Type I or Unlisted actions) binds other involved agencies.[25]

If the lead agency "determine[s] either that there will be no adverse environmental impacts or that the . . . impacts will not be significant," no EIS is required, and instead the lead agency issues a

19. *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).

20. *See* 6 N.Y.C.R.R. § 617.6(a)(3).

21. *See id.* § 617.20 ("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. 3, 2024).

22. 6 N.Y.C.R.R. § 617.2(m). New York City, which implements SEQRA under its City Environmental Quality Review, uses an Environmental Assessment Statement, or EAS, in lieu of an EAF. *See, e.g.*, Hells Kitchen Neighborhood Ass'n v. N.Y.C., 915 N.Y.S.2d 565, 567 (App. Div. 1st Dep't 2011).

23. *See* 6 N.Y.C.R.R. § 617.6(b)(2)(i), (b)(3)(i)–(ii); *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.").

24. *See id.* § 617.4(a)(2).

25. *See* 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. For unlisted actions where there is no coordinated review, different agencies make their own determinations of significance. *See id.* § 617.6(b)(2)(i), (b)(4). However, if one of these agencies requires an EIS, that determination is binding on the other involved agencies. *See id.* § 617.6(b)(3)(iii).

negative declaration.[26] If the answer is affirmative, the lead agency may in certain cases impose conditions on the proposed action to sufficiently mitigate the potentially significant adverse impacts[27] or, more commonly, the lead agency issues a positive declaration requiring the preparation of an EIS.[28]

If an EIS is prepared, the first step is the scoping of the contents of the Draft EIS (DEIS).[29] Until 2018, scoping had been commonplace, but not required.[30] Under the 2018 SEQRA amendments, effective January 1, 2019, scoping was made mandatory for all EISs, except for supplemental EISs.[31] Scoping involves focusing the EIS on relevant areas of environmental concern, with the goal (not often achieved) of eliminating inconsequential subject matters.[32] A draft scope, once prepared by a project sponsor and accepted as adequate and complete by the lead agency (which may, as noted, be an agency project sponsor), is circulated for public and other agency review and comment.[33] The project sponsor must incorporate the information submitted during the scoping process into the DEIS or include the comments as an appendix to the document, depending on the relevancy of the information or comment.[34]

A DEIS must include an alternatives analysis comparing the proposed action to a "range of reasonable alternatives . . . that are feasible,

26. 6 N.Y.C.R.R. § 617.7(a)(2), (d).

27. *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., *2015–16 Survey of New York Law: Environmental Law: Developments in the Law of SEQRA*, 67 SYRACUSE L. REV. 897, 901 n.27 (2017) [hereinafter *2015–16 Survey of Environmental Law*].

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

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

30. *See id.*

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

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

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

34. *See* SEQRA HANDBOOK, *supra* note 4, at 101–02; *see also* 6 N.Y.C.R.R. § 617.8(f)–(g); *see also* Shapiro v. Plan. Bd. of the Town of Ramapo, 65 N.Y.S.3d 54, 56–57 (App. Div. 2d Dep't 2017) (holding that failure to follow scope can result in judicial invalidation of EIS).

considering the objectives and capabilities of the project sponsor."[35] This analysis includes a "no action alternative," which evaluates the "changes that are likely to occur . . . in the absence of the proposed action" and generally constitutes the baseline against which project impacts are assessed.[36]

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

> (a) reasonably related short-term and long-term impacts, cumulative impacts and other associated environmental impacts;
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> (b) those adverse environmental impacts that cannot be avoided or adequately mitigated if the proposed action is implemented;
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> (c) any irreversible and irretrievable commitments of environmental resources that would be associated with the proposed action should it be implemented;
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> (d) any growth-inducing aspects of the proposed action;
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> (e) impacts of the proposed action on the use and conservation of energy . . . ;
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> (f) impacts of the proposed action on solid waste management and its consistency with the state or locally adopted solid waste management plan; [and] . . .
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> (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.[38]

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

36. *Id.* § 617.9(b)(5)(v). "The 'no action alternative' does not necessarily reflect current conditions, but rather the anticipated conditions without the proposed action." *2022–23 Surv. of Env't. L.*, *supra* note 1, at 569. In New York City, where certain developments are allowed as-of-right (and do not require a discretionary approval), the no action alternative would reflect any such developments as well as other changes that could be anticipated in the absence of the proposed action. *See* Uptown Holdings, LLC v. N.Y.C., 908 N.Y.S.2d 657, 660 (App. Div. 1st Dep't 2010) (citing 6 N.Y.C.R.R. § 617.9(b)(5)(v)).

37. 6 N.Y.C.R.R. § 617.9(b)(1).

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

Although not required, the lead agency typically holds a legislative hearing regarding the DEIS.[39] That hearing should, and often is, combined with other hearings required for the proposed action.[40] The next step is the preparation of a Final EIS (FEIS), which addresses any project changes, new information and/or changes in circumstances, and responds to all substantive comments on the DEIS.[41] After preparing the FEIS, and before undertaking or approving an action, each acting involved agency must issue findings that the provisions of SEQRA (as reflected in DEC's implementing regulations) have been met, and "consider[ing] the relevant environmental impacts, facts and conclusions disclosed in the FEIS," must "weigh and balance relevant environmental impacts with social, economic and other considerations."[42] The agency must then:

> [C]ertify that consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable.[43]

The substantive mitigation requirement of SEQRA is an important feature of the statute—a requirement notably absent from SEQRA's parent federal statute, the National Environmental Policy Act (NEPA).[44]

For agency actions that are "broader" or "more general than site or project specific" decisions, SEQRA regulations provide that agencies may prepare a Generic EIS (GEIS).[45] Preparation of a GEIS is appropriate if (1) "a number of separate actions [in an area] which, if considered singly, may have minor impacts, but if considered together may have significant impacts;" (2) the agency action consists of "a

39. *See id.* § 617.9(a)(4).

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

41. *See id.* § 617.11(a).

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

43. *Id.* § 617.11(d)(5).

44. *See* 42 U.S.C.A. §§ 4321, 4370h (West 2024) (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 (quoting Philip H. Gitlen, *The Substantive Impact of the SEQRA*, 46 ALB. L. REV. 1241, 1248 (1982)).

45. 6 N.Y.C.R.R. § 617.10(a).

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."[46] GEISs commonly relate to common or program-wide impacts and should set forth criteria for when further environmental review will be required for site-specific or subsequent actions that follow approval of the initial program.[47]

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

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46. *Id.* § 617.10(a)(1)–(4).

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

48. *See generally* N.Y.C. RULES, tit. 43, §§ 6-01, 6-15 (2024); N.Y.C. RULES, tit. 62, § 5-01 (2024); Executive Order No. 91 of 1977, as amended.

49. *See* N.Y. ENV'T CONSERV. LAW § 8-0113(1), (3) (McKinney 2024). That authority extends to the designation of specific categories of Type I and Type II actions. *See* 6 N.Y.C.R.R. §§ 617.4(a)(2), 617.5(b), 617.14(e).

