New York State Environmental Quality Review Process

The Environmental Impact Statement

1

Where have we been?

" We don't know where we're going, but we're making good time"

It's time for a little review

2

Preparing the Full EAF

Who Does What?

Part 1: Site and Project Descriptions
< Prepared by Project Sponsor
Part 2: Project Impacts and Magnitude
< Prepared by Lead Agency
Part 3: Importance of Impacts Identified in Part 2
< Prepared by Lead Agency

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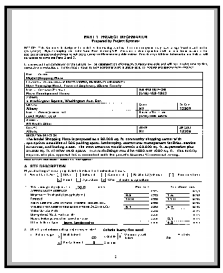
EAF - Part 1

Project and Site Information



Project sponsor prepares and submits with application
- < Provides information on project and site
- < Includes list of other agencies which may have jurisdiction

Lead Agency should review for accuracy
- < Check for inconsistencies
- < Note corrections, or return to sponsor

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Additional Sources of Information

In addition to Part 1, also consult:

application plus supporting maps or studies;
resource and reference maps like wetlands, stream classifications, flood hazard, agricultural districts, archaeological or historic sites;

published sources like soil surveys, traffic studies and plans, or local histories;
other agencies, such as State Transportation or local highway departments;
local resources like county planners or historians.

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EAF - Part 2

Identify Possible Impacts Within Major Categories:

Land # Water # Air # Plants & Animals
Agricultural Land
Aesthetics
Historic & Archaeologic
Open Space & Recreation
Critical Environmental Areas
Transportation # Energy
Noise & Odor # Public Health
Growth & Community Character

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EAF - Part 2

Determine Magnitudes of Potential Impacts

Lead Agency must complete
Identify potential impacts of proposed action
< Yes if any impact possible
< Maybe should be treated as Yes
Compare elements of proposed action to examples and thresholds
< Size only: small-to-moderate v. large
< Large impact is not always significant impact
Be reasonable
< Use Part 2 examples as a guide

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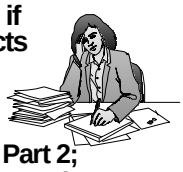
EAF - Part 3

What and when?

Lead Agency uses Part 3 to evaluate potential impacts, leading to determination of significance.
Lead Agency must complete Part 3 if one or more potentially large impacts are identified in Part 2,
Should complete Part 3 if any impacts are identified:
< Describe each impact identified in Part 2;
< If project changes could mitigate OR reduce impacts, describe those changes;
< Decide if any of the impacts identified as "potentially large" are important.



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EAF - Part 3

Importance of Potential Impacts

Assess for each identified potential impact:

Probability that the impact will actually occur;
Likely duration of the impact;
Whether impact is reversible, and resources lost;
Whether mitigation can and will be implemented;
Whether impact will have broader effects;
Any divergence from local goals or needs; and
Whether stated objections relate to this impact.

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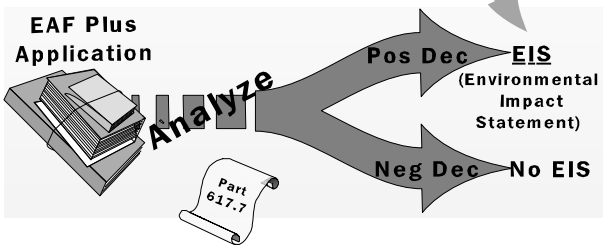
After a Positive Declaration

"You Are Now Here"



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The Environmental Impact Statement (EIS) Process

Basic Steps

- < Positive Declaration
  - < Scoping (*Optional)
    - < Draft Environmental Impact Statement (DEIS)
      - < Public Review
        - < Final Environmental Impact Statement (FEIS)
          - < Agency Findings and Actions

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Who Does What?

At Each Step in the EIS Process

Positive Declaration:
- < Lead Agency issues

Scoping (*Optional):
- < Lead Agency directs
- < Applicant or Project Sponsor must participate
- < Other Agencies and the Public should participate

DEIS:
- < Applicant/Sponsor prepares; and
- < Lead Agency determines adequacy

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Who Does What? (continued)

(after DEIS is determined adequate ...)

Public Review:
< Lead Agency directs
< Involved and Interested Agencies plus the Public should participate

FEIS:
< Lead Agency

Agency Findings and Decision or Action:
< Each Involved Agency

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Scoping

Discussion Question:

How can an involved agency productively contribute during scoping?

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Scoping

What is Scoping?

"Scoping" is an <u>optional</u>, <u>public</u> process for outlining DEIS content:
< started by an initial submission from the sponsor or applicant;
< directed by the lead agency;
< includes input from lead, involved, interested agencies and members of the public; and
< leads to creation of an EIS "scope".

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Scoping

What is a Scope?

The "scope" is a written product which specifies the range of a DEIS, including:
< the project's environmental setting;
< a summary of its anticipated significant adverse environmental impacts;
< existing, relevant studies and data;
< all needed studies or models;
< potential mitigation measures;
< feasible alternatives; and
< issues not to be included in the DEIS.

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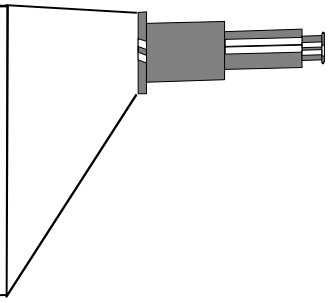
Why Scope?

< Focus the DEIS on Significant Issues
< Identify needed information
< Eliminate non-significant issues
< Identify Alternatives
< Identify mitigation measures
< Provide opportunity for other agency and public input



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Scoping Steps 1 & 2

Applicant:
< prepares draft scope, and
< submits it to lead agency.
Lead agency must:
< send copy to involved agencies;
< conduct its own technical review; and
< arrange for public review and input.

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Scoping Steps 3 & 4

Lead agency must:
< compile comments from its own review, involved agencies, and the public; and
< prepare final written scope based on draft scope and all comments.

Lead agency:
< provides final written scope to sponsor or applicant within 60 days of receiving draft scope; and
< sends copies to involved agencies plus individuals who have so requested.

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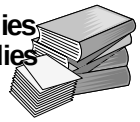
Fine-tuning Your Scope

Using Existing Information

Incorporate results of existing studies
< Limit number or range of new studies
< Eliminate issues



Examples of available information:
< Applications, EAF, site maps and plans
< Prior EIS's -
• Generic EIS's for site, area, or project type
• Individual EIS's on same site or similar projects
< Adopted plans (local, regional, state, federal)
< Natural and cultural resource inventories

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Fine-tuning Your Scope

Practical Suggestions

Develop agreement of affected parties on specifications for models or studies, such as:
< Neighbors and involved agencies help set receptor points for air, noise or visual analyses
< Technical staff in lead or involved agencies help determine analytical standards for models

Record basis for excluded issues, such as:
< Citations to prior studies

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Scoping - Practitioners' Tips

Seeking and Using Public Input

Regulations require "opportunity for public participation" but do not specify how
Lead agency has flexibility to adapt methods to nature and setting of each project
Suggestions:
< Notify public via mass media, published notices, mail, posters, or combine several methods
< Take written comments, hold a meeting, or both
< Make draft scope and files available locally

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Scoping - A Few Last Tips

Staying On Track

Do advance work!
< Set up clear communication lines:
• Develop primary contacts in agencies and citizen groups
• Designate information point in lead agency
< Set up supplemental file locations
< Educate local media
< Establish and stick with clear ground rules for written or oral comments, such as:
• Address DEIS content, not feelings about project
• Allow all to speak even if it requires time limits

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What If There Is No Scope?

DEIS Can Proceed, But ...

