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Grandfathering Under SEQRA: How to Determine Which Actions Are Excluded from the Environmental Impact Statement Requirement

I. Introduction

The purpose of this note is to present problems in applying the grandfathering provisions of New York's State Environmental Quality Review Act (SEQRA)¹ and to suggest use of a three-step analysis that should aid the Department of Environmental Conservation (DEC) and local agencies in determining when to require compliance with SEQRA.

Basic to the problem is an insufficiency in the definition of a key term: "action."² The importance of an adequate definition is that SEQRA and its regulations provide for exclusion of certain "actions" from the environmental

1. N.Y. Env'tl. Conserv. Law §§ 8-0101 to 8-0117 (McKinney Supp. 1983-1984). Sections 8-0101, 8-0111(5)(a) and 8-0117 are commonly referred to as the grandfathering provisions. See N.Y. Admin. Code tit. 6, § 617.2(n) (1982) (defines excluded action as an action undertaken, funded or approved prior to the effective dates set forth in the State Environmental Quality Review Act).

2. The N.Y. Admin. Code definition is cited in the cases and is the one referred to in this article. See *infra* note 8 and accompanying text. It is based on the definition set forth in the statute. Actions include:

- (i) projects or activities directly undertaken by any agency; or projects or activities supported in whole or part through contracts, grants, subsidies, loans, or other forms of funding assistance from one or more agencies; or projects or activities involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use or permission to act by one or more agencies;
- (ii) policy, regulations and procedure-making.

N.Y. Env'tl. Conserv. Law § 8-0105(4) (McKinney Supp. 1983-1984).

Section 8-0105 begins with the statement that "[u]nless the context otherwise requires, the definition in this section shall govern the construction of the following terms as used in this article" The problem with the term "action" is that it is sometimes unclear from the context whether "action" means a statutory action or an activity.

impact statement (EIS) requirement if they occur before the effective date of the statute.³ In *Northeast Solite Corp. v. Flacke*⁴ and *Salmon v. Flacke*,⁵ the DEC used contradictory arguments in determining whether the activities constituted actions and thus, qualified for exclusion.

This note describes the different categories of actions under SEQRA, the applicability of the EIS requirement for each category, and the effective dates for implementation of the statute. The two cases presented demonstrate how the courts have tried both a literal interpretation of the statute and a "what-makes-sense" approach in their efforts to properly apply the grandfathering provisions. The appellate court's approach in *Northeast Solite Corp. v. Flacke* is formalized and presented as a three-step analysis for grandfathering determination under SEQRA.

II. SEQRA and the EIS Requirement for Certain Actions

SEQRA expressed "the intent of the Legislature that all agencies...have an obligation to protect the environment..." and "that all agencies which regulate activities . . . which are found to affect the quality of the environment shall regulate such activities so that due consideration is given to preventing environmental damage."⁶ To aid agency decisionmaking, SEQRA requires an EIS on any action an agency proposes or approves which may have a significant effect on the environment.⁷ For determination of what constitutes an action, the regulations provide the following definition:

Actions include:

- (1) Projects or physical activities, such as construction

3. N.Y. Envtl. Conserv. Law § 8-0117 (McKinney Supp. 1983-1984).

4. *Northeast Solite Corp. v. Flacke*, 114 Misc.2d 313, 451 N.Y.S.2d 633 (Sup. Ct., Albany County 1982), *rev'd*, 91 A.D.2d 57, 458 N.Y.S.2d 291 (3d Dep't 1983).

5. *Salmon v. Flacke*, 113 Misc. 2d 640, 449 N.Y.S.2d 610 (Sup. Ct., Erie County 1982), *rev'd*, 91 A.D.2d 867, 458 N.Y.S.2d 755 (4th Dep't 1982), *aff'd*, 61 N.Y.2d 798 (1984).

6. N.Y. Envtl. Conserv. Law § 8-0103(8), (9) (McKinney Supp. 1983-1984).

7. N.Y. Envtl. Conserv. Law § 8-0109(2) (McKinney Supp. 1983-1984).

or other activities which change the use or appearance of any natural resource or structure, which:

- (i) are directly undertaken by an agency; or
- (ii) involve funding by an agency; or
- (iii) require one or more permits from an agency or agencies.⁸

Some actions, however, are not subject to the EIS requirement. An action may be excluded, or exempted,⁹ or determined not to have a significant effect on the environment.