50. *See* N.Y.C. CHARTER § 192(e); *see also* N.Y.C. RULES, tit. 62, § 5-01 (2024).

51. 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].

52. *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 Cty. 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 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.

II. SUMMARY OVERVIEW OF LEGISLATIVE DEVELOPMENTS

In 2022, the New York State legislature adopted legislation aimed at incorporating environmental justice considerations into the SEQRA process. Senate Bill 8830 of 2022 (SB 8830), also referred to as the Cumulative Impacts Law, injected environmental justice considerations into SEQRA for certain actions and DEC permitting.[53] It was signed by Governor Hochul on December 30, 2022, and would have become effective on June 28, 2023,[54] but the Governor's approval was accompanied by a memorandum that reflected pending amendments.[55] Those amendments, adopted in March 2023 (SB 1317), narrowed the scope of the legislation and deferred its effectiveness until December 2024.[56] However, even as narrowed, the Cumulative Impacts Law 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.[57]

The Cumulative Impacts Law 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

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2017) (Agency "is entitled to rely on the accepted methodology set forth in the City Environmental Quality Review Technical Manual (CEQRTM)" in preparing EIS).

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

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

55. *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 "[a]n 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).

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

57. *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.

indirectly affected by such action."[58] The Cumulative Impacts Law adopts the same definition of "disadvantaged communities" as the 2019 Climate Leadership and Community Protection Act (CLCPA).[59] Additionally, where an agency must prepare an EIS, the Cumulative Impacts Law 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."[60] While the term "pollution" is defined broadly to mean pollution as defined in section 1-0303 of the Environment Conservation Law, the term "pollution burden" is not defined.[61] 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.

In addition to imposing greater SEQRA obligations, the Cumulative Impacts Law 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.[62] For permit applications under these provisions that "*will* cause or contribute more than a de minimis amount of pollution to a disproportionate pollution burden on a disadvantaged community," DEC or the applicant must prepare an "existing burden report."[63] However, the term "de minimis" is not defined.

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

59. *See 2022–23 Surv. of Env't. L.*, *supra* note 1, at 573–74 for additional information regarding the CLCPA's definition of "disadvantaged communities." The CLCPA created a "Climate Justice Working Group," which in March 2023 finalized forty-five criteria for identifying such communities and, based on the criteria and a Scoring methodology, identified 1,736 census tracts, out of the States 4,918 census tracts, as disadvantaged communities. *See Disadvantaged Communities*, N.Y. STATE ENERGY RSCH. & DEV. AUTH., https://www.nyserda.ny.gov/ny/disadvantaged-communities (last visited Dec. 18, 2024).

60. N.Y. Senate Bill No. 1317 § 3 (enacted) (amending ENV'T CONSERV. § 8-0109(2)).

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

62. *Id.* § 7.

63. *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,

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.[64] The report must assess relevant baseline data, environmental or public health stressors already borne by the disadvantaged community, the potential or projected contribution of the proposed action to that existing pollution burden, and benefits to the community from the proposed project.[65]

Perhaps most significant of the Cumulative Impact Law's obligations is the requirement that DEC, after considering the application and the existing burden report, "not issue an applicable permit for a new project if it determines that the project will cause or contribute more than a de minimis amount of pollution to a disproportionate pollution burden on the disadvantaged community."[66]

The Cumulative Impacts Law directs DEC to undertake rulemaking to amend SEQRA and uniform permit review regulations to effectuate the new legislation.[67] To date, DEC has not released any proposed regulations implementing the Cumulative Impacts Law. However, in May 2024, DEC adopted a policy (DEP-24-1) aimed at implementing Section 7(3) of the 2019 Climate Leadership and Community Protection Act (CLCPA), which seeks to prevent disadvantaged communities from being disproportionately affected by greenhouse gas (GHG) or co-pollutant emissions.[68] The policy lays out the

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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.*

64. *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.

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

66. *See id*. 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.*

67. *See id*. §§ 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. § 70-0107(1), which obligates the Commissioner to promulgate regulations for the uniform review of regulatory permits).

68. *See DEC Program Policy - Permitting and Disadvantaged Communities Under the Climate Leadership and Community Protection Act*, N.Y. STATE DEP'T ENV'T CONSERVATION, https://dec.ny.gov/regulatory/permits-licenses/notable-

procedure DEC will follow when reviewing certain permit applications for projects that involve sources and activities that will result in direct or indirect GHG or co-pollutant emissions. The policy also acknowledges that DEC intends to further modify it to take into consideration the Cumulative Impacts Law, plus any regulations DEC implements pursuant to that law. Next year's *Survey* will cover this topic in more detail, as regulations augmenting the Cumulative Impacts Law should have been released, given the law's December 2024 effective date.

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 (C.P.L.R.).[69] Article 78 imposes upon petitioners in such proceedings certain threshold requirements, separate and distinct from the procedural requirements imposed by SEQRA.[70] A number of decisions during the *Survey* period addressed questions arising from these threshold requirements, as well as obligations arising solely from SEQRA.[71]

1. Standing

Standing is one of the more frequently litigated issues in SEQRA case law.[72] To establish standing, a SEQRA petitioner must demonstrate that the challenged action is likely to cause an environmental

projects-documentation/permitting-disadvantages-communities-under-climate-leadership-and-community-protection-act (last visited Dec. 12, 2024).

69. *See generally* N.Y. C.P.L.R. 7803 (McKinney 2024).

70. *See id.* at 7803(1)–(5).

71. *See, e.g.*, Cold Spring Country Club, Inc. v. Town of Huntington, No. 609827/2023, 2023 N.Y. Slip Op. 51407(U) (Sup. Ct. Suffolk Cty. Oct. 30, 2023); Williams v. State, No. 824/23, 2024 N.Y. Slip Op. 30872(U) (Sup. Ct. Kings Cty. Mar. 6, 2024); Lubavitch of Old Westbury, Inc. v. Inc. Vill. of Old Westbury, No. 08-cv-5081, 2024 U.S. Dist. LEXIS 27641 (E.D.N.Y. Feb. 16, 2024); Carlson v. N.Y.C. Council, 208 N.Y.S.3d 197 (App. Div. 1st Dep't 2024); Seneca Meadows, Inc. v. Town of Seneca Falls, 23-01878, 2024 N.Y. Slip Op. 06435 (App. Div. 4th Dep't Dec. 20, 2024); Marebo, LLC v. Nolan, N.Y.L.J., July 10, 2024 (Sup. Ct. Albany Cty. Nov. 27, 2023); DLV Quogue, LLC v. Town of Southampton, No. 606443/18, 2023 N.Y. Misc. LEXIS 32493 (Sup. Ct. Suffolk Cty. Dec. 15, 2023); Walsh v. Town of Northumberland Plan. Bd., No. EF20231097, 2023 N.Y. Slip Op. 33689(U) (Sup. Ct. Saratoga Cty. Oct. 20, 2023); Pres. Pine Plains v. Town of Pine Plains Plan. Bd., No. 500087/2024, 2024 N.Y. Slip Op. 50696(U) (Sup. Ct. Putnam Cty. June 4, 2024).

