

STATE ENVIRONMENTAL REGULATION

Expert Analysis

The SEQR Handbook Is Changing— Here's Why That Matters

The New York State Department of Environmental Conservation (NYSDEC) is proposing significant revisions to its handbook on the State Environmental Quality Review Act (SEQR). The SEQR Handbook, as it is commonly known, is the standard reference book on SEQR, often consulted and utilized by attorneys, local government officials, environmental consultants, and permit applicants.

The SEQR Handbook first was published in 1982. It was updated in a second edition a decade later, and a third edition was published electronically in 2010. Since then, the NYSDEC has made a variety of minor updates to the electronic edition.

The draft of the forthcoming fourth edition of the SEQR Handbook replaces the previous editions and contains a variety of important changes to the third edition. Of greatest interest is that the proposed new edition reflects the 2018 amendments to the SEQR regulations, available at 6 NYCRR Part 617, that became effective on Jan. 1, 2019. These amendments are the first major amendments to the SEQR regulations

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that the NYSDEC has made in over two decades. The draft SEQR Handbook also contains summaries of important court decisions, which is a handy reference for practitioners when challenging or defending SEQR determinations.

This column highlights the most noteworthy proposed modifications to the SEQR Handbook in three specific areas—Type II actions, Type I actions, and scoping—and explains their practical significance.

Background

As a guide to SEQR, which is found at Article 8 of the New York Environmental Conservation Law, the SEQR Handbook addresses common questions that arise during the process of applying SEQR.

In addition to the statute, the regulations, and the SEQR Handbook, the other key documents for SEQR practitioners are the SEQR full and short environmental assessment

form (EAF) workbooks, which guide parties through the completion of EAFs with step-by-step instructions, and a publication referred to as the SEQR Cookbook, which is an illustrated procedural guide through the SEQR process. The SEQR Cookbook, which was revised in January 2019, uses a flow-chart approach to describe the steps to take when applying SEQR to a project. The EAF workbooks and the SEQR Cookbook also are published by the NYSDEC and are available on its website.

The proposed fourth edition of the SEQR Handbook, which weighs in at well over 200 pages, contains an intro-

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duction explaining how to use the SEQR Handbook, as well as a history and description of SEQR. It also discusses the key concepts of “reasonableness” and the “rule of reason” as applied in the context of SEQR.

Eight separate chapters follow, containing guidelines on specific SEQR issues as well as detailed explanations of the SEQR process. These chapters are organized by topic to parallel the sequential steps in the SEQR process

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(generally paralleling the regulations and the SEQR Cookbook). They also include special sections on how local land use procedures relate to SEQR and the relationship of any other review procedures to SEQR. The final chapter contains the synopsis of crucial court decisions that have interpreted SEQR.

Type II Actions

“Type II actions” for purposes of SEQR are actions that the Legislature has excluded or made exempt from SEQR as well as actions that the NYSDEC has determined do not require further review under SEQR because they have been determined not to have a significant adverse environmental impact. Thus, if an action is classified as Type II, SEQR is satisfied, and no further environmental consideration is required. Among other things, Type II actions do not require preparation of an EAF or an environmental impact statement. The proposed SEQR Handbook adds quite a number of actions to the list of Type II actions and are discussed in Chapter 2 of the document.

Under the third edition of the SEQR Handbook, a project calling for the replacement, rehabilitation, or reconstruction of a structure or facility, in kind, on the same site, including upgrading buildings to meet building or fire codes, typically was a Type II action. Now, such a project for the purpose of meeting “energy” codes also is a Type II action.

In addition, the proposed SEQR Handbook includes the following as new Title II actions:

- Retrofitting an existing structure and its appurtenant areas to incorporate green infrastructure;
- Installing telecommunication cables in existing highway or utility

rights of way using trenchless burial or aerial placement on existing poles;

- Installing solar energy arrays where such installation involves 25 acres or less of physical alteration on sites such as closed landfills and brownfield sites;
- Installing solar energy arrays on an existing structure as long as the structure is not a specified historical place;
- A government agency’s acquisition and dedication of 25 acres or less of land for parkland, or dedication of land for parkland that was previously acquired, or an agency’s acquisition of a conservation easement;
- Sale and conveyance of real property by public auction pursuant to Article 11 of the Real Property Tax Law, i.e., when a municipality or state agency acquires land through foreclosure or other means where the land reverts to the agency due to a failure of the owner to remain current on property taxes; and
- Construction and operation of an anaerobic digester (which utilizes the naturally occurring process of anaerobic digestion) within currently disturbed areas at an operating publicly owned landfill, provided the digester meets certain specific conditions.