A. *Excluded Action*

An excluded action is one which is undertaken, funded, or one for which substantial time, effort, or money was expended, prior to the effective dates set forth in SEQRA.¹⁰ The term "grandfathered action" is synonymous with "excluded action."¹¹

8. N.Y. Admin. Code tit. 6, § 617.2(b)(1) (1982). Where actions involve activities, it is impossible from the definition to separate the action from the activity. Without the activity the action would not exist. It follows that subjecting the action to SEQRA review subjects the activity to that review.

9. The terms "exclude" and "exempt" are specific in meaning. A problem in interpretation could result if these terms are interchanged in briefs and judicial opinions.

10. N.Y. Admin. Code tit. 6, § 617.2(n) (1982). Amendments to the Environmental Conservation Law provided that agencies maintain a list of certified excluded actions. 1977 N.Y. Laws ch. 252 §§ 9-14; 1978 N.Y. Laws ch. 460 § 3. The procedure for including actions on the list is for a local agency to submit to its chief fiscal officer a list of projects which the agency deems approved prior to the implementation dates. The chief fiscal officer must then certify that substantial time, work, or money has been expended on the project. Those certified actions are not subject to SEQRA. According to the SEQR Handbook, *see infra* note 11, an action absent from the list may be considered for inclusion regardless of the time period, if the chief fiscal officer can substantiate the time, work, or money requirement. The chief fiscal officer is the agency official who is specified to have authority to review and certify the list.

Additionally, ch. 252 § 14 provides that where final approvals were obtained prior to November 1, 1978, actions requiring the issuance of a permit are not subject to SEQRA if they were neither planned nor supported nor identified by the DEC as likely to require an EIS. The regulations define approval as a decision by the agency to issue a permit or otherwise authorize a proposed project or activity. N.Y. Admin. Code tit. 6, § 617.2(e) (1982).

11. N.Y.S. Dep't of Environmental Conservation, The SEQR Handbook, B-9

B. Exempt Action

An exempt action is one that does not require review under SEQRA. Exempt actions are listed in the regulations. The category includes criminal proceedings, ministerial acts, maintenance or repair involving no substantial changes in an existing structure or facility, actions which are immediately necessary on a limited emergency basis, and actions of the State Legislature.¹² It is the kind of action, not the timing of the action, that provides the exempt status.

C. Type II Action

An action determined to have no significant effect on the environment is a Type II action. It does not require an EIS or any other determination or procedure under the SEQRA regulations.¹³

D. Phased Implementation

The requirement for an EIS became effective on different dates depending on whether the action was planned and proposed or supported by a state or local agency. September 1, 1976 was the effective date for actions directly undertaken¹⁴ by any state agency;¹⁵ June 1, 1977 was the effective date for actions directly undertaken by any local agency and actions receiving some form of funding from a

(1982). The handbook "is intended to provide agencies with a practical reference guide to issues and procedures of" SEQRA. *Id.*

12. N.Y. Admin. Code tit. 6, § 617.2(o) (1982).

13. N.Y. Admin. Code tit. 6, § 617.13 (1982). The Type II determination is made by an agency on its initial review of the action. Kinds of actions and sources of additional criteria for Type II determinations are listed in this section of the regulations. The list includes the repaving of existing highways not involving the addition of new travel lanes, installation of traffic control devices on existing streets, collective bargaining activities, and investments by or on behalf of agencies or pension or retirement systems.

14. Directly undertaken action refers to an action planned and proposed for implementation by an agency. N.Y. Admin. Law tit. 6, § 617.2(j) (1982).

15. N.Y. Env'tl. Conserv. Law § 8-0117(1) (McKinney Supp. 1983-1984).

state agency;¹⁶ September 1, 1977 was the effective date for actions receiving any support from a local agency and approved actions identified by the department as likely to require an EIS;¹⁷ and November 1, 1978 was the effective date for all other actions subject to SEQRA.¹⁸

Application of these descriptions of actions and implementation dates is the basic issue in the two cases that follow. Both cases involve the issuance of the same kind of permit. In *Northeast Solite Corp. v. Flacke*,¹⁹ DEC considered the action to be one that required preparation of an EIS; in *Salmon v. Flacke*,²⁰ it did not.

