SEQRA's Siblings: Precedents from Little NEPA's in the Sister States

Nicholas A. Robinson
Elisabeth Haub School of Law at Pace University

Follow this and additional works at: https://digitalcommons.pace.edu/lawfaculty

Part of the Environmental Law Commons, and the State and Local Government Law Commons

Recommended Citation

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.
SEQRA'S SIBLINGS: PRECEDENTS FROM LITTLE NEPA'S IN THE SISTER STATES

Nicholas A. Robinson*

Most environmental degradation occurs incrementally and cumulatively. The small homebuilder blacktops and covers a vacant lot, thereby increasing the flow of casual surface waters on other lots in the watershed; by itself the effect is not noticed, but when several score of homebuilders repeat the event, flooding occurs downstream. The same is true of the isolated discharge of one smokestack's emissions into the atmosphere or the seemingly isolated filling of a small riverside marsh. When one road is sited, few see how it bisects a wildlife habitat or foresee how it triggers further new developments in its wake.

Indeed, as the biologist Garret Hardin has observed, a person's rational self-interest may usually be to exploit natural resources or property to the maximum extent possible without regard to the cumulative effect that ultimately inures to the detriment of the same person.¹ Even when a town arrests adverse trends within its jurisdiction,² the gasoline alley or fast food strip often locates at the border of the town in greater or more troublesome concentrations than would have otherwise been the case.

No single nostrum can establish a healthful and pleasing environment. No statute can legislate a sound environment into existence. Rather, environmental quality will be the result of many isolated and discrete decisions, each one structured so as to avert environmental degradation. Progress in society can then be realized without the unintended harm that might otherwise result.

As Lord Eric Ashby puts it, human endeavor can become a sympathetic part of the natural environment.³ In place of a conflict with nature brought on by pollution and other environmental harm, there can be a reconciliation of human society and nature. This becomes

---

¹ Hardin, The Tragedy of the Commons, 162 SCIENCE 1243 (1968).
possible "not by heroic long-term megadecision, but by the cumulative effect of wise medium-term microdecisions, each decision clarifying the shape of the decision that needs to follow." The technique of environmental impact assessment has emerged as the principal regulatory tool for assuring that each person acts "so that due consideration is given to preventing environmental damage." Just as the National Environmental Policy Act (NEPA) requires that each of the federal government's agencies assure that its decisions will be environmentally sound, so have many of the various states decreed that their agencies and political subdivisions shall maximize environmental protection.

I. NEPA'S PROGENY: SEQRA'S SIBLINGS

New York's State Environmental Quality Review Act (SEQRA) is ably described throughout this Symposium. It mandates that New York governmental units "conduct their affairs with an awareness that they are stewards of the air, water, land and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations." In adopting SEQRA in 1975, New York joined a number of states that had followed the lead of Congress in enacting NEPA. The state environmental policy acts, often referred to as "little NEPA's," occasionally copy NEPA almost verbatim. Most, however, make extensive adaptations ranging from the Michigan Environmental Protection Act, adopted contemporaneously with NEPA, which makes unlawful the "pollution, impairment or destruction of the air, water..."

---

4 Id. at 87.
9 1975 N.Y. LAWS ch. 612. See also Orloff, supra note 6, at 1129.
or other natural resources or the public trust therein" unless there are no prudent and feasible alternatives, to states with statutes that require an environmental impact assessment by executive order of the governor for selected actions only.

Most of the twenty-eight jurisdictions that have little NEPA requirements incorporate the same administrative procedures as does the federal environmental impact statement (EIS) process. For this reason, there is considerable borrowing of case law and interpretation from one state to another. A common body of law guides the EIS process in whatever jurisdiction it comes to be adopted.

In this manner, the EIS process enjoys a status similar to a uniform state law such as the Uniform Commercial Code. When a question arises as to which types of alternatives should be examined in an EIS, guidance can be found in federal decisions under NEPA, or in leading cases under little NEPA's such as the California Environmental Quality Act (CEQA) and Washington's State Environmental Policy Act of 1971 (SEPA).

There are currently twenty-eight jurisdictions with an EIS requirement. Fifteen states and Puerto Rico have enacted comprehensive laws like NEPA. Michigan has a law more substantial than NEPA.