As can be seen, a number of these new Type II actions are “green” or environmentally-related. For example, retrofitting existing structures to incorporate green infrastructures that manage storm water through infiltration, evapotranspiration, and reuse by the use of permeable pavement, bio-retention, green roofs and green walls, tree pits and urban forestry, storm water planters, rain gardens, vegetated swales, downspout disconnection, or storm water harvesting and reuse, are Type II actions. (As noted in the draft SEQR Handbook, the Type II designation does not eliminate the need to comply with

the NYSDEC’s stormwater permitting requirements.)

The new Type II action relating to the new category of installing solar energy on sites such as closed landfills and brownfield sites certainly fits the “green” bill, too, as does the new Type II action pertaining to an agency’s acquisition and dedication of land for a park or acquisition of a conservation easement.

By adding these activities as Type II actions, the NYSDEC seems to be seeking a way to encourage them and to streamline and speed up the approval process.

Type I Actions

The actions on the Type I list in the proposed SEQR Handbook are actions that are considered more likely to have significant adverse environmental impacts and, therefore, that must be reviewed further under SEQR to determine the potential for significant adverse environmental impacts. The proposed new SEQR Handbook contains a number of changes to the list of Type I actions.

For example, the NYSDEC has modified the Type I action involving the construction of new residential units to lower the numeric threshold for the number of new residential units that trigger a Type I classification. The old rules provided that the threshold for a city, town, or village having a population of less than 150,000 was 250 units to be connected to existing community or public water or sewer systems. The new rules change 250 units to 200 units for a city, town, or village having a population of 150,000 persons or less.

In addition, a Type I action for a city, town, or village having a population of greater than 150,000 persons but less than one million previously had to involve 1,000 units; that has

been changed to 500 units. Similarly, the NYSDEC has changed the parking feature that triggers a Type I designation. Now, activities other than the construction of residential facilities or the expansion of existing non-residential facilities by more than 50 percent are Type I actions if they involve parking for 500 vehicles in a city, town, or village having a population of 150,000 or less. That is a reduction from the previous threshold of 1,000 vehicles whatever a community's population.

Finally, the NYSDEC has created a new threshold for when an action that is located wholly or partially within or substantially contiguous to a National Register listed historic site becomes a Type I action and it added properties determined to be eligible for inclusion on the State Register of Historic Sites to the Type I list.

These changes to the Type I rules are likely to expand the number of developments and actions that will be deemed Type I actions, although by how many remains to be seen.

There is another notable change regarding Type I actions in the proposed SEQR Handbook. Before Jan. 1, 2019, a lead agency could waive or excuse the requirement of filing an EAF for a Type I action. Now, the NYSDEC has eliminated the ability of a lead agency to waive the requirement for an EAF even if a project proposal is accompanied by a draft environmental impact statement. The NYSDEC explained that it made this change because, as discussed below, it generally made "scoping" mandatory, effective Jan. 1, 2019, as the first step in drafting an environmental impact statement once a determination of significance has been made.

Scoping

Scoping is a process that develops a written document known as the "scope"

that outlines the topics and analyses of potential environmental impacts of an action that will be addressed in a draft environmental impact statement. The process for scoping is set out in 6 NYCRR 617.8.

The purpose of scoping, according to the NYSDEC, is to narrow issues and ensure that the draft environmental impact statement will be a concise, accurate, and complete document that is adequate for public review. The scoping process is intended to

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ensure public participation in the environmental impact statement development process, allow open discussion of issues of public concern, and permit inclusion of relevant, substantive public issues in the final written scope.

Up until the adoption of the recent amendments to the SEQR regulations, environmental impact statement scoping has been an optional procedure.

The proposed new SEQR Handbook makes scoping mandatory for every draft environmental impact statement (except that mandatory scoping does not apply to supplemental environmental impact statements). With regard to scoping, the NYSDEC has explained that the scoping requirement would yield shorter environmental

impact statements that focus on the relevant and significant adverse environmental impacts associated with a proposed action. In the NYSDEC's opinion, the better the scope, the better the quality and efficiency of the environmental impact statement process.

Conclusion

The NYSDEC is accepting comments on the proposed SEQR Handbook until Feb. 1, 2019. Given that the NYSDEC's proposal reflects changes to the SEQR rules that were approved on June 27, 2018, it would appear that the proposal is likely to become effective in substantially its current form. Because of the significance of the changes discussed above, and other important changes reflected in the proposed SEQR Handbook—for instance, environmental impact statements now will have to address the effects of climate change—it behooves all parties involved in property development and other activities subject to SEQR to become very familiar with the new version of the SEQR Handbook once it is finalized.