III. The Application of Grandfathering

A. *Northeast Solite Corp. v. Flacke*

In *Northeast Solite Corp. v. Flacke*, Northeast Solite began producing lightweight aggregate²¹ at its Ulster County, New York facility in 1961. The production process involved on-site mining, crushing, and heating of raw shale. In April 1976, the corporation started using industrial solvents and spent lubricating oils as fuels for the heating process. Areas for receiving, blending, and storing the fuels and for storing generated industrial wastes and heavy metals were located on the facility. The corporation had received numerous Department of Environmental Conservation permits.²² These were prior to SEQRA and therefore did not require an EIS.

16. Id. at § 8-0117(2).

17. Id. at § 8-0117(3).

18. Id. at § 8-0117(4).

19. *Northeast Solite Corp. v. Flacke*, 114 Misc.2d 313, 451 N.Y.S.2d 633 (Sup. Ct., Albany County 1982), *rev'd*, 91 A.D.2d 57, 457 N.Y.S.2d 291 (3d Dep't 1983).

20. *Salmon v. Flacke*, 113 Misc.2d 640, 449 N.Y.S.2d 610 (Sup. Ct., Erie County 1982), *rev'd*, 91 A.D.2d 867, 458 N.Y.S.2d 755 (4th Dep't 1982), *aff'd*, 61 N.Y.2d 798 (1984).

21. Lightweight aggregate is a building material used in the construction industry. 114 Misc.2d 313, 314, 451 N.Y.S.2d 633, 634 (Sup. Ct., Albany County 1982).

22. The permits issued to the facility included mining, state pollution discharge elimination system, and air quality permits. Id. at 314, 451 N.Y.S.2d at 634.

In 1977, DEC regulations governing solid waste management facilities were amended to apply to industrial facilities whose manufacturing processes involved the storage and burning of "non-conforming fuels" and the generation and accumulation of industrial and hazardous wastes.²³ The regulation required such a facility to obtain permits (Part 360 permits) to continue its operation.²⁴ Because the corporation used and handled non-conforming fuels, the DEC, in November 1980, claimed that the corporation was required to obtain these permits. In May 1981, DEC commenced enforcement proceedings against the corporation that resulted in its compliance.²⁵ After the permit application was submitted to DEC,²⁶ it notified the corporation that the facility was subject to SEQRA. DEC required the corporation to prepare a draft EIS to complete the permit application. The corporation sought to annul this determination. The resulting litigation held in favor of the DEC position.²⁷ The court found that because Part 360 permits were not required until February 1978, the corporation's "activities were not actions within the meaning of SEQRA until after the effective date of SEQRA."²⁸ This subjected the action to the EIS requirement. It also meant that an activity requiring new agency involvement after SEQRA's effective dates was denied appraisal as an excluded action under the Act's grandfathering provisions. On appeal, the DEC argued that the activity of the corporation was an action under SEQRA in that it involved the issuance of a permit by an agency.

23. N.Y. Admin. Code tit. 6, pt. 360 (1977).

24. *Id.*

25. *Northeast Solite Corp. v. Flacke*, 91 A.D.2d 57, 58, 458 N.Y.S.2d 291, 292 (3d Dep't 1983).

26. The corporation applied for Part 360 permits for "the disposal by incineration of some 10,000 to 40,000 gallons of waste industrial solvents per week . . . the storage of hazardous wastes in lagoons and disposal via long-term storage of sludge." Brief for Respondent-Respondent at 14, *Northeast Solite Corp. v. Flacke*, 91 A.D.2d 57, 458 N.Y.S.2d 291 (3d Dep't 1983).

27. *Northeast Solite Corp. v. Flacke*, 114 Misc.2d 313, 316, 451 N.Y.S.2d 633, 635 (Sup. Ct., Albany County 1982).