Lead Agency must still evaluate adequacy of DEIS after it is submitted
Less clear focus for contents of DEIS
< Tendency to "cover all bases" dilutes discussion of key negative impacts
Agencies and affected parties are unable to specify the content they need in the DEIS
< No input on specifications for studies or models
< Mitigation measures and alternatives to be included in DEIS may not be clearly specified

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Preparing the DEIS

Practical Suggestions

Have a clear outline and table of contents
Use existing information whenever possible
  < Caveat: make sure it's still accurate
Think about readability:
  < Summarize studies in main text
  < Keep detailed data and methods in appendices
Clearly link studies and data to identified impacts
Include maps and plans at scales to let readers locate the general area and project site

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Determining DEIS Adequacy

Standards

If scoped, compare to scope
Sufficient for agencies to use as decision basis?
  < All relevant and material facts included?
  < Significant adverse impacts analyzed:
    • Identified during scoping; or
    • Reasonably anticipated?
  < All reasonable alternatives evaluated?
"... Analytical, not encyclopedic"
Flexible overall format with some content and title requirements [§§(b)(3 - 5)]

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Public Review of a DEIS

Discussion Question:

What level of detail is appropriate in a DEIS, or in an involved agency's comments on a DEIS?

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Evaluating the DEIS

"Who, What and When?"

Lead Agency must review DEIS to determine adequacy for public review
< Evaluate underlying information as well as document itself
< All impacts, mitigation and alternatives discussed?
< 45 days to review an initial submission
< 30 days for a resubmission

Public review and comment starts after DEIS is accepted by Lead Agency

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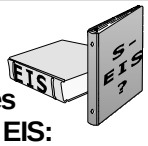
Supplemental EIS's

When? How? Why?



Can supplement draft <u>or</u> final EIS
Subject to all standard EIS procedures
Determining need for a supplemental EIS:
< Only if original EIS does not adequately address <u>new</u> information or issues
< May be related to changes in proposed project, change of circumstances related to the project, or new information
< If newly discovered information, lead agency must evaluate -
- Importance and relevance of new items
- Information in original EIS

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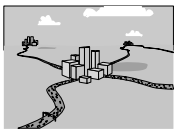
Generic EIS's

Optional for Lead Agency

To address:
< Impacts common to a series of nearby or closely-related projects; OR
< Broad impacts of a plan for a specific area or parcel; OR
< General impacts of a policy or regulation.



Follow all requirements for notice and review.
May require later supplements for specific projects or changes in plans and policy.

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Filing & Notice Requirements

EIS Notices and Findings

File Notices of Draft and Final EIS Completion, Notice of Hearing (if any) and Findings with:
- < Involved Agencies
- < Applicant
- < CEO of municipality
- < Any individual who has requested a copy

Publish in ENB:
- < All EIS and SEQRA Hearing Notices

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Public Review of a DEIS

What, When and How?

Lead agency acceptance of DEIS starts a public review period:
- < "Public review" includes public plus involved and interested agencies
- < No less than 30 days if no hearing
- < At least 10 days after close of hearing if one is held
- < Lead agency has discretion whether or not to hold a hearing

Deadline and contact point for written comments is included in notice of completion of DEIS
- < Lead agency may disregard late comments

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Commenting on a DEIS

When You're Not the Lead Agency

Involved and interested agencies' review should concentrate on DEIS sections related to their mandates and responsibilities
- < Ensure analysis is adequate to support required decisions

Comments from public should focus on issues and adequacy of information
- < Relate comments on specific parts of DEIS to actions lead agency can take
- < Avoid using DEIS comments as a "soapbox" to air opinions about project

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The FEIS

Responsibility of Lead Agency

Lead Agency is ultimately responsible for accuracy and adequacy of the FEIS
The FEIS must contain:
< The DEIS, revised or supplemented if necessary
< Copies or summaries of all substantive comments on the DEIS, with sources identified
< Responses to all substantive comments
File within 45 days of close of hearing, or 60 days after filing DEIS if no hearing

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After the FEIS

Following through ...

Lead Agency must file and issue Notice of Completion of FEIS:
< Minimum 10-day public review period before findings and decisions can be issued
< If action involves an application, decision must be issued within 30 days of filing of notice
Lead and each involved agency must issue their own findings and decisions
Findings and decisions may be made at the same time

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After the FEIS

Discussion Question:

What are an involved agency's options if an FEIS is unresponsive to comments on the DEIS?

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This presentation is based upon a program originally prepared by the Department of Environmental Conservation

Http://www.dec.state.ny.us

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State Environmental Quality Review (SEQR) Handbook*

* Posted in cooperation with the New York State Department of Environmental Conservation.

Since it first appeared in March 1982, the SEQR Handbook has been a very popular reference book for state, county and local government officials; environmental consultants; attorneys; permit applicants; and the public at large. However, the publication is now out of date.

The Department of Environmental Conservation SEQR staff have been working on updates to the SEQR Handbook. (The section posted on the Department of State website has been drafted by a DOS attorney and reviewed by DEC technical staff.) As the draft of each section is completed, it will be posted on the DEC website at www.dec.state.ny.us/website/dcs/seqr/handbook/index.html.

A final version of the handbook will be prepared and distributed in hard copy and posted to the DEC website, once all the sections have been introduced and then final drafts prepared based on comments received.

DEC welcomes your comments! To send comments, suggestions or corrections please click on the e-mail link here: Comments

If you prefer to send comments via surface mail, you may send them to:

NYSDEC
Division of Environmental Permits
Attn: Andrea Bergstrom
625 Broadway, 4th Floor
Albany NY 12233-1750

SEQR Handbook: SEQR and Local Government

Click on a question below to go directly to that topic, or scroll down for full text.

Which local governments must comply with SEQR?
Which local government decisions are subject to SEQR?
What local government actions do not require SEQR review?
If an action is classified as a Type II action, is SEQR review required of the municipal board before it undertakes, approves or funds the action?
Is a municipality required to apply SEQR even if its present procedures incorporate environmental considerations (for example, a site plan review law containing performance standards for visual impacts)?
How does a municipality integrate SEQR into its decision-making processes?
May a municipal board delegate its SEQR duties to another board?
If a proposed development will require approvals by agencies in two or more municipalities, how are these multiple reviews integrated?

Does a municipal board have to consider extraterritorial environmental impacts, e.g., impacts occurring in an adjoining municipality?
When a municipal board such as a conservation advisory council or planning board is acting in an advisory role only can it be designated as the lead agency?
If my board is reviewing, for example, a special use permit application, or any other type of application, what difference does it make if the applicant prepares an EIS or just submits a long-form EAF with heavy documentation?
Does the building inspector's issuance of a building permit require SEQRA review?
When would the building inspector's or code enforcement officer's issuance of a building permit not be classified as a Type II action and therefore require review under SEQRA?
If issuance of a building permit for a project is ministerial and no local discretionary approvals are required, may SEQRA be applied by the local government?
Can a ministerial permit be issued while SEQRA review of an action is being conducted?
Are municipal land use moratoria subject to SEQRA?
If a municipality adopts a moratorium on development projects and includes projects that are currently in the review process does the SEQRA review also stop for those projects in the pipeline?
Does SEQRA apply to the adoption of a comprehensive plan?
What is the best way for a municipality adopting a comprehensive plan to comply with SEQRA?
Should a GEIS be prepared for all comprehensive plans?
Are all municipal plans subject to SEQRA?
What zoning activities are subject to SEQRA?
Which board is responsible for the conduct of SEQRA when local zoning decisions are made?
In a community adopting zoning for the first time, what are the SEQRA responsibilities of the zoning commission?
Are there differences, for SEQRA purposes, between a zoning change sought by a project sponsor and one initiated by the municipality?
When a zoning change is a direct action and no physical changes or projects are proposed, what should be considered in the SEQRA review?
Can the environmental review of rezoning be segmented from the environmental review of any site specific projects that may come about as a result of the rezoning?
What types of variances are classified as Type II actions, and, therefore, exempt from SEQRA?
Does a zoning board of appeals, when interpreting a zoning law or ordinance have to apply SEQRA?
Is a use variance that changes the allowable uses on 25 or more acres of land a Type I action?
Is a ZBA decision subject to SEQRA when it is an interpretation of the zoning ordinance or the review of a decision of a zoning enforcement officer?
How should SEQRA be applied to a zoning board's review of a use variance application?
How should SEQRA be applied to area variance requests?
How does a board integrate SEQRA into the special use permit process under General City Law §27-b, Town Law §274-b and Village Law §7-725-b?
How can SEQRA be integrated into the site plan approval process?
If a public hearing is to be held on an application for site plan review, how should the public hearing be timed with SEQRA?
How can the determination that an application for site plan review is complete be timed with the SEQRA determination on whether to require an EIS for the project?
How does the planning board procedurally implement SEQRA for subdivision applications?
How is SEQRA procedurally implemented into the review of a subdivision where the local law

