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# New York's SEQRA in the Courts

Gail Bowers\*

## I. Introduction

Since 1982 the number of court decisions on the State Environmental Quality Review Act (SEQRA)<sup>1</sup> has exploded.<sup>2</sup> Early decisions stand as landmarks which drew broad judicial boundaries for the interpretation of a new statute. The purpose of this article is to review recent decisions on SEQRA and to highlight some of the more noteworthy opinions. The substantive cases present new judicial views, and, in some instances, articulate boundaries for the future. The procedural cases tend to fill the interstices left by the early landmark decisions. The article will be devoted to a discussion of both substantive and procedural issues decided by the courts, and will attempt to provide some guidance on where the courts appear to be headed on some of the growth issues of the 1980's and beyond.

## II. Substantive Aspects and Adequacy Issues

This section will focus on the substantive, or "action forcing," aspects of SEQRA rather than the procedural aspects considered in the next section.<sup>3</sup> It will highlight some of the

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1. N.Y. Envtl. Conserv. Law §§ 8-0101 to -0117 (McKinney 1984 & Supp. 1987). SEQRA is also referred to as Article 8 of the ECL. The regulations adopted pursuant to the statute are contained in N.Y. Comp. Code R. & Regs. tit. 6, §§ 617.1-.21 (1987).

2. The Division of Legal Affairs of the Department of Environmental Conservation has a record of slightly more than two hundred fifty SEQRA cases. In his article, *SEQRA in the Courts*, Daniel A. Ruzow noted that over fifty decisions had been handed down. 46 Alb. L. Rev. 1177, 1177 (1982).

3. The goals of SEQRA are those legislative priorities stated in N.Y. Envtl. Conserv. Law §§ 8-0101 & -0103 (McKinney 1984). The Legislature declared protection of the environment to be a state policy and mandated that state and local agencies con-

emerging issues such as conditioned negative declarations, alternatives, and cumulative impacts. The court decisions here deal with the judicial standards of review for environmental impact statements (EIS), as well as determinations of significance. Of particular interest is the application by the courts of the "rule of reason"<sup>4</sup> and the extension of the *H.O.M.E.S.* test<sup>5</sup> from negative declarations (determinations of no significant impact) to the entire SEQRA process.

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sider environmental factors and give them appropriate weight in their decisions. The "action forcing" portion of the statute, set forth in § 8-0109(1) is to be read in relation to those goals. That subdivision requires agencies to act in accordance with the state policy in choosing "alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse effects." The requirement of § 8-0109(1) is the heart of the substantive component of SEQRA and constitutes a legal mandate to agencies to make the best possible effort to meet their environmental stewardship responsibilities. A determination by an agency that an action *may* have significant environmental impacts requires preparation of an Environmental Impact Statement (EIS). This document must disclose and analyze impacts, alternatives to the action, and possible mitigation measures to reduce impacts. See N.Y. Comp. Codes R. & Regs. tit. 6, § 617.14 (1987).

4. The "rule of reason," like the *H.O.M.E.S.* test, (discussed *infra* note 5) is drawn from the federal National Environmental Policy Act (NEPA) cases, 42 U.S.C. §§ 4321-70a (1982 & Supp. III 1985). It was discussed in *Coalition Against Lincoln West v. City of New York*, 94 A.D.2d 483, 491, 465 N.Y.S.2d 170, 176 (1st Dep't), *aff'd*, 60 N.Y.2d 805, 457 N.E.2d 795, 469 N.Y.S.2d 689 (1983), and *Environmental Defense Fund v. Flacke*, 96 A.D.2d 862, 465 N.Y.S.2d 759 (2d Dep't 1983) and held applicable to SEQRA, particularly for interpretation of substantive issues. *H.O.M.E.S. v. New York State Urban Dev. Corp.*, 98 Misc. 2d 790, 414 N.Y.S.2d 988, *modified*, 67 A.D.2d 222, 418 N.Y.S.2d 827 (4th Dep't 1979). The rule of reason limits the discussion of impacts solely to reasonably potential impacts, and states that not every conceivable alternative need be addressed in an EIS. The court of appeals, in *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 494 N.E.2d 429, 503 N.Y.S.2d 298 (1986), has distinguished SEQRA from NEPA, noting that SEQRA imposes substantive, action-forcing requirements on agencies. *Id.* at 415, 494 N.E.2d at 434, 503 N.Y.S.2d at 303.

5. The *H.O.M.E.S.* test originated in *H.O.M.E.S. v. New York State Urban Dev. Corp.*, 98 Misc. 2d 790, 414 N.Y.S.2d 988, *modified*, 69 A.D.2d 222, 418 N.Y.S.2d 827 (4th Dep't 1979) which took the test from NEPA cases. The three part test, sometimes also called the "hard look" test, requires an agency to 1) identify relevant areas of environmental concern, 2) thoroughly analyze those areas to determine if the action may have a significant adverse impact, and 3) support its determination with reasoned elaboration. *H.O.M.E.S.*, 69 A.D.2d at 231-32, 418 N.Y.S.2d at 832. A negative declaration is a determination that an action *will not* have any significant environmental impacts. See N.Y. Comp. Codes R. & Regs. tit. 6, § 617.2(y) (1987).

### A. *Judicial Review of Determinations of Significance*

The *H.O.M.E.S.* test has been the standard of review used by all four appellate divisions in New York. In most cases, the determination undergoing review has been a negative declaration, and the challenge has been made without a hearing.<sup>6</sup> The "hard look" issue is generally framed according to the traditional standard of whether the agency's decision was arbitrary and capricious.<sup>7</sup>

It is interesting to compare agency determinations that have been upheld with those which have been annulled based upon the application of the arbitrary and capricious standard. In *Soule v. Town of Colonie*,<sup>8</sup> members of the Shaker religious sect challenged a negative declaration issued for a municipal sports stadium conceded to be a Type I action,<sup>9</sup> which was proposed to adjoin to an important Shaker cemetery. The court noted that its review was limited to whether the determinations of the agency were made according to proper procedure, and whether or not the determinations were arbitrary and capricious in light of the low threshold for determining significance of an action.<sup>10</sup> The court noted that, to support the negative declaration, the three-part *H.O.M.E.S.* test must be met.<sup>11</sup> It was found that an environmental assessment form (EAF) and a comprehensive engineering report were submitted, both of which were found to have identified and provided for mitigation of "each and every criterion affecting the environment."<sup>12</sup> Thus, respondents were found to have "made a

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6. See *infra* text accompanying notes 9 to 22.

7. The arbitrary and capricious standard is derived from N.Y. Civ. Prac. L. & R. § 7803 (McKinney 1981) (CPLR).

8. 95 A.D.2d 979, 464 N.Y.S.2d 576 (3d Dep't 1983).

9. A Type I action, pursuant to N.Y. Comp. Codes R. & Regs. tit. 6, § 617.12, is one which meets certain thresholds and which is deemed to be more likely than other actions to require preparation of an EIS.

10. *Soule*, 95 A.D.2d at 981, 464 N.Y.S.2d at 579.

11. *Id.* See *supra* note 5.

12. *Id.* at 981, 464 N.Y.S.2d at 579. The court of appeals, in *Chinese Staff & Workers, Ass'n v. City of New York*, 68 N.Y.2d 359, 365, 502 N.E.2d 176, 179-80, 509 N.Y.S.2d 499, 503 (1986), held the term "environment" to be very broadly defined in Part 617. The criteria promulgated at N.Y. Comp. Codes R. & Regs. tit. 6, § 617.11 are a checklist of examples which, if certain thresholds are met, require preparation

thorough investigation of all the problems involved and reasonably exercised their discretion."<sup>13</sup> The agency determination, therefore, was upheld.