---


and New Mexico, which had a little NEPA, repealed it after a short time.\textsuperscript{17} Four states have promulgated comprehensive executive orders establishing procedures equivalent to the EIS function.\textsuperscript{18} Nine states have established an EIS function for specified limited purposes.\textsuperscript{19}

Courts in states with legislatively enacted little NEPA's look to federal case law for authority and guidance by analogy in construing their state act.\textsuperscript{20} There is also a growing literature in the law reviews about the operation of these state laws;\textsuperscript{21} this body of commentary is


\textsuperscript{18} These four states, with their executive orders and implementing regulations, are as follows: Michigan, see Michigan Executive Directive 1971-10, as superseded by Michigan Executive Order 1973-9, as superseded by Michigan Order 1974-4 (May 1974); New Jersey, see New Jersey Executive Order No. 53 (Oct. 15, 1973); Texas, see Policy for the Environment (Mar. 7, 1972), published in \textit{Environment for Tomorrow: The Texas Response}, updated by \textit{The Environment Policy-Guidelines and Procedures for Processing EIS's}, (Nov. 1975); Utah, see State of Utah Executive Order (Aug. 27, 1974).


of increasing value to bench and bar alike.\(^{22}\)

New York's SEQRA was adopted at least four years after the federal, California and Washington statutes. Because of precedent from these other jurisdictions, there was no question in New York about applying SEQRA to private projects requiring a state permit, as had

---

been litigated in the seminal California decision in *Friends of Mammoth v. Board of Supervisors.* There was also no question that the EIS duty was a serious and fundamental administrative responsibility, as described in the federal ruling in *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission.* CEQA had already been amended once by the time New York enacted SEQRA. When it did so, New York was able to benefit from the experiences of California and twelve other states with little NEPA's.

The legislature actively considered this corpus of jurisprudence when it shaped SEQRA. The actual operations under the California Act were described to the legislature by the chief of that state's Office of Environmental Protection, Nicholas Yost. Reports from other states were solicited and reviewed. Assemblyman Oliver Koppel expressed New York's debt to California on the eve of SEQRA's taking effect June 1, 1976, as follows:

Fortunately, we do have substantial information in the experience of California, a state which has had such a law since 1970. The states have much in common, apart from the fact that much of the New York act is patterned on the earlier California model. Both states are large, populous and diverse. . . .

---

18 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).
19 449 F.2d 1109 (D.C. Cir. 1971).
20 The states that had an EIS requirement in 1975 were California, Connecticut, Hawaii, Indiana, Maryland, Massachusetts, Minnesota, Montana, North Carolina, South Dakota, Virginia, Washington and Wisconsin. See note 16, supra.
21 See Koppell, *Environmental Protection Laws At Issue,* N.Y.L.J., May 6, 1976, at 1, col. 2 (an essay by the chairman of the New York State Assembly Environmental Conservation Committee).
22 Id. Mr. Yost later became general counsel to the President's Council on Environmental Quality in the administration of President Carter.
23 Id. (citing Massachusetts Executive Office of Environmental Affairs and Virginia Council on the number of environmental impact reports and the time used in considering those reports).
24 Id. Assemblyman Koppel further observed that:
    According to Nicholas C. Yost, Deputy Attorney General in charge of the environmental unit of the Attorney General's Office in California, the California experience is that environmental reporting has worked, and worked well. There were fears of opening the flood gates of litigation. These fears have not materialized. Mr. Yost reported that with over 400 cities in California and 58 counties, plus several hundred special districts and all of the agencies of State government, the Attorney General's records indicated some approximately 103 suits since 1970—an average of something over twenty suits a year.
    A report of the California Attorney General's office indicated that California's environmental impact reporting statute has not been "a vehicle for delay or frustration of projects on nonmeritorious grounds." The Attorney General's report concluded, that both in overall numerical terms and in relation to the number of agencies implementing their environmental consulting firm, confirms this conclusion (sic) . . . .
Indeed, shortly after the adoption of SEQRA, commentators were already citing California precedents to assist in the proper interpretation of SEQRA. In like vein, the Practising Law Institute provided a continuing legal education course in 1978 on SEQRA featuring the California and Washington statutes, along with NEPA, as principal sources of authority for construing SEQRA. As observed by Professor Phillip Weinberg, who was in charge of the Environmental Protection Bureau in the New York State Attorney General's Office at the time of SEQRA's enactment:

SEQRA had as its model [NEPA], which since January 1, 1970 has required every federal agency performing, permitting or funding any major action with a substantial impact on the environment to weigh the environmental effects of its action and to prepare an environmental impact statement—to look, in short, before it leaps, or permits someone else to. Even more in point, a number of states, notably California and Washington, had also enacted environmental impact laws with parallel mandates. Our Legislature adapted these laws to New York's needs, requiring the state, localities and private businesses acting under state or local permit or funding to consider the impact of their action on the environment and to document that consideration by furnishing a reviewable record.