provides for preliminary plat approval that is preceded by sketch plan review?
How is SEQRA procedurally implemented into "one-stage" subdivision reviews (where preliminary and final plat approvals are merged)?
Can a planning board reviewing a subdivision wait until the close of the public hearing to determine whether to require an EIS?
What types of actions by county government affecting local development are subject to review under SEQRA?
Should local planning and zoning boards ask county planning agencies for assistance in deciding whether to require an EIS?
Do county planning agency reviews of certain zoning, site plan and subdivision applications under General Municipal Law (GML) §§239-m and 239-n require SEQRA review?
Are county health departments considered involved agencies when they approve on-site sewer and water for "realty subdivisions?
What role does a county Environmental Management Council (EMC) or similar county environmental advisory body have in the SEQRA process?
Does the fact that Class A and B Regional Projects (as defined by the Adirondack Park Agency Act) are classified as Type II actions mean that local governments in the Adirondack Park do not have to apply SEQRA when conducting land use reviews of a project subject to the Adirondack Park Agency's Class A or B Regional Project review jurisdiction?
Can a municipal board charge the reasonable costs of environmental review to a project applicant?
How does SEQRA apply to capital improvements and other infrastructure development undertaken by local governments?
Are there capital improvement actions that are classified as Type II actions, which can be undertaken without SEQRA review?
If a municipality makes a bond resolution for a capital project does the bond resolution have to undergo SEQRA review and does the scope of such review cover the project that is being financed by the bond resolution?
Is a capital budget considered a sufficient commitment to the improvements listed within it to require a review under SEQRA before its adoption?
Is the acquisition or disposal of land associated with a capital improvement covered by SEQRA?
Must SEQRA be applied to budget items for purchase of equipment?
Are municipal annexations subject to SEQRA?
At what point in the annexation process should SEQRA be applied?
Can annexations associated with development proposals be reviewed separately from such development?
What if details of future development are not known?
What factors should be considered in establishing lead agency for an annexation?
What forms of public financial support of development incentives by a municipality are subject to SEQRA?
Are actions of local or county Industrial Development Agencies (IDA's) subject to review under SEQRA?

SEQR Handbook: SEQRA and Local Government

A. General Applicability of SEQR to Local Governments

Which local governments must comply with SEQR?
All local governments, including county legislatures and county agencies, city councils, town boards, village board of trustees, planning boards, zoning boards of appeal, school boards, and

industrial development agencies, must comply with SEQR.

Which local government decisions are subject to SEQR?
Most local government "actions" are subject to SEQR. Determining whether a governmental activity is an "action" under SEQR is the first step in deciding if SEQR applies. As defined by SEQR, the term "action" includes all discretionary decisions to fund, approve or directly undertake projects or physical activities that may affect the environment by changing the use, appearance or condition of any natural resource or structure. The definition also includes adoption of local laws, ordinances, and resolutions that may affect the environment. Specific examples of local government actions are:

- Adoption or amendment of a comprehensive plan
- Adoption or amendment of zoning laws and ordinances and amendments to zoning laws and ordinances
- Special use permit approvals
- Site plan review approvals
- Subdivision approvals
- Bond resolutions for municipal development projects
- Capital improvements
- Annexations
- Acquisition or sale of public lands

What local government actions <u>do not</u> require SEQR review?

Activities that do not meet the definition of "action" or that are classified as Type II actions do not require SEQR review. As for the Type II actions, included among them are some typical local government activities such as:

- Construction or expansion of a single-family, a two-family or a three-family residence on an approved lot;
- Granting of individual setback and lot line variances, granting of area variance(s) for a single-family, two-family or three-family residence;
- Official acts of a ministerial nature involving no exercise of discretion, including building permits and historic preservation permits whose issuance is predicated solely on the applicant’s compliance or noncompliance with the relevant building or preservation code(s);
- Collective bargaining activities;
- Adoption of a moratorium on land development or construction;
- Designation of local landmarks or their inclusion within historic districts.

If an action is classified as a Type II action, is SEQR review required of the municipal board before it undertakes, approves or funds the action?
No. The board should note the Type II classification of the action in the resolution approving the action or in a separate resolution prior to approving the action. The resolution should specify the item on the Type II list that covers the action.

Is a municipality required to apply SEQR even if its present procedures incorporate environmental considerations (for example, a site plan review law containing performance standards for visual impacts)?

Yes. Though seemingly redundant or overlapping, SEQR review is still required for actions even though the local or State law governing the proposed action provides for the consideration of the environment. In fact, many zoning actions taken under the municipal enabling acts provide for varying consideration of environmental factors. As a practical matter, the same information may form the basis for a SEQR decision to approve, reject, or approve a project with conditions and whether, for example, a project meets the locality's requirements for land use approval.

How does a municipality integrate SEQR into its decision-making processes?

If the action involves the review of a subdivision, General City Law §32, Town Law §276 and Village Law §7-728 (the State subdivision review enabling laws) incorporate SEQR directly into the overall subdivision review process. For other local government actions, there are a few basic rules to follow:

- First, the SEQR process should be started at the earliest practicable time in the review of a project or legislative decision.
- Second, an agency cannot fund, approve, or undertake an action until it has complied with SEQRA.
- Third, an application to fund or approve an action is not complete until a negative declaration has been issued or a draft EIS has been accepted by the lead agency as satisfactory with regard to scope, content and adequacy.

With regard to the third rule, there are some caveats. Historically, municipal boards used the public hearing forum to do fact finding on whether to require a draft EIS. At the same time, the public hearing ordinarily follows the determination that an application is complete. Because no application is complete until a negative declaration has been issued or the municipal board has accepted a draft EIS the public hearing must follow the determination on whether to require a draft EIS. To satisfy the rule here and to allow fact finding on whether to require a draft EIS, where necessary, municipal boards can hold a separate public hearing on whether to require a draft EIS or accept public comment on its determination to require or not require a draft EIS at the hearing held subsequent to determining that the application is complete. Along these lines, a negative declaration may be rescinded when, among other circumstances, new information is discovered. Finally, the third timing rule does not apply to the adoption of local laws and ordinances since neither involves an "application."

May a municipal board delegate its SEQR duties to another board?

No. A municipal board may not delegate SEQR to a separate board or agency if the other board or agency does not have decision making authority for the action being reviewed. SEQR is intended to make boards that are responsible for approving, funding or undertaking an action consider the environmental effects of their decisions. Delegating SEQRA-review to a non-involved agency is not permitted. A board may be assisted in its review by other agencies and staff with expertise on environmental issues. An example is where a planning board is assisted in its review of a subdivision by a municipal planner or a conservation advisory council. If an action involves the approval of more than one board, a lead agency may be picked from among the boards and thereby be primarily responsible for the SEQRA review of that action.

If a proposed development will require approvals by agencies in two or more municipalities, how are these multiple reviews integrated?
Because SEQRA requires agencies to look at the whole action and not to segment the review of

actions, the involved agencies of each municipality must participate in the SEQRA process and consider the whole action, including impacts in neighboring communities. If coordinated review is initiated or required by an involved agency, and the initial phases of a development occur in only one of the municipalities, but one or more of the municipalities will be ultimately involved, then each agency should be treated as involved agency at the beginning of the process.

Does a municipal board have to consider extraterritorial environmental impacts, e.g., impacts occurring in an adjoining municipality?

