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STATE ENVIRONMENTAL REGULATION

Expert Analysis

# DEC Proposes First Revisions To SEQRA Regulations Since 1996

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The New York State Department of Environmental Con-servation (DEC) is proposing significant amendments[1] to the regulations[2] that implement the State Environmental Quality Review Act (SEQRA).[3] According to the DEC, the proposed amendments are aimed at streamlining the SEQRA process "without sacrificing meaningful review."[4] Whether the SEQRA process would, in fact, be streamlined if these Proposed Amendments are adopted is debatable as they mandate certain steps that are optional under the current regulations and that lower threshold triggers for SEQRA review.

### Scoping

Under current regulations, scoping is a process that a lead agency may engage in if the proposed action is found to have significant adverse impacts that require the preparation of a full environmental impact statement (EIS).[5] "The primary goals of scoping are to focus an EIS on potentially significant adverse impacts and to eliminate consideration of those impacts that are irrelevant or not significant."[6]

Scoping is currently not mandated for any project, large or small.[7] However, state and local agencies that lead environmental review of large land use projects[8] typically engage in scoping to solicit public comments about potential adverse impacts, the extent and quality of the information needed to be presented in the EIS to address these impacts, mitigative measures, and alternatives to the proposed action.[9] Current regulations allow for the project sponsor to initiate scoping,[10] but that is less likely to occur.

In the Proposed Amendments, the DEC requires scoping for every EIS.[11] The DEC's explanation for changing scoping from optional to mandatory when an EIS is required to be prepared is that "all parties" have come to accept "the importance of public scoping as a tool to focus an EIS on the truly substantive and significant issues" and that "[s]eeking public input early in the EIS process helps to ensure that all of the substantive issues are identified prior to the preparation of the draft EIS."[12]

In addition, the Proposed Amendments place more emphasis than current regulations on using the environmental assessment form (EAF)[13] "as the first step in scoping."[14] The revised EAF is supposed to be more comprehensive and, in the DEC's view, "[t]his should allow a lead agency to assess, in a thorough fashion, all of the potential impacts and to establish a basis for determining those issues that need additional scrutiny in an EIS and issues that do not require any further analysis and that can be excluded from the scope of an EIS."[15]

While mandating scoping for all projects that need an EIS to be prepared is likely to increase the time needed to complete the SEQRA review, there are some changes in the proposed amendments relating to scoping that may speed up the process. For example, the DEC expects that the proposed scoping will eliminate the need to collect and include in the EIS unnecessary information that is neither substantive nor significant, but often is included in an EIS as a defensive measure, in an effort to have a "bullet proof EIS" that is not likely to be rejected by the lead agency or successfully challenged by opponents of the project.[16]

The DEC also is proposing "better guidance" relating to the basis for a lead agency to accept or reject a draft EIS for adequacy.[17] Currently, a project sponsor is "responsible for accepting or deferring issues following the preparation of the final written scope" and the "lead agency cannot reject a draft EIS as inadequate if the project sponsor has decided to defer an issue and treat it as a comment on the draft EIS."[18] The proposed amendments provide that information submitted after the final scope is completed "and not included by the project sponsor in the draft EIS cannot be the basis for the rejection of a draft EIS as inadequate."[19]

### Type I Actions

Another significant area of change in the proposed amendments relates to Type I actions, which are presumed to have significant adverse impacts requiring the preparation of an EIS.[20]

The DEC is proposing to decrease some of the thresholds applicable to residential subdivisions so that more of them fall within Type I actions. This may be due to the DEC's perception that the current residential subdivision thresholds for Type I actions are too high and result in many large projects not undergoing rigorous environmental review. For example, the proposed amendments would require Type I review for (i) residential developments with 500 or more parking spaces in communities with a population of 150,000 or less, and (2) residential developments with 1,000 or more parking spaces in communities with a population of 150,000 people or more.

According to the DEC, the proposed amendments are aimed at streamlining the SEQRA process "without sacrificing meaningful review."

In addition, the proposed amendments significantly reduce the number of units proposed to be connected to existing community or public water and sewage systems that would trigger Type I review. In communities with a population of 150,000 or less, the number of units triggering Type I review would be reduced from 250 to 200. In communities with a population of greater than 150,000 but less than one million, the number of units triggering Type I review would be reduced from 1,000 to 500.

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In communities with over one million in population, the number of units triggering Type I review would be reduced from 2,500 to 1,000.[21]

The proposed amendments also would elevate to a Type I action any Unlisted action[22] that exceeds 25 percent of any threshold found in 6 NYCRR 617.4 occurring wholly or partially within or substantially contiguous to a historic resource.[23] As a result, more projects will require Type I review.

### Type II Actions

On the other hand, the DEC is proposing to broaden the list of actions that will not require review under SEQRA (so-called "Type II actions").[24] The DEC asserts in the proposed amendments that this will "allow agencies to focus their time and resources on those projects likely to have significant adverse impacts on the environment."[25] The DEC also asserts that another reason for adding to the list of Type II actions is to "try and encourage environmentally compatible development."

The DEC is proposing to broaden the list of actions that will not require review under SEQRA. The DEC asserts in the proposed amendments that this will "allow agencies to focus their time and resources on those projects likely to have significant adverse impacts on the environment."

The DEC believes that many of its proposed additions to Type II actions will "encourage development in urban areas vs. development in greenfields, and will encourage green infrastructure projects and solar energy development." Other proposed additions to Type II actions are aimed at removing "obstacles encountered by municipalities when developing affordable housing in cooperation with not-for-profit organizations." The overall goal "is to provide a regulatory incentive for project sponsors to further the State's policy of sustainable development," according to the DEC.