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

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.[73] The harm must be "different in kind or degree from the public at large" but it need not be unique.[74] To fall within SEQRA's "zone of interests," the alleged injury must be "environmental and not solely economic in nature."[75] Several noteworthy SEQRA decisions addressed standing during this *Survey* period.[76]

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 of the most common of these circumstances is where the challenger is the owner of property that was rezoned[77] or within an historic district that would be impacted.[78] There were no new cases during the *Survey* period addressing presumed standing.

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."[79] This is often shown by the proximity of the challenger to a project site.[80] There

73. *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)).

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

75. *See* 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)).

76. *See, e.g.*, *Cold Spring Country Club, Inc*., 2023 N.Y. Slip Op. 51407(U); *Williams*, 2024 N.Y. Slip Op. 30872(U); Whispering Pines Assoc., LLC v. Town of Queensbury Plan. Bd., No. EF2022-70258, 2023 N.Y. Slip Op. 50800(U) (Sup. Ct. Warren Cty. July 27, 2023).

77. *See Cold Spring Country Club, Inc*., 2023 N.Y. Slip Op. 51407(U), at 4.

78. *See* Creda, LLC v. City of Kingston Plan. Bd., 183 N.Y.S.3d 591, 594 (App. Div. 3d Dep't 2023). *Compare, with* 1160 Mamaroneck Ave. Corp. v. City of White Plains, 180 N.Y.S.3d 211, 214 (App. Div. 2d Dep't 2022).

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

80. *Id.*

were no new cases during the *Survey* period addressing sufficiently "particularized" harm.

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.[81] This was reinforced in *Cold Spring Country Club, Inc. v. Town of Huntington*, where the court held that petitioners lacked standing under SEQRA because they failed to demonstrate environmental injury.[82] Petitioners, adjoining fee holders, alleged harm to their future development plans after the Town approved a rezoning that allowed respondents to proceed with developing luxury condominium.[83] The parties were previously partners in this venture, but a disagreement prevented the project from moving forward.[84] Respondents later proceeded with pursuing the development on their own and obtained permission from the Town to rezone a portion of the site.[85] Petitioners challenged the Town's rezoning as arbitrary and capricious, but the court held that petitioners' close nexus to the property was not sufficient to provide standing, as they were claiming only potential economic, rather than environmental, injury.[86]

Similarly, in *Williams v. State of New York*, the Kings County Supreme Court held that petitioners' alleged injuries did not fall within the zone of interest that SEQRA was intended to protect, which is "the environment."[87] Petitioners challenged the City of New York's use of a portion of Floyd Bennett Field as an emergency shelter for migrant asylum seekers and New York State's use of State funding to reimburse certain costs related to the project, claiming that respondents had failed to comply with SEQRA and NEPA.[88] The court held that petitioners failed to claim or demonstrate that the temporary housing of approximately 2,000 migrant asylum seekers at Floyd Bennett Field

81. *See 2017–18 Survey of Env't. L.*, *supra* note 2, for a discussion of caselaw concerning solely economic injuries and standing.

82. *See Cold Spring Country Club, Inc*., 2023 N.Y. Slip Op. 51407(U), at 1.

83. *See id.* at 5.

84. *See id.* at 2.

85. *See id.* at 2–3.

86. *See id.* at 5.

87. *See* Williams v. State, No. 824/23, 2024 N.Y. Slip Op. 30872(U), at 7 (Sup. Ct. Kings Cty. Mar. 6, 2024).

88. *See id.* at 2.

would have an adverse effect on the environment "so as to fall within the purview of SEQRA or NEPA . . . ."[89]

Matter of Whispering Pines Assoc., LLC v. Town of Queensbury Planning Bd. involved a dispute between adjacent landowners where petitioners owned a restaurant and respondents owned a car wash.[90] Respondents applied for site plan approval to demolish the existing car wash and construct a larger one in its place, using an existing access road on petitioners' property.[91] The court held that petitioners' demonstration of potential traffic delays and safety concerns resulting from the new car wash was sufficient to constitute an injury-in-fact, not merely an economic harm.[92] Moreover, the court found that the inclusion of the access road in respondents' development plans made the petitioners' property not merely adjacent, but a part of the project site. Therefore, the petitioners' concerns fell squarely within the zone of interest to be protected by SEQRA, warranting judicial review.[93]

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 have been exhausted,[94] that the claim is not moot,[95] and that the claim be timely brought within the statute of limitations period.[96]

89. *See id.* at 11–12.

90. *See* Whispering Pines Assoc., LLC v. Town of Queensbury Plan. Bd., No. EF2022-70258, 2023 N.Y. Slip Op. 50800(U), at 2 (Sup. Ct. Warren Cty. July 27, 2023).

91. *See id.* at 2–4.

92. *See id.* at 13.

93. *See id.* at 14.

94. 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))).

95. *See* Friends of Flint Mine Solar v. Town Bd. of Coxsackie, 2019 N.Y. Slip Op. 19-0216(U), at 5–7 (Sup. Ct. Greene Cty. Sept. 13, 2019) (holding, inter alia, that respondent's adoption of the local law rendered the proceeding moot).

96. *See* N.Y. C.P.L.R. 7801(1) (McKinney 2024).

A. Ripeness

With respect to ripeness, only final agency actions are generally subject to challenge in a SEQRA (or any other Article 78) challenge.[97] 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.[98] 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.'"[99]

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.[100] 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."[101]

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97. *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 2024)); 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).

98. *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).

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

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

101. *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. of the Town of Smithtown, No. 40966/2009, 2019 N.Y. Slip Op. 31376(U), at 5–6 (Sup. Ct. Suffolk Cty. May 20, 2019)) [hereinafter *2018–19 Surv. of Env't L.*].

Several noteworthy cases during the *Survey* period addressed ripeness.[102] *Lubavitch of Old Westbury, Inc. v. Inc. Village of Old Westbury* involved a sixteen-year-long civil action challenging the Village's Places of Worship Law, which requires a minimum of twelve acres of land for the construction of a religious facility.[103] Plaintiffs brought both facial and as-applied challenges to the law, arguing it was unconstitutional, including under equal protection and religious land use protections. The Eastern District held that plaintiffs' facial challenge was ripe, and that the Village's long delay in processing the land use application could not be used to argue that the plaintiffs' claims were unripe.[104]

In *Village of Pelham Manor v. Crown Communication N.Y., Inc.*, plaintiffs challenged the installation of a telecommunications tower by the State of New York, and defendants moved to dismiss the complaint on ripeness grounds.[105] The Second Department held that plaintiffs' claims were not ripe because "the State ha[d] not yet made any final determination nor taken any final action with regard to the installation of the telecommunications tower . . . ."[106] A mere "proposed plan" was not sufficient to trigger a default approval provision of an agreement between the telecommunications company and the State, and the SEQRA review had not yet concluded.[107]

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."[108] An exception to the

102. For a discussion of the ripeness considerations in a noteworthy case during this *Survey* period, see Lubavitch of Old Westbury, Inc. v. Inc. Vill. of Old Westbury, No. 08-cv-5081, 2024 U.S. Dist. LEXIS 27641, at *2–3 (E.D.N.Y. Feb. 16, 2024); *see also infra* Part III.A.