Yes. For example, a planning board reviewing a cellular communications tower visible from a neighboring community should consider the aesthetic impact of the tower on the neighboring community. A town planning board reviewing a big box development should consider the impact of the development on the community character of a neighboring village that might suffer business displacement as a result of the approval of the big box development. A third example is a community reviewing a shopping plaza that generates traffic on an adjoining community's roadway system. In that case, the host community's review should consider the traffic on the adjoining community.

When a municipal board such as a conservation advisory council or planning board is acting in an advisory role only can it be designated as the lead agency?

No agency can serve as the lead agency or be considered an involved agency on the basis of an advisory role. The same would apply to the county planning agencies, though their recommendations trigger special voting requirements.

If my board is reviewing, for example, a special use permit application, or any other type of application, what difference does it make if the applicant prepares an EIS or just submits a long-form EAF with heavy documentation?

The EIS process establishes a formal process for the identification and assessment of impacts, consideration of alternatives to the proposed action, and identification of mitigation measures for adverse impacts revealed in the EIS process. Through the various notice provisions of the SEQRA regulations, the public is given the opportunity for a greater role in the project review over that which may be required by the General City Law, Town Law or the Village Law (municipal enabling statutes). For an action (or project) that is the subject of a final EIS, the lead agency (or board) must make the SEQRA findings required by Section 617.11 (of 6 NYCRR). Notably, the findings require, based on a balancing of social and economic considerations with environmental considerations, the alternative that avoids or minimizes adverse impacts to the maximum extent practicable. In a nutshell, while SEQRA does not change the jurisdiction of an agency (or board), it overlays a formalized process for the consideration of environmental impacts onto an agency's (or board's) jurisdiction. It then imposes a findings requirement that forces the lead agency to consider alternatives and to then pick the alternative with the least impact while balancing social and economic considerations with environmental considerations.

B. SEQRA and Land Use Decisions

1. SEQRA and Building Permits

Does the building inspector's issuance of a building permit require SEQRA review?

SEQRA classifies as Type II actions official acts of a "ministerial" nature involving no exercise of discretion, including building permits, where the issuance of the permit is predicated solely on the applicant's compliance with the building code. (A "ministerial" act is one that involves direct adherence to a rule or standard with a compulsory result.) The building inspector's issuance of most building permits does not involve the exercise of discretion. In a typical situation if an application meets the requirements of the New York State Uniform Fire Prevention and Building Code then the building permit must be issued. The building inspector does not have any discretion in the matter. (If a building permit is issued following site plan review approval or the issuance of a special use permit, or both, the building permit should have to meet the requirements of those approvals. However, the code enforcement officer or building inspector is merely enforcing conditions that have already been established by the planning or zoning board.)

When would the building inspector's or code enforcement officer's issuance of a building permit not be classified as a Type II action and therefore require review under SEQRA?

There are instances where the issuance of building permit does involve the exercise of discretion by the building inspector. Some local laws give the building inspector some discretionary authority. For example, in some limited instances, building inspectors may have some authority to conduct site plan review. In that situation, the issuance of the building permit is no longer a ministerial action and SEQRA review is required.

If issuance of a building permit for a project is ministerial and no local discretionary approvals are required, may SEQRA be applied by the local government?

The local government has no opportunity to apply SEQRA because it has no discretionary approvals to give. If SEQRA review is conducted by a state or county agency, the local government may participate as an interested party, but not as an involved agency.

Can a ministerial permit be issued while SEQRA review of an action is being conducted?

A ministerial permit can be issued while the SEQRA review is ongoing if the permit can otherwise be issued. However, the activity allowed in the permit may not be undertaken because the SEQRA regulations [6 NYCRR §617.3(a)] state that no physical alteration related to an action shall be commenced by a project sponsor until the provisions of SEQRA have been complied with. The issuing official should notify the project sponsor of this prohibition. This would be particularly applicable to the issuance of demolition permits associated with a subsequent development action subject to review under SEQRA.

2. SEQRA and Land Use Moratoria

Are municipal land use moratoria subject to SEQRA?

Land use moratoria are classified as Type II actions, which means that a municipality adopting a moratorium is not required to undertake any SEQRA review with respect to the moratorium. A municipality adopting a moratorium should merely note the Type II classification in its resolution adopting a moratorium.

If a municipality adopts a moratorium on development projects and includes projects that are currently in the review process does the SEQRA review also stop for those projects in the pipeline?

Yes. This answer is based on the rule that SEQRA does not change the existing jurisdiction of agencies. SEQRA only applies when a board is authorized by some other statute to fund, approve or undertake an action (e.g., site plan, special use permit, or subdivision review). If the underlying review has been stayed by the moratorium then the SEQRA review is also stayed pending the end of the moratorium since the SEQRA review does not have independent life. Therefore, a moratorium on development projects that are in the "pipeline" would stay the SEQRA process.

3. SEQRA and Comprehensive Plans (or land use "Master plans")

Does SEQRA apply to the adoption of a comprehensive plan?

Yes. A municipality's adoption of a land use or "comprehensive plan" (as referred to in General City Law §28-a, Town Law §272-a, and Village Law §7-722) is not only subject to SEQRA but is classified as a Type I action in the SEQRA regulations. As a result, the adoption of a comprehensive plan is more likely to have a potentially significant, adverse impact on the environment, and, therefore, more likely to require the preparation of an EIS.

What is the best way for a municipality adopting a comprehensive plan to comply with SEQRA?

While it is possible to issue a negative declaration in connection with the adoption of a comprehensive plan, the generic EIS is the most appropriate way to analyze the environmental impacts of a comprehensive plan. The generic EIS is specifically designed to analyze actions that call for a series of subsequent actions such as a comprehensive plan. In most cases, the comprehensive plan will set out a series of follow-up actions such as the amendment or writing of zoning laws or ordinances. Second, the adoption of a comprehensive plan can be one of the most significant land use actions taken by a municipality. General City Law §28-a, Town Law §272-a, and Village Law §7-722 each provide that all city, town and village land use regulations must be in accordance with the comprehensive plan. Therefore, underlying all local land use regulations should be the comprehensive plan. The preparation of a generic EIS allows for a more searching review of the range of possible land use actions proposed in a comprehensive plan. Third, SEQRA provides an important incentive for preparing GEISs, namely, if a GEIS has been prepared, no further SEQRA compliance is required if a subsequent proposed action is carried out in conformance with the conditions and thresholds established for such actions in the generic EIS or its findings statement. In other words, the generic EIS can be used as a tool for preplanning actions that involve more than one step such as the adoption of a comprehensive plan which, in many cases, involves the re-drafting of zoning laws or ordinances.

If the municipality chooses to prepare a generic EIS for the comprehensive plan, the comprehensive plan and the generic EIS should be made available for public review as a joint document. Having both documents available at the same time provides for meaningful public review and assessment of the comprehensive plan along with consideration of the relevant environmental factors. Following public review and hearing, the final comprehensive plan and generic EIS and SEQRA findings would be produced and the lead agency can proceed with implementing the plan.

Should a GEIS be prepared for all comprehensive plans?

As mentioned above, it is lawful to prepare a long-form EAF and then issue a negative declaration for a comprehensive plan if there are no potentially significant adverse environmental impacts as a result of the plan's adoption. If a municipality goes ahead and prepares a draft, generic EIS and then determines that there are no potentially significant, adverse environmental impacts as a result of the plan's adoption, the municipality can issue a negative declaration based on the draft GEIS. Despite these options, the comprehensive nature of comprehensive plans and the need to inform and gain input from the public on long-range plans make the comprehensive plan process very compatible with the GEIS. Additionally, the long-form EAF addresses itself more to analyzing projects than planning documents, which is another reason why both the Department of Environmental Conservation and the Department of State recommend the use of the generic EIS for comprehensive plans.

Are all municipal plans subject to SEQRA?