The teaching of these authorities is obvious. Both the bench and bar should examine the case law under little NEPA's in other states before "recreating the wheel" in New York. In some instances, New York ought not to follow case law from a sister state. The provisions of SEQRA may be so different as to make the authority inapplicable. Similarly, the ruling may be inadequate to the needs of New York.

In general, the fear of increased litigation, as reviewed above, is believed not to be well founded. It should be noted that the experience from other states, particularly California, is that there simply has not been the degree of litigation stemming from environmental reporting which was originally feared. In light of its stringent rule protecting administrative decisions, . . . New York is no more likely than California to have excessive litigation.

Similarly, with respect to reporting delays and costs, studies from Massachusetts and California do not appear to suggest that either will be inordinate. If the SEQR Act is properly implemented at the State and local agency levels, its procedures can and should be carried out with and at the same time as other requirements of planning, with minimum delay, if at all, and with expense commensurate with other necessary planning costs and not excessive in light of the importance of assuring that the future growth of the state is properly planned in the interests of both a prosperous and livable state.

Id. at 4 (footnotes omitted).

Sandler, supra note 22, at 115-16.


Weinberg, supra note 22, at 120 (citations omitted).
Whether or not this analogous case law is followed, however, it should at least be considered.

The strength which a common body of law possesses is the intellectual force and perception of each decision's ratio decidendi; especially in rulings of first impression, the advocate and judge should at least examine prior rulings of the key states having statutes substantially similar to SEQRA. Since the environmental problems themselves are apt to be similar from state to state, and since commercial activity most often has interstate characteristics, society is best served by promoting a common pattern of environmental impact assessment. This will lead to predictability and shared expectations, strengthening both an ordered society with the rule of law and environmental protection.

II. COMPARATIVE VIEWS OF IMPACT ASSESSMENT

It is beyond the scope, and probably capacity, of this Article to identify every possible issue under SEQRA for which authority may be found in a sister state. Nonetheless, it may be instructive to illustrate how analogous case law from other states may be drawn upon to further SEQRA. Obviously, other states may be drawn upon to further SEQRA. The little NEPA precedents may most usefully be sought not in the context of state agency actions which are often analogous to federal agency actions; rather, the state rulings are most valuable in construing the duties of villages, towns, cities, counties and other political subdivisions of a state. Two examples can demonstrate these matters. The first concerns the realm of the stewardship which the little NEPA's require. The second involves the details of the environmental impact assessment process itself.

A. Ethics and Stewardship

One leading case under SEQRA is Tuxedo Conservation and Taxpayers Association v. Town Board. In Tuxedo, the town board had final SEQRA approval authority over a 200 million dollar project, which would quadruple the town's population. One town trustee

---

88 As well, the large body of federal case law under NEPA should be examined closely. See Orloff, supra note 6.
86 Id. at 7, 408 N.Y.S.2d at 671.
was an officer of an advertising agency, employed by the developer parent corporation. He refused to disqualify himself, however, and cast the decisive vote despite the probability of his firm’s financial interest. Although no ethics statutes had been violated, both trial and appellate courts in Tuxedo rigorously condemned the trustee’s action and invalidated the project approval.

The Tuxedo decision held the town board trustee to the standard of “the punctilio of an honor the most sensitive,” in the context of SEQRA decisions as “stewards of the air, water, land, and living resources” with “an obligation” to “this and all future generations.” About the same time as Tuxedo, the courts in California were reaching a different view. A badly divided California Supreme Court in Woodland Hills Residents Associations v. City Council failed to insist upon the punctilio of honor. The court held that campaign contributions to city council members do not prevent them from deciding matters involving contributors. Finding no literal violation of the statute, the court refused to imply a violation from the circumstances. Thus, the court ignored even “the amount of the contribution, its timing, its method, as well as the significance of the issue being considered . . . in judging the appearance of bias.”