103. *See Lubavitch of Old Westbury, Inc.*, 2024 U.S. Dist. LEXIS 27641, at *1.

104. *See id*. at *5.

105. *See* Vill. of Pelham Manor v. Crown Commc'n N.Y., Inc., 202 N.Y.S.3d 389, 390 (App. Div. 2d Dep't 2023).

106. *Id*. at 391.

107. Castle Tower Holding Corp. and the New York State Police, on their own behalf, and on behalf of other participating State agencies, had entered into an agreement providing for a "default" approval by the State if it failed to express approval or disapproval of the project within thirty days of receipt of required materials. *See id.*

108. 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)).

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 questions not previously passed on, i.e., substantial and novel issues."[109] In other words, a matter is not moot where it "presents a live controversy and enduring consequences potentially flow" from the determination that is challenged.[110] And in the case of an agency, the reviewing court must also analyze whether the agency's determination will have the potential to affect a petitioner's future rights.[111]

No new cases of note from this *Survey* period addressed mootness in SEQRA proceedings.

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."[112] As a practical matter, it can be difficult to identify that point in time when the statute of limitations begins to run,

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

110. 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)).

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

112. N.Y. C.P.L.R. 217(1) (McKinney 2024); 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, 735 (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)).

and the trigger point has become an area of some confusion.[113] 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.[114] Adding to the confusion, a shorter statute of limitations may apply pursuant to statute, often in challenges to certain land use approvals.[115]

In *Cerini v. N.Y.C. Dep't of City Plan.*, petitioners filed an Article 78 petition challenging a rezoning decision just four hours before the Statute of Limitations expired and failed to timely serve it within the fifteen-day period required by C.P.L.R. 306-b.[116] Additionally, petitioners later attempted to add an indispensable party after the Statute of Limitations had elapsed. The court dismissed the case, ruling that the addition of an indispensable party was time-barred, and that the "relation back" doctrine was inapplicable because the indispensable party and respondents were not "united in interest."[117] Since the indispensable party was not timely joined, the court held that the action could not proceed given the significant resultant prejudice to respondent,[118] and the five factor discretionary analysis under C.P.L.R. 100K(b), which allows relief from the inability to join an indispensable party, was not applicable due to the Statute of Limitations.[119]

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113. 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).

114. *See* Mark A. Chertok et al., *Environmental Law: Developments in the Law of SEQRA*, 66 SYRACUSE L. REV. 905, 921–22 (2015) (discussing *Stop-The-Barge*, 803 N.E.2d at 362 and *Eadie*, 854 N.E.2d at 469).

115. A party may be subject to a shorter statute of limitations period for challenging SEQRA decisions by statute. For example, N.Y. TOWN LAW § 267-c (McKinney 2024) prescribes a thirty-day statute of limitations for persons aggrieved by a decision of a town's Zoning Board of Appeals regarding a use or area variance, and N.Y. TOWN LAW § 274-a (McKinney 2024) prescribes a thirty-day statute of limitations for persons aggrieved by a decision regarding a site plan approval.

116. *See* Cerini v. N.Y.C. Dep't of City Plan., No. 802417/2023E, N.Y. Misc. LEXIS 16976, at *4 (Sup. Ct. Bronx Cty. Aug. 14, 2023).

117. *See id*. at *5.

118. *See id*. at *12.

119. *See id*. at *13. The five factor analysis considers: "1. whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder; 2. the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined; 3. whether and by whom prejudice might have been avoided or may in the future be avoided; 4. the feasibility of a protective provision by order of the court or in the judgment; and 5. whether an effective judgment may be rendered in the absence of the person who is not joined. Although a court must consider all five criteria, no single factor is determinative in the discretionary analysis of whether an action may proceed in the absence of a necessary party who is not subject

Similarly, *Wood v. Village of Painted Post* involved an Article 78 petition seeking to annul the Planning Board's grant of site plan approval for the construction and operation of a warehouse and trucking distribution facility.[120] However, petitioners failed to commence the proceeding within thirty days after the Planning Board's decision was filed with the Village Clerk, and they also failed to add a necessary party, Painted Post Development LLC, which had entered into a contract to sell the subject parcel.[121] The Fourth Department upheld the supreme court's decision to dismiss the petition for the petitioners' failure to commence their proceedings in a timely manner and join a necessary party.[122]

B. Procedural Requirements Imposed by SEQRA on 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 the preparation of an EIS.[123] A few reported cases during the *Survey* period concerned lead agencies' alleged failures to comply with one or more of these procedural mandates.

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.[124] As noted above, a Type I action carries the presumption that an EIS will be required.[125] 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."[126] Any state or local agency may adopt its own list of additional Type I or Type II actions

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to mandatory jurisdiction." Swezey v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 973 N.E.2d 703, 708 (N.Y. 2012) (internal citations omitted).

120. *See* Wood v. Vill. of Painted Post, 189 N.Y.S.3d 845, 846 (N.Y. App. Div. 4th Dep't 2023).

121. *See id*. at 847.

122. *See id*.

123. *See supra* Part I.

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

125. *See id.* § 617.4(a).

126. *Id.* § 617.5(a).

to supplement those provided by DEC.[127] 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.[128]

Of note was a decision from the First Department challenging the negative declaration for a proposed school development, which the New York City School Construction Authority (SCA) classified as an Unlisted action.[129] In *Carlson v. N.Y.C. Council*, the City did not dispute that the project formally qualified as Type I based on its proximity to a site eligible for listing on the State Register of Historic Places and park but nonetheless argued that the previous misclassification did not require annulling the negative declaration.[130] The court agreed, holding that even though the project was misclassified, SCA conducted the equivalent of a Type I review because SCA's Environmental Assessment Statement ("EAS") took the required hard look at potential adverse environmental impacts.[131]

B. Unlawful "Segmentation" of SEQRA Review

Defining the proper parameters of an action can be a difficult task. SEQRA regulations provide that "[c]onsidering only a part or segment of an action is contrary to the intent of SEQR[A]."[132] As explained by the Third Department, impermissible segmentation occurs in two situations: (1) "when a project which would have a significant effect on

127. *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).

128. *See id.* § 617.2(al). Beyond Type II actions under SEQRA, there exist additional exemptions. *See* N.Y. PUB. AUTH. 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 [§ 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., No. 160085/2022, 2023 N.Y. Slip Op. 30682(U), at 2, 9 (Sup. Ct. N.Y. Cty. Mar. 8, 2023). The MTA has an exemption for most actions the agency takes on land that it already owns. *See* SEQRA HANDBOOK, *supra* note 4, 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.