No. Only those plans that may affect the environment and commit the municipality to a definite course of future decisions, such as a municipality's comprehensive plan. Sometimes municipalities engage in planning-like activities that affect the environment but do not commit the municipality to a definite course of conduct. For example, the establishment of a committee to do planning does not commit the municipality to a definite course of conduct.

4. SEQRA and Zoning, Special Use Permits, Variances and Zoning Board Interpretations

a. Zoning (in general) and Rezonings

What zoning activities are subject to SEQRA?

SEQRA applies to local government decisions to adopt zoning laws and ordinances or to modify existing zoning laws and ordinances. Certain zoning actions receive special attention under SEQRA. For example, zoning actions that change the allowable uses on twenty-five or more acres of land are classified as Type I actions. Special or conditional use permits also require SEQRA review. Finally, variances are subject to SEQRA, though, as mentioned below, certain types of variances are classified as Type II actions– making them exempt from SEQRA review.

Which board is responsible for the conduct of SEQRA when local zoning decisions are made?

The board with primary responsibility for making the zoning decision. Except with regard to subdivision regulations, which can only be administered by a planning board, there is significant variance among municipalities as to which of the various boards ordinarily established by a city, town or village will have primary responsibility for the various zoning decisions. If the zoning decision is legislative (such as a rezoning decision), then the board with primary responsibility, depending on whether the municipality is a city, town or village, will be the city council, the town board or the village board of trustees, respectively. If a municipality has zoning then it must have a zoning board of appeals. The statutory jurisdiction of the zoning board of appeals includes granting use and area variances as well as interpretations of the zoning law or ordinance. Thus, the zoning board of appeals will ordinarily be responsible for the conduct of SEQRA with regard to variances (interpretations are classified as Type II actions). Jurisdiction to issue special or

conditional use permits varies among municipalities. Typically, this function is usually given to either the zoning board of appeals or the planning board. Thus, for special or conditional use permits, the board with primary responsibility will usually be the zoning board of appeals or the planning board. Site plan review, which is a power given to municipalities separate and apart from zoning, is normally delegated to planning boards. Typically, planning boards have responsibility for making site plan review decisions. If more than one zoning-related decision is necessary for the same action and if the review is to be coordinated, then the boards must decide on which board is to be lead agency following SEQR's procedures for establishing lead agency. These procedures are described in 6 NYCRR §617.6 (b).

In a community adopting zoning for the first time, what are the SEQRA responsibilities of the zoning commission?

For towns and villages adopting zoning for the first time, Town Law §266 and Village Law §7-710 each require appointment of a zoning commission to formulate and recommend the law or ordinance. The zoning commission may be either a temporary, special board or the planning board – if one already exists. The town board or the village board of trustees, however, remains responsible for complying with SEQRA since the legislative boards ultimately decide whether to adopt the zoning proposed by the zoning commission. Nonetheless, the legislative bod may direct the zoning commission to assist it in preparing the environmental assessment form or the EIS.

Are there differences, for SEQRA purposes, between a zoning change sought by a project sponsor and one initiated by the municipality?

When a zoning change is initiated by the municipality on its own recommendation or at the request of residents, but no specific development project is planned (e.g., the zoning is changed to be consistent with actual use), the rezoning itself is the whole action and is classified as a direct action of local government. The determination of significance must consider the consequences of such rezoning on the environment, but it is not necessary to speculate about specific projects (see the next question and answer). In contrast, if the zoning change is proposed by a project sponsor, in conjunction with a proposal, the impacts of both the rezoning and the specific development must be considered in determining environmental impacts.

When a zoning change is a direct action and no physical changes or projects are proposed, what should be considered in the SEQRA review?

The SEQRA review should consider the relative impacts based on the proposed changes. In other words, the analysis should compare the relative impacts of land use and development (based on the existing zoning) and the proposed zoning. For example, the rezoning of agricultural land to a commercial or residential use might significantly affect community character, aesthetics, traffic and stormwater runoff. A municipality should consider the most intensive uses allowable under the proposed zoning to judge potential impacts. Keep in mind that rezoning itself may be more significant from the standpoint of SEQRA than the individual permitting of projects since a zoning change triggers a change in the allowable use of land and ostensibly individual projects consistent with that change will be considered in the future in the rezoned area. The use of a generic EIS is the best SEQRA-tool to analyze the rezoning actions for large-scale or significant changes.

Can the environmental review of rezoning be segmented from the environmental review of any site specific projects that may come about as a result of the rezoning?

Segmentation is contrary to the intent of SEQRA. (See ____ for discussion of segmentation.) Under certain circumstances, however, certain forms of segmentation may be reasonable. For example, if a landowner is seeking to rezone a parcel of land to conform the parcel to changing uses in the surrounding area, segmentation may be justified if the owner has no present plan to develop the parcel for a particular use. Nonetheless, the lead agency should conceptually review the potential impacts for the maximum development that could be realized on the rezoned parcel of land. In general, segmented review should be justified in writing and used sparingly.

Project sponsors may be unwilling or financially unable to provide detailed information about a project until the zoning question is resolved. However, this does not justify a segmented review. For situations where there are uncertainties about the specifics of development projects, the following options are suggested:

- If the lead agency determines that neither the rezoning nor the project, taken together, may have a significant environmental impact, it can issue a negative declaration.
- If the project or the zoning may result in significant impacts, the project sponsor may be required by the lead agency to prepare a generic EIS that analyzes the impacts of the zoning change. The generic EIS should also conceptually analyze the impacts of the proposed development, based on current information and reasonable projections without the need for detailed engineering. If the zoning decision allows the proposed use, a supplemental EIS may be needed to discuss specific impacts of the project in detail.

b. Variances and Interpretations

What types of variances are classified as Type II actions, and, therefore, exempt from SEQRA?

The granting of individual setback and lot line variances and area variances for a single-family, two-family or three-family residence.

Does a zoning board of appeals, when interpreting a zoning law or ordinance have to apply SEQRA?

No. As part of their appellate jurisdiction, zoning boards of appeals (ZBA) are specifically authorized to render interpretations of local zoning laws. Interpretations of the local zoning law by zoning boards are classified as Type II actions, which are exempt from SEQRA review.

Is a use variance that changes the allowable uses on 25 or more acres of land a Type I action?

No. The Type I classification for actions that change the uses allowable on 25 acres or more of land refers to legislative rezonings by either the city council, town board or the village board of trustees. Nonetheless, the practical effect of a variance that changes the allowable uses of land on 25 or more acres of land may be the same as a legislative rezoning that affected the allowable uses on 25 or more acres of land. Therefore, a zoning board would be prudent to scrutinize such a request to the same degree as if the action were classified as a Type I action. This can be done by, among other things, utilizing the long-form EAF and coordinating review with other involved agencies, if any.

Is a ZBA decision subject to SEQRA when it is an interpretation of the zoning ordinance or the review of a decision of a zoning enforcement officer?

No. ZBA interpretations are classified as Type II actions. The rationale for classifying ZBA interpretations as Type II actions is that they are akin to judicial interpretations and do not directly result in a decision to approve, fund or undertake an action.

How should SEQRA be applied to a zoning board's review of a use variance application?

SEQRA applies to a ZBA's consideration of use variance requests. Unlike area variances, where in certain limited circumstances they are classified as Type II actions, there are no Type II categories corresponding to use variances. Use variances will be classified as either Type I or Unlisted actions.

There is an overlap between the criteria for granting use variances and SEQRA considerations. To be eligible for a use variance under General City Law, Town Law and the Village Law, an applicant must demonstrate "unnecessary hardship." To prove unnecessary hardship the applicant must show, among other factors, that the variance, if granted, will not alter the essential character of the neighborhood. Also, under the General City Law, the Town Law and the Village Law, zoning boards, in granting use variances, are directed to preserve and protect the character of the neighborhood and the health, safety and welfare of the community. At the same time, closely akin to the use variance factors, SEQRA factors include community character and aesthetics. Procedurally, however, the zoning board must still apply the use variance criteria factors even where it issues a negative declaration under SEQRA.