It may be that the unfortunate recent legislative criticisms of the California Supreme Court have cast it into a timid mold. The California court’s deference to the legislature, in the face of “the mother’s milk of politics” (that is, campaign contributions to CEQA decisionmakers), does little to ensure a full measure of environmental

---

87 Id. The court noted that the trustee had knowingly participated and had even requested a local committee’s ethics opinion. Id. at 323, 418 N.Y.S.2d at 639-40.
86 “For, like Caesar’s wife, a public official must be above suspicion.” Id. at 324, 418 N.Y.S.2d at 640. The trial court expressed a similar view: “Considering the scope of this application (1,500 acres, 3,900 units and one fifth of a billion dollars), only the naive would not suspect that there could be tacit business pressures conflicting with the right of the public to a fair hearing.” Tuxedo Conservation and Taxpayers Ass’n v. Town Bd., 96 Misc. 2d 1, 10, 408 N.Y.S.2d 668, 673 (Sup. Ct. 1978), aff’d, 69 A.D.2d 320, 418 N.Y.S.2d 638 (1979).
82 Id. at 947, 609 P.2d at 1033, 164 Cal. Rptr. at 259.
81 Id. at 946-47, 609 P.2d at 1032-33, 164 Cal. Rptr. at 259.
80 Id. at 951-52, 609 P.2d at 1036, 164 Cal. Rptr. at 262 (Bird, C.J., concurring and dissenting).
79 26 Cal. 3d at 953, 609 P.2d at 1037, 164 Cal. Rptr. at 264 (Newman, J., concurring).
protection. CEQA lacks the express stewardship intent of SEQRA, and that may also explain the difference. Perhaps the public policy in California is to favor "political influence" in quasi-judicial decisionmaking.

A comparable situation in the State of Washington, however, would be resolved as in New York. Washington's little NEPA tracks the policies of NEPA, and establishes a stewardship role for government as to nature. All agencies of the state are urged to "[f]ulfill the responsibilities of each generation as trustee of the environment for succeeding generations." Moreover, the Washington legislature has recognized "that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." In establishing this policy, Washington goes beyond 


All state agencies, boards, and commissions shall prepare, or cause to be prepared by contract, and certify the completion of an environmental impact report on any project they propose to carry out or approve which may have a significant effect on the environment. Such a report shall include a detailed statement setting forth the following:

- (a) The significant environmental effects of the proposed project.
- (b) Any significant environmental effects which cannot be avoided if the project is implemented.
- (c) Mitigation measures proposed to minimize the significant environmental effects including, but not limited to, measures to reduce wasteful, inefficient, and unnecessary consumption of energy.
- (d) Alternatives to the proposed project.
- (e) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.
- (f) Any significant irreversible environmental changes which would be involved in the proposed project should it be implemented.
- (g) The growth-inducing impact of the proposed project.

The report shall also contain a statement briefly indicating the reasons for determining that various effects of a project are not significant and consequently have not been discussed in detail in the environmental impact report.


It is the purpose of this act to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state.


NEPA.60

The judiciary in Washington, as in New York, has properly identified its role in examining impropriety and the appearance of impropriety. Several cases offer guidance for municipal officials as to both ethics and environmental stewardships.61 In varied contexts, the Washington judiciary has developed the "appearance of fairness" ethical standard for land use decision.62 In Chrobuck v. Snohomish County,63 the Washington Supreme Court considered the rezoning of an area from a rural-residential to heavy industrial district. The court recognized that the denial of cross-examination, provision of trips paid for by the developer to similar plant sites as well as free entertainment, and prior membership in an organization with a financial interest in the project were cumulative circumstances condemned as casting "an aura of influence."64 In Buell v. City of Bremerton,65 the court focused on the single "infecting" circumstance of a board member with a financial interest in the project.66 Even prior or subsequent connections with the project or project sponsor have been condemned as violating the duty to reach and appear to reach an unbiased decision.67 Further, in Fleming v. City of Ta-
post-decision employment of a council member by the project sponsor's attorney, and in Anderson v. Island County, the biased participation of a former owner of the property, caused the courts to rescind both the ordinance and the reclassification. Although no wrongdoing was found in any of these cases, the Washington Supreme Court held that the importance of public trust and confidence mandated that even the appearance of impropriety be avoided.

This stringent standard was interwoven with the requirements of environmental stewardship in local bond use decisions in SAVE a Valuable Environment v. Bothell, Swift v. Island County, and Narrowsview Preservation Association v. City of Tacoma. Inadequate environmental review and financially interested board members caused the Swift and SAVE courts to void both local zoning changes. In Narrowsview, although the environmental review was adequate, the court found that the participation of a financially interested board member tainted the zoning approval. The continuing scrutiny of the Washington judiciary under the "appearance of fairness" standard encourages fair and impartial land use decisions which fulfill the responsibility of each citizen to preserve and enhance the environment.