Contrast *Soule* with *Inland Vale Farm Co. v. Stergianopoulos*,<sup>14</sup> in which a local planning board issued a negative declaration along with its approval of a site plan for a commercial and office center. The EAF, however, had indicated that surface or ground water quality would be adversely impacted by the plan. The court held that more than a mere identification of an impact is required to satisfy the "hard look" test. The agency must also require that an environmental impact statement (EIS) be prepared, otherwise, its negative declaration is arbitrary and capricious.<sup>15</sup>

The agency in *Inland Vale* failed to adequately identify or analyze impacts, and failed to act in accordance with state policy as articulated by Article 8 of the Environmental Conservation Law (ECL); the agencies in *Soule* recognized the potential for significant impacts and addressed them through mitigation measures. The differences between *Inland Vale Farm* and *Soule* give fairly clear guidance regarding the need for complete and adequate information for review, adherence to the Part 617 criteria, reasoned elaboration which does not overlook significant impacts, and a decision to require an EIS when the criteria are met.<sup>16</sup>

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of an EIS for an action whether the action is Type I or Unlisted.

13. *Soule*, 95 A.D.2d at 982, 464 N.Y.S.2d at 580. An unrelated issue raised by this case is the court's sanctioning of what was essentially a conditioned negative declaration (CND) on a direct agency action. For a discussion of CNDs, see *infra*, notes 17 to 24 and accompanying text.

14. 104 A.D.2d 395, 478 N.Y.S.2d 926 (2d Dep't 1984), *aff'd*, 65 N.Y.2d 718, 481 N.E.2d 547, 492 N.Y.S.2d 7 (1985). See also *Kirk-Astor Drive Neighborhood Ass'n v. Town of Pittsford*, 106 A.D.2d 868, 483 N.Y.S.2d 526 (3d Dep't 1984) (regarding the pitfalls of using an incomplete or inadequate EAF substitute).

15. *Inland Vale*, 104 A.D.2d at 397, 478 N.Y.S.2d at 928.

16. Several courts have indicated the need for adequate documentation, or written elaboration, of the reasons for determinations of significance (particularly negative declarations), if agencies are to provide adequate evidence that their decisions are not arbitrary and capricious. This documentation is also needed to provide the courts with an adequate basis of review. Even for Unlisted actions, for which filing requirements are simplified, courts have required a showing that some analytical process has occurred prior to the issuance of a determination. Although there is not the

### B. *Can a Negative Declaration Be Subject to Conditions?*

The question of conditioned negative declarations (CND) requires a look at the issue of mitigation. Clearly, the primary purpose of SEQRA is prevention of environmental damage.<sup>17</sup> Thus mitigation measures, either voluntarily proposed by a project sponsor, or imposed or negotiated by an agency, are an important issue in the approval of a project through the SEQRA process. The statute requires that an EIS discuss mitigation measures<sup>18</sup> and that a findings statement be issued stating that, to the maximum extent practicable, adverse impacts will be minimized or avoided.<sup>19</sup> Although the statute contemplates that the EIS and findings statement act as tools for setting forth and deciding upon mitigation measures,<sup>20</sup> in a number of cases mitigation measures were used as conditions attached to a negative declaration.<sup>21</sup> Such a mechanism effectively prevents a project from reaching the EIS threshold.

In *Soule v. Town of Colonie*<sup>22</sup> and *Manes v. Simpson*,<sup>23</sup> cases in which agencies were acting directly, the EAF<sup>24</sup> and supporting documents proposed specific methods to be used to mitigate identified adverse environmental impacts. Despite obvious problems of subsequent self-enforcement of such non-

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opportunity in this article to further probe this topic, the readers are directed to a review of *Tehan v. Scrivani*, 97 A.D.2d 769, 468 N.Y.S.2d 402 (2d Dep't 1983), and *Oak Beach v. Lehman*, 100 A.D.2d 906, 474 N.Y.S.2d 793 (2d Dep't 1984) (indicating the courts' unwillingness to tolerate a conclusory or virtually non-existent decision record).

17. N.Y. Env'tl. Conserv. Law § 8-0101 (McKinney 1984).

18. *Id.* § 8-0109(2)(f).

19. *Id.* § 8-0109(8); see also *Town of Henrietta v. Department of Env'tl. Conservation*, 76 A.D.2d 215, 430 N.Y.S.2d 440 (4th Dep't 1980).

20. N.Y. Env'tl. Conserv. Law §§ 8-0109(1), (2)(f) (McKinney 1984).

21. *H.O.M.E.S. v. New York State Urban Dev. Corp.*, 69 A.D.2d 222, 418 N.Y.S.2d 827 (4th Dep't 1979) involved a conditioned negative declaration. More recently, the court of appeals considered the concept in *Chinese Staff & Workers Ass'n v. City of New York*, 68 N.Y.2d 359, 364, 502 N.E.2d 176, 178, 509 N.Y.S.2d 499, 501-02 (1986).

22. 95 A.D.2d 979, 464 N.Y.S.2d 576 (3d Dep't 1983).

23. 108 A.D.2d 914, 485 N.Y.S.2d 802 (2d Dep't 1985).

24. EAF forms are used by agencies to obtain and analyze basic project information in order to make a determination of significance. N.Y. Comp. Code R. & Regs. tit. 6, § 617.5 (1987).

binding conditions by agencies undertaking direct actions, the courts approved negative declarations in both cases.<sup>25</sup> A somewhat different set of circumstances existed in *Southampton Association v. Planning Board*.<sup>26</sup> This case involved a grant of final plat approval for a subdivision. A portion of the parcel had an historic house located on it which the developer intended to preserve. The village board issued its negative declaration based upon mitigation measures which were negotiated with the project sponsor, and which were to be enforced by restrictive covenants in the deeds.<sup>27</sup>

Although conditioned negative declarations were not directly addressed in the statute, they seem to have met with a degree of court approval. Their continued use was the subject of recent debate in the revision process for the Part 617 regulations.<sup>28</sup>

### C. *How Do the Courts Review an EIS?*

The judicial standard of review of an EIS and the findings<sup>29</sup> is somewhat confusing. The reason for the confusion is partly the result of application of the *H.O.M.E.S.* test to EIS review, and partly the result of lack of clarity as to whether procedural or substantive aspects of SEQRA are being reviewed. In all cases, the EIS process includes a record upon which an agency decision is made, whether written comments or hearing testimony are involved.<sup>30</sup> Thus, the traditional Civil Practice Law and Rule (CPLR) Article 78 standards are applicable. These standards require a finding of a rational ba-

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25. *Soule*, 95 A.D.2d at 981, 464 N.Y.S.2d at 579; *Manes*, 108 A.D. at 915, 485 N.Y.S.2d at 804.

26. 109 A.D.2d 204, 491 N.Y.S.2d 388 (2d Dep't 1985).

27. *Id.* at 207, 491 N.Y.S.2d at 390.

28. Various arguments for and against the use of conditioned negative declarations have been discussed in the generic EIS accompanying the 1987 text amendments to Part 617. The GEIS is available from the Department of Environmental Conservation, 50 Wolf Road, Albany, N.Y. 12233.