Here is a suggested way to handle the overlap. The zoning board should determine based on the EAF and other information whether to require an EIS. This determination will come before the decision on the variance; in fact, this determination will be made as part of the determination on whether the application is complete for review purposes. Whether the variance, if granted, would alter the essential character of the neighborhood is something that the zoning board would consider in determining whether to require an EIS. If the zoning board were to determine that the variance, if granted, would not alter the essential character of the neighborhood, it would still have to determine whether based on the other SEQRA criteria to require the preparation of an EIS. If an EIS is required based on impacts to the neighborhood or community character or for any other SEQRA-relevant reason, the zoning board can proceed to consider the environmental related variance factors within the environmental impact statement process.

Another practical problem with variances is the potential for redundant SEQRA reviews. Once a use variance is granted, most municipalities will provide for either site plan review or special use permit review, or both, of the project that has been granted the variance. This subsequent review often requires SEQRA review unless the action is classified as a Type II action. This second review may result in needless repetition of the same SEQRA issues that were addressed during the variance stage of the review. One solution is to coordinate SEQRA review of the variance and the special use permit or site plan application, if coordinated is review is not otherwise required under the SEQRA regulations. This approach may result in more immediate cost to the project applicant. However, coordinated review avoids segmented and repetitive review of the action.

How should SEQRA be applied to area variance requests?

Certain area variances are classified as Type II actions, meaning that there is no SEQRA review. Type II actions include granting of individual setback and lot line variances and granting of area variances for a single-family, two-family or three-family residence. All other area variances would either be classified as Type I or Unlisted actions. The comments on projects that require both area variances and special use or site plan review applications, mentioned in answer to the proceeding question, applies to area variances.

c. Special Use Permits

How does a board integrate SEQRA into the special use permit process under General City Law §27-b, Town Law §274-b and Village Law §7-725-b?

Unlike subdivision reviews, the State enabling laws for special use permits does not directly integrate the SEQRA process into the process for reviewing special use permit applications. Procedurally, the board reviewing the special use permit application must: (1) decide whether to require an EIS prior to determining whether the application for site plan review is complete; and (2) complete the SEQRA process before making a final decision on the site plan application. Under State law, public hearings are mandatory for special use permits. Public hearings are optional under SEQRA. However, if a public hearing is held on the draft EIS then it should be combined with the public hearing on the special use permit. Since SEQRA contains a 14-day public notice requirement for public hearings, the public notice period should conform with the longer SEQRA period rather than the five or ten day notice usually required for the notice of public hearing for special use permit applications. More generally, it is a difficult exercise to interpose the SEQRA timeframes with the State enabling law time frames. Fortunately, this has been done schematically as follows: <Timeframe chart (not available at this time)>

5. SEQRA and Site Plan Review

How can SEQRA be integrated into the site plan approval process?

Unlike subdivision reviews (discussed below), the State enabling laws for site plan review (General City Law §27-a, Town Law §274-a, and Village Law §7-725-a) do not directly integrate SEQRA into the process of reviewing site plans. Procedurally, the board conducting site plan review must: (1) decide whether to require an EIS prior to determining whether the application for site plan review is complete; and (2) complete the SEQRA process before making a final decision on the site plan application. If a public hearing is required on the site plan and the board is requiring an EIS then the hearing on the site plan should also address SEQRA issues (though a public hearing on the EIS is optional).
It is a difficult exercise to interpose the SEQRA timeframes with the State enabling law timeframes. Fortunately, this has been done schematically as follows: <Timeframe chart (not available at this time)>

If a public hearing is to be held on an application for site plan review, how should the public hearing be timed with SEQRA?

As an initial matter, the State enabling laws for site plan review do not require municipalities to hold a public hearing on applications for site plan review unless the zoning board of appeals is the board charged by the locality with review of site plan applications. (In contrast, state law requires public hearings for subdivisions and special use permits). However, local governments may

require a public hearing on a site plan, notwithstanding the lack of such a requirement in the State law. The public hearing should follow the determination that the application is complete for review purposes. Under the SEQRA regulations, a municipality can not make the determination that an application is complete until either a negative declaration has been issued or a draft EIS has been accepted. If a municipality desires public input on the SEQRA determination it can hold an optional public hearing on any SEQRA-related issues prior to determining whether the application is complete. A municipality can also change a previously made determination of significance as a result of the public hearing based on, among other reasons, new information. However, the new information should be material. If the municipality requires an EIS, the public hearing on the application, whether it is optional or mandatory, should be combined with any public hearing on the draft EIS. Public hearings on draft EISs are optional.

How can the determination that an application for site plan review is complete be timed with the SEQRA determination on whether to require an EIS for the project?

The completeness determination should follow the municipal determination on whether to require an EIS. ("Completeness" in this case means "complete" for the purpose of starting the application review stage or that all of the basic application materials necessary for the board to make a decision on an application have been submitted to the board.) If an EIS is required, then the completeness determination should not be made until a draft EIS is accepted by the lead agency.

6. SEQRA and Planning Board Review of Subdivisions

How does the planning board procedurally implement SEQRA for subdivision applications?

For the "two-stage" subdivision review process set forth in the State's enabling laws for subdivision review (namely, Town Law §276, Village Law §7-728, and General City Law §32) the Legislature has directly integrated SEQRA into the statute. ("Two-stage" is the phrase used to described the process of first approving a "preliminary plat" and then a "final plat".) The statutory process is best understood in a series of flowcharts as follows: <Subdivision flow charts (not available at this time) >

How is SEQRA procedurally implemented into the review of a subdivision where the local law provides for preliminary plat approval that is preceded by sketch plan review?

There does not have to be a separate SEQRA review at the sketch plan phase of review since sketch plan review is an informal process that does not result in an approval or commitment by the lead agency. Where a local law does provide for sketch plan review, the planning board should, during the sketch plan phase, preliminarily classify the action, provide the applicant with an EAF, and identify other involved agencies. The planning board should also alert the project sponsor to potential environmental concerns including site limitations. The determination of significance and establishment of lead agency should not be made until the application for preliminary approval has been submitted. The reason for this procedure is that the sketch plan phase is too informal and early in the process of subdivision review to make these determinations.

How is SEQRA procedurally implemented into "one-stage" subdivision reviews (where preliminary and final plat approvals are merged)?

Many local governments provide for "one-stage" subdivision reviews, meaning that the subdivision plat is submitted to the planning board in final form without having a preliminary plat precede the

final plat. While one-stage reviews are authorized in the State enabling laws for subdivision review (General City Law §32, Town Law §276, and Village Law §7-728), the procedure for such reviews is not spelled out as it is for two-stage subdivision reviews. Many local governments provide for one-stage review in the case of "minor" subdivisions, which are defined, for example, to involve fewer lots or lots that are already connected to sewer and water, or both. (State law permits communities the flexibility to define ‘minor subdivisions" in other ways.) As for incorporating SEQRA into the one-stage review, municipalities can still follow the SEQRA procedure and timetables in the State statute. Under the State statute, SEQRA review is completed at the preliminary plat stage. Typically, the one-stage review simply merges the final approval into the preliminary approval stage. As a word of caution, the procedure for one-stage review and SEQRA should be spelled out in the local law or ordinance authorizing the one-stage reviews.

Can a planning board reviewing a subdivision wait until the close of the public hearing to determine whether to require an EIS?

No. The SEQRA regulations provide that no application for funding or approval of an action is complete until a negative declaration has been issued or a draft EIS has been accepted by the lead agency. Since the public hearing should not be held until the application is complete, the SEQRA determination on whether to require an EIS by necessity precedes the public hearing on the application. The difficulty with this sequence is that, on its surface, it would appear to rob the public of the opportunity to comment on whether an EIS should be required. While not a perfect solution, there are two ways to get public input on the SEQRA determination. First, the State enabling statutes do not preclude the planning board from holding an additional public hearing prior to the decision on whether to require an EIS. Another public hearing would have to be held once the SEQRA determination is made and the application is determined to be complete. Or, in lieu of holding an additional public hearing, the planning board can receive comment on the SEQRA determination at the public hearing that is held following the planning board’s determination that the application is complete. The SEQRA regulations permit the planning board to reverse a determination of significance (negative or positive declaration) when, for among other reasons, new information is discovered. If an EIS is required, then the planning board should combine the required hearing on the subdivision with the non-mandatory hearing on the EIS.

