

STATE ENVIRONMENTAL REGULATION

Expert Analysis

New SEQRA Regulations Finally Appear On the Horizon

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_ej_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

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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

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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

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. The NYSDEC says that it has received many questions about the SEQRA classification for installation of antennas and repeaters on 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, which also would avoid the need for construction of new towers. The proposed regulations also would classify installation of fiber-optic or other broadband cable technology in existing highway or utility rights-of-way as Type II actions.

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 outcome. 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 property 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 discretion 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 environmental assessments under these circumstances are fairly meaningless 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 regulations 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 subdivisions, 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 systems 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 population.

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 irrelevant or insignificant impacts.

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The NYSDEC is proposing to mandate scoping for every EIS, permitting 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 developers, property owners, and local governments, including changes that would more precisely define and tighten the acceptance procedures for a draft EIS. All interested 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.