129. *See* Carlson v. N.Y.C. Council, 208 N.Y.S.3d. 197, 197 (App. Div. 1st Dep't 2024).

130. *See id.*

131. *See id.* at 198.

132. 6 N.Y.C.R.R. § 617.3(g)(1) (2024).

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."[133] 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."[134]

Three cases from this *Survey* period addressed segmentation. In *Penn Community Defense Fund v. New York State Urban Development Corp*., Empire State Development adopted a "mixed[-]use redevelopment plan for Pennsylvania Station and the surrounding midtown neighborhood."[135] Petitioners alleged that the Final Environmental Impact Statement (FEIS) did not adequately address the Penn Station Reconstruction Project and the Penn Station Expansion Project, two related but separate projects near the station. While these two projects were geographically proximate, the court held that the Penn Station Reconstruction Project was exempt from SEQRA review under New York Public Authorities Law § 1266(11), because it was a transportation-related construction that would not materially change the station's existing character.[136] Additionally, the court found that the Penn Station Expansion Project was exempt from SEQRA because it requires environmental review under NEPA.[137]

Segmentation was also at issue in *Cold Spring Country Club, Inc. v. Town of Huntington*, where petitioners sought to annul the town's

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

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

135. Penn Cmty. Def. Fund v. N.Y. State Urb. Dev. Corp., No. 159154/2022, 2023 N.Y. Slip Op. 33247(U), at 1–2 (Sup. Ct. N.Y. Cty. Sept. 18, 2023).

136. *See id.* at 10–11.

137. *See id.* at 11. The rationale for this aspect of decision is not clear. SEQRA allows a federal EIS to substitute for a SEQRA EIS, but the state agency must still make SEQRA Findings, *see* 6 N.Y.C.R.R. § 617.15(a); thus, the fact that a project is subject to NEPA does not exempt it from SEQRA. The court may have been suggesting that there was permissive segmentation because there would be a later environmental review, *see id*. § 617.3(g), as the court also noted that the EIS did address the impacts of both of the separate but related projects in question. *See Penn Cmty. Def. Fund*, 2023 N.Y. Slip Op. 33247(U), at 11; N.Y.C.R.R. § 617.3(g)(1) ("Related actions should be identified and discussed to the fullest extent possible.").

resolution authorizing the rezoning of respondents' property.[138] After a failed joint-venture between petitioners and respondents, respondents proceeded to develop the site independently. Petitioners later filed their own development plan and claimed that the town's approval of respondents' plan amounted to impermissible segmentation.[139] The court held that respondents' proposal to develop the site on their own was not "the first phase of a larger, unified project" as petitioners' plan was at best described as tentative and lacked the substance necessary to establish a connection between the two projects.[140] Thus, the town's determination satisfied the requirements of SEQRA.[141]

In *Hofstra University v. Nassau County Planning Commission*, Sands entered into a lease transfer for the Nassau County Coliseum as part of its effort to pursue the construction of a casino.[142] The lease transfer was framed as providing Sands with "site control," while a separate "new" lease would enable future development of the property.[143] The Nassau County Legislature issued a Negative Declaration, determining that the lease transfer would have no significant environmental impacts.[144] However, the court held that considering only the transfer of site control, without considering the planned future development, was improper segmentation under SEQRA.[145] It was undisputed that the purpose of the lease transfer was to allow Sands to pursue the development described in the new lease.[146]

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

138. *See* Cold Spring Country Club, Inc. v. Town of Huntington, No. 609837/2023, 2023 N.Y. Slip Op. 51407(U), at 3 (Sup. Ct. Suffolk Cty. Oct. 30, 2023).

139. *See id.* at 7–8.

140. *See id.* (quoting Village of Tarrytown v. Plan. Bd., 741 N.Y.S.2d 44, 49 (App. Div. 2d Dep't 2002).

141. *See id.*

142. *See* Hofstra Univ. v. Nassau Cnty. Plan. Comm'n, No. 606293/2023, 2023 N.Y. Slip Op. 51181(U), at 1 (Sup. Ct. Nassau Cty. Nov. 9, 2023).

143. *Id.* at 50.

144. *Id.* at 61–62.

145. *Id.* at 68.

146. *Id.*

approving an action," and it must conduct a coordinated review.[147] 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."[148]

During this *Survey* period, no noteworthy case addressed lead agency designation and preservation of its determination of significance.

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.[149] 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.'"[150] 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."[151] 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

147. 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).

148. *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).

149. *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)).

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

151. 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 2013); 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.3d 667, 669 (App. Div. 3d Dep't 2011)).

role to 'weigh the desirability of any action or [to] choose among alternatives.'"[152]

This deferential standard of review means that successful challenges to the adequacy of an EIS are rare.[153] Success has been marginally more common in challenges to determinations of significance—i.e., the issuance of a negative declaration. Several cases from the *Survey* period show that success in this area may become more common, as more courts showed a willingness to nullify a negative declaration.[154]

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.[155] 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.[156]

As noted above, courts generally 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.[157] However, during this *Survey* period, multiple courts vacated negative declarations.

The Supreme Court of Dutchess County nullified the Town of Dover Planning Board's negative declaration for failing to take a hard look at the areas of environmental concern for a proposed electric

152. *Riverkeeper, Inc.*, 881 N.E.2d at 177 (quoting *Akpan*, 554 N.E.2d at 570).

153. *See* MICHAEL B. GERRARD ET AL., 2 ENVIRONMENTAL IMPACT REVIEW IN N.Y. § 7.04(4) (2024).

154. *See generally* Michael B. Gerrard, *Annual SEQRA Review: Project Applicants Winning More Cases*, N.Y.L.J. (July 10, 2024, 10:00 AM), https://www.law.com/newyorklawjournal/2024/07/10/annual-seqra-review-project-applicants-winning-more-cases/.

155. *See* 6 N.Y.C.R.R. § 617.5(a) (2024); *see also* GERRARD, *supra* note 153, at § 2.01(3)(b).

156. *See* N.Y. C.P.L.R. 7803(3) (McKinney 2024); *see also 2018–19 Surv. of Env't L.*, *supra* note 101, at 347. Challenges to positive declarations are less common than challenges to negative declarations. *See* GERRARD ET AL., *supra* note 153, at § 3.05(2)(e). Part of the reason is that positive declarations generally are not considered final agency actions. *See supra* notes 97–101 and accompanying text.