28. *Id.*

The application for the permit was made in 1981. DEC said that to be grandfathered, the actions must have been approved prior to the effective date of SEQRA.²⁹

Northeast Solite argued that it was exempt from SEQRA because it had not changed its method of operation nor made any material modification to the facility. The corporation said its activities were maintenance or repair and that Environmental Conservation Law section 8-0105(5)(iii) provides that actions do not include maintenance or repair.³⁰

The appellate court did not agree that the activities at Northeast Solite were for maintenance and repair.³¹ The court concluded that activities involved in mining and crushing shale changed the use or appearance of a natural resource.³² Nevertheless, it reversed the decision of the supreme court.³³ The appellate court held that since the facility had existed and operated before SEQRA came into existence, had continued to operate in the same manner, and had applied for or obtained permits required for its operation, it was "grandfathered" from the requirements of SEQRA.³⁴ Thus, the court determined that it was the facility which met the qualifications for exclusion. It labeled as "patently irrational" the DEC argument that grandfathering applied only to agency actions or facilities with approval to operate prior to SEQRA when no such approval was required.³⁵

Since the statute provides specifically for exclusion from the EIS requirement of "actions undertaken or approved prior to the effective date of this article,"³⁶ the court held

29. Brief for Respondent-Respondent at 8-11. *See supra* note 26.

30. Brief for Petitioners-Appellants at 11, *Northeast Solite Corp. v. Flacke*, 91 A.D.2d 57, 458 N.Y.S.2d 291 (3d Dep't 1983).

31. *Northeast Solite Corp. v. Flacke*, 91 A.D.2d 57, 59, 458 N.Y.S.2d 291, 292 (3d Dep't 1983).

32. *Id.*

33. *Id.* at 60, 458 N.Y.S.2d at 292.

34. *Id.* at 59-60, 458 N.Y.S.2d at 292-93.

35. *Id.* at 60, 458 N.Y.S.2d at 293.

36. N.Y. Env'tl. Conserv. Law § 8-0111(5)(a) (McKinney Supp. 1983-1984).

that the date for the grandfather status was a date prior to September 1, 1976, the effective date of the Act.³⁷ By not requiring an EIS for the Part 360 permit, the court signified that if a facility had sought all the permits and other approval required before the effective date of SEQRA, the facility would not be subject to SEQRA for subsequent DEC regulations.³⁸

B. *Salmon v. Flacke*

*Salmon v. Flacke*³⁹ was first decided two months before the supreme court decision in *Northeast Solite Corp. v. Flacke*. Here, in contrast, the DEC was defending a claim by the Supervisor of the Town of Sardinia⁴⁰ that the DEC had violated its statutory duty by failing to require an EIS before its 1981 issuance of an operating permit and a variance to Chaffee Landfill, Inc. (Chaffee), codefendant. Chaffee took over a facility that had been issued a permit in 1958 from the Erie County Department of Health.⁴¹ That permit covered the facility for the removal, collection, transportation, and disposal of garbage, rubbish, and refuse.⁴² DEC issued to Chaffee a Part 360 permit for the operation of a Solid Waste Management Facility.⁴³ It also issued a variance⁴⁴ allowing for acceptance of Buffalo

37. *Northeast Solite Corp. v. Flacke*, 91 A.D.2d 57, 60, 458 N.Y.S.2d 291, 293 (3d Dep't 1983).

38. Id. It should be noted that excluded actions may be subjected to SEQRA requirements if certain conditions exist. These conditions are provided in the "ungrandfathering provisions" of the statute. See *infra* notes 66-67 and accompanying text.

39. *Salmon v. Flacke*, 113 Misc.2d 640, 449 N.Y.S.2d 610 (Sup. Ct., Erie County 1982), *rev'd*, 91 A.D.2d 867, 458 N.Y.S.2d 755 (4th Dep't 1982), *aff'd*, 61 N.Y.2d 798 (1984).

40. Sardinia is located approximately twenty-five miles southeast of Buffalo, New York.

41. *Salmon v. Flacke*, 91 A.D.2d at 867-68, 458 N.Y.S.2d at 755-56 (4th Dep't 1982), *aff'd*, 61 N.Y.2d 798 (1984).