29. Findings are statements in support of a decision on an action based on facts and conclusions in the EIS. Such a statement includes a certification that the action meets the statutory requirements of N.Y. Env'tl. Conserv. Law § 8-0109(8) (McKinney 1984).

30. N.Y. Env'tl. Conserv. Law §§ 8-0109(4), -0113(2)(i) (McKinney 1984).

sis and of substantial evidence in the record to support the decision.<sup>31</sup> Review of an EIS and the findings statement based on it, requires an examination of the substantive aspects of the SEQRA process. When a court considers the adequacy of an EIS or the basis for a findings statement, it puts itself squarely into substantive issues.

The *H.O.M.E.S.* test was extended to apply to the review of an EIS by the First Department in *Coalition Against Lincoln West v. City of New York*,<sup>32</sup> and by the Second Department in *Environmental Defense Fund v. Flacke*.<sup>33</sup> This extension of the test clouded the issue of review, because both decisions refer to the need for literal compliance with SEQRA and the use of the "hard look" test to determine literal compliance.<sup>34</sup> In both cases, the courts also noted that courts should construe SEQRA "in light of the rule of reason" and be able to conclude that their determinations were supported by substantial evidence.<sup>35</sup> By throwing all these procedural and substantive standards and tests into one case review, these early substantive decisions set a confusing example for others to follow. Further, by relying on the "hard look" test, the courts may have restricted their ability to adequately review whether an agency has met the substantive requirements of SEQRA in regard to the agency's duty to avoid and mitigate adverse environmental impacts.

A decision which has helped to clarify one court's judicial reasoning in an EIS review is *Aldrich v. Pattison*.<sup>36</sup> In this case, the Second Department took the opportunity to "clarify the judicial standard of review" applicable in substantive,

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31. See *Town of Hempstead v. Flacke*, 82 A.D.2d 183, 187, 441 N.Y.S.2d 487, 490 (2d Dep't 1981); and *Pell v. Board of Educ.*, 34 N.Y.2d 222, 231, 313 N.E.2d 321, 325, 356 N.Y.S.2d 833, 839 (1974).

32. 94 A.D.2d 483, 465 N.Y.S.2d 170, *aff'd*, 60 N.Y.2d 805, 457 N.E.2d 795, 469 N.Y.S.2d 689 (1983).

33. 96 A.D.2d 862, 465 N.Y.S.2d 759 (2d Dep't 1983).

34. *Environmental Defense Fund*, 96 A.D.2d at 862, 465 N.Y.S.2d at 761; see also *Coalition*, 94 A.D.2d at 491, 465 N.Y.S.2d at 176.

35. *Environmental Defense Fund*, 96 A.D.2d at 863, 465 N.Y.S.2d at 762-63; *Coalition*, 94 A.D.2d at 491-92, 465 N.Y.S.2d at 176.

36. 107 A.D.2d 258, 486 N.Y.S.2d 23 (2d Dep't 1985).



rather than procedural, cases.<sup>37</sup> After reviewing the specific statutory and regulatory requirements for procedural issues, the court turned its attention to judicial review of substantive compliance.<sup>38</sup> It noted the relatively meager guidance provided by the statute as to the list of information to be included and analyzed in an EIS.<sup>39</sup> The court stated that in order to determine substantive compliance, the "hard look" test is to be applied along with the rule of reason standard.<sup>40</sup> In order to undertake its review, the court considered each issue raised by the petitioner, assessed the information identified and analyzed by the respondent lead agency, and found that each impact had been adequately addressed. The court concluded that by combining these standards, close review of an EIS's adequacy, and thus the adequacy of the basis for an agency's findings, would be achieved.<sup>41</sup>

The court of appeals made numerous references to the *Aldrich* decision in its opinion rendered in *Jackson v. New York State Urban Development Corp.*<sup>42</sup> It noted that its review must be tempered by viewing an agency's substantive obligations "in light of the rule of reason" and by recognizing that the statutory scheme allows agencies "considerable latitude in evaluating environmental effects and choosing among alternatives."<sup>43</sup> Although describing its review as "supervisory only," the court undertook a searching and detailed review of the record to ensure that reasoned consideration was given to all pertinent issues.<sup>44</sup> Only by undertaking such detailed reviews can the courts ensure that the substantive mandates of the statute are met.

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37. *Id.* at 263, 486 N.Y.S.2d at 27.

38. *Id.* at 265, 486 N.Y.S.2d at 28.

39. *Id.* at 265, 486 N.Y.S.2d at 28-29 (citing N.Y. Env'tl. Conserv. Law § 8-0109(2) (McKinney 1984)).

40. *Id.* at 265-66, 486 N.Y.S.2d at 29.

41. *Id.* at 265-67, 486 N.Y.S.2d at 31-36.

42. 67 N.Y.2d 400, 494 N.E.2d 429, 503 N.Y.S.2d 298 (1986).

43. *Id.* at 417, 494 N.E.2d at 436, 503 N.Y.S.2d at 305.

44. *Id.*

### D. *The Range of Alternatives Issue*

The most often discussed aspects of the EIS process in recent court decisions have been: (1) the consideration of alternatives; (2) the range of alternatives that must be aired; and (3) whether government project sponsors have a different burden than private project sponsors to consider a broader range of alternatives.

*Webster Associates v. Town of Webster*<sup>45</sup> was the first case to focus directly on the alternatives issue. In *Webster*, the litigation was brought, in part, by the sponsor of a competing project which was not discussed as an alternative in the draft EIS (DEIS).<sup>46</sup> The issue was whether a discussion of alternatives in a final EIS (FEIS) was sufficient compliance. The court of appeals' holding that the FEIS discussion was adequate was based upon a recognition of broad community and official awareness of, and debate on, the alternative project, in addition to the attendance and comment of Webster Associates at public hearings.

In response to the question of which alternatives must be considered, the First Department, in *Coalition Against Lincoln West v. City of New York*,<sup>47</sup> stated that "SEQRA does not require that every conceivable alternative must be considered,"<sup>48</sup> but rather that "reasonableness and balance" is the rule.<sup>49</sup> The court went on to note that an agency must look at "viable alternatives" and have enough information to "permit a reasoned conclusion."<sup>50</sup> A similar result was reached by the Second Department in *Environmental Defense Fund v. Flacke* (EDF).<sup>51</sup> In *EDF*, the court concluded that alternatives to a proposed power plant that would not meet applicable ambient air quality standards need not be considered because

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45. 59 N.Y.2d 220, 451 N.E.2d 189, 464 N.Y.S.2d 431 (1983). The project was controversial and received much local public attention, some of which was generated by the sponsor of a competing project.

46. *Id.* at 227.

47. 94 A.D.2d 483, 465 N.Y.S.2d 170 (1st Dep't 1983).

48. *Id.* at 491, 465 N.Y.S.2d at 176.

49. *Id.* at 492, 465 N.Y.S.2d at 176.

50. *Id.*, 465 N.Y.S.2d at 177.