157. *See* GERRARD ET AL., *supra* note 153, at § 7.04(4).

substation.[158] The petitioners argued that the board failed to consider contamination at the project site and the anticipated negative aesthetic impact the project would have on the town and its residents. The petitioners further argued that the project was barred under the CLCPA because it would have a disproportionate burden on a Disadvantaged Community (DAC). Although the court noted that the board had taken a hard look at numerous issues, the court held that it failed to take a hard look at potential soil and groundwater contamination. The court laid out multiple missteps it felt the board had made, including failing to address concerns raised by members of the public regarding the need to evaluate and confirm the levels of contamination at the project site, which could run offsite during construction; failing to press the applicant on whether it had consulted with DEC about its chosen soil cleanup objectives; and simply "parroting" the applicant's expert reports in its own memos, instead of pressing the applicant on its chosen methodologies.[159]

The court also noted its concern that the board relied on misrepresentations from the applicant, including those regarding certain DEC findings about the project site, instead of "actually exercising its own judgment in determining whether a particular circumstance adversely impacts the environment."[160] The court further took issue with the board's reliance on mitigation efforts to be undertaken by the applicant in justifying issuing a negative declaration, noting that the need for such efforts "act as a tacit acknowledgement of the potential for significant environmental impact such that a negative declaration was inappropriate."[161] The court did not engage in a robust discussion of the CLCPA, and instead simply noted that the record established that the board "took a hard look at whether the [project] would violate the CLCPA" and that the Board's attorney had advised the Board that the CLCPA did not apply to the Board.[162] As such, this case does not clearly establish the court's views on how the CLCPA affects SEQRA reviews or give insight as to how other courts may incorporate the CLCPA into the SEQRA process.

158. *See* Friends of the Great Swamp, Inc. v. Town of Dover, N.Y.L.J., July 10, 2024, at 29 (Sup. Ct. Dutchess Cty. Aug. 24, 2023).

159. *See id.* at 20.

160. *Id.* at 23 (citing Boise v. City of Plattsburg, 195 N.Y.S.3d 307, 313 (App. Div. 3d Dep't 2023)).

161. *Id.* at 25 (citing West Branch Conservation Association, Inv. v. Plan. Bd. of the Town of Clarkstown, 616 N.Y.S.2d 550, 551 (App. Div. 2d Dep't 1994)).

162. *Id.* at 26.

In *Seneca Meadows, Inc. v. Town of Seneca Falls*, the Supreme Court of Seneca County concluded that the Seneca Falls Town Board failed to take a "hard look" at the relevant areas of environmental concern or provide a "reasoned elaboration" for the Town Board's decision to issue a negative declaration for a local law that would have required the petitioner to close its landfill.[163] In evaluating the case, the court reviewed the Town Board meeting minutes, which revealed that, in addition to not preparing the EAF, the Town Board members also failed to review or discuss its content before adopting a negative declaration.[164] This lack of review and discussion led the court to conclude that the Town Board "simply assumed that closure of the landfill had no obvious environmental impacts," and thus failed to take the necessary hard look at the potential environmental consequences of the local law.[165]

The Supreme Court of the County of Albany also rejected a board's decision, annulling the Planning Board of the Town of Coeymans' failure to approve the petitioner's application for a special use permit for a propane storage terminal. In *Marebo, LLC v. Nolan*, the petitioner argued that the board's denial of the application less than a month after issuing a negative declaration based on identical facts was arbitrary and capricious.[166] The court agreed, explaining that although "there does not appear to be a bright-line rule concerning the collateral estoppel effect of a negative SEQRA declaration," where the same board that issued the negative declaration denies the permit without explaining its reasons, such a determination can be found to be arbitrary.[167] Here, the court held that the board had failed to cite "specific, reasonable grounds, supported by evidence" to deny the application.[168]

In *DLV Quogue, LLC v. Town of Southampton,* the court determined that the Town Board violated the plaintiffs' due process rights by failing to provide a meaningful opportunity to be heard, as several members of the Board pre-determined their votes against the

163. Seneca Meadows, Inc. v. Town of Seneca Falls, N.Y.L.J., July 10, 2024, at 2–3 (Sup. Ct. Seneca Cty. June 8, 2023).

164. *See id.* at 14–17 ("Indeed, one Board Member . . . took the time to read the content of the EAF, but it does not appear that the other Board Members did so or were even aware of its contents.").

165. *See id.* at 18.

166. *See* Marebo, LLC v. Nolan, N.Y.L.J., July 10, 2023, at 22 (Sup. Ct. Albany Cty. Nov. 27, 2023).

167. *Id.* at 23–24.

168. *Id.* at 22.

plaintiffs' application.[169] Plaintiffs sought approval to develop a commercial golf club as part of a Mixed-Use Planned Development District ("MUPDD") project. Over the course of nearly five years, the plaintiffs' DEIS and FEIS were accepted, and the Town Board adopted a SEQRA Findings Statement affirming that the project would not result in significant adverse environmental impacts.[170] Despite this, the MUPDD application was ultimately denied.[171] The court held that there was no other conclusion that could be reached other than that the two Board members "acted in an arbitrary manner" during their final hearing and disregarded the SEQRA findings.[172] By looking to the record, the court determined that the two Board members had "acceded to the community voices in opposition to the project rather than basing their votes on a dispassionate and reasoned review of the environmental studies conducted over the course of years preceding the vote."[173] This due process violation resulted in the court overturning the votes against the project and directing the Board to approve the application.[174]

There were some challenges during this *Survey* period that resulted in the typical upholding of the lead agency's determination. In *Walsh v. Town of Northumberland Planning Board*, petitioners sought to annul the Town of Northumberland Planning Board's approval of the construction of a suspension bridge.[175] The Supreme Court of Saratoga County found that the administrative record supported the contention that the Planning Board took the requisite hard look at potential impacts over the course of the project, having reviewed numerous studies and analyses of the project, considered public oral and written comments on the application, and engaged an engineering consultant to evaluate and assess the project's potential environmental impacts.[176] The court further rejected petitioner's assertions about alleged potential impacts, which the court deemed were speculative and based on the petitioner's own subjective analysis.[177]

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169. *See* DLV Quogue, LLC v. Town of Southampton, No. 606443/18, 2023 N.Y. Misc. LEXIS 32493, at *17–18 (Sup. Ct. Suffolk Cty. Dec. 15, 2023).

170. *See id.* at *4–5.

171. *See id*. at *6.

172. *See id*. at *14.

173. *Id*. at *15.

174. *Id.*

175. *See* Walsh v. Town of Northumberland Plan. Bd., No. EF20231097, 2023 N.Y. Slip Op. 33689(U), at 1 (Sup. Ct. Saratoga Cty. Oct. 20, 2023).

176. *See id.* at 10.

177. *See id.* at 8.

