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COMMENT

**Wildlife Management of Canada Geese  
in New York State: A Departure  
from the Express Policies of  
New York's Environmental  
Conservation Law**

BY LORIANN VITA\*

*For generations, the sights and sounds of migratory Canada geese have led people to think of the far-away places from which the birds come and go. Sometimes called the aristocrat of wildfowl, the Canada [goose] is seen by millions of spectators at some season of the year—flying high in the air, over hill and valley, river and lake, forest and plain, country, town, and city. Our admiration of the goose is evident by its symbolic presence in our every-day lives as seen on items such as postage stamps, letterheads, paintings, and even on commercial aircraft.<sup>1</sup>*

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\* This Comment is dedicated to my family, for all their love, support, and patience.

1. K. PURDY & R. MALECKI, N.Y. DEP'T OF NAT. RESOURCES, CORNELL U., NEW YORK'S WILDLIFE RESOURCES NO. 20, CANADA GOOSE (*BRANTA CANADENSIS*) 8 (1984) [hereinafter PURDY & MALECKI, CANADA GOOSE].

## I. Introduction

In recent years, Canada geese have become an ubiquitous sight in New York State. The Canada goose is one of several species of geese inhabiting North America<sup>2</sup> and is one of many species of waterfowl comprising the Atlantic Flyway population of migratory waterfowl.<sup>3</sup> "Canada geese are traditional birds with lifelong pair bonds and strong family unity. They migrate in flocks comprised of individual families that stop at the same areas from year to year."<sup>4</sup> The usual migration pattern of Atlantic Flyway population Canada geese is to breed in the summer in a wide area of Canada, then to travel south in winter to an area ranging from New York to South Carolina, where the geese remain until they resume their mi-

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2. *Id.* at 1. Five other species of geese common to North America are the brant goose, the snow goose, the Ross goose, the white-fronted goose, and the emperor goose. *Id.*

3. See THE ATLAS OF BREEDING BIRDS IN NEW YORK STATE (Robert F. Andrie & Janet R. Carroll, eds., 1988) (stating that Canada geese are part of the Atlantic Flyway population of migratory birds and that New York State is part of the Atlantic Flyway); N.Y. ENVTL. CONSERV. LAW § 11-0103(2)(a)(1) (McKinney 1984) (stating that migratory game birds in New York include geese, swans, river and sea ducks, rails, American coots, woodcock, snipe, surfbirds, sandpipers, crows, and magpies). See also 50 C.F.R. § 10.13 (1995) (listing the migratory birds protected by the Migratory Bird Treaty Act, 16 U.S.C. §§ 702-712 (1994), and related international conventions). The Atlantic Flyway is one of four bioadministrative units designated in the 1940s for the management of waterfowl. Richard A. Malecki & Robert E. Trost, *A Breeding Ground Survey of Atlantic Flyway Canada Geese, Branta canadensis, in Northern Quebec*, 104(4) CANADIAN FIELD-NATURALIST 575 (1990). The Atlantic Flyway consists of seventeen states and includes waterfowl populations from Ontario, Quebec, and the Maritime Provinces. *Id.* The other three bioadministrative units are the Mississippi, Central, and Pacific Flyways. See 50 C.F.R. § 20.105 (1995) (stating that "the regulations are arranged by the Atlantic, Mississippi, Central and Pacific Flyways"); see also, e.g., Migratory Bird Hunting; Final Frameworks for Late-Season Migratory Bird Hunting Regulations, 60 Fed. Reg. 50,055-59 (1995) (to be codified at 50 C.F.R. pt. 20).

4. Robert E. Trost & Richard A. Malecki, *Population Trends in Atlantic Flyway Canada Geese: Implications for Management*, 13 WILDL. SOC'Y BULL. 502 (1985) (citing A.C. Bent, *Life Histories of North American Wildfowl*, 130 U.S. NAT'L MUS. BULL. 204 (1925); H.C. Hanson & R.H. Smith, *Canada Geese of the Mississippi Flyway, With Special Reference to an Illinois Flock*, 25(3) BULL. ILL. NAT. HIST. SURV. 59 (1950); D.G. Raveling, *Dynamics of Distribution of Canada Geese in Winter*, 43 TRANS. N. AM. WILDL. AND NAT. RESOURCES CONF. 206 (1978); D.G. Raveling, *Traditional Use of Migration and Winter Roost Sites by Canada Geese*, 43 J. WILDL. MGMT. 229 (1979)).

gration pattern.<sup>5</sup> Despite this habitual journey, some geese appear to have ceased migrating. Indeed, the number of Canada geese permanently inhabiting New York State has increased dramatically,<sup>6</sup> resulting in a resident population of Canada geese,<sup>7</sup> which now remains in the region through both summer and winter.<sup>8</sup>

Canada geese are easily observable in many areas throughout New York State, including parks, lakes and ponds, golf courses, corporate lawns, and backyards. This resident population of Canada geese has now acquired the reputation of being a public nuisance.<sup>9</sup> For instance, one newspaper reporter noted that, "[f]or many suburbanites, Canada geese are nothing more than a magnificent pencil line of a V high in the sky. But for those who contend with

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5. PURDY & MALECKI, CANADA GOOSE, *supra* note 1, at 3-4.

6. See Jay B. Hestbeck, *Survival of Canada Geese Banded in Winter in the Atlantic Flyway*, 58(4) J. WILDL. MGMT. 748 (1994) [hereinafter Hestbeck, *Survival of Canada Geese*]. "Profound changes have occurred in numbers of Canada geese located in primary wintering regions of the Atlantic Flyway since the 1950s." *Id.* at 748 (citing U.S. Fish & Wildl. Serv., Laurel, Md., unpubl. data). "During the 1980s, the numbers of Canada geese increased in the mid-Atlantic region and declined in the Chesapeake region." *Id.* at 754.

7. The New York State Department of Environmental Conservation (DEC) has made a distinction between migratory and resident Canada geese populations. See Respondents' Memorandum of Law in Opposition to Petition at 2-3, *Coalition to Prevent the Destruction of Canada Geese v. Jorling* (N.Y. Sup. Ct. 1994) (No. 93/6295) [hereinafter Respondents' Memorandum] (on file with the Rockland County Clerk's Office). However, too much interaction exists between resident and migrant populations to truly distinguish one from the other. Telephone Interview with Anne Muller, Co-founder of the Coalition to Prevent the Destruction of Canada Geese (Feb. 23, 1995).

8. PURDY & MALECKI, CANADA GOOSE, *supra* note 1, at 4-5. Several factors may be contributing to the emergence of the resident population. One such factor is the increased supply of food and refuge areas in more northerly regions. *Id.* at 5.