51. 96 A.D.2d 862, 465 N.Y.S.2d 759 (2d Dep't 1983).

they were not viable.<sup>52</sup> The court also noted that although petitioner's proposal was not considered, a similar proposal was discussed, thereby providing a sufficient basis for analytical discussion.<sup>53</sup>

In *Horn v. IBM*,<sup>54</sup> a recent Second Department case, additional guidance was provided concerning when alternatives must be considered, and what duty a private developer has regarding site alternatives. In *Horn*, IBM sought to build in a residentially zoned area, and accordingly acquired options on several parcels of land. In support of its rezoning request, IBM submitted a draft generic EIS (DGEIS).<sup>55</sup> Plaintiff, a neighbor of the preferred site, argued that the draft and a final GEIS submitted by IBM failed to adequately address alternative locations for the project.<sup>56</sup> The draft GEIS contained a discussion of alternative uses for the chosen site as well as references to other parcels in the town which, although not under option to IBM, might be considered. IBM argued that the impacts would be the same despite the particular site chosen.<sup>57</sup>

The court concluded that the discussion of alternatives in the draft and final GEIS complied with SEQRA.<sup>58</sup> It stated that "a crucial factor to consider is whether the applicant is a private developer or a governmental agency."<sup>59</sup> The distinction, the court reasoned, is crucial because of the broader range of alternative sites available to government agencies through the use of eminent domain. Economic factors limit a private developer's choices, so that it "would be unrealistic, and, indeed, onerous" to require a developer to option or purchase various sites so as to present them as alternatives.<sup>60</sup>

Because IBM was asked to do a generic EIS by the town,

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52. *Id.* at 864, 465 N.Y.S.2d at 762.

53. *Id.* at 864, 465 N.Y.S.2d at 763.

54. 110 A.D.2d 87, 493 N.Y.S.2d 184 (2d Dep't 1985).

55. *Id.* at 89, 493 N.Y.S.2d at 186.

56. *Id.* at 92, 493 N.Y.S.2d at 188. A GEIS is used for a more conceptual review of an action. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.15 (1987).

57. *Horn*, 110 A.D.2d at 94, 493 N.Y.S.2d at 190.

58. *Id.* at 100, 493 N.Y.S.2d at 194.

59. *Id.* at 95, 493 N.Y.S.2d at 190.

60. *Id.* at 95, 493 N.Y.S.2d at 191.

a question remains as to why a conceptual review of site alternatives was not done before IBM committed itself to a particular site. It is also interesting to note that the limited alternative standard applied to private developers is restricted to *site* alternatives and not to use, size, or other alternatives. Thus, although the court has responded with a reasoned approach to site selection for private applicants, the debate continues as to whether a home builder, for example, must discuss an office park as an alternative, or whether a smaller, less profitable project must be discussed by an applicant.

### E. Cumulative Impacts

Attention has focused recently on the issue of cumulative impacts. Although the issue of long-term impacts was raised in the early years,<sup>61</sup> increasing sophistication on the synergistic, chronic, secondary, and precedent-setting impacts of certain actions has resulted in court review at both the appellate division and the court of appeals.<sup>62</sup> The regulations promulgating SEQRA require consideration of cumulative impacts in determining the significance of an action.<sup>63</sup>

In *Save the Pine Bush, Inc. v. City of Albany*,<sup>64</sup> the Appellate Division, Third Department held that the city was required to consider the cumulative impact of a number of development proposals, totaling almost three hundred acres,<sup>65</sup> in a unique environmental setting.<sup>66</sup> The court also held that the

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61. See, *Onondaga Landfill Sys., Inc. v. Flacke*, 81 A.D.2d 1022, 440 N.Y.S.2d 788 (4th Dep't 1981).

62. *Save the Pine Bush, Inc. v. City of Albany*, 117 A.D.2d 267, 502 N.Y.S.2d 540 (3d Dep't 1986); *Chinese Staff & Workers Ass'n v. City of New York*, 68 N.Y.2d 359, 502 N.E.2d 176, 509 N.Y.S.2d 499 (1986).

63. N.Y. Comp. Code R. & Regs. tit. 6, §§ 617.11(a)(11), (b) (1987) directly or indirectly require consideration of cumulative impacts. Also sections 617.14(f)(3), (4) require an EIS to describe short and long-term effects and typical associated effects, as well as any adverse environmental effects of an action.

64. 117 A.D.2d 267, 502 N.Y.S.2d 540 (3d Dep't 1986). The court of appeals affirmed the merits of this decision in an opinion strongly supportive of SEQRA's purposes. *Save the Pine Bush, Inc. v. City of Albany*, 70 N.Y.2d 193, 512 N.E.2d 526, 518 N.Y.S.2d 943 (1987).

65. *Save the Pine Bush, Inc. v. City of Albany*, slip op. at 4 (N.Y. Sup. Ct. Albany County, May 17, 1985) on file at Pace Env'tl. Law Rev. office.

66. *Save the Pine Bush*, 117 A.D. at 271, 502 N.Y.S.2d at 543.

failure to provide a reasoned elaboration of the consideration of that issue required nullifying the related zoning change.<sup>67</sup> In *Chinese Staff & Workers Association v. City of New York*,<sup>68</sup> the court of appeals decided a case based upon New York City's own environmental regulations.<sup>69</sup> This case involved the issues of whether impacts on community character are environmental, rather than social and economic,<sup>70</sup> and whether long-term displacement of residences and businesses could be considered in a determination of significance. The case involved a proposed luxury high-rise condominium in a special zoning district created to preserve the residential character of Chinatown. Once the court determined that community character was an environmental impact, it then considered the need to address both short and long-term, primary and secondary impacts, including potential gentrification impacts of luxury housing in a working class neighborhood.<sup>71</sup> Having failed to consider those impacts, the city's approval of the action was nullified.<sup>72</sup>

By focusing attention on the need to consider cumulative impacts, these decisions highlight the need for agencies to

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67. *Id.* The unpublished decision of the New York Supreme Court, Albany County. (Conway, J.) contains an interesting analysis of the effects of a number of separate projects, stating: "These harmful environmental impacts are cumulative because they increase in magnitude and severity as the number of individual projects constructed increases." *Save the Pine Bush, Inc. v. City of Albany*, slip op. at 6 (N.Y. Sup. Ct. Albany County, (May 17, 1985) on file at Pace Env'tl. Law Rev. office.

68. 68 N.Y.2d 359, 502 N.E.2d 176, 509 N.Y.S.2d 499 (1986).

69. City Environmental Quality Review (CEQR), N.Y. City Exec. Order 91 (Aug. 24, 1977). The court declined to say whether it would reach the same conclusion under SEQRA. However, the issue of secondary impacts, explicitly required to be considered under CEQR, is implicit in the term "cumulative impacts" as used in the SEQRA regulations. Many of the impacts considered in an EIS are not primary impacts (site-specific impacts such as removal of trees to construct a building) but are secondary (traffic or growth inducement, for example). The court of appeals agreed that the state statute would require a similar result in its decision in *Save the Pine Bush, Inc. v. City of Albany*, 70 N.Y.2d 193, 512 N.E.2d 526, 518 N.Y.S.2d 943 (1987).

70. See *supra* note 12.

71. *Chinese Staff*, 68 N.Y.2d 366, 367-68, 502 N.E.2d at 180-81, 509 N.Y.S.2d at 503-04.

72. Although not at issue in this case, the court noted that the city failed to address the issue of community character when it created the zoning district, so the city would have to consider it on each project. *Id.* at 367 n.9, 502 N.E.2d at 181 n.9, 509 N.Y.S.2d at 504 n.9.

consider the potential damage to finite resources caused by a case by case approach to project approvals. The decisions should encourage agencies to think about cumulative impacts before the initial incremental impacts occur. Agencies will likely bear the initial burden of considering cumulative impacts, since they have the broad authority, as well as the ability to review a series or group of actions, or to consider a resource as a whole, whereas a private project sponsor may not.<sup>73</sup>

#### F. *Summary*

Recent substantive cases reflect the increased sophistication of agencies and project sponsors in avoiding the preparation of an EIS by offering to mitigate adverse environmental impacts. In addition, these cases show the reluctance of the courts to go beyond traditional judicial review standards to determine whether an agency has met its statutory mandates. In order to preserve the integrity of the SEQRA process, judicial attention should be focused on the need for public review of proposed mitigation measures, the need to ensure that agencies choose alternatives that make the most environmental sense and meet the statutory requirements, and that, to the fullest extent practicable, the decision has avoided or mitigated the impacts.