42. Id.

43. Id.

44. *Salmon v. Flacke*, 113 Misc.2d 640, 647, 449 N.Y.S.2d 610, 615 (Sup. Ct., Erie County 1982), *rev'd*, 91 A.D.2d 867, 458 N.Y.S.2d 755 (4th Dep't 1982), *aff'd*, 61 N.Y.2d 798 (1984).

Sewer Authority sludge with a substandard amount of solids.⁴⁵

The DEC defense regarding the permit was that the action was grandfathered because it already had prior approval in the form of the 1958 Erie County Department of Health permit. DEC argued that "[p]etitioner's restatement of the beneficent purposes of SEQRA does not change the fact that the Legislature in enacting SEQRA excluded projects from its review if a prior approval may have been granted by a local agency."⁴⁶ The DEC defense regarding the variance was that the action was an exempt action because it was in response to an emergency condition.⁴⁷

The trial court disagreed with the grandfathering argument. It noted that the health department permit expired December 31, 1958, and that the nature and service of the landfill were substantially different in 1981 than in 1958.⁴⁸ Also, the granting of the operation permit for the solid waste management facility at the landfill did not occur until after September 1, 1977.⁴⁹ The court quoted from the regulations which exempt those actions "which are immediately necessary on a limited emergency basis for the protection or preservation of life, health, property, or natural resources."⁵⁰ It stated that a variance permitting the disposal of 200,000 pounds of sludge per day, six days per week, for a period of four months could not be considered

45. See *infra* note 47.

46. Reply Memorandum for Respondents at 5, *Salmon v. Flacke*, 113 Misc.2d 640, 449 N.Y.S.2d 610 (Sup. Ct., Erie County 1982).

47. *Id.* at 8-10. The sludge from the Buffalo Sewer Authority was unacceptable under standard permit conditions because it did not contain enough solids. The sludge dewatering equipment at the Bird Island Treatment Plant could not attain a 20% solids content in the sludge. The Chaffee Landfill was considered the only landfill in the area that could accept, in an environmentally sound manner, the dilute sludge.

48. *Salmon v. Flacke*, 113 Misc.2d 640, 644, 449 N.Y.S.2d 610, 614 (Sup. Ct., Erie County 1982), *rev'd*, 91 A.D.2d 867, 458 N.Y.S.2d 755 (4th Dep't 1982), *aff'd*, 61 N.Y.2d 798 (1984)..

49. *Id.* at 644-45, 449 N.Y.S.2d at 614.

50. N.Y. Admin. Code tit. 6, § 617.2(o)(6) (1982).

limited.⁵¹ The court held for the Town of Sardinia, voided the November 1981 permit to operate and the variance on the permit, and enjoined the landfill from receiving and disposing of the sludge.⁵² The landfill operator appealed.

The Appellate Division reversed.⁵³ It held, in part, that it was not the issuance of a permit that constituted the action.⁵⁴ It found that the prior landfill activities for which the permit was sought constituted the action. The court held that the action was undertaken or approved prior to SEQRA and was, therefore, entitled to exclusion.⁵⁵ The New York Court of Appeals affirmed for the reasons stated in the memorandum of the Appellate Division.⁵⁶

IV. A Three-step Analysis

Under SEQRA not all actions require preparation of an EIS. Determination of whether an activity is subject to SEQRA may be accomplished by a three-step analysis: whether the activity constitutes an "action", if so, whether the activity is the type requiring review under SEQRA, and, if so, whether the activity is within the effective dates of SEQRA.

A. *Elements of an "Action" under SEQRA*

An "action" is a project or physical activity, such as construction or other activity, which changes the use or appearance of any natural resource or structure, and which involves an agency.⁵⁷ If an agency directly undertakes a project or activity, or supports it in whole or in part, or is

51. *Salmon v. Flacke*, 113 Misc.2d 640, 646, 449 N.Y.S.2d 610, 614 (Sup. Ct., Erie County 1982), *rev'd*, 91 A.D.2d 867, 458 N.Y.S.2d 755 (4th Dep't 1982), *aff'd*, 61 N.Y.2d 798 (1984).

52. *Id.* at 647, 449 N.Y.S.2d at 615.

53. *Salmon v. Flacke*, 91 A.D.2d 867, 458 N.Y.S.2d 755, 756 (4th Dep't 1982), *aff'd*, 61 N.Y.2d 798 (1984).