A second potential factor . . . may be related to hunter harvest. Birds migrating farther south are subject to greater hunting pressure and may therefore be experiencing lower survival rates. Over the years, those birds genetically inclined to travel greater distances south have been steadily removed from the population, resulting in geese with tendencies to remain in northern areas.

*Id.* Additionally, already existing resident populations may be serving as decoys to attract migrants. *Id.*

9. The DEC has termed resident Canada geese as being a general nuisance. Respondents' Memorandum, *supra* note 7, at 3.

them on the ground, . . . they are a noisy, exasperating nuisance, soiling everything they walk on, overgrazing lawns, . . . and hampering home sales near their encampments."<sup>10</sup> In an effort to regulate this perceived nuisance, as well as provide increased hunting opportunities, the United States Fish and Wildlife Service (USF&WS) and the New York State Department of Environmental Conservation (DEC) have, over the years, devised and implemented various wildlife management programs.<sup>11</sup>

The DEC is the state agency primarily responsible for developing New York's wildlife management programs.<sup>12</sup> Wildlife management is the process by which federal and state agencies, such as the USF&WS and the DEC, effectuate and promote species conservation and ecological protection for the purpose of biodiversity and for the benefit of the citizens of New York State.<sup>13</sup> The DEC's management of migratory waterfowl, including Canada geese, consists of both habitat management<sup>14</sup> and species manipulation, which includes the

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10. Robert Hanley, *Geese So Nice in the Sky, but Oh, When They Land*, N.Y. TIMES, Apr. 6, 1992, at B1. See also Nick Karas, *Atlantic Flyway Now in Full Flight*, NEWSDAY, Oct. 26, 1990, at 142 (reporting that an increase in the resident population of Canada geese has caused a nuisance to both farmers and residents); Ed Lowe, *We're All in This Mess Together*, NEWSDAY, July 18, 1990, at 6 (discussing whether interrupting the reproductive cycle of Canada geese is a proper form of nuisance abatement).

11. See, e.g., DIV. OF FISH & WILDL., N.Y. DEP'T OF ENVTL. CONSERV., PROPOSED SEPTEMBER CANADA GOOSE HUNTING SEASONS IN NEW YORK, 1993-1995 (1993); N.Y. Comp. Codes R. & Regs. tit. 6, § 2.30 (1993). See also Respondents' Memorandum, *supra* note 7, at 3.

12. See N.Y. ENVTL. CONSERV. LAW § 11-0303(1) (McKinney 1984) (stating that "[t]he general purpose of powers affecting fish and wildlife, granted to the [DEC] by the Fish and Wildlife Law, is to vest in the department . . . the efficient management of the fish and wildlife resources of the state"). See also *infra* note 29 for the definition of lead agency.

13. See, e.g., N.Y. ENVTL. CONSERV. LAW § 11-0303(1) (McKinney 1984). Wildlife management "include[s] both the maintenance and improvement of such resources as natural resources and the development and administration of measures for making them accessible to the people of the state." *Id.* See also *infra* text accompanying notes 89 and 90 for definitions of wildlife management and wildlife species management.

14. The DEC defines habitat management as "the manipulation or protection of various elements or portions of the physical environment to produce or maintain a combination of cover, food and water desirable for a particular species or group of species of fish or wildlife." DIV. OF FISH & WILDL., N.Y. DEP'T OF

setting of durational hunting seasons and bag limits.<sup>15</sup> However, through these wildlife management policies and activities, the DEC itself may be contributing to the surplus numbers of resident Canada geese.<sup>16</sup> Ironically, the DEC has used this surplus of Canada geese to promote recreational hunting.<sup>17</sup> Thus, despite the existence of humane, non-lethal methods of nuisance-abatement,<sup>18</sup> the DEC has chosen to take an ill-informed, exploitive, and destructive approach to wildlife management of Canada geese. Indeed, such an approach may have contributed to a sharp decline in the number of existing migratory breeding pairs of Canada geese in the Atlantic Flyway.<sup>19</sup>

The widespread presence of Canada geese throughout New York State and the manner in which the DEC manages the species has fueled much debate between citizens of nu-

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ENVTL. CONSERV., FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT ON HABITAT MANAGEMENT ACTIVITIES 3 (1979).

15. See N.Y. COMP. CODES R. & REGS. tit. 6, § 2.30(e), (g) (1994). Daily bag limits are the number of animals that the state permits hunters to take each day. *Id.* § 2.30(g)(1)(ii) (1994).

16. See Jolene R. Marion, *Whose Wildlife Is It Anyway? How New York's Fish and Game Statutes, Regulations, and Policies Endanger the Environment and Have Disenfranchised the Majority of the Electorate*, 4 PACE ENVTL. L. REV. 401, 412-17 (1987) (arguing that the DEC systematically creates a surplus of animals for hunting purposes).

17. The DEC recognizes recreational, or sport, hunting as a primary method of wildlife species management. See DIV. OF FISH & WILDL., N.Y. DEP'T OF ENVTL. CONSERV., FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT ON WILDLIFE GAME SPECIES MANAGEMENT PROGRAM 9 (1980) [hereinafter *GENERIC ENVTL. IMPACT STATEMENT*].

18. See *infra* text accompanying notes 149-75 for a discussion of non-lethal nuisance abatement methods. The DEC has stated that "[n]on-lethal control measures have been only partially successful, and larger scale control efforts were determined to be necessary." Respondents' Memorandum, *supra* note 7, at 3.

19. U.S. Fish & Wildl. Serv., Dep't of the Interior, *News Release: Continuing Decline in Breeding Populations of Migratory Geese Likely to Lead to Hunting Restrictions in Atlantic Flyway*, July 14, 1995 (stating that the number of breeding pairs of Canada geese in the Atlantic Flyway dropped to only 29,000). Moreover, a study has determined that lower survival rates and population declines of Canada geese correspond statistically to higher harvest or hunting rates. See generally Hestbeck, *Survival of Canada Geese*, *supra* note 6. Furthermore, higher survival rates and population increases are statistically related to lower harvest rates. *Id.* at 748.

merous towns and counties, local governments, wildlife advocacy groups, the USF&WS, and the DEC. For example, in September 1993, the Coalition to Prevent the Destruction of Canada Geese (Coalition)<sup>20</sup> sought to enjoin the DEC from commencing a three-year plan to open early hunting seasons on Canada geese<sup>21</sup> and, in effect, to expose the alleged exploitive wildlife management programs of the DEC.<sup>22</sup> The Coalition argued that the DEC's wildlife management policies and practices regarding Canada geese violated the mandates of New York's Environmental Conservation Law (ECL),<sup>23</sup> in particular the letter and the spirit of New York's State Environmental Quality Review Act (SEQRA).<sup>24</sup> The Coalition as-