### III. Procedural Aspects of SEQRA

Partial answers to procedural issues concerning the SEQRA process were suggested by some early court cases. Later decisions, however, have provided more complete explanations. This section discusses these later cases.

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73. In *Save the Pine Bush*, the city of Albany was encouraged to prepare a generic EIS to address the cumulative impacts of multiple projects. *Save the Pine Bush, Inc. v. City of Albany*, 117 A.D.2d 267, 271, 502 N.Y.S.2d 540, 543 (3d Dep't 1986). The individual project sponsors might thereafter be charged a proportionate share of the EIS preparation fee to partially reimburse the lead agency for its costs. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.17 (1987).

A. *How Early in the Formulation of a Proposal for an Action Does SEQRA Apply?*

In *Tri-County Taxpayers Association v. Town Board*,<sup>74</sup> the court of appeals held that the SEQRA process must be complied with prior to the taking of any significant step by an agency.<sup>75</sup> This holding was based upon the statutory mandate that "[a]s early as possible in the formulation of a proposal for an action, the responsible agency shall make an initial determination whether an environmental impact statement need be prepared for the action."<sup>76</sup> Several variations on *Tri-County Taxpayers* have occurred, and the question of just when and under what circumstances a determination of significance is required has been answered with varying degrees of consistency by the courts. In *Devitt v. Heimbach*,<sup>77</sup> the court of appeals reviewed a county resolution approving the sale of more than one hundred acres of land without the prior issuance of a determination of significance.<sup>78</sup> The court held that the resolution authorizing the sale was not properly passed "because the County Legislature did not have prior to passing that resolution either an EIS or a determination of non-significance".<sup>79</sup> In its decision, the court specifically relied on *Tri-County Taxpayers*.<sup>80</sup>

Subsequent to *Devitt*, the court of appeals, in *Programming and Systems v. New York State Urban Development Corp.*<sup>81</sup> considered an attempt to require an agency to make a

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74. 55 N.Y.2d 41, 432 N.E.2d 592, 447 N.Y.S.2d 699 (1982).

75. *Id.* at 46-47, 432 N.E.2d at 594, 447 N.Y.S.2d at 701.

76. N.Y. Envtl. Conserv. Law § 8-0109(4) (McKinney 1984).

77. 58 N.Y.2d 925, 447 N.E.2d 59, 460 N.Y.S.2d 512 (1983).

78. *Id.* at 928, 447 N.E.2d at 60-61, 460 N.Y.S.2d at 513. The county first acted without having made any attempt to comply with SEQRA and then, upon being ordered to comply, was challenged on the negative declaration which it issued. *Devitt v. Heimbach*, 109 Misc. 2d 463, 471, 440 N.Y.S.2d 465, 470 (1981).

79. *Devitt*, 58 N.Y.2d at 928, 447 N.E.2d at 61, 460 N.Y.S.2d at 513.

80. *Id.* at 928, 447 N.E.2d at 60, 460 N.Y.S.2d at 513 (citing *Tri-County Taxpayers Ass'n v. Town Bd.*, 55 N.Y.2d 41, 432 N.E.2d 592, 447 N.Y.S.2d 699 (1982)).

81. 61 N.Y.2d 738, 460 N.E.2d 1347, 472 N.Y.S.2d 912 (1984). In this case, the proceeding was brought by a lessee who feared that the Urban Development Corporation might undertake eminent domain proceedings and hinder his rights. See also *Pizzuti v. Metro. Transit Auth.*, 114 A.D.2d 943, 495 N.Y.S.2d 90 (2d Dep't 1985)(re-

determination of significance. In *Programming and Systems*, the Urban Development Corporation (UDC) was involved in the redevelopment of the neighborhood around 42nd Street in Manhattan. The court found that because only preliminary steps in planning for redevelopment had occurred, an impact statement was not required.<sup>82</sup> No EIS was needed until a specific project plan was actually formulated and proposed. At that time, however, prior to acting on the proposal, an environmental impact statement would have to be prepared and made available to the public.<sup>83</sup> As it did in *Devitt*, the court again relied on its decision in *Tri-County Taxpayers*.<sup>84</sup>

The court's holding in *Programming and Systems* raises the question of how early in an action SEQRA must be triggered. Had the UDC in *Programming and Systems* used the SEQRA mechanism early in its planning process, before the formulation of a specific proposal, SEQRA would have been able to help shape the proposal that was prepared rather than being a mere procedural afterthought prior to final approval.<sup>85</sup> If SEQRA need only be complied with immediately prior to an approval resolution, its use as a planning tool is obviated and the statutory mandate to act early in the formulation of an action is effectively ignored.

#### B. *Interrelation of SEQRA with Other Statutory Requirements for Agencies*

An issue related to the procedural aspects of SEQRA is how those procedures mesh with other statutory mechanisms which control agency decision-making. In *Sun Beach Real Estate Development Corp. v. Anderson*,<sup>86</sup> the Second Depart-

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garding Em. Dom. Proc. Law, section 207 proceedings); *Jackson v. New York State Urban Dev. Corp.*, 110 A.D.2d 304, 494 N.Y.S.2d 700 (1st Dep't 1985)(dealing with a project related to the *Programming and Systems* case).

82. *Programming and Systems*, 61 N.Y.2d at 739, 460 N.E.2d at 1349, 472 N.Y.S.2d at 913.

83. *Id.*, 460 N.E.2d at 1348, 472 N.Y.S.2d at 913.

84. *Id.*, 460 N.E.2d at 1348, 472 N.Y.S.2d at 913.

85. This might have been done through use of a generic EIS as provided in N.Y. Comp. Code R. & Regs. tit. 6, § 617.15 (1987).

86. 98 A.D.2d 367, 469 N.Y.S.2d 964 (2d Dep't 1983).



ment considered the interrelation between section 276 of the Town Law<sup>87</sup> and SEQRA. Section 276 requires a planning board to issue its preliminary plat approval within forty-five days after the receipt of a complete application.<sup>88</sup> In *Sun Beach*, a town planning board required that a draft EIS be prepared. While the board awaited the submission of the DEIS, the forty-five days from submission of the plat ran out. The applicant then brought a CPLR Article 78 proceeding.<sup>89</sup> The court approved the town's action on the application within forty-five days after acceptance of the DEIS, rather than after submission of the original application. In doing so, the court took note of the legislative purpose behind SEQRA of relating environmental considerations to the planning process,<sup>90</sup> in addition to the requirement that the SEQRA process be coordinated with other procedures dealing with the review and approval of an action.<sup>91</sup> The court found that preliminary plat approval was "so significant a determination during the [subdivision approval] process that an environmental impact statement must be deemed a prerequisite to the approval."<sup>92</sup> The significance of the *Sun Beach* case is that SEQRA was deemed both to take precedence over another statutory time frame, and to be non-waivable by an agency.

### C. *Classifying Actions as Type I, Type II, or Unlisted*

Although the classification of actions as Type I, Type II,

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87. N.Y. Town Law § 276 (McKinney 1987).

88. *Id.* § 276(3).