54. *Id.*

55. *Id.*

56. *Salmon v. Flacke*, 61 N.Y.2d 798 (1984).

57. N.Y. Env'tl. Conserv. Law § 8-0105(4) (McKinney Supp. 1983-1984); N.Y. Admin. Code tit. 6, § 617.2(b) (1984).

involved in issuing a permit for it, that activity is an "action" under SEQRA. "Action" does not include maintenance or repair involving no substantial change in an existing structure or facility or official acts involving no exercise of discretion.⁵⁸

A pre-SEQRA activity may be considered an "action" once new agency involvement becomes required. The "action" status may begin its existence at the time of agency involvement. In *Northeast Solite Corp. v. Flacke*, the activity was one that changed the use or appearance of a natural resource and that involved agency issuance of a Part 360 permit. It was an "action" under SEQRA and was so held by the supreme court. The Appellate Division, Third Department, discussed the corporation's activities and included the regulations' definition of "actions" without specifically concluding whether there was an action.⁵⁹ One may infer either that the court concluded that there was an action and proceeded with this three-step analysis or that the court avoided such a conclusion. Either way, the court concentrated on the activities at the corporation's facility and on the timing of those activities essential to effectuate the grandfathering provision. Whether the activity constituted an action was not determinative of the outcome.

In contrast, in *Salmon v. Flacke*, the action status did not begin its existence when new agency involvement was required. The Appellate Division, Fourth Department, was satisfied that the "landfill operation was an action undertaken or approved" prior to SEQRA.⁶⁰ The court held that the supreme court erred in concluding that it was the issuance of a permit under Part 360, and not the prior landfill activities for which the permit was sought, that constituted the action.⁶¹ The court did not address the issue

58. *Id.*

59. *Northeast Solite Corp. v. Flacke*, 91 A.D.2d 57, 58-59, 458 N.Y.S.2d 291, 292 (3d Dep't 1983).

60. *Salmon v. Flacke*, 91 A.D.2d 867, 868, 458 N.Y.S.2d 755, 756 (4th Dep't 1982), *aff'd*, 61 N.Y.2d 798 (1984).

61. *Id.* at 868, 458 N.Y.S.2d at 757.

of whether those activities were continuous and unchanged since SEQRA became effective.

It should be noted that the Court of Appeals referred to an "activity" rather than to an "action"⁶² and recognized that the appellant's activities plus agency requirements for a permit equalled an action as defined by SEQRA. This is important because the exclusion principle requires recognition of whether a situation is an action.

*B. Activities Requiring Review under SEQRA*⁶³

The regulations provide for initial review of an action to determine as early as possible whether it is subject to SEQRA. If the action is exempt, excluded, or a Type II action, the agency has no further responsibilities under SEQRA.⁶⁴ Therefore, unless it is excluded, every action which is proposed, funded, or approved by an agency and which may have significant effect on the environment⁶⁵ is subject to review under SEQRA.

The Act specifically provides that some actions are excluded from the EIS requirement. The exclusions or grandfathering clause applies to actions involving pre-

62. *Salmon v. Flacke*, 61 N.Y.2d 798 (1984).

63. Activities are arranged in three categories: Type I actions . . . identify, for agencies, project sponsors, and the public, those actions and projects that are more likely to require the preparation of an EIS than those not so listed. N.Y. Admin. Code tit. 6, § 617.12 (1982). Type II actions identify actions which do not have significant effect on the environment and do not require an EIS. N.Y. Admin. Code tit. 6, § 617.13 (1982). Unlisted actions mean all actions not excluded, or exempt, not listed as a Type I or Type II action, or, in the case of a particular agency action, not listed as Type I or Type II actions in the agency's own SEQRA procedures. Note that in Type I actions, projects are distinguished from actions. It is presumed that actions refers to activities and not to "actions" as defined by the statute, whereas Type II actions are within the definition.
See supra note 2.

64. N.Y. Admin. Code tit. 6, § 617.5(a) (1982).

65. The New York Administrative Code provides a list of criteria that are considered indicators of significant effects on the environment. N.Y. Admin. Code tit. 6, § 617.11 (1982). Exempt and Type II actions are types of actions that have been determined not to have significant effects on the environment.