There are a number of actions that the proposed amendments would classify as Type II and make exempt from SEQRA review. For example, in municipalities with adopted subdivision regulations, subdivisions involving 10 acres or less and defined as minor under the municipality's regulations or subdivisions of four or fewer lots, whichever is less, would be exempt.

The proposed amendments also would exempt, in the municipal center of a city, town, or village having a population of less than 20,000, with adopted zoning regulations, construction or expansion of a residential or commercial structure or facility involving fewer than 8,000 square feet of gross floor area or construction or expansion of a residential structure of 10 or fewer units where the project is subject to site plan review and will be connected (at the commencement of habitation) to existing community-owned or public water and sewerage systems, including sewage treatment works that have the capacity to provide service, and does not involve the construction of new public roads.

Moreover, in the municipal center of a city, town, or village having a population of greater than 20,000 but less than 50,000, with adopted zoning regulations, there would be an exemption for construction or expansion of a commercial or residential structure or facility involving less than 10,000 square feet of gross floor area or construction or expansion of a residential structure of 20 or fewer units where the project is subject to site plan review and will be connected (at the commencement of habitation) to existing community or public water and sewerage systems, including sewage treatment works that have the capacity to provide service, and does not involve the construction of new public roads.

In the municipal center of a city, town, or village having a larger population—of greater than 50,000 but under 150,000—with adopted zoning regulations, there would be an exemption for construction or expansion of a commercial or residential structure or facility involving less than 20,000 square feet of gross floor area or construction or expansion of a residential structure of 40 or fewer units where the project is subject to review under local land use regulation, and will be connected (at the commencement of habitation) to existing community or public water and sewerage systems, including sewage treatment works that have the capacity to provide service, and does not involve the construction of new roads;

The proposed amendments also would exempt certain actions in even larger cities. In particular, in the municipal center of a city, town, or village having a population of greater than 150,000, with adopted zoning regulations, there would be an exemption for construction or expansion of a commercial or residential structure or facility involving less than 40,000 square feet of gross floor area or construction or expansion of a residential structure of 50 or fewer units where the project is subject to review under local land use regulation, and will be connected (at the commencement of habitation) to existing community or public water and sewerage systems, including sewage treatment works that have the capacity to provide service, and does not involve the construction of new roads.

Finally, the proposed amendments would create other exemptions, including for:

- Replacement, rehabilitation, or reconstruction of a structure or facility using green infrastructure techniques, unless it meets or exceeds certain specified thresholds;
- Installation of rooftop solar energy arrays on an existing structure that is not listed on the National or State Register of Historic Places or installation of less than 25 megawatts of solar energy arrays on closed sanitary landfills;
- Installation of cellular antennas or repeaters on an existing structure that is not listed on the National or State Register of Historic Places; and
- Brownfield site clean-up agreements under Title 14 of ECL Article 27.

### Timing

Finally, the DEC is proposing to amend the SEQRA regulations to revise the timeline for the completion of a final EIS, stating that the current language regarding the time frame for the preparation of a final EIS—which requires that a final EIS be prepared within 45 days after the close of any hearing or within 60 days of the filing of the draft EIS—is "unrealistic," and acknowledging that it is "[r]arely, if ever" met. The proposed amendments would extend this time frame and provide "certainty" for when the EIS process will end by stating that if a final EIS is not prepared and filed within 180 calendar days after the lead agency's acceptance of the draft EIS, the EIS shall be deemed complete on the basis of the draft EIS, public comment, and the response to comments prepared and submitted by the project sponsor to the lead agency.

### Conclusion

The comment period for the proposed amendments has closed and developers, property owners, and local governments no doubt are eagerly awaiting the DEC's fin=al regulations. Given what is contained in the proposed amendments, the final regulations are likely to affect SEQRA practice for a great number of projects.

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*1. See "DRAFT SCOPE for the Generic Environmental Impact Statement (GEIS) on the Proposed Amendments to the State Environmental Quality Review Act (SEQRA)," available at http://www.dec.ny.gov/docs/permits_ej_operations_pdf/drftscope617.pdf.*

*2. Title 6, New York Code of Rules and Regulations (6 NYCRR), Part 617.*

*3. New York Environmental Conservation Law Art. 8.*

*4. Proposed Amendments, at 1.*

*5. 6 NYCRR §617.2(af); 6 NYCRR §617.8.*

*6. Proposed Amendments, at 6.*

*7. 6 NYCRR §617.8(a).*

*8. A lead agency typically is the involved agency that is principally responsible for carrying out, funding, or approving a proposed development. See http://www.dec.ny.gov/permits/6451.html. In the vast majority of instances, a lead agency is a local planning board or other local governmental agency that needs to approve the proposed action.*

*9. 6 NYCRR §617.8(f).*

*10. 6 NYCRR §617.8(a).*

*11. See Proposed Amendments, at 6.*

*12. Id., at 5-6.*

*13. See Full Environmental Assessment Form, available at http://www.dec.ny.gov/docs/permits_ej_operations_pdf/longeaf.pdf.*

*14. Proposed Amendments, at 6.*

*15. Id., at 6.*

*16. Id., at 6.*

*17. Id., at 6.*

*18. Id., at 6. See also 6 NYCRR §617.8(h).*

*19. Proposed Amendments, at 6.*

*20. 6 NYCRR 617.4.*

*21. Proposed Amendments, at 3.*

*22. An Unlisted action means any action not classified as a Type I action (those that require full SEQRA review) or Type II action (those that are not submited to review under SEQRA.) See 6 NYCRR §§617.2(ak), 617.4 and 617.5.*

*23. Id., at 3.*

*24. See 6 NYCRR § 617.5.*

*25. Proposed Amendments, at 4.*