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20. The Coalition to Prevent the Destruction of Canada Geese (Coalition) is an unincorporated, not-for-profit organization located in Ulster County, New York. Telephone Interview with Anne Muller, Co-founder of the Coalition to Prevent the Destruction of Canada Geese (Feb. 23, 1995). The Coalition's members are regular users of the parks and other open areas of New York State and are committed to protecting Canada geese from abuse, exploitation, and hunting. *Id.* A primary goal of the Coalition is to promote the use of non-lethal methods in controlling Canada geese. *Id.*

21. The DEC's plan was to open an early hunting season on Canada geese in early September each year for three years, after which the program was to be reviewed. N.Y. DEP'T OF ENVTL. CONSERV., PROPOSAL FOR SEPTEMBER CANADA GOOSE HUNTING SEASONS IN NEW YORK, 1993-1995 (1993). "The purpose of these special [hunting] seasons [was] to reduce potential nuisance and crop depredation problems caused by resident Canada geese and to provide additional recreational hunting opportunity." *Id.* (emphasis added). Open season is defined as "the days on which migratory game birds may lawfully be taken. Each period described as an open season shall be construed to include the first and last days thereof." 50 C.F.R. § 20.11(b)(1) (1995).

22. Petitioners' Memorandum of Law in Support of Article 78 Action, Coalition to Prevent the Destruction of Canada Geese v. Jorling (N.Y. Sup. Ct. 1994) (No. 93/6295) [hereinafter Petitioners' Memorandum] (on file with the Rockland County Clerk's Office).

23. Although wildlife management in New York State is governed by the New York Environmental Conservation Law (ECL), migratory game birds, including Canada geese, are protected by the Migratory Bird Treaty Act, 16 U.S.C. §§ 701-712 (1994). Hence, the New York DEC's management of migratory game birds must also conform with federal regulations. See N.Y. ENVTL. CONSERV. LAW § 11-0307(1) (McKinney Supp. 1995).

24. N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to -0117 (McKinney 1984 & Supp. 1995). State Environmental Quality Review Act (SEQRA) is New York State's version of the federal National Environmental Policy Act (NEPA). Both statutes are designed to promote environmental policy by requiring agencies to consider the consequences of actions that may have unacceptable side effects or impacts

serted that the DEC set both regular and early hunting seasons and bag limits for Canada geese without first sufficiently developing an Environmental Impact Statement (EIS).<sup>25</sup> The DEC, however, countered that it had fully complied with SEQRA's EIS mandate and that the most practical method of wildlife management of Canada geese is wildlife harvesting, which is more commonly known as recreational, or sport, hunting.<sup>26</sup>

Prolonged recreational hunting of Canada geese in New York State may be contributing to the degradation of the species and ecological damage throughout the state.<sup>27</sup> Indeed, there are currently only 29,000 breeding pairs of migratory Canada geese in the Atlantic Flyway.<sup>28</sup> This number alone reflects the potential detrimental effect of the DEC's wildlife management practices. Therefore, due to the significant changes in the resident and migratory populations of Canada geese, a more thorough EIS than the one the DEC currently relies on should be required for any action that will result in the hunting of Canada geese. Indeed, the goals and man-

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on the environment. See National Environmental Policy Act §§ 2-209, 42 U.S.C. §§ 4321-4370d (1988 & Supp. V 1993).

25. Petitioners' Memorandum, *supra* note 22, at 2. The Environmental Impact Statement (EIS) used by the DEC is its Final Programmatic Impact Statement on Wildlife Game Species Management Program, or Generic Environmental Impact Statement (Generic EIS). See GENERIC ENVTL. IMPACT STATEMENT, *supra* note 17. See *infra* text accompanying notes 48-50 for the definition and purpose of an environmental impact statement.

26. Respondents' Memorandum, *supra* note 7, at 12 (arguing that the early hunting season was an action that did not require a new EIS). See also N.Y. COMP. CODES R. & REGS. tit. 6, § 2.30(e) (1994) (listing open hunting season dates for waterfowl game species). "Canada geese can be managed by changing survival and harvest rates through changes in hunting regulations in the Atlantic Flyway." Hestbeck, *Survival of Canada Geese*, *supra* note 6, at 755 (stating that the changes in survival rates of Canada geese correspond to changes in harvest regulations) (citing L.J. Hindman et al., *Effects of Restrictive Hunting Regulations on Harvest and Survival of Canada Geese in Maryland* (forthcoming 1996)).

27. See generally Marion, *supra* note 16 (discussing how current wildlife management in New York State not only endangers the target species, but also predators and their related ecosystems).

28. U.S. Fish & Wildl. Serv., Dep't of the Interior, News Release: *Continuing Decline in Breeding Populations of Migratory Geese Likely to Lead to Hunting Restrictions in Atlantic Flyway*, July 14, 1995. See *infra* note 82 for information on percentage of declines in the Canada geese population.

dates of New York's ECL, specifically SEQRA, would be better served if the DEC, as the lead agency,<sup>29</sup> prohibited all current and future hunting of Canada geese.<sup>30</sup> The DEC should also reopen environmental review and conduct a cumulative impact assessment<sup>31</sup> of the effects of excessive habitat manipulation and prolonged hunting on Canada geese.

This Comment considers whether the DEC's management of Canada geese deviates from the policies and mandates of the New York ECL and whether the DEC's management of Canada geese should be reconsidered and restructured to better comply with New York State's ECL and, therefore, embody a more ecologically sound approach to the management of Canada geese. Section II of the Comment presents the statutory policies and mandates currently governing wildlife management in New York State. Section III discusses the Coalition's efforts to enjoin recreational hunting of Canada geese and expose the DEC's alleged exploitive policies and practices. Section IV considers how the DEC's management of Canada geese is not only inconsistent with the procedural and substantive mandates of SEQRA, and hence, the express intent of the New York Legislature, but also extremely detrimental to the future of Canada geese. Section V considers proposals for future actions to be taken by the New

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29. A lead agency is the "agency principally responsible for carrying out, funding or approving an action, and therefore responsible for determining whether an environmental impact statement is required in connection with an action, and for the preparation and filing of the statement if one is required." N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(v) (1987).

30. The USF&WS suspended the harvest of migratory Canada geese in the Atlantic Flyway for the 1995-1996 hunting season, except for "[a] special experimental season [allowed] between January 21 and February 15, with 5 geese daily in Westchester County and portions of Nassau, Orange, Putnam, and Rockland Counties." Migratory Bird Hunting; Final Frameworks for Late-Season Migratory Bird Hunting Regulations, 60 Fed. Reg. 50,042, 50,055 (1995) (to be codified at 50 C.F.R. pt. 20). The final rule also provided for other exceptions in other states in the Atlantic Flyway. *Id.* at 50,048.