P.2d 594, 602 (1972) (en banc) (prior ownership of property).

*81 Wash. 2d 292, 300, 502 P.2d 327, 331 (1972) (en banc). The employment was entered into less than 48 hours after the crucial vote. Id. The trial court observed:
The time coincidence is devastating. It is unfortunate this probably has taken place because this was one of those days that we all have where a problem arose and a man just didn't think about the whole implications of what he was doing. The appearance of conflict of interest is here. The appearance of conflict of interest is so strong that I am sure those who oppose the zoning and who thought this thing through will never, never believe that somehow this wasn't kind of wired before the final vote was taken.

Id. at 300, 502 P.2d at 332.

*81 Wash. 2d 312, 501 P.2d 594 (1972) (en banc).

*Fleming v. City of Tacoma, 81 Wash. 2d 292, 502 P.2d 327 (1972) (en banc); Anderson v. Island County, 81 Wash. 2d 312, 501 P.2d 594 (1972) (en banc); Buell v. City of Bremerton, 80 Wash. 2d 518, 495 P.2d 1358 (1972) (en banc); Chrobuck v. Snohomish County, 78 Wash. 2d at 858, 480 P.2d 489 (1971) (en banc).

*89 Wash. 2d 862, 576 P.2d 401 (1978) (en banc).

*87 Wash. 2d 348, 552 P.2d 175 (1976) (en banc).


*In Swift, there was no environmental review and in SAVE, there was no mitigation of adverse environmental effects. SAVE a Valuable Environment v. City of Bothell, 89 Wash. 2d 862, 576 P.2d 401 (1978) (en banc); Swift v. Island County, 87 Wash. 2d 348, 552 P.2d 175 (1976) (en banc).

*Narrowsview Preservation Assoc. v. City of Tacoma, 84 Wash. 2d 416, 526 P.2d 897 (1974) (en banc). The tainted board member was an employee, whose employer would be directly affected by the decision. Id.

Taken seriously, the legislative mandate for stewardship is akin to the common law duty of a trustee to avoid waste. The trustee owes all allegiance to the public, present and future, to conserve and best manage the resources at issue. This task, as New York and Washington concur, is incompatible with even the appearance of a conflict of interest.

B. EIS Procedure

The heart of SEQRA and all of the little NEPA's is the environmental impact statement process. This is the "action forcing" element which makes the stewardship role realistic and practical. It is this process which admits of a shared common law among the little NEPA's. The key stages of the SEQRA procedures can be construed in light of the analogous rulings of other jurisdictions. In like vein, New York's growing case law is becoming a part of the body of authority available to assist other jurisdictions.

Six principal steps characterize the EIS process. Initially, there is the threshold question of whether or not SEQRA applies to a given action. Second is the lead agency designation. Third is the negative declaration or the finding of a Type I action requiring preparation of an environmental impact statement. Fourth is the preparation of the draft EIS (DEIS) and review of alternatives. Fifth is the preparation of the final EIS (FEIS) and full identification of impacts and their possible mitigation. Finally, there is judicial review of this...
process along with the final agency decision itself and the resolution of who has standing to seek review.\(^7\)

Although there is little case law concerning SEQRA’s EIS procedure to rely on, references can be usefully drawn from California and Washington. Because the little NEPA’s from these two states were models from which SEQRA was in part adapted,\(^7\) the judicial glosses on their state environmental impact assessment process are apt sources to guide the evolution of SEQRA.\(^7\)

1. Whether the EIS Process Applies to a Given Action

Much rides on the initial decision that an action requires an EIS. Failure to undertake the EIS process frustrates SEQRA’s stewardship and courts will enjoin actions seeking to circumvent the Act.\(^7\) The validity of subsequent permits may be subject to invalidation.\(^7\)

Several early New York cases ratified exemptions from the SEQRA process.\(^7\) Where facts of the underlying action manifestly constituted a Type I action under SEQRA, the cases favoring exemptions appear to be wrongly decided,\(^7\) the rule of reason and remedial purposes of SEQRA militate that actions not be exempted.\(^7\)

