In September 2012, the New York State Department of Environmental Conservation (NYSDEC) proposed the most significant changes to the regulations governing the State Environmental Quality Review Act (SEQRA) since the mid-1990s. It accepted comments and the comment period closed.

In the years that followed, however, the NYSDEC did not finalize the changes it proposed to the existing SEQRA regulations, available at 6 NYCRR Part 617. That now appears to be changing.

The NYSDEC recently issued a draft generic environmental impact statement (EIS), available at http://www.dec.ny.gov/docs/permits_je_operations_pdf/drft617geis.pdf, explaining its rationale and its objectives for the changes it proposed in 2012. The EIS discusses the comments the NYSDEC received in response to the 2012 proposal and its proposed final regulations.

The NYSDEC believes that the regulations it is proposing to finalize now would “streamline” the SEQRA process without sacrificing “meaningful environmental review.” It also suggests that, in many instances, costs for developers, property owners, and local governments actually could decrease under the new rules.

Whether these goals will be met in practice of course remains to be seen. Clearly, though, the NYSDEC’s proposed final regulations, which now appear on the verge of being adopted, will affect SEQRA practice for many projects across the state.

Type II Projects

SEQRA does not require certain actions—known as Type II actions—to undergo SEQRA review. The NYSDEC proposes to add over a dozen different specific actions to this category of actions not subject to SEQRA review.

For example, in a city, town, or village with an adopted zoning law or ordinance, reuse of a commercial or residential structure not requiring a change in zoning or a use variance would be a Type II action unless it meets or exceeds certain specified thresholds. The NYSDEC suggests that this would expedite redevelopment, for housing or commercial purposes, of the many structures in the state that currently are vacant.

Additionally, in cities, towns, and villages with adopted subdivision regulations, a “minor” subdivision would include as a Type II action the installation of cellular antennas or repeaters on certain existing structures.

The proposed final regulations would be a Type II action provided that it does not involve the construction of new roads, water, or sewer infrastructure and provided further that it is not part of a larger tract subdivided within the previous 12 months. The NYSDEC supports this change based on its belief that the ability of municipalities to condition or deny approvals for these projects provides assurances that

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these actions would not have a significant effect on the environment. The NYSDEC also would permit, under specified conditions, a sliding scale of development based on population levels on lots with previous construction that have existing road, sewer, and water infrastructure. It reasons that the development of sites that have been previously disturbed and that have existing infrastructure results in less environmental impact than developing undisturbed sites, and it acknowledges that these impacts can be “readily addressed through the land use review process.”

Currently, neither SEQRA nor the NYSDEC regulations mandate scoping for any project, but the NYSDEC’s proposed final regulations would change that.

The NYSDEC also would classify as a Type II action a recommendation of a county or regional planning board issued pursuant to General Municipal Law §§239-m or 239-n.

Another proposed Type II change involves the replacement, rehabilitation, or reconstruction of a structure or facility on the same site, including upgrading buildings to meet energy codes or to incorporate green building infrastructure techniques, within certain specified thresholds. The NYSDEC favors the installation of green roofs and other green infrastructure techniques because, it says, they can “substantially improve energy efficiency and reduce generation of runoff.” It says that the specified thresholds would place appropriate limits on the size of the projects that would fall within the Type II category.

Another “green”-related change would allow, as a Type II action, the installation of up to five megawatts of solar energy arrays on certain existing structures, including landfills, brownfield cleanup sites, and residential and commercial parking facilities. The NYSDEC’s rationale for these changes is quite straightforward: to reduce both energy costs and the generation of greenhouse gases.

Next, the proposed final regulations would include as a Type II action the installation of cellular antennas or repeaters on certain existing structures, given the current rule, 6 NYCRR § 617.5(c)(7), that precludes the installation of radio communication and microwave transmission facilities as a Type II action. Perhaps as a consequence, the NYSDEC has decided that these antenna and repeaters can in many locations be installed on existing buildings as a Type II action. Perhaps as a consequence, the NYSDEC has decided that these antenna and repeaters can in many locations be installed on existing buildings as a Type II action. Perhaps as a consequence, the NYSDEC has decided that these antenna and repeaters can in many locations be installed on existing buildings as a Type II action. Perhaps as a consequence, the NYSDEC has decided that these antenna and repeaters can in many locations be installed on existing buildings as a Type II action. Perhaps as a consequence, the NYSDEC has decided that these antenna and repeaters can in many locations be installed on existing buildings as a Type II action. Perhaps as a consequence, the NYSDEC has decided that these antenna and repeaters can in many locations be installed on existing buildings as a Type II action. Perhaps as a consequence, the NYSDEC has decided that these antenna and repeaters can in many locations be installed on existing buildings as a Type II action.