31. A cumulative impact assessment is "a supplement to the final generic EIS [which] must be prepared if the subsequent proposed action was not . . . adequately addressed in the generic EIS and the subsequent action involves one or more significant environmental effects." N.Y. COMP. CODES R. & REGS. tit. 6, § 617.15(c)(3) (1987).

York Legislature and the DEC and suggests alternative methods of nuisance-abatement to be employed by the DEC and the citizens of New York State.

## II. Background

New York's ECL governs, in part, wildlife management in New York State,<sup>32</sup> emphasizing the promotion of biodiversity and species preservation for the benefit of the citizens of New York State.<sup>33</sup> For instance, Article 1 of the ECL declares that a principal environmental policy of New York State is "to conserve, improve and protect its natural resources and environment and control water, land and air pollution, in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well being."<sup>34</sup> An additional New York State environmental policy is "to foster, promote, create and maintain conditions under which man and nature can thrive in harmony with each other, and achieve social, economic and technological progress for present and future generations."<sup>35</sup> These policies reflect the New York Legislature's recognition of the necessity and importance of a healthy balance between man and nature, and thus, the need to protect New York State's natural resources.

In addition to the general policy declarations of Article 1, the ECL, in Article 11, demonstrates the New York Legislature's interest in species protection as a means to achieve ecological balance and a high quality of life for the citizens of

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32. See N.Y. ENVTL. CONSERV. LAW § 11-0303 (McKinney 1984 & Supp. 1995). In addition to New York State statutes and regulations, there are controlling federal regulations and laws regarding the taking and possession of migratory game birds. See, e.g., Migratory Bird Hunting, 50 C.F.R. pt. 20 (1994); Migratory Bird Treaty Act, 16 U.S.C. §§ 701-712 (1994). "Where . . . [a state] agency . . . directly or indirectly participates in the preparation of . . . material relating to a statement prepared pursuant to the requirements of the National Environmental Policy Act[,] . . . compliance with . . . article [8] shall be coordinated with and made in conjunction with federal requirements in a single environmental reporting procedure." N.Y. ENVTL. CONSERV. LAW § 8-0111(1) (McKinney 1984).

33. See N.Y. ENVTL. CONSERV. LAW §§ 1-0101, 11-0303 (McKinney 1984 & Supp. 1995).

34. N.Y. ENVTL. CONSERV. LAW § 1-0101(1) (McKinney 1984).

35. *Id.* § 1-0101(3).

New York State.<sup>36</sup> Article 11 vests in the Division of Fish and Wildlife of the DEC the authority to manage New York State's fish and wildlife resources.<sup>37</sup> Specifically, Article 11 requires the New York State Division of Fish and Wildlife to engage in wildlife management, including "both the maintenance and improvement of such resources as natural resources and the development and administration of measures for making them accessible to the people of the state."<sup>38</sup> This Article further authorizes the Division of Fish and Wildlife to develop and implement wildlife management programs that will "promote natural propagation and maintenance of desirable species in ecological balance, and . . . lead to the obser-

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36. *Id.* § 11-0303(2).

37. *Id.* § 11-0303(1). Nevertheless, the USF&WS maintains the ultimate management authority over Canada geese, because the birds are classified as migratory game birds. See Respondents' Memorandum, *supra* note 7, at 5. See also Migratory Bird Treaty Act, 16 U.S.C. §§ 701-712 (1994). The purpose of the Migratory Bird Treaty Act is to protect game birds and other wild birds that "have become scarce or extinct, and also to regulate the introduction of American or foreign birds or animals in localities where they have not heretofore existed." *Id.* § 701. The Act also authorizes the promulgation of regulations to implement the provisions of international treaties governing migratory birds, such as the 1916 Convention between the United States and Great Britain for the protection of migratory birds. *Id.* § 712. The 1916 Convention between the United States and Great Britain specifically classifies Canada geese as migratory game birds. Convention for the Protection of Migratory Birds, Dec. 8, 1916, U.S.-Gr. Brit., art. 1, 39 Stat. 1702-04. The purpose of this Convention is to protect migratory game birds which are "in danger of extermination through lack of adequate protection during the nesting season or while on their way to and from their breeding grounds." *Id.* Preamble, 39 Stat. 1702. This 1916 Convention protects migratory birds by prohibiting the taking of nests and eggs "except for scientific or propagating purposes." *Id.* art. 5, 39 Stat. 1704. However, the Convention allows permits to be issued for the killing of any of the protected birds "under extraordinary conditions" if the birds "become seriously injurious to the agriculture or other interests in any particular community." *Id.* art. 7, 39 Stat. 1704.

38. N.Y. ENVTL. CONSERV. LAW § 11-0303(1) (McKinney 1984). "Such resources shall be deemed to include all animal and vegetable life and the soil, water and atmospheric environment thereof, . . . to the extent that they constitute the habitat of fish and wildlife." *Id.* See also *id.* § 1-0101(1) (stating that a primary goal of New York's agencies is the conservation of the state's natural resources for its citizens).

vance of sound management practices for such propagation and maintenance on lands and waters of the state."<sup>39</sup>

Article 8 of the ECL, which is known as SEQRA,<sup>40</sup> is particularly important to the formulation and implementation of natural resource management in New York State.<sup>41</sup> SEQRA's stated policies are to "encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state."<sup>42</sup> Thus, SEQRA mandates all New York regulatory agencies to consider prevention of environmental damage.<sup>43</sup> Moreover, in enacting SEQRA, the New York Legislature intended that all "environmental factors be given consideration '[a]s early as possible in the formulation of a proposal for an action.'"<sup>44</sup> Furthermore, the New York Legislature intended state agencies, which regulate activities that affect the quality of the environment, such as the DEC, to give due consideration to preventing environmental damage.<sup>45</sup> This substantive mandate manifests the New York Legislature's intent to make SEQRA more than merely a procedural statute.<sup>46</sup>

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39. *Id.* § 11-0303(2)(a), (b). The question arises, however, as to the criteria that the Division of Fish & Wildlife of the DEC should use to determine which species are desirable. For the DEC to conclude, without setting forth its criteria, that some species are undesirable seems to contradict the purposes behind sound wildlife management.

40. N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to -0117 (McKinney 1984 & Supp. 1995).

41. *Id.* § 8-0101.

42. *Id.*

43. N.Y. ENVTL. CONSERV. LAW § 8-0103(9) (McKinney 1984). The legislature intended "all agencies [to] conduct their affairs with an awareness that they are stewards of the air, water, land, and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations." *Id.* § 8-0103(8).

44. *Sun Beach Real Estate Dev. Corp. v. Anderson*, 469 N.Y.S.2d 964, 968 (1983) (quoting N.Y. ENVTL. CONSERV. LAW § 8-0109(4)).