7. SEQRA and the County Role in Land Use Decisionmaking

What types of actions by county government affecting local development are subject to review under SEQRA?

Direct actions by county government such as construction of roads, public sewerage or water facilities, parks and hospitals, schools and community colleges and facilities to house county government require SEQRA review. In addition, county funding for local development may require review under SEQRA. All county agencies, including planning, health or transportation departments, that issue permits or approvals on elements of a proposed development (e.g., on-site sewage disposal, water supply or access to a county road) must be considered as involved agencies.

Should local planning and zoning boards ask county planning agencies for assistance in deciding whether to require an EIS?

For larger scale projects that may have an inter-community, county-wide or regional impact, the answer is yes. While there is no requirement for local boards to seek such assistance, county

planning agencies were established, for among other purposes, to study and comment on projects that may have county-wide or inter-community impacts. This request can take place outside of the formal referral requirement of sections 239-m and 239-n of the General Municipal Law. A word of caution: for projects requiring referral, boards should be careful to make the formal referral required by sections 239-m and, in the case of subdivisions, 239-n of the General Municipal Law.

Do county planning agency reviews of certain zoning, site plan and subdivision applications under General Municipal Law (GML) §§239-m and 239-n require SEQRA review?

No. The county planning agencies do not, under sections 239-m and 239-n of the General Municipal Law, "undertake, fund, or approve" actions. Under sections 239-m and 239-n of the General Municipal Law, county planning agency recommendations are advisory, though the county recommendations can trigger special voting requirements. Along these lines, county recommendations for modification or disapproval need not be followed if overridden by a local board's vote of a majority plus one. County planning agencies cannot be considered involved agencies in such decisions. The county's advisory recommendations are not "approvals," as that word is used in SEQRA. SEQRA does not apply to agency actions which are only advisory in nature. However, if the county planning agency has expressed particular environmental concerns as part of their section 239-m and 239-n reviews, the lead agency should consider those comments in any determination of significance or EIS. Some local boards actively solicit the county planning agency's recommendations on the determination of significance, in addition to its comments on the project or subdivision.

Are county health departments considered involved agencies when they approve on-site sewer and water for "realty subdivisions?

Yes. County health departments with subdivision review authority are involved agencies.

What role does a county Environmental Management Council (EMC) or similar county environmental advisory body have in the SEQRA process?

Like local Conservation Advisory Commissions (CAC's), most EMC's serve in advisory roles without discretionary jurisdiction over local projects. As in the case of local CAC's and county planning agencies, EMC recommendations, when provided to local decision-making bodies, should be considered during the conduct of SEQRA even though the EMC is not an involved agency.

8. SEQRA in the Adirondack Park

Does the fact that Class A and B Regional Projects (as defined by the Adirondack Park Agency Act) are classified as Type II actions mean that local governments in the Adirondack Park do not have to apply SEQRA when conducting land use reviews of a project subject to the Adirondack Park Agency's Class A or B Regional Project review jurisdiction?

The answer is yes, except for municipalities in the Lake George Park that have an Adirondack Park Agency approved local land use program under Adirondack Park Agency Act §807. Municipalities in the Lake George Park that have an Adirondack Park Agency approved local land use program must still apply SEQRA, which is most towns in the Lake George Park.

The theory of the Type II exemption or exclusion for Class A and B regional projects in the Adirondack Park is that the Adirondack Park Agency's Class A and B Regional Project review is the equivalent of SEQRA review. Thus, redundant reviews are avoided by classifying as Type II actions land use or development projects that have been or will be reviewed by the Adirondack Park Agency as Class A or B regional projects.

Caution should be exercised in asserting the Type II exemption or exclusion for Class B Regional Projects in the Adirondack Park. A project can begin as a Class B Regional Project but change to one that is not a Class B Regional Project requiring application of SEQRA. Here is a simplified example of how this might work: a town planning board receives an application for a seven-lot subdivision in a Rural Use area. Under Adirondack Park Agency Act §810, the proposed subdivision is a Class B Regional Project and requires review by the Adirondack Park Agency under Adirondack Park Agency Act §809. Class B regional projects include subdivisions of land (and all land use and development related to the subdivision) involving five or more but less than twenty lots, other than subdivisions involving mobile homes. The subdivision would be classified as a Type II action. However, if the proposal were reduced to less than five lots then the subdivision may no longer be a Class B Regional Project (it may be non-jurisdictional as far as the Adirondack Park Agency is concerned). If such a change were to come about, the subdivision would have to be reclassified under SEQRA and SEQRA review would most likely be required unless the subdivision was still subject to review under Adirondack Park Agency Act §809 based on some other jurisdictional ground in Adirondack Park Agency Act §810. If, on the other hand, the Adirondack Park Agency has already reviewed and approved the project then the municipality could safely classify the action as a Type II action.

9. Paying for SEQRA Reviews

Can a municipal board charge the reasonable costs of environmental review to a project applicant?

Yes. There are two ways this can be done. First, the actual cost of preparing or reviewing an EIS can be charged to the applicant. Thus, if the municipality prepares the EIS for a project then the municipality can pass this cost to the applicant. If the applicant prepares the EIS, the municipality can pass the cost of its independent review of the EIS to the applicant. The applicant cannot be made to pay for both the cost of preparation and review of the EIS. The Department of Environmental Conservation has detailed regulations (within the SEQRA regulations) on charging applicants for the actual cost of preparing or reviewing an EIS.

Municipalities also incur review fees in determining whether to require the preparation of an EIS and fees in connection with site plan review, subdivision review and special use permit review notwithstanding the SEQRA process. Some of these costs may be reimbursed to the municipality through application and review fees established outside of SEQRA. Specifically, the courts have held that local governments have implied authority to adopt local laws or ordinances establishing review fees. However, such fees may not be open ended. Instead, they must be reasonable, uniform, and predictable, and based average costs associated with past projects. Local governments, in setting review fees, may distinguish between classes of applicants such as residential and commercial projects.

C. SEQRA and Local Government Capital Improvements

How does SEQRA apply to capital improvements and other infrastructure development undertaken by local governments?

Direct actions of local governments to acquire, construct, alter, remove or dispose of land or structures intended for public purposes require review under SEQRA. Included would be capital projects such as public buildings and open space, streets and highways, sewer and water systems and maintenance facilities.

Are there capital improvement actions that are classified as Type II actions, which can be undertaken without SEQRA review?
Yes. Prominent examples from the Type II list include:

- Maintenance or repair involving no substantial changes in an existing structure or facility;
- Replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site, including upgrading buildings to meet building or fire codes, unless such action meets or exceeds any of the thresholds for Type I actions; and
- Maintenance of existing landscaping or natural growth.

If a municipality makes a bond resolution for a capital project does the bond resolution have to undergo SEQRA review and does the scope of such review cover the project that is being financed by the bond resolution?

The bond resolution requires SEQRA review, if it comes within the definition of "action" and is not for an action classified as a Type II action. The scope of the review should include the project that is being financed by the indebtedness. As with any action that either may involve a series of actions or where the action may evolve over time, the generic environmental impact statement will most likely be the best SEQRA tool to identify and assess the impacts of the action. As the action evolves, the municipality can prepare supplemental statements covering the changes.

Is a capital budget considered a sufficient commitment to the improvements listed within it to require a review under SEQRA before its adoption?

The inclusion of capital improvements within a municipal budget is not an action subject to SEQRA. The budgeting process merely sets aside funds without a commitment to their expenditure. Such budget items are usually not definitive enough with respect to design, and sometimes even location, to be reviewable at the time the budget is adopted. However, the adoption of a capital budget should alert public agencies that SEQRA should be applied to such projects before they are initiated. Municipal or agency bonding of a particular capital project would be an action requiring SEQRA compliance before it is undertaken.