89. *Sun Beach*, 98 A.D.2d at 368-69, 469 N.Y.S.2d at 966-67. N.Y. Civ. Prac. Law & R. §§ 7801-06 (McKinney 1981) is referred to as an article 78 proceeding.

90. N.Y. Envtl. Conserv. Law § 8-0109(4) (McKinney 1984).

91. *Id.* § 8-0109(5).

92. *Sun Beach Real Estate Dev. Corp. v. Anderson*, 98 A.D.2d 367, 372, 469 N.Y.S.2d 964, 969 (2d Dep't 1983). It is doubtful that the court meant to require an EIS because many plat approvals are made upon findings of no significant impact. It is more likely that the court meant to say that either a negative declaration or a DEIS is a prerequisite. While the idea that issuing a positive declaration effectively stays any further agency action on an application may be troubling to project sponsors, they have the ability to move the process along by timely and efficient preparation of an acceptable DEIS.

or Unlisted<sup>93</sup> is separate from the issue of the need for an EIS,<sup>94</sup> the two issues overlap and have been confused occasionally by the courts. The Part 617 SEQRA regulations specify Type I actions as those actions which are more likely to have a significant impact on the environment and therefore are more likely to require an EIS.<sup>95</sup> Type II actions are deemed to be non-significant and never trigger any determination of significance.<sup>96</sup> In between Type I and Type II actions are the Unlisted actions for which no presumption of need for an environmental impact statement exists, but for which a determination of significance needs to be made using the criteria provided in the regulations similar to determinations of the Type I actions.<sup>97</sup> The regulations require the use of a long form EAF for all Type I actions.<sup>98</sup>

The court of appeals made clear in *Devitt* that both the statewide Type I list and the local agency's placement of an otherwise Unlisted action on its own Type I list required the agency to treat the action as Type I.<sup>99</sup> Although *Devitt* concerned an agency's attempt to ignore its own Type I list, that case should be compared with *Group for the South Fork, Inc. v. Suffolk County Water Authority*.<sup>100</sup> In this case, the Authority's own Type II list included the installation of certain sized water mains.<sup>101</sup> Arguably, the designation of that action as Type II was inconsistent with the purposes of SEQRA. Additionally, the town in which the action occurred designated

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93. N.Y. Envtl. Conserv. Law § 8-0113(2)(c) (McKinney 1984); N.Y. Comp. Codes R. & Regs. tit. 6, §§ 617.12, 617.13 (1987).

94. A full environmental assessment form (EAF) or similar document must be used for Type I actions. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.5(b) (1987). Unlisted actions require either a short or a full EAF. *Id.* § 617.5(c).

95. *Id.* § 617.12.

96. *Id.* § 617.13.

97. *Id.* §§ 617.4, 617.11.

98. *Id.* § 617.5(b).

99. Section 617.4 allows for individual agency adoption of SEQRA regulations including Type I and Type II lists which are consistent with the statewide lists. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.4 (1987).

100. Slip op. (N.Y. Sup. Ct. Suffolk County, Mar. 1, 1985) on file at Pace Envtl. Law Rev. office.

101. *Id.* at 2.

such an action as Type I in its SEQRA regulations.<sup>102</sup> The court held that the Authority was bound by the town's regulations and thus it could not act prior to a determination of significance by the town.<sup>103</sup> Thus, although the courts recognize the flexibility granted to agencies by the statute to tailor their Type I and Type II lists to their own needs, the statute's consistency and "interagency respect" provisions have been supported.

Another case involving interaction between the Type I and Type II list which raises some confusion is *Houser v. Finneran*.<sup>104</sup> In that case the respondent, the chairman of the state Cable Commission, determined that the granting of a cable franchise was a Type II action because the action was merely an extension of a utility distribution facility.<sup>105</sup> Special Term found that the action constituted a Type I action because it occurred contiguous to an historic building.<sup>106</sup> The appellate division based its affirmance on the fact that the powers granted in the franchise went far beyond the mere extension of utility distribution lines, because the franchise also authorized construction of towers and poles. However, the court did not explicitly disagree with Special Term's assumption that an activity classed as Type II could be taken out of that category because it met a Type I threshold.<sup>107</sup> Such a conclusion would be contrary to the purposes of the statute and regulations.<sup>108</sup> Type II actions should never re-

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102. *Id.*

103. *Id.* at 3. The regulations provide that "[n]o agency shall issue a decision on an action that it knows any other involved agency has determined may have a significant effect on the environment, until a final EIS and findings statement have been filed." N.Y. Comp. Code R. & Regs. tit. 6, § 617.3(a) (1987). The statute and regulations also require that local SEQRA rules be consistent with those adopted by DEC for statewide application. N.Y. Envtl. Conserv. Law § 8-0113(3) (McKinney 1984); N.Y. Comp. Code R. & Regs. tit. 6, § 617.5(f) (1987).

104. 99 A.D.2d 926, 473 N.Y.S.2d 50 (3d Dep't 1984).

105. *Id.* at 926, 473 N.Y.S.2d at 51 (citing N.Y. Comp. Codes R. & Regs. tit. 6, § 617.13(d)(20) (1978)).

106. *Id.* at 926, 473 N.Y.S.2d at 51.

107. *Id.* at 926-27, 473 N.Y.S.2d at 51 (relying on N.Y. Comp. Codes R. & Regs. tit. 6, § 617.13(d)(8) (1978)).

108. N.Y. Envtl. Conserv. Law § 8-0113(2)(c) (McKinney 1984). N.Y. Comp. Codes R. & Regs. tit. 6, § 617.13 (1987). With the exception of replacement of a facil-

quire even a determination of significance.<sup>109</sup> Only Unlisted actions which occur under such circumstances would be treated as Type I. To the extent that the Cable Commission's action actually went beyond what was contemplated by the Type II list, the Appellate Division's decision is correct.<sup>110</sup>

D. *When Is an Environmental Assessment Form Required?*

Although the regulations now provide for the use of a short form EAF for Unlisted actions, such use was optional.<sup>111</sup> Despite the scheme set forth in the regulations, the courts have taken different and occasionally conflicting views of the EAF/EIS requirements and the relationship of the requirements to whether an action is Type I, Type II, or Unlisted.

In *Tehan v. Scrivani*,<sup>112</sup> petitioner challenged a negative declaration on a subdivision plat approval. The approval was an Unlisted action for which the planning board did not use, and was not required by law to use, an EAF.<sup>113</sup> The petitioner, a neighbor of the project proponent, had submitted an engineering report to the town showing potential soil erosion and well pollution problems that the planning board ignored. The court held that, under the circumstances, the board could not have taken the requisite "hard look" absent the use of an EAF.<sup>114</sup> The court apparently concluded that the lack of an EAF made it unclear as to whether or not the agency had properly reviewed the action.<sup>115</sup>

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ity in kind, no Type II action can ever be treated as either Type I or Unlisted.

109. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.13(a) (1987).

110. See also *Badura v. Guelli*, 94 A.D.2d 972, 464 N.Y.S.2d 98 (4th Dep't 1983)(regarding rezoning as a Type I action); and *Save the Pine Bush, Inc. v. Planning Bd.*, 96 A.D.2d 986, 466 N.Y.S.2d 828 (3d Dep't 1983)(in which the court held that the agency had ignored the section 617.12 thresholds).

111. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.7(b) (1978). The 1987 revised regulations now mandate the use of the short EAF as a minimum requirement. *Id.* § 617.5(c) (1987).