The logic of California’s *Friends of Mammoth* decision\(^8\) should

---

617.14(h). Mitigation must be shown at this time. *Id.* § 617.9(c)(2).  
\(^7\) Final agency action is the approval or disapproval step which occurs 30 days after the FEIS is filed. *Id.* § 617.9(b). Judicial review is available under article 78 of the CPLR. *N.Y. CIV. PRAC. LAW* § 7800-7806 (McKinney 1981).  
\(^7\) This Article is not intended to be an exhaustive treatise of the commentary on each of these six steps from each of the nineteen states which have little NEPA’s akin to SEQRA. See generally authority cited in notes 16 & 18 supra.  
\(^7\) See text accompanying note 31 supra.  
serve to guide SEQRA. California courts regularly require application of the EIS process in many varied circumstances. CEQA applies to power plant authorizations, to actions with environmental impacts outside the jurisdiction of the entity preparing the EIS, to annexation of land by a municipality, to permits for subdivisions, and to other local zoning decisions. Comparably broad rulings are found in the State of Washington.

Ministerial actions may be exempt from SEQRA, but they must be identified as being ministerial beyond cavil. Washington has found it difficult to draw the line between ministerial and major actions. In Eastlake Community Council v. Roanoke Associates, Washington’s highest court ruled that where a building permit renewal was “mandatory” no EIS was needed, but where the renewal was “non-duplicative” and discretionary and there was no prior environmental review, then an EIS was required. Care must be taken to define the “ministerial” exemption.

The California courts have furthered CEQA’s remedial purposes by restricting exemptions through narrow construction and by declining to find implied exemptions. Where discretion is involved in an agency decision, there is usually an opportunity to mitigate environmental harm. For such action, an EIS is required.

---


84 6 N.Y.C.R.R. § 617.13(d) (1979) (exempting routine and maintenance activity).

85 82 Wash. 2d 475, 513 P.2d 36 (1973) (en banc). See also Loveless v. Yantie, 82 Wash. 2d 754, 513 P.2d 1023 (1973) (en banc) (on exemption for ministerial actions).

86 See Note, Aftermath; Friends of Mammoth and the Amended California Environmental Quality Act, 3 Ecology L.Q. 349, 386-87 (1973) (critical discussion of California case law).


2. The Designation of a Lead Agency

Where a project must be approved by more than one agency, it is essential for the effective and efficient operation of the EIS process that, as early as possible, one be identified as the agency responsible for conducting the environmental review. This is the "lead" agency. Not only must one agency assume that burden of EIS responsibility, but other agencies must assist it in doing so. The need for efficient execution of this stage led to amendments of CEQA aimed at assigning the burden of EIS responsibility.

3. The Decision to Require an EIS

Guidance from other states can be of assistance in determining when and whether an EIS is needed under SEQRA. "Segmentation," or the division of what would be a Type I action into small bits and pieces, each with insignificant impact, is usually not allowed. Even if the action would have a Type I classification, a decision must still be made as to when in time the action exists. A mere plan to act may not trigger an EIS. If an agency is unsure whether an act is advanced enough to require an EIS under CEQA, it can order tests and research. This goes beyond the administrative environmental assessment form (EAF) now used under SEQRA.

The general criteria for deciding when an impact is significant, so as to require an EIS, have been reviewed often. In Norway Hill Preservation and Protection Association v. King County Council, Washington's Supreme Court defined "significantly" as "whenever more than a moderate effect on the quality of the environment is a

---

90 Segmentation is the term derived from the practice of dividing highways into small linking units to avoid reviewing the entire route. See, e.g., River v. Richmond Metropolitan Auth., 359 F. Supp. 611, 634 (1973), aff'd, 481 F.2d 1280 (4th Cir. 1973).
94 87 Wash. 2d 267, 552 P.2d 674 (1976).
reasonable probability. Factors considered by the court were the size of the project, the type of environmental change, and the classification of the project under SEPA. If no EIS had been prepared and the action was significant, then even extensive prior discussion and the attachment of the protective conditions would be insufficient according to the court. The court held that SEPA mandates full disclosure and investigation before decisionmaking precisely to ensure that adequate protective measures could be taken. Ultimately, whether an EIS is required is a mixed question of law and fact. A rule of reasonableness should govern review of this determination.

4. The Draft EIS and Consideration of Alternatives

The DEIS is intended to be a comprehensive and fair review of all the adverse environmental effects of the proposed action. The central analytic tool for highlighting these impacts is a discussion of alternatives. By requiring a discussion of the effect of no action or a modified action, the decisionmaker identifies a way to avoid adverse impacts and is less reluctant to describe the range of realistically possible adverse effects in a candid fashion.