Is the acquisition or disposal of land associated with a capital improvement covered by SEQRA?

Land acquisition or disposal associated with a capital improvement should be reviewed as part of the whole action. Frequently the first commitment to a project will occur when a property transaction is made, and it is appropriate that SEQRA be completed before such commitment is made.

Must SEQRA be applied to budget items for purchase of equipment?

No. Purchase (or sale) of new or replacement furnishings, equipment or supplies, such as vehicles, waste handling equipment, traffic control devices and playground equipment (other than land, radioactive material, pesticides, herbicides or other hazardous materials) is considered a Type II action.

D. SEQRA and Municipal Annexations

Are municipal annexations subject to SEQRA?

Yes. The determinations of public interest that must be made by municipalities pursuant to Article 7 of the General Municipal Law, prior to granting or denying an annexation petition, involves the weighing and balancing of social, economic and environmental factors. Municipal annexation decisions are, therefore, discretionary decisions requiring SEQRA review. Annexations of 100 or more contiguous acres are classified as Type I actions; annexations involving less than 100 acres are classified as Unlisted actions, unless some other aspect of the action triggers Type I review. Annexation is typically associated with potential changes in land use or need for public services that may be more readily available from one municipality than another. Municipal decisions on annexation are similar in their consequences to rezoning decisions; both decisions have the potential to change land use patterns and require a hard look at the consequences of the whole action. In the case of an annexation, only after examination of these SEQRA concerns, among other factors, can the question of public interest be fully addressed.

At what point in the annexation process should SEQRA be applied?

SEQRA should be applied at the time the initial petitions for annexation are presented to the involved municipalities, and prior to the joint municipal public hearing required under General Municipal Law. If an EIS is required, it should be made available as a draft for public review prior to the joint public hearing. The joint hearing can also serve as a SEQRA hearing.

Can annexations associated with development proposals be reviewed separately from such development?

No. Although annexation petitions often will be the first elements of an overall action presented, annexation considerations cannot be segmented from the SEQRA analysis necessary for the whole action. Moreover, an annexation approved without considering the environmental impacts of the associated development may be unwise, if it turns out that the development is not feasible.

What if details of future development are not known?

If the annexation petitioners are not committed to a specific development proposal, or if several parts of the area have undefined development potential, a generic EIS may be appropriate. A generic EIS would allow both the petitioners and reviewers to evaluate potential impacts of a variety of project proposals.

What factors should be considered in establishing lead agency for an annexation?

Although state and county agencies occasionally have involvement with some aspect of specific projects associated with annexations, the most appropriate lead agency is likely to be from one of the involved municipalities. Major considerations are the agency's:
jurisdiction over activities in the proposed annexation; jurisdiction over environmental impacts which may occur outside the proposed annexation due to activities within it (e.g., traffic congestion and waste generation); and the municipal ability to assess and mitigate anticipated environmental impacts.If no development activities requiring discretionary decisions by other agencies are anticipated within the proposed annexation, only the municipal legislative boards would be involved agencies and eligible to serve as lead. All other considerations being equal, the most logical choice for lead agency is the agency which has had the longest standing jurisdiction within the area. This is normally an agency of the municipality from which the annexed parcel may be taken.

E. SEQRA and Municipal Development Incentives

What forms of public financial support of development incentives by a municipality are subject to SEQRA?

Local public agencies can encourage desired development by providing direct financing, financial or tax incentives, and land for development; by constructing infrastructure and by limiting certain regulatory constraints. The provision of such incentives is subject to review under SEQRA. If the incentives are proposed broadly such as a local program to encourage senior citizen group housing, they may be examined under SEQRA in generic fashion. If they involve one-of-a-kind proposals, site specific reviews would be appropriate. Agencies providing financial or other incentives are involved agencies.

Are actions of local or county Industrial Development Agencies (IDA's) subject to review under SEQRA?

Yes. The approval to guarantee funds or loans is subject to SEQRA, even when no other approvals are required. The exception of course is where the action is classified as a Type II action. If so, no further application under SEQRA is required by the IDA. Also, if the funding proposal is part of a previously considered action covered by a negative declaration, no further SEQRA review is necessary. If the action is consistent with a previously produced FEIS, the IDA should make SEQRA findings about its approval or disapproval of the action, based on such FEIS. If the proposed funding or loan application is independent of any earlier review under SEQRA, the IDA must make its own determination of significance.

This page last modified on April 17, 2003

Legal Memorandum LU04
SEQRA AND THE NORTH ELBA WALMART DECISION

The recent decision of the Appellate Division, Third Department, in *Matter of Wal-Mart Stores, Inc., v. Planning Board of the Town of North Elba*, 238 AD 2d 93, 668 NYS 2d 774, is a significant one in terms of local land use reviews. The decision indicates that it is permissible for a municipality to make a land use decision based on facts relating to the projected impacts of the proposed development on existing, similar businesses within the community.

The court held that, under the State Environmental Quality Review Act (SEQRA), it is possible that findings may be made which could support a disapproval on such a basis. Also, if a town's land use regulations governing the grant of a special or conditional use permit contain properly-worded prerequisite standards, then the potential impact of the project on businesses of a similar nature may be considered. Those standards might be worded to require that the project not be shown to have a "materially adverse impact" on nearby properties, or even on the social and economic resources of the community.

Wal-Mart Stores, Inc., recently sought to establish a store and adjacent parking area just outside the resort community of Lake Placid. After a lengthy public hearing, the town planning board adopted a final environmental impact statement (EIS), which addressed issues such as the visual impact of the project on the scenic values of the surrounding area. The EIS also addressed the projected effects of the project on the general character and ambience of the community, paying particular attention to the secondary growth effects it would probably have on surrounding properties, as well as to the projected effects on the nearby downtown business district due to increased competition and potential store closings. The planning board then adopted SEQRA findings which supported a disapproval of the application, based on potential negative effects on the overall character of the community. The board went on to disapprove the project, based in part on those findings, and in part on the applicant's failure to meet similar standards as expressed in the town's Land Use Code. Those standards called for approval only if the proposed use "will not have a materially adverse impact upon adjoining and nearby properties," and "will not result in a clearly adverse aesthetic impact."

The planning board made further findings, unfavorable to the project, with respect to a standard in the Land Use Code which referred to "general development considerations." That standard was aimed at avoiding "any undue adverse impact on the natural, physical, social and economic resources of the Town." The board assessed factors such as reasonably foreseeable secondary growth in the areas immediately surrounding the project, as well as a potential increase in vacancy rates among business properties in the downtown area. Based on its research, the planning board found that the standards of the Land Use Code also were not met by the applicant.

Upon challenge, the Appellate Division held that the planning board was within its jurisdiction in disapproving the conditional use permit, both under SEQRA as well as under the Land Use Code. The court held that it is an "entirely proper avenue of inquiry...within SEQRA" to address the projected economic effects of a proposed project on other local businesses, because such an inquiry relates properly to the extent of change in the overall character of the community--which amounts to an environmental impact. Further, the court held that the standards (stated above) in the Land Use Code could legitimately require an inquiry which even goes beyond the traditionally "environmental" factors considered within SEQRA. These locally-stated standards could properly address impacts on the social and economic resources of the community, and on the implications of those potential impacts on community character.

It should not be overlooked that while the Court affirmed the analysis and conclusions drawn by the local planning authorities in this case, it nevertheless remains an obligation of the reviewing agency(ies) to not only have empirical information upon which to base its decision, but that conclusions drawn must be clearly articulated and dependent upon a thorough analysis of that information. Generalized opposition or sentiment, not supported in the record, will not carry the day.

For further detail, please contact the Department of State, Office of Counsel.

The SEQR Cookbook is available for download at
http://www.dec.state.ny.us/website/dcs/seqr/cookbook1.PDF

6 NYCRR Part 617
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