In *Preserve Pine Plains v. Town of Pine Plains Planning Bd.*, the Putnam County Supreme Court rejected petitioner's claim that the planning board had failed to take a hard look at the potentially significant adverse environmental impacts of a proposed solar energy facility.[178] In affirming the planning board's determination to issue a negative declaration, the court held that the agency "gave due consideration to the public's concerns with the solar project and took a careful and hard look at the potential negative environmental impacts," as evidenced by the public hearings and additional workshops held, as well as the planning board's responses to the numerous public comments submitted.[179]

In *Town of Beekman v. Town Board of the Town of Union Vale*, an applicant sought to construct and operate a 150-foot monopole telecommunications tower and related equipment on property owned by the Town of Beekman.[180] As the lead agency, the Town of Beekman issued a negative declaration. Without elaborating, the Second Department, affirming the lower court, held that the Town Board took the requisite hard look at identified environmental concerns regarding the project.[181]

In *Clean Air Action Network of Glens Falls, Inc. v. Town of Morea Planning Board*, the Supreme Court of Saratoga County upheld the negative declaration issued for a facility that would be used to remove PFAS from biosolids to create carbon fertilization, but required the planning board to take additional actions, given the novelty of the facility and lack of available data. In its decision, the court meticulously walked through the various steps the planning board took before issuing a negative declaration, including demanding additional information and documents from the applicant; asking various questions at meetings; consulting with DEC and the Town's water superintendent; using an independent engineering consultant; holding two public hearings, one of which consisted of a four hour discussion about the environmental review; and continuing to consider new information for an additional five months during the site plan review process.[182] While

178. *See* Pres. Pine Plains v. Town of Pine Plains Plan. Bd., N.Y.L.J, June 14, 2024, at 21 (Sup. Ct. Putnam Cty. June 4, 2024).

179. *See id.* at 31, 33.

180. *See* Town of Beekman v. Town Bd. of the Town of Union Vale, 196 N.Y.S.3d 507, 509 (App. Div. 2d Dep't 2023).

181. *See id.*

182. *See* Clean Air Action Network of Glens Falls, Inc. v. Town of Morea Plan. Bd., No. EF 20222135, 2023 N.Y. Slip Op. 50666(U), at 14 (Sup. Ct. Saratoga Cty. July 6, 2023).

the above was sufficient for the court not to nullify the negative declaration, given that the facility would involve PFAS remediation, the science of which is still evolving, the court determined that SEQRA imposed an additional duty on the planning board to later re-confirm the reasonableness of its evaluation of the impacts once data became available and before the facility increased production in later phases of the project.[183]

As demonstrated above, courts are seemingly beginning to scrutinize lead agency decisions more and demand particular actions be taken to demonstrate the agency "identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination when [deciding] that the environmental impact is not significant and issu[ing] a negative declaration."[184] Given that many of the cases above were issued by the New York State Supreme Court, it is possible the Appellate Division could reestablish a more deferential standard for reviewing lead agency decisions during the next *Survey* period.

2. Challenges to EISs & Findings Statements

Historically, successful challenges to EISs are very uncommon due to the deferential standard of review, but one such successful challenge occurred during this *Survey* period. In *Boise v. City of Plattsburgh*, the Third Department addressed whether the Supreme Court correctly determined that the City of Plattsburgh Common Council did not take the requisite hard look at the potential impacts of a project by failing to provide mitigation measures for soil contamination at the project site in the EIS.[185] In affirming the Supreme Court's decision, the court took issue with the fact that the Common Council acknowledged the need for a health and safety plan (HASP) during construction but failed to subject the HASP to review as part of the SEQRA process.[186] The court proffered that deferring the creation of the HASP and failing to include it in the EIS, despite the need for it being "imminent given that [the] project expressly contemplates excavation,"

183. *Id.* at 20.

184. Douglaston Civic Ass'n v. N.Y.C., 159 N.Y.S.3d 23, 24 (App. Div. 3d Dep't 2021) (quoting Friends of P.S. 163, Inc. v. Jewish Home Lifecare, 90 N.E.3d 1253, 1260 (N.Y. 2017)) (internal quotations omitted).

185. Boise v. City of Plattsburgh, 195 N.Y.S.3d 307, 313 (App. Div. 3d Dep't 2023).

186. *Id.* at 311.

demonstrated noncompliance with SEQRA.[187] The dissent disagreed, arguing that the Supreme Court should not have "second-guess[ed]" the Common Council's "reasoned judgment" that the remediation at the site and the existing standards to be followed in the event of remediation, including complying with a site-specific HASP, were sufficient to address the risks posed by the contaminated soil, and thus a HASP was not needed at the EIS stage.[188]

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.[189] These include: (1) substantive changes proposed for the project; (2) the discovery of new information; or (3) changes in circumstances relating to the project.[190] 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.[191] On the other hand, information that could prompt amendment to a positive declaration usually arises after an EIS has been issued, and thus is typically dealt with through a technical memorandum demonstrating that the change and/or new information does not warrant a supplemental EIS, or through a supplemental EIS. In these instances, the lead agency is required to "discuss the reasons supporting the amended determination" and follow the same filing and publication requirements that apply to the original determination.[192] 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 adequately addressed, in the original EIS.[193] Whether issues, impacts, or

187. *Id.* at 316 (citing Riverkeeper, Inc. v. Plan. Bd. of Town of Se., 881 N.E.2d 172, 178 (N.Y. 2007)).

188. *Id.* at 320.

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

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

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

192. 6 N.Y.C.R.R. § 617.7(e)(2).

193. *See* 6 N.Y.C.R.R. § 617.9(a)(7). *See supra* discussion in Part III(C).

project details omitted from an initial EIS require preparation of a SEIS is a frequent subject of litigation.[194]

In one notable case, both parties challenged a Supreme Court order directing respondents to issue a SEIS.[195] The petitioners argued that the court should have annulled the challenged approvals, while the respondents argued that no SEIS was needed because they had complied with their substantive obligations under SEQRA.[196] The Fourth Department agreed with respondents that the lower court erred in directing them to prepare a SEIS, and sided with them regarding the sufficiency of the existing environmental review.[197] The court held that not only did the respondents take the requisite hard look at the relevant environmental factors but under the applicable regulations, "[a] lead agency's determination whether to require a SEIS is discretionary" and petitioners did not have a clear legal right to demand one be completed.[198]

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.[199] 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.[200]

One notable case, *Elizabeth Street Garden, Inc. v. City of New York*, involved the issuance of a negative declaration by the New York City Department of Housing Preservation and Development (HPD) for

194. *See 2022–23 Surv. of Env't. L.*, *supra* note 1, at 601.

195. Renew 81 for All v. N.Y. State Dep't of Transp., 204 N.Y.S.3d 666, 668 (App. Div. 4th Dep't 2024).

196. *See id*.

197. *See id.* at 669.

198. *Id.* (quoting Riverkeeper, Inc. v. Plan. Bd. of Town of Se., 881 N.E.2d 172, 176 (N.Y. 2007)).

199. *See* N.Y.C. Executive Order No. 91 of 1997 (as amended); N.Y.C. RULES, tit. 43, §§ 6-01–6-16 (2024); *id.* tit. 62, §§ 5-01–6-15.