The EIS process must consider all aspects of a proposed action. Under CEQA, close scrutiny is given to such consideration. Thus, in County of Inyo v. Los Angeles, the court found a number of deficiencies in the consideration of alternatives and impacts. The court found two major deficiencies in the environmental impact report (EIR).

---

---
include a “no project” alternative.103 Second, the court held that the EIR was void because it was based on an inaccurate project description.104 The court noted that the revised EIR described a small scale groundwater project and that the final EIR dealt with large scale phases of the City's aqueduct management program.105 The County of Inyo court recognized that the interim EIR's may be based on new insights requiring revision. It refused, however, to validate the project when its scope was known in advance but was deliberately misstated to confuse the public.106 The court reemphasized that the scope of the project and all reasonable alternatives must be included in the EIR.107

An alternative can be feasible and merit review in the EIS even though the applicant would reject undertaking such a course.108 An alternative must, therefore, be examined in the EIS even though the agency may later make an independent decision as to whether or not to make the alternative a condition of approval as a form of mitigation to comply with SEQRA's substantive mandate discussed below. The scope of the EIS must include secondary and cumulative impacts.109

One useful technique, first developed in Massachusetts,110 is "scoping," a means of focusing on important issues and streamlining the method of review. When NEPA was enacted, it did not include a scoping provision but the revised implementing regulations now address the issue.111 SEQRA has no specific provision on scoping, but the concept can be read into the Act.112 Scoping is especially useful at

---

103 County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 193, 203, 139 Cal. Rptr. 396, 401, 406.
104 Id. at 192-93, 199-200, 139 Cal. Rptr. at 401, 406.
105 Id. at 190-91, 199, 139 Cal. Rptr. at 399-400, 406.
106 Id. at 199-200, 139 Cal. Rptr. at 406.
107 Id.
111 40 C.F.R. § 1501.7 (1981). See also notes 131-32 and accompanying text infra.
112 N.Y. ENVTL. CONSERV. LAW § 8-0109(2) lists specific considerations to be included in the EIS and provides that it "should not contain more detail than is appropriate." Id. This section also provides that "agencies may make their own independent judgment of the scope, contents and adequacy of an environmental impact statement." Id. § 8-0109(3). DEC's implementing regulations provide that impact statements should not be "encyclopedic," 6 N.Y.C.R.R. § 617.14(b) (1979), and "should not contain more detail than is appropriate considering the nature and magnitude of the proposed action and the significance of its potential impacts." Id. §
the beginning of the EIS process where a scoping conference is often held with the lead agency.\textsuperscript{118}

5. The Final EIS Proposals for Mitigation

Not only must an FEIS under SEQRA fully review adverse environmental effects and identify alternatives, but viable steps for mitigating those effects must also be discussed. The final agency decision should make appropriate mitigation a condition for project approval.

The failure to select a feasible alternative which would avert environmental harm gives the agency the option in some jurisdictions to deny the requested approval.\textsuperscript{114} This is ultimate mitigation. There is authority under CEQA that an agency need only impose feasible mitigation, not the most environmentally superior alternative.\textsuperscript{118} With SEQRA's social and economic compatibility provisions,\textsuperscript{116} this CEQA rule may be appropriate in New York.

SEQRA, unlike NEPA, expressly embodies the requirement of substantive mitigation.\textsuperscript{117} As in Washington, this means that a permit may be denied on the grounds that it would degrade the environment excessively in contravention of SEQRA's stewardship responsibilities.\textsuperscript{118} Among all the little NEPA's, Minnesota's statute probably imposes the greatest substantive burden.\textsuperscript{119}

Even after an action has gone forward without a valid EIS or absent all feasible mitigation, the SEQRA duty to assure that feasible mitigation be considered and applied must be discharged. This may mean retrofitting a project. Both California\textsuperscript{120} and New York\textsuperscript{121} courts have reached this EIS implication in their rulings.