45. N.Y. ENVTL. CONSERV. LAW § 8-0103(9) (McKinney 1984).

46. *Id.* § 8-0103 (Practice Commentary). The Practice Commentary further stated that SEQRA is both procedural and substantive, while NEPA, SEQRA's

The New York Legislature expressly provided for this substantive mandate of environmental protection to be implemented through the development of an EIS.<sup>47</sup> An EIS is "a detailed statement setting forth the matters specified in section 8-0109 of [SEQRA]."<sup>48</sup> SEQRA section 8-0109(2) provides that:

[a]ll agencies . . . shall prepare, or cause to be prepared by contract or otherwise an environmental impact statement on any action they propose or approve which may have a significant effect on the environment. Such a statement shall include a detailed statement setting forth the following:

- (a) a description of the proposed action and its environmental setting;
- (b) the environmental impact of the proposed action including short-term and long-term effects;
- (c) any adverse environmental effects which cannot be avoided should the proposal be implemented;
- (d) alternatives to the proposed action;
- (e) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented;
- (f) mitigation measures proposed to minimize the environmental impact;
- (g) the growth-inducing aspects of the proposed action, where applicable and significant;
- (h) effects of the proposed action on the use and conservation of energy resources, where applicable and significant . . . ; and . . .

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federal counterpart, is primarily procedural. *Id.* See National Environmental Policy Act §§ 2-209, 42 U.S.C. §§ 4321-4370d (1988).

47. N.Y. ENVTL. CONSERV. LAW § 8-0109(2) (McKinney Supp. 1995). "[A]n agency in approving an action must make a written finding that it has imposed whatever conditions are necessary to minimize or avoid all adverse environmental impacts revealed in the EIS." *Henrietta v. Dep't of Env'tl. Conserv.*, 430 N.Y.S.2d 440, 447 (1980).

48. N.Y. ENVTL. CONSERV. LAW § 8-0105(7) (McKinney 1984). An EIS also "includes any comments on a draft environmental statement . . . [,] and the agency's response to such comments, to the extent that such comments raise issues not adequately resolved in the draft environmental statement." *Id.*

(j) such other information consistent with the purposes of this article as may be prescribed in guidelines issued by the commissioner.<sup>49</sup>

The purpose of an [EIS] is to provide detailed information about the effect which a proposed action is likely to have on the environment, to list ways in which any adverse effects of such an action might be minimized, and to suggest alternatives to such an action so as to form the basis for a decision whether or not to undertake or approve such action.<sup>50</sup>

Indeed, the language of these sections indicates that the New York Legislature intended any particular EIS to operate as a procedural safeguard against potential environmental damage. In considering Article 8, in conjunction with Articles 1 and 11, it is evident that the New York Legislature intended the DEC to address, in its wildlife management programs, the overall welfare of New York State's ecology and natural resources, as well as the ability of the state's citizens to enjoy, and thus benefit from, these resources.<sup>51</sup>

### III. *Coalition to Prevent the Destruction of Canada Geese v. New York Department of Environmental Conservation*

In September, 1993, the Coalition to Prevent the Destruction of Canada Geese (Coalition) sought to enjoin<sup>52</sup> the

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49. N.Y. ENVTL. CONSERV. LAW § 8-0109(2) (McKinney Supp. 1995). The information reported in the EIS "allows state and local officials intelligently to assess and weigh the environmental factors, along with social, economic and other relevant considerations in determining whether or not a project or activity should be approved or undertaken in the best overall interest of the people of the State." *Henrietta v. DEC*, 430 N.Y.S.2d 440, 446 (1980).

50. N.Y. ENVTL. CONSERV. LAW § 8-0109(2) (McKinney Supp. 1995). An EIS must contain "a description and evaluation of the range of reasonable alternatives to the action which are feasible, considering the objectives and capabilities of the project sponsor." N.Y. COMP. CODES R. & REGS. tit. 6, § 617.14(f)(5) (1987).

51. N.Y. ENVTL. CONSERV. LAW §§ 1-0101(1), 8-0101, 11-0303(1) (McKinney 1984).

52. Request for Judicial Intervention, *Coalition to Prevent the Destruction of Canada Geese v. Jorling* (N.Y. Sup. Ct. 1993) (No. 93/6295) (on file with the Rockland County Clerk's Office). On September 3, 1993, the Coalition filed a

New York DEC from effectuating, in many counties throughout New York State,<sup>53</sup> the first of three scheduled early hunting seasons on Canada geese.<sup>54</sup> The first proposed early hunting season was to run from September 7, 1993 to September 15, 1993.<sup>55</sup> The DEC had proposed the early hunting season,<sup>56</sup> in part, as a response to the alleged nuisance situations caused by resident Canada geese inhabiting such areas as corporate lawns, state and local parks, beaches, and water supply reservoirs.<sup>57</sup> The DEC's reason for the early hunting

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petition for a temporary restraining order (TRO), pursuant to Article 78 of the New York Civil Practice Law and Rules, in the Supreme Court of Rockland County. *Id.* See N.Y. CIV. PRAC. L. & R. 7803 (McKinney 1994).

The only questions that may be raised in [an Article 78 proceeding] are: (1) whether the body or officer failed to perform a duty enjoined upon it by law; or (2) whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or (3) whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion . . . ; or (4) whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

*Id.* The judge denied the TRO. See Order to Show Cause, Coalition to Prevent the Destruction of Canada Geese v. Jorling (N.Y. Sup. Ct. 1993) (No. 93/6295) at 2-3 (showing the TRO language stricken from the Order to Show Cause, thus, representing the judge's denial) (on file with the Rockland County Clerk's Office). The Coalition then petitioned the court for a preliminary injunction, which, upon hearing, the judge denied from the bench. See Case File, Coalition to Prevent the Destruction of Canada Geese v. Jorling (No. 93/6295) (on file with the Rockland County Clerk's Office). The Coalition continued to file papers in 1994, seeking to enjoin the September, 1994 early hunting season. *Id.*

53. The affected counties were Albany, Allegany, Cattaraugus, Chautauqua, Columbia, Delaware, Dutchess, Erie, Genesee, Greene, Livingston, Niagara, Orange, Orleans, Putnam, Rensselaer, Rockland, Saratoga, Schenectady, St. Lawrence, Sullivan, Ulster, Warren, Washington, Westchester, and Wyoming. DIV. OF FISH & WILDL., N.Y. DEP'T OF ENVTL. CONSERV., PROPOSED SEPTEMBER CANADA GOOSE HUNTING SEASONS IN NEW YORK, 1993-1995 at fig. 1 (1993).

54. DIV. OF FISH & WILDL., N.Y. DEP'T OF ENVTL. CONSERV., PROPOSED SEPTEMBER CANADA GOOSE HUNTING SEASONS IN NEW YORK, 1993-1995 at 1 (1993) (proposing early hunting seasons in September of 1993, 1994, and 1995).

55. Petitioners' Memorandum, *supra* note 22, at 1.

56. Early hunting seasons have been implemented in counties throughout New York State since 1990. See Respondents' Memorandum, *supra* note 7, at 4.

57. Respondents' Memorandum, *supra* note 7, at 3. However, according to the Coalition, the DEC had "received a small number of complaints compared to a disproportionately large number of communications from people . . . expres-

season on Canada geese was "the need to reduce [a number of] problems caused by resident Canada geese, which included water quality degradation, hazards to aircraft and agricultural damages, [and] the desire to increase recreational hunting opportunities."<sup>58</sup>

The Coalition alleged that the DEC, in effectuating the early hunting season plan, failed to develop a site-specific EIS and thus did not comply with SEQRA.<sup>59</sup> Specifically, the Coalition argued that the DEC "flagrantly violate[d] SEQRA by having failed to inform itself, and the public, as to the risks to the many specific sites upon which [the DEC would] now permit the killing [of Canada geese] at such an unexpected time

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sing strong opposition to killing the birds." *Id.* at 2. The Animal Damage Control Unit of the United States Department of Agriculture had suggested, as an alternative, that flocks of Canada geese be rounded up during molting season and euthanized as a method of nuisance abatement. Telephone Interview with James E. Forbes, Office of Animal Damage Control, State Director of the U.S. Dep't of Agric., (Oct. 19, 1995) (discussing how the geese would be processed at poultry processing plants). During molting season, both adult and young birds experience changes in body chemistry and amount of feathering. Telephone Interview with Anne Muller, Co-founder of the Coalition to Prevent the Destruction of Canada Geese (Feb. 23, 1995). The birds, therefore, are grounded, facilitating their relatively easy capture. *Id.* Indeed, entire families of geese would have been affected. The Coalition and other members of the public actively sought to prevent the implementation of this plan by meeting with the DEC and local representatives. See Coalition to Prevent the Destruction of Canada Geese, *Selected Research Findings* (Mar. 16, 1993) [hereinafter Coalition, *Selected Research Findings*] (setting forth the results of research conducted by the Coalition in preparation for a Mar. 16, 1993 meeting with Rockland County Town Supervisors, members of the Rockland County Legislature, and representatives from various federal and state agencies) (on file with author). The groups discussed public concerns regarding the DEC's wildlife management of Canada geese as well as potential compromises and solutions. Telephone Interview with Anne Muller, Co-founder of the Coalition to Prevent the Destruction of Canada Geese (Feb. 23, 1995).

58. Respondents' Memorandum, *supra* note 7, at 4.

59. Petitioners' Memorandum, *supra* note 22, at 2. Essentially, the Coalition sought procedural and substantive review of the Generic EIS developed and relied upon by the DEC. See Petitioners' Memorandum, *supra* note 22. In its memorandum of law in opposition to the Coalition's petition, the DEC stated that "[t]he setting of hunting seasons, such as the September season, is an 'established and accepted practice,' having been performed within [New York State] since colonial days." Respondents' Memorandum, *supra* note 7, at 12.

of the year.”<sup>60</sup> Additionally, the Coalition alleged that the DEC neglected to study the effects of its wildlife management programs on the designated counties, even though these designated counties encompass many environmentally diverse hunting sites.<sup>61</sup> Based on these allegations, the Coalition concluded that the DEC’s plan to commence an early hunting season on Canada geese should be enjoined as a violation of SEQRA, because the plan was devised without the development of an adequate, site-specific EIS.<sup>62</sup>

In response to the Coalition’s allegations, the DEC asserted that there existed an overpopulation of resident Canada geese, which needed to be reduced.<sup>63</sup> The DEC further contended that the number of Canada geese present in certain areas posed a general nuisance to the public.<sup>64</sup> The agency identified problems related to the presence of Canada geese, including the soiling of beaches and lawns with droppings, crop damage, and degradation of the water supply.<sup>65</sup> These health hazards, according to the DEC, resulted from increased coliform counts and nutrient loading in area reservoirs.<sup>66</sup> The question remains, however, as to whether there really exists an overpopulation of Canada geese and, if so, whether the DEC itself was the source of the surplus birds.

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60. Petitioners’ Memorandum, *supra* note 22, at 5. The Coalition supported this argument with the assertion that the early hunting season endangered people who would be enjoying the late summer season and not expecting to encounter hunters. *Id.* But see Respondents’ Memorandum, *supra* note 7, at 16-17 (stating that the Coalition was merely attempting to ban hunting, which is a legislatively permissible activity under the ECL).

61. Petitioners’ Memorandum, *supra* note 22, at 2.

62. *Id.* at 1-2.

63. Respondents’ Memorandum, *supra* note 7, at 2. See Marion, *supra* note 16, at 412-17 (stating that the DEC engages in the practice of creating a surplus number of game species in order to assure that a sufficient number of animals will be available for the next hunting season).

64. Respondents’ Memorandum, *supra* note 7, at 3.

65. *Id.*

66. *Id.* Coliform counts are “test[s] for the presence of fecal coliform bacteria in a water sample, used as an indicator of the presence of pollution by human or animal wastes in a body of water.” WILLIAM ASHWORTH, *THE ENCYCLOPEDIA OF ENVIRONMENTAL STUDIES* 74 (1991). Nutrient loading is the “[o]verenrichment of aquatic ecosystems . . . . Increasing the amounts of nutrients such as nitrates or phosphates causes a rapid increase in plant growth.” *THE DICTIONARY OF ECOLOGY AND ENVIRONMENTAL SCIENCE* (Henry W. Art, ed., 1993).

The DEC further asserted that it had fully complied with SEQRA's environmental review provisions.<sup>67</sup> The DEC argued that it had satisfied the purposes and spirit of SEQRA<sup>68</sup> by preparing a Final Programmatic Impact Statement on its Wildlife Game Species Management Program, the DEC's Generic Environmental Impact Statement (Generic EIS).<sup>69</sup> The DEC stated that its Generic EIS identified the "various environmental and socio-economic factors relevant to wildlife game management and the setting of hunting seasons."<sup>70</sup>

67. Respondents' Memorandum, *supra* note 7, at 2. In its memorandum of law in opposition to the Coalition's petition, the DEC stated that the New York State Register referred to the Generic EIS as having been prepared in accordance with SEQRA. *Id.* at 11. See also N.Y. St. Reg. at 10.

68. Respondents' Memorandum, *supra* note 7, at 11.

69. See generally GENERIC ENVTL. IMPACT STATEMENT, *supra* note 17. "Generic EISes, which broadly analyze the environmental effects of one large, extended action or smaller, separate related actions . . . , provide a method for reviewing complex projects, including resource management plans." *Schultz v. Jorling*, 563 N.Y.S.2d 876, 879 (1990). "A [resource] management plan includes site-specific descriptions of the topography, fauna and flora of a geographic area, as well as goals and objectives for preserving and managing the acreage. Field visits are said to be essential to the proper preparation of such site-specific narrative and graphic summaries." *Id.*

70. Respondents' Memorandum, *supra* note 7, at 11. The New York State regulations state that

[a] generic EIS may be used to assess the environmental effects of: (1) a number of separate actions in a given geographic area which, if considered singly may have minor effects, but if considered together may have significant effects; or (2) a sequence of actions, contemplated by a single agency or individual; or (3) separate actions having generic or common impacts; or (4) an entire program or plan having wide application or restricting the range of future alternative policies or projects.

N.Y. COMP. CODES R. & REGS. tit. 6, § 617.15(a) (1987). Moreover, the regulations provide an informational narrative of the scope and nature of a generic environmental impact statement:

[g]eneric EIS[es] may be broader, and more general than site or project specific EIS[es] and should discuss the logic and rationale for the choices advanced. They may also include an assessment of specific impacts if such details are available. They may be based on conceptual information in some cases. They may identify the important elements of the natural resource base as well as the existing and projected man-made features, patterns and character. They may discuss in general terms the constraints and consequences of any narrowing of future options. They may present and analyze in general terms a few hypothetical scenarios that could and are likely to occur.

Thus, the DEC contended that it was not required to prepare a more specific EIS and that it "properly relied on [the Generic EIS] when engaging in [its] rulemaking."<sup>71</sup>

Additionally, the DEC argued that, because its activities would have only minor, rather than significant, effects on the environment, strict compliance with SEQRA was unnecessary.<sup>72</sup> Specifically, the DEC stated that the setting of an early hunting season on Canada geese constituted a Type II action.<sup>73</sup> Type II actions are defined as "[a]ctions or classes of actions which have been determined not to have a significant effect on the environment and which do not require environmental impact statements."<sup>74</sup> The DEC concluded that its promulgation of a plan for early hunting seasons, which constituted a necessary means of alleviating the general nuisance caused by an overpopulation of resident Canada geese, fully complied with the letter and the spirit of SEQRA.<sup>75</sup>

The DEC successfully thwarted the Coalition's first attempt at obtaining judicial intervention in 1993. The Coalition, however, filed additional papers in 1994, seeking to

*Id.* § 617.15(d).

71. Respondents' Memorandum, *supra* note 7, at 11. The DEC also contended that the Coalition failed to file timely written comments during the agency's rulemaking process. *Id.* at 6.

72. *Id.* at 12.

73. *Id.*

74. N.Y. COMP. CODES R. & REGS. tit. 6, § 618.2(a)(2) (1988). In addition, the regulations consider certain "site specific and individual fish and wildlife activities . . . 'minor' if they do not involve significant departures from established and accepted practices and if such actions are described in and are a part of general fish and wildlife management programs for which an EIS has been prepared." *Id.* § 618.2(d)(5). The list of Type II actions includes:

fish and wildlife habitat improvement, . . . harvesting or thinning of fish and wildlife surpluses, setting of hunting, trapping and fishing seasons, weeding of competing or parasitic species and species incompatible with man's interests, improvement or rehabilitation of fish or wildlife resources, . . . and other alterations which are relatively short-lived and where followed by prompt replacement of fish or wildlife resources with the intention of providing equivalent or greater values.

*Id.* Cf. *Kravetz v. Sullivan*, 424 N.Y.S.2d 312, 313 (1979) (stating that "a Type I action is a class of projects which generally will in almost every instance have a significant effect on the environment").

75. Respondents' Memorandum, *supra* note 7, at 11.

enjoin the 1994 early hunting season.<sup>76</sup> Unfortunately, the attorney representing the Coalition suffered an untimely death and the Coalition was unable to acquire further counsel at that time.<sup>77</sup> The Coalition eventually received permission from the court to withdraw the case without prejudice.<sup>78</sup> Thus, the 1993 and 1994 early hunting seasons on Canada geese commenced and concluded without the benefit of judicial intervention. However, continued public interest in the issues surrounding the plight of Canada geese in New York State prompted the Coalition to seek representation to reinstate the lawsuit against the DEC in 1995.<sup>79</sup> In August 1995, the Coalition acquired counsel and, in early September 1995, petitioned the court for a preliminary injunction to enjoin the 1995 early hunting season on Canada geese, but was once again denied.<sup>80</sup> Foremost support for the Coalition's arguments for the cancellation of the early hunting season was the USF&WS' proposed suspension of the 1995-96, and potentially the 1996-97, regular hunting season on Canada geese throughout most of the Atlantic Flyway.<sup>81</sup> The USF&WS eventually finalized this proposed rule because the

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76. Case File, Coalition to Prevent the Destruction of Canada Geese v. Jorling (No. 93/6295) (on file with the Rockland County Clerk's Office).

77. Telephone Interview with Anne Muller, Co-founder of the Coalition to Prevent the Destruction of Canada Geese (Aug. 15, 1995).

78. Order, Coalition to Prevent the Destruction of Canada Geese v. Jorling (N.Y. Sup. Ct. entered June 10, 1994) (No. 93/6295) (ordering withdrawal of the case) (on file with the Rockland County Clerk's Office).

79. Telephone Interview with Anne Muller, Co-founder of the Coalition to Prevent the Destruction of Canada Geese (Aug. 15, 1995).

80. *Id.* However, in October, 1995, the Coalition instituted another action against the DEC, seeking to acquire a judgment permanently enjoining the DEC from effectuating any hunting on Canada geese. Verified Petition, Coalition to Prevent the Destruction of Canada Geese v. Jorling (N.Y. Sup. Ct. 1995) (No. 95/121741) (on file with the New York County Clerk's Office). As of the date of publication, the court's decision was pending. Telephone Interview with Anne Muller, Co-founder of the Coalition to Prevent the Destruction of Canada Geese (Jan. 12, 1996).

81. Telephone Interview with Anne Muller, Co-founder of the Coalition to Prevent the Destruction of Canada Geese (Oct. 23, 1995). *See also* U.S. Fish & Wildl. Serv., Dep't of the Interior, *News Release: Continuing Decline in Breeding Populations of Migratory Geese Likely to Lead to Hunting Restrictions in Atlantic Flyway*, July 14, 1995.

number of breeding pairs of Canada geese in the Atlantic Flyway had dropped to only 29,000.<sup>82</sup>

#### IV. Analysis

The DEC's current approach to wildlife management of Canada geese contradicts the express policies and mandates of the ECL. For instance, the ECL requires that the DEC's wildlife management programs be geared toward the welfare of New York's citizens,<sup>83</sup> rather than toward only a small minority of the state population consisting of recreational hunters. Moreover, the DEC's reliance on its fifteen-year-old Generic EIS to promulgate early, regular, and late hunting seasons on Canada geese constitutes insufficient compliance with the substantive and procedural requirements of SEQRA. By relying on this outmoded Generic EIS, the DEC has failed to adequately investigate the consequences and impact of excessive habitat manipulation and prolonged hunting on Canada geese.<sup>84</sup> In formulating an EIS on the effects of hunting on Canada geese within various areas throughout New York State, the DEC, as the lead agency, must focus on the cumulative impact of its actions and the overall welfare of New York State's ecology for the purpose of promoting biodiversity, and for the benefit of the citizens of New York State. Therefore, the DEC must both reconsider and update its fif-

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82. U.S. Fish & Wildl. Serv., Dep't of the Interior, *News Release: Continuing Decline in Breeding Populations of Migratory Geese Likely to Lead to Hunting Restrictions in Atlantic Flyway*, July 14, 1995. "An annual survey conducted in conjunction with the Canadian Wildlife Service and the Atlantic Flyway Council revealed just 29,000 breeding pairs despite excellent habitat conditions in the northern Quebec survey area. This is down 27 percent from 1994 and 75 percent below levels recorded in 1988 when the decline was first detected." *Id.* The final rule stated that the 1995-1996 hunting season would be suspended, except for a special experimental late hunting season which may be held in New York between January 21 and February 15, 1996, and other similar exceptions in other states in the Atlantic Flyway region. *Migratory Bird Hunting; Final Frameworks for Late-Season Migratory Bird Hunting Regulations*, 60 Fed. Reg. 50,048 (1995) (to be codified at 50 C.F.R. pt. 20).

83. See N.Y. ENVTL. CONSERV. LAW §§ 1-0101(1), 8-0101, 11-0303(1) (McKinney 1984).

84. See Petitioners' Memorandum, *supra* note 22, at 4. See generally GENERIC ENVTL. IMPACT STATEMENT, *supra* note 17.

teen-year-old Generic EIS and reopen environmental review of the effect of its hunting policies and programs on Canada geese.

SEQRA requires that the DEC create an EIS whenever a proposed agency action will have a significant impact on the environment.<sup>85</sup> The New York Legislature requires the DEC to address specific criteria, including the short-term and long-term effects of an action, any feasible alternatives, and mitigation measures.<sup>86</sup> Furthermore, the ECL mandates state agencies to take into consideration the protection of New York's ecology for the benefit of its citizens,<sup>87</sup> rather than for just a select group of recreational hunters. Indeed, the DEC does not have the discretion to create EISes in whatever fashion it may deem appropriate. Since the DEC has promulgated its wildlife management programs, such as the early

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85. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.11(b) (1987) (stating that, [f]or the purpose of determining whether an action will cause [a significant environmental impact pursuant to N.Y. COMP. CODES R. & REGS. tit. 6, § 617.11(a) (1987)], the lead agency must consider reasonably related long-term, short-term and *cumulative effects*, including other simultaneous or subsequent actions which are: (1) included in any long-range plan of which the action under consideration is a part; (2) likely to be undertaken as a result thereof; or (3) dependent thereon

(emphasis added)).

86. N.Y. ENVTL. CONSERV. LAW § 8-0109(2)(b), (d), (f) (McKinney Supp. 1995). See also N.Y. COMP. CODES R. & REGS. tit. 6, § 617.14(f)(5) (1987) (requiring that an EIS contain

a description and evaluation of the range of reasonable alternatives to the action which are feasible, considering the objectives and capabilities of the project sponsor. The description and evaluation of each alternative should be at a level of detail sufficient to permit a comparative assessment of the alternatives discussed. The range of alternatives must include the no-action alternative and may include, as appropriate, alternative: (i) sites; (ii) technology; (iii) scale or magnitude; (iv) design; (v) timing; (vi) use; and (vii) types of action).

Cf. *Schultz v. Jorling*, 563 N.Y.S.2d 876, 881 (1990) (stating that "[n]ot every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before a [final] EIS will satisfy the substantive requirements of SEQRA") (quoting *Jackson v. N.Y. Urban Dev. Corp.* 67 N.Y.2d 400, 417 (1986)).

87. N.Y. ENVTL. CONSERV. LAW §§ 1-0101(1), 8-0101, 11-0303(1) (McKinney 1984).

hunting seasons on Canada geese, in accordance with its outmoded, insufficiently detailed Generic EIS, the DEC has failed to comply with the letter and the spirit of SEQRA.

The New York Legislature also intended the DEC to incorporate the policies set forth in Articles 1 and 11 of the ECL into its wildlife management of game species,<sup>88</sup> such as Canada geese. The DEC defines wildlife management as "the science and art of interpreting and adjusting the characteristics of wild populations, their food, water, cover and protection, as well as regulating the actions of people to achieve specific goals and objectives for the recreational, aesthetic, scientific and commercial uses of wildlife resources."<sup>89</sup> More specifically, the DEC defines wildlife species management as "that portion of wildlife management which deals with population status and how that species relates to its habitat."<sup>90</sup> However, in making recommendations, wildlife species managers must consider factors other than habitat.<sup>91</sup> In implementing sound wildlife management practices, the DEC must consider the following factors:

- (1) ecological factors, including the need for restoration and improvement of natural habitat and the importance of ecological balance in maintaining natural resources; (2) the compatibility of production and harvesting of fish and wildlife crops with other necessary or desirable land uses; (3) the importance of fish and wildlife resources for recreational purposes; (4) requirements for public safety; and (5) the need for adequate protection of private premises and of the persons and property of occupants thereof against abuse of privileges to access to such premises for hunting, fishing or trapping.<sup>92</sup>

Additional factors include socio-economic and biological impacts of species management.<sup>93</sup>

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88. See N.Y. ENVTL. CONSERV. LAW §§ 1-0101(3) (McKinney 1984), 11-0903(1) (McKinney Supp. 1995).

89. GENERIC ENVTL. IMPACT STATEMENT, *supra* note 17, at 1.

90. *Id.*

91. *Id.*

92. N.Y. ENVTL. CONSERV. LAW § 11-0303(2)(b) (McKinney 1984).

93. GENERIC ENVTL. IMPACT STATEMENT, *supra* note 17, at 74, 79.

Although "SEQRA contains no provision regarding judicial review,"<sup>