200. *See* CEQR MANUAL, *supra* note 51, at Introduction-1.

the development of a low-income senior housing facility.[201] The First Department held that HPD took the requisite hard look at the relevant areas of environmental concern since it had followed the methodology set forth in the CEQR Technical Manual.[202] Specifically, the court rejected petitioner's argument that, as part of public policy considerations, HPD was required to take a hard look at sustainability goals arising from Mayoral Executive Order No. 26 of 2017.[203] The court explained that the executive order did not set any standard, but rather directed "City agencies to work with national and international partners 'to develop further greenhouse gas reduction plans and actions that are consistent with the principles and goals of the Paris Agreement.'"[204] Thus, the City was "entitled to rely on the accepted methodology set forth in the Manual" and "did not have to parse every subissue as framed by petitioners."[205]

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."[206] 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

201. *See* Elizabeth St. Garden v. N.Y.C., 192 N.Y.S.3d 102, 104 (App. Div. 1st Dep't 2023).

202. *See id*. at 105.

203. *See id.*

204. *See id.* (quoting N.Y.C. Executive Order No. 26 of 2017).

205. *Id.* (quoting N. Manhattan Is Not for Sale v. N.Y.C., 128 N.Y.S.3d 483, 487 (App. Div. 1st Dep't 2020)).

206. N.Y. CONST. art. I, § 19.

garbage in the subject landfill.[207] All of the defendants moved to dismiss the claims against them.[208] In a decision later modified by the Fourth Department, the Supreme Court of New York County 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.[209] The court also dismissed the claims against the City of New York, holding that as a customer of the waste management company, the city had no duty to police the company's compliance with permits or to abate operational issues at its landfill.[210]

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 . . . ."[211] 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."[212] 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.[213] The court held such an argument had no merit, because complying with the Constitution, including the newly adopted Green Amendment, "is not optional for a state agency, and is thus nondiscretionary and ministerial."[214] Thus, it was unnecessary for the Green Amendment to impose such a duty on the state.

In July 2024, the Fourth Department modified the Supreme Court's decision, dismissing the petitioner's claim against DEC and, therefore, the entire action. The court held that because the only conduct on the part of DEC that the complaint alleged violated the Green Amendment was its failure to take regulatory enforcement actions against the landfill operator based on its allegedly inadequate

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

208. *See id.* at 11.

209. *See id.* at 12–13.

210. *See id.* at 13.

211. *Id.* at 14.

212. *Fresh Air for the Eastside*, 2022 N.Y. Slip Op. 34429(U), at 14.

213. *See id.* at 16.

214. *Id.* (citing D.J.C.V. v. United States, No. 20-Civ-5747, 2022 U.S. Dist. LEXIS 99808, at *32–33 (S.D.N.Y. June 3, 2022)).

operation of the landfill, the court could not impose mandamus relief because such enforcement is not ministerial.[215] Rather, it is an act over which DEC may exercise judgment or discretion.[216]

In *Streeter v. New York City Department of Environmental Protection*, a case decided before the Fourth Department issued its decision in *Fresh Air for the Eastside, Inc. v. State*, petitioners brought an Article 78 proceeding claiming that the New York City Department of Environmental Protection (DEP) violated petitioner's right to clean air and a healthful environment under the Green Amendment by blocking petitioner's second complaint about a vehicle illegally idling.[217] Since the alleged second idling violation was committed by the same vehicle in the same location, DEP determined that petitioner's second complaint was duplicative of the first and refused to treat it as a second violation.[218] The Supreme Court of New York County held that DEP's determination to block the second complaint was not subject to constitutional scrutiny under the Green Amendment.[219] In doing so, the court distinguished the facts of this case from those of *Fresh Air for the Eastside, Inc.*, noting that in *Fresh Air*, the landfill was "operated contrary to or in violation of current laws and regulations" and was causing "so much harm and impact [to] so many people" that it could not "go unchecked, without the proper intervention from the State."[220] Here, the Court agreed with DEP that under the NYC Administrative Code, the City could only impose one penalty per day for an idling violation and, therefore, DEP had complied with the law in deeming the second complaint related to idling occurring on the same day as duplicative. As such, the court determined DEP had not acted "contrary to or in violation of current laws and regulations."[221]

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

215. *See id.* at 19.

216. *See id.* at 13.

217. *See* Streeter v. N.Y.C. Dep't of Env't Prot., 213 N.Y.S.3d 865, 867 (Sup. Ct. Kings Cty. 2024).

218. *Id.* at 869–70.

219. *Id.* at 870.

220. *Id.* (quoting Fresh Air for the Eastside, Inc. v. State, No. E2022000699, 2022 N.Y. Slip Op. 34429(U), at 9–10 (Sup. Ct. Monroe Cty. Dec. 20, 2022)).

221. *Id.*

supplemental jurisdiction.[222] 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 *Lost Lake Holdings LLC v. Town of Forestburgh*, in which a developer sought to rezone a parcel of land within a residential zoning district to allow for more subdivisions than permitted under the existing size and density limits to make the project "economically feasible."[223] Before acting on the application, the Town Board undertook a mandatory environmental review of the proposed project under SEQRA, which resulted in the issuance of a "Findings Statement" that specified mitigation measures the developer would undertake as conditions to construction approvals.[224] The Town Board subsequently approved the application.[225]

Following the Town Board's approval, the property was sold to a new owner, who changed the anticipated use of the property as a seasonable recreational resort to a permanent affordable housing community.[226] In response, the Town Board issued stop work orders to Plaintiffs and adopted a resolution calling for a supplemental environmental review of the project under SEQRA.[227] Plaintiffs sought a preliminary injunction in federal court to enjoin the Town from enforcing various orders that prohibited plaintiffs from developing the site and requiring a supplemental environmental review. Plaintiffs claimed that defendants' actions were motivated by discriminatory animus against Hasidic Orthodox Jews.[228]

The Southern District held that plaintiffs failed to demonstrate any irreparable harm that would result from a delay in construction and development caused by a supplemental SEQRA review.[229] Plaintiffs did not allege the delay would "effectively make future

222. *See, e.g.*, Eisenbach v. Vill. of Nelsonville, No. 20-CV-8566, 2021 U.S. Dist. LEXIS 210639, at *17–18 (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").

223. Lost Lake Holdings v. Town of Forestburgh, No. 22-CV-10656, 2023 U.S. Dist. LEXIS 230517, at *4 (S.D.N.Y. Dec. 28, 2023).

224. *See id.* at *4–5.

225. *See id.* at *5.

226. *See id.* at *9.

227. *See id*. at *10.

228. *Lost Lake Holdings*, 2023 U.S. Dist. LEXIS 230517, at *10.

229. *Id.* at *20.

development impossible or infeasible such that the absence of an injunction [would] preclude them from ever building on the . . . property at all."[230] There was also no evidence that plaintiffs could not be made whole through monetary damages.[231]

CONCLUSION

Case law from this *Survey* period demonstrates that SEQRA continues to present the courts with difficult legal questions related to standing, ripeness, and the statute of limitations; procedural issues, including the classification of an action and segmentation; 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 and generate new challenges for judicial review; the initial wave of such litigation is reflected in the discussion *supra* of the decisions under the Green Amendment. These and other developments in the law of SEQRA will be covered in future installments of the *Survey of New York Law*.

230. *Id.*
231. *Id*. at *19.