The NYSDEC is proposing to include specified brownfield site clean-up agreements as Type II actions. Currently, the NYSDEC has considered these types of agreements and clean-ups as civil or criminal enforcement proceedings under 6 NYCRR § 617.5(c) (29). It explains that, as more agencies start to enter into these agreements, its proposed change would clarify the correct SEQRA classification for these activities.

In addition, the acquisition, sale, lease, annexation, or transfer of any ownership of land to undertake any activity on the new list of Type II actions also would be a Type II action. The NYSDEC reasons that one of the basic concepts of SEQRA is the “whole action,” and that having the land transaction of a proposed activity subject to review under SEQRA when the activity itself is listed as a Type II action violates this concept. According to the NYSDEC, this “quirk” has resulted in affordable housing projects such as those sponsored by not-for-profit agencies being subjected to SEQRA review for the transfer of land from the municipality to the not-for-profit when the activity involved the construction of a one, two, or three family residence that was a Type II action. Adding this item to the Type II list would remove a “potential stumbling block to the construction of affordable housing,” according to the NYSDEC.

Another proposed change would add as a Type II action a municipal or state agency’s disposition of
land, by auction, where there is no
discretion on its part on the out-
come. The NYSDEC explains that a
municipality or a state agency may
acquire land through foreclosure or
other means where the land reverts
to the agency due to a failure of the
owner to remain current on prop-
erty taxes. State law requires that
the municipality or agency dispose
of this land through a public auction
to the highest qualified bidder; the
municipality or agency has no dis-
cretion but to abide by the results
of the auction. Currently, agencies
are required to perform a SEQRA
review in these circumstances. The
proposed final regulations recognize
the NYSDEC’s view that environ-
mental assessments under these
circumstances are fairly mean-
ingsless because the agency has no
idea of what the ultimate use of
the property will be by the new
owner at the time of the auction.

**Type I Actions**

The NYSDEC’s proposed final regu-
lations also would change the rules
for certain Type I actions, which are
actions that trigger SEQRA review.
The effect would be to increase the
numbers of actions subject to Type
I review.

For instance, the proposed final
regulations would reduce some of
the thresholds for residential sub-
divisions, thereby increasing the
number of projects subject to SEQRA
review.

To trigger Type I review, the
NYSDEC is proposing, depending
on the population of a city, town,
or village, to reduce the number
of units that the project proposes
to connect to existing community
or public water and sewage sys-
tems from 250 to 200; 1,000 to 500;
and 2,500 to 1,000. The NYSDEC
explains that its experience has
shown that the higher thresholds
were “rarely triggered because they
were set too high.”

Similarly, the proposed final
regulations would categorize as Type
I actions a project proposing to
add at least 500 parking spaces
in communities with a population
smaller than 150,000 persons and
at least 1,000 parking spaces for
communities with a larger popu-
lation.

**Scoping**

The proposed final regulations
also address “scoping,” which is
the process that the government
agency principally responsible for
reviewing a proposed development
may engage in if it determines
that the proposed development
has significant adverse impacts
requiring the preparation of a
full EIS. Scoping helps to focus
the EIS on potentially significant
adverse impacts while avoiding
undue consideration of irrel-
evant or insignificant impacts.

Currently, neither SEQRA nor the
NYSDEC regulations mandate scop-
ing for any project, but the NYSDEC’s
proposed final regulations would
change that.

The NYSDEC is proposing to man-
date scoping for every EIS, permit-
ting it to be initiated by the lead
government agency overseeing the
proposed project or by the project
sponsor.

**Conclusion**

There are other changes in the
proposed final regulations that
likely are of significance to devel-
opers, property owners, and local
governments, including changes
that would more precisely define
and tighten the acceptance pro-
dcedures for a draft EIS. All inter-
ested parties should recognize
that comments on the proposed
final regulations are due May 19,
2017. The NYSDEC has indicated
that the final regulations could
take effect as early as Oct. 23, 2017,
although it conceded that it could
change that date to three months
from the date of their adoption. At
last, it appears that the NYSDEC
is on the verge of finalizing new
SEQRA regulations.