112. 97 A.D.2d 769, 468 N.Y.S.2d 402 (2d Dep't 1983).

113. *Id.* at 771, 468 N.Y.S.2d at 405. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.7(b) (1978).

114. *Tehan*, 97 A.D.2d at 771, 468 N.Y.S.2d at 405. See *supra* note 5.

115. Once an action has been classified as Type I or Unlisted, information about the action is compared with criteria to determine its significance. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.11 (1987).

The use of an EAF to review the SEQRA criteria and to undertake the requisite "hard look" was also an issue in *Nielsen v. Planning Board*,<sup>116</sup> in which the court held that preparation of an EAF subsequent to review was not sufficient to constitute literal compliance with SEQRA.<sup>117</sup> In contrast to *Nielsen* is *Town of Victory v. Flacke*,<sup>118</sup> in which the town assumed that a landfill proposal was a Type I action. In that case, the Department of Environmental Conservation issued a negative declaration without the use of a long form EAF. The Appellate Division, Fourth Department, held that the negative declaration was not issued arbitrarily, was not a failure of literal compliance, and did not require reversal of the Commissioner's determination, because the department had done the same analysis that would have been done using an EAF.<sup>119</sup> One may understand, in part, the inconsistency of one court requiring an EAF for an Unlisted action, while another court sanctions the failure to use an EAF for a denominated Type I action, by reviewing the differing facts of each case and by recognizing that the EAF is a model form, and that the nature of SEQRA reviews allows agencies to fashion their own comparable documents.

#### E. *When is an Environmental Impact Statement Required?*

As noted above, the classification of an action as Type I does not *per se* require an EIS.<sup>120</sup> However, there still appears

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116. 110 A.D.2d 767, 487 N.Y.S.2d 845 (2d Dep't 1985) *modifying and aff'g* N. Y. Sup. Ct., Suffolk County (McInerney, J.) (Oct. 12, 1983). See also *E.F.S. Ventures Corp. v. Foster*, 128 A.D.2d 28, 514 N.Y.S.2d 981 (2d Dep't 1987), *rev'd*, 71 N.Y.2d 359, 520 N.E.2d 1345, 526 N.Y.S.2d 56 (1988).

117. It should be noted that a question exists as to whether the action involved was a Type I or Unlisted; the issue was not clearly dealt with by the court.

118. 101 A.D.2d 1016, 476 N.Y.S.2d 711 (4th Dep't 1984).

119. *Id.* at 1016, 476 N.Y.S.2d at 711. See *supra* note 14.

120. See *Devitt v. Heimbach*, 58 N.Y.2d 925, 447 N.E.2d 59, 460 N.Y.S.2d 512 (1983); and *Save the Pine Bush, Inc. v. City of Albany*, 117 A.D.2d 267, 502 N.Y.S.2d 540 (3d Dep't 1986) for the point that no absolute requirement to prepare an EIS exists for Type I actions.

The statute and regulations consider that Type I actions are *more likely* to require an EIS. The action still must be compared with the section 617.11 criteria to determine whether or not an EIS is needed.

to be some judicial confusion on this point. In *Badura v. Guelli*,<sup>121</sup> the town board approved a fifty-two acre rezoning to allow an auto salvage business adjacent to a wetland which contained a great blue heron rookery. The court held that the action was Type I and that therefore an EIS was required.<sup>122</sup> In this case, the court may have hedged its bet on the issue of whether a Type I action requires an EIS by adding that, in any case, there were significant impacts that the board failed to address.<sup>123</sup>

The criteria listed in the regulations are more critical than the classification of an action in determining whether an EIS is required. The court in *Save the Pine Bush, Inc. v. Planning Board*<sup>124</sup> noted that both Type I and Unlisted actions must be compared to the criteria and that "once a certain threshold is reached, an EIS must be filed."<sup>125</sup> Although an action on the Type I list is more likely to require an EIS, there clearly may be projects which fall into that classification which do not have potentially significant impacts. The Type I presumption puts the burden on the project sponsor, in the first instance, to prove there will be no significant impact. While the courts should be encouraged to keep in mind the low threshold of SEQRA in requiring an EIS, the courts should also require that significant environmental issues be raised in order to warrant the judicial mandate of an EIS. Conversely, an Unlisted action that meets the criteria for determining environmental significance should be treated with the same respect as a Type I action for purposes of agency and judicial review.

#### F. *What Part Does the Public Play in SEQRA?*

SEQRA allows for, and encourages, public participation

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121. 94 A.D.2d 972, 464 N.Y.S.2d 98 (4th Dep't 1983).

122. *Id.* at 973, 464 N.Y.S.2d at 99.

123. See also *Group for the South Fork, Inc. v. Suffolk County Water Auth.*, slip op. at 3 (N.Y. Sup. Ct. Suffolk County, Mar. 1, 1985). In this case, the court concluded that designation as a Type I action *per se* required an EIS.

124. 96 A.D.2d 986, 466 N.Y.S.2d 828 (3d Dep't 1983).

125. *Id.* at 987, 466 N.Y.S.2d at 830.

in agency decision making.<sup>126</sup> In addition to including comment periods on a draft EIS, the statute allows for hearings on a project for which no hearing may otherwise be available. Questions arise as to what part the public plays in these hearings, their usefulness in shaping a project, and whether there can be too many hearings. There are no definitive answers to these questions, but review of the following case may be enlightening.

In *Coalition Against Lincoln West v. City of New York*,<sup>127</sup> petitioner sought to block a large-scale residential and commercial project on the site of an abandoned railroad yard encompassing more than seventy-five acres on the upper west side of Manhattan.<sup>128</sup> The project sponsor had to appear before various city departments, as well as community boards; it also held informal meetings with those entities. After the submission and revision of the DEIS, there were more meetings with the community boards. Hearings were held over a four month period and modifications of the project were made as a direct result of community board participation. In upholding the city's approval of the project, following over two years of informal and formal review, the court considered the procedural history of the project, including the opportunity for public input. There is an implication that such a large degree of public input on a project ensures that the reviewing agency has taken the requisite hard look at environmental consequences of the proposed action.<sup>129</sup>

Clearly, there are many projects which are shielded from public review, particularly when negative declarations are is-

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126. SEQRA provides the opportunity for public comment and hearing on some governmental decisions which do not generally require public participation, thus giving the public an arena for redress. N.Y. Env'tl. Conserv. Law §§ 8-0109(2), (4), (5), & (6) (McKinney 1984).

127. 94 A.D.2d 483, 465 N.Y.S.2d 170 (1st Dep't), *aff'd*, 60 N.Y.2d 805, 457 N.E.2d 795, 469 N.Y.S.2d 689 (1983).

128. The original project proposal was never built, and the parcel is now the site of a proposal by developer Donald Trump to build the world's largest building and a multitude of satellite buildings.

129. See *supra* note 45. See also *Manes v. Simpson*, 108 A.D.2d 914, 485 N.Y.S.2d 802 (2d Dep't 1985)(in which project opponents were given six months to undertake their own environmental review while the project was suspended).

sued by a single reviewing agency, or when the project is an Unlisted action. So, too, there are project reviews in which the public process is used as a bludgeon to kill or delay a project rather than to reshape it into an environmentally acceptable form. Both extremes are regrettable abuses of the SEQRA process. The public has a valuable role to play in bringing information to the attention of agency decision-makers, in helping to shape a project as the best environmental alternative, as well as, occasionally, in checking potential government abuse of the SEQRA process.