\textsuperscript{118} In re City of White Bear Lake, 311 Minn. 146, 247 N.W.2d 901 (1976).
\textsuperscript{116} See Gitlen, The Substantive Impact of SEQRA, 46 Alb. L. Rev. 1241 (1982); Ulasewicz, supra note 5. As to CEQA, see Substantive Enforcement, supra note 22.
\textsuperscript{117} See, e.g., Polygon Corp. v. City of Seattle, 90 Wash. 2d 59, 578 P.2d 1309 (1978).
\textsuperscript{118} State v. Erickson, 285 N.W.2d 84 (Minn. 1979).
\textsuperscript{120} Rye Town/King Civic Ass'n v. Town of Rye, 82 A.D.2d 474, 442 N.Y.S.2d 67, appeal dismissed, 55 N.Y.2d 747 (1981).
6. Standing and Judicial Review

The entire EIS process is enforced through recourse to the courts by way of judicial review of the agency action. The lead agency must compile a careful record documenting the EIS process. This record is the basis for determining both the procedural correctness and the substantive reasonableness of the agency’s decision.

Judicial review is contemplated as the principal means for enforcing agency adherence to SEQRA’s stewardship responsibilities. The criteria for any citizen’s standing to so enforce SEQRA is found in the pre-SEQRA ruling of Douglaston Civic Association v. Galvin. While courts have occasionally found that the standing criteria of Douglaston have not been met, the pattern of New York standing cases follows the federal lead in liberally construing environmental noneconomic interests as being of sufficient weight to accord standing to their champions to enforce SEQRA. In this respect, most jurisdictions in zoning and land use cases analogous to EIS cases today accord standing to civic groups.

The literature on the scope of judicial review of an EIS process under little NEPA’s has been extensively developed. Since SEQRA relies on each state agency and local government to remake its own procedures to assure that its stewardship duties will be met, only the courts can assure that a uniform statewide process will eventually emerge. This will take time and will ultimately call for the guiding hand of the court of appeals. Uniformity of EIS application will

---


119 See also Wisconsin’s Envtl. Decade v. Public Serv. Comm’n, 79 Wis. 2d 409, 256 N.W.2d 149 (1977); authority discussed in Wisconsin Environmental Policy Act, supra note 22, at 161-66. The pattern was fixed under NEPA with Calvert Cliffs’ Coordinating Comm., Inc. v. United States Atomic Energy Comm’n, 449 F.2d 1109 (D.C. Cir. 1971).


124 See, e.g., Roe & Lean, supra note 22, at 533-40.

125 Uniformity of application has been criticized under other little NEPA’s. See, e.g., Quest for Uniformity, supra note 22.
therefore be enhanced by following the precedents of sister states where applicable.

III. Conclusion

Recurring patterns of new land uses and development exist throughout the United States. It is only natural, therefore, that state legislatures have sought to regulate and control these developments in similar ways. The environmental impact assessment process at its best is a technique not just to protect environmental quality, but also to promote the ordered growth of society. The courts do much to advance both wise use of natural resources and social and economic development by reinforcing the legislative judgment that environmental impact analysis shall be a part of all governmental decisionmaking in the federal government and in states such as New York, California and Washington.

Just as the experiences under the Massachusetts little NEPA\textsuperscript{130} gave the Council on Environmental Quality the idea of “scoping” to narrow an EIS,\textsuperscript{131} and the NEPA regulations now include a requirement for scoping,\textsuperscript{132} so also the NEPA process can guide the states’ little NEPA’s. An evolving and symbiotic relationship exists between NEPA and the comparable state laws, just as there is one among the state enactments.

The New York Legislature should seek to improve and streamline SEQRA by considering the strengths in other states’ little NEPA’s. For one thing, a New York oversight body, analogous to the President’s Council on Environmental Quality,\textsuperscript{133} should be created to facilitate the work of SEQRA. Such a body could exist in either the Department of Environmental Conservation or the Department of State. A similar proposal has been made for California.\textsuperscript{134}

In like vein, the New York courts should draw on the wealth of EIS case law around the nation in shaping SEQRA. A common body of law, adapted mutatis mutandis for each state, now exists. The judici-


\textsuperscript{131} See 40 C.F.R. §§ 1500.4, 1501.1, 1501.4, 1501.7, 1502.3, 1506.8 (1979); [1978] COUNCIL ON ENVIRONMENTAL QUALITY ANN. REP., ENVIRONMENTAL QUALITY 396, 398 (discussing Council on Environmental Quality revisions to NEPA regulations). For a further discussion of scoping, see notes 110-13 and accompanying text supra.

\textsuperscript{132} 40 C.F.R. § 1501.7 (1981).

\textsuperscript{133} 42 U.S.C. §§ 4341-4347. See also Crary, supra note 124, at 1231-32.

\textsuperscript{134} Quest for Uniformity, supra note 22, at 873-76.
ary can and should do much to mold this corpus of ordered common law which environmental impact laws make possible.