SEQRA activities approved prior to the effective dates. New agency discretion over these same activities constitutes a definable action. However, a new action involving a pre-SEQRA activity should not automatically "ungrandfather" a previous action.⁶⁶ It is the statute that provides the conditions for ungrandfathering an action. SEQRA provides that an action prior to the effective date will not be excluded if it meets one of these conditions:

- (i) In the case of an action where it is still practicable either to modify the action in such a way as to mitigate potentially adverse environmental effects or to choose a feasible and less environmentally damaging alternative, in which case the commissioner may, at the request of any person or on his own motion, in a particular case, or generally in one or more classes of cases specified in rules and regulations, require the preparation of an environmental impact statement pursuant to this article; or (ii) In the case of an action where the responsible agency proposes a modification of the action and the modification may result in a significant adverse effect on the environment, in which case an environmental impact statement shall be prepared with respect to such modification.⁶⁷

The wording of subsection (i) demonstrates that the legislature anticipated that some excluded actions would have adverse or damaging environmental effects. This statute excludes such actions unless it is "practicable" to change them.

It should be concluded that SEQRA applies to activities which involve agency discretion for their inception or continuance when such activities may have a significant

66. Subjecting a grandfathered activity to SEQRA review when new permits are required effectively ungrandfathers a previous action. If the legislature intended that result, it was not clearly expressed in the statute.

67. N.Y. Env'tl. Conserv. Law § 8-0111(5)(a)(i)-(ii) (McKinney Supp. 1983-1984). The court of appeals decision in *Salmon v. Flacke* suggests that the new dumping activities at Chaffee Landfill did not change the level of operation so as to ungrandfather the prior action. 61 N.Y.2d 798 (1984).

effect on the environment and, in the case of continued activities, when they may be modified practicably.⁶⁸

C. Dates Subjecting an Action to SEQRA

It has been stated that the grandfathering clause refers to the effective date of SEQRA rather than the phased implementation dates.⁶⁹ However, the Act was amended to provide a phased implementation.⁷⁰ This was to give government officials time to properly adjust their administrative procedures.⁷¹ It is, then, the phased implementation dates that should be used to determine whether SEQRA applies to a given type of action. Any other interpretation would strip section 8-0117 and its amendments of any meaning.

V. Conclusion

Grandfathering has been an issue in several cases since SEQRA became effective.⁷² The two cases presented demonstrate the difficulty in determining what constitutes an action when new permit requirements are involved. The definition of action does not stipulate whether the permits referred to in the definition include all permits regardless of when they are first required nor does it stipulate whether the

68. This note does not address any problems inherent in agency issuance of a permit for an activity that would require an EIS were it not a pre-SEQRA activity. For example, this note will not address the problem of environmental damage where it is impracticable to change the action, as described previously.

69. *Northeast Solite Corp. v. Flacke*, 91 A.D.2d 57, 60, 458 N.Y.S.2d 291, 293 (3d Dep't 1982).

70. 1978 N.Y. Laws ch. 460 (codified at N.Y. Env'tl. Conserv. Law § 8-0117 (McKinney Supp. 1983-1984)).

71. New York State Legislative Annual at 199 (1976).

72. *E.g.*, *Rome-Floyd Residents Ass'n v. Oneida County*, 93 A.D.2d 979, 461 N.Y.S.2d 654 (4th Dep't 1983) (challenge to approval of a resource recovery system); *Rye Town/King Civic Ass'n v. Town of Rye*, 82 A.D.2d 474, 442 N.Y.S.2d 834 (2d Dep't 1982) (challenge to a proposed office building); *Appalachian Mountain Club v. Flacke*, 109 Misc.2d 514, 440 N.Y.S.2d 430 (Sup. Ct., New York County 1981) (challenge to DEC determination to amend tidal wetlands map in area of proposed Westway construction site).

projects and activities must begin after the effective date. To solve this problem, the exclusion provisions of the statute must supplement the definition of action. It is, after all, the action that is grandfathered.

As new legislation is enacted which requires agency discretion regarding existing facilities, the need will increase for clear understanding of exclusion under SEQRA. Appropriate application of the exclusion provisions should limit litigation in this area.

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