### G. *When is a Supplemental EIS Required?*

SEQRA contemplates a process which is not static and in which information may be and, on occasion, should be updated or broadened.<sup>130</sup> However, the statute and regulations also recognize the need for finality of review.<sup>131</sup> Only a few cases to date have discussed the need for supplementing a draft or a final EIS. As more complex projects and permitting procedures loom ahead, however, the issue of supplements will arise more frequently.<sup>132</sup>

The need for, and the procedural treatment of, a supplement were reviewed by the Second Department in *Glen Head-Glenwood Landing Civic Council v. Town of Oyster Bay*.<sup>133</sup> In that case the town was challenged on its rezoning of a parcel of land to allow a condominium development. Subsequent to

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130. N.Y. Envtl. Conserv. Law §§ 8-0109(2), (3) (McKinney 1984).

131. *Id.* §§ 8-0107, -0113(2)(i); N.Y. Comp. Codes R. & Regs. tit. 6, § 617.3(l) (1987).

132. The subject of supplements first arose in *Webster Assoc. v. Town of Webster*, 59 N.Y.2d 220, 451 N.E.2d 189, 464 N.Y.S.2d 431 (1983). The project opponent alleged that incorporating new material in the FEIS was improper, unless the DEIS was recirculated with the additional material. *Id.* at 226, 451 N.E.2d at 191, 464 N.Y.S.2d at 433. The court of appeals noted that, although the brief comment period of ten days afforded an FEIS could not substitute for the fuller thirty day minimum review on a DEIS, the particular facts of this case did not call for anything further. *Id.* at 228, 451 N.E.2d at 191, 464 N.Y.S.2d at 433. Presumably, that further requirement would have been a supplement to the DEIS requiring a minimum thirty day comment period. The record in *Webster* showed full consideration by the town and the public of the missing information, which was the alternative of a rival developer's proposed shopping center.

133. 88 A.D.2d 484, 453 N.Y.S.2d 732 (2d Dep't 1982).



the circulation of a final EIS, the town was informed that the assured sewer hook-up with a neighboring community had not been approved. The town failed to inform other agencies or the parties of that significant information. The court pointed mainly to NEPA cases for the proposition that an agency has a "continuing duty to evaluate new information relevant to the environmental impact of its actions . . . so that important new information will not be ignored by the decision maker".<sup>134</sup> The court held that a supplemental FEIS was required and "should have been circulated and reviewed in the same manner as an original statement".<sup>135</sup>

In *Horn v. IBM*,<sup>136</sup> the Second Department recently considered whether new information should have been provided as a supplement to a draft EIS rather than included in the final EIS. The court recognized that significant new information requires a supplement, and that omissions from a DEIS cannot be cured by including the data in a final EIS because the review period for the latter is too abbreviated.<sup>137</sup> The court found, however, that the omitted information was "not sufficiently novel or probative as to require a circulation of a supplemental DGEIS".<sup>138</sup> Furthermore, the court found that the public comment period on the final GEIS extended more than three weeks and thus there was adequate public scrutiny.<sup>139</sup>

These cases help to answer the question of when a supplement is needed, but they imply that, in some instances, inclusion of new information in an FEIS will suffice if the FEIS has an extended comment period. They also give some insight as to what information is considered significant enough to warrant the additional burden of a supplement.<sup>140</sup>

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134. *Id.* at 494-95, 453 N.Y.S.2d at 739.

135. *Id.* at 495, 453 N.Y.S.2d at 739.

136. 110 A.D.2d 87, 493 N.Y.S.2d 184 (2d Dep't 1985). *See also* *Horn v. County of Westchester*, 106 A.D.2d 612, 482 N.Y.S.2d 896 (2d Dep't 1984)(a related case).

137. The draft EIS in this case was a draft generic EIS.

138. *Horn*, 110 A.D.2d at 97, 493 N.Y.S.2d at 192.

139. *Id.* at 98, 493 N.Y.S.2d at 192.

140. The Court of Appeals, in *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 494 N.E.2d 429, 503 N.Y.S.2d 298 (1986), recognized that a final EIS could expand on information analyzed in a draft EIS. The court allowed non-substan-

## H. Summary

In giving guidance to agencies, applicants, and attorneys on when an action is subject to SEQRA, what documentation and public record is required, and when a decision becomes final, the courts have generally continued to adhere to the literal compliance standard referred to earlier.<sup>141</sup> There have even been some instances where the courts have gone beyond the statute in what they have required.<sup>142</sup> In cases such as *Tehan v. Scrivani*<sup>143</sup> and *Coalition Against Lincoln West*<sup>144</sup> the courts have evidenced a concern for open and adequate government decision-making and public review; while in cases such as *Sun Beach*<sup>145</sup> and *Horn v. IBM*,<sup>146</sup> the courts have been sensitive to an applicant's need for timeliness and finality of review.

Since 1982, all four appellate divisions appear more willing to apply strictly the procedural requirements of the statute and the regulations, and to better understand the important purposes served by the strict procedural standards.

## IV. Conclusion

The many opinions issued in the past six years have provided helpful guidance on the statutory and regulatory mandates of SEQRA. Applicants and agencies have been given some assistance in working through the process by such publications as the SEQRA Handbook.<sup>147</sup> Interesting issues which remain to be fleshed out are the timing issues not satisfacto-

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tial post-FEIS project modification to be done on the basis of a separate negative declaration. The court found that the changes were not substantial enough to warrant a supplement. *Id.* at 430, 494 N.E.2d at 444, 503 N.Y.S.2d at 313.

141. *Rye Town/King Civic Ass'n v. Town of Rye*, 82 A.D.2d 474, 442 N.Y.S.2d 67 (2d Dep't 1981). See *supra* notes 32-33.

142. See *supra* text accompanying notes 112-15.

143. 97 A.D.2d 769, 468 N.Y.S.2d 402 (2d Dep't 1983).

144. 94 A.D.2d 483, 465 N.Y.S.2d 170 (1st Dep't), *aff'd*, 60 N.Y.2d 805, 457 N.E.2d 795, 469 N.Y.S.2d 689 (1983).

145. 98 A.D.2d 367, 469 N.Y.S.2d 964 (2d Dep't 1983).

146. 110 A.D.2d 87, 493 N.Y.S.2d 184 (2d Dep't 1985).

147. N.Y. Dep't Env'tl. Conservation, SEQRA Handbook (Mar. 1982)(available from the Department, 50 Wolf Road, Albany, N.Y. 12233).

rily addressed by the court of appeals in *Programming and Systems*;<sup>148</sup> threshold issues raised by conditioned negative declaration cases; cumulative impact issues raised in the *Chinese Staff and Workers*<sup>149</sup> and in *Jackson v. New York State Urban Development Corp.*;<sup>150</sup> and alternatives issues, particularly concerning private applicants.

The appellate level courts of New York have shed some, if not all, of their early unwillingness to deal with the policies and procedures of SEQRA, although it is apparent the courts still feel more comfortable with the concrete procedural issues rather than the discretionary substantive issues. As we recede further from the environmental enthusiasm of the early 1970's, it will be interesting to see how the statutory mandates of SEQRA continue to influence government decision-making.

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148. 61 N.Y.2d 738, 460 N.E.2d 1347, 472 N.Y.S.2d 912 (1984).

149. 68 N.Y.2d 359, 502 N.E.2d 176, 509 N.Y.S.2d 499 (1986).

150. 67 N.Y.2d 400, 494 N.E.2d 429, 503 N.Y.S.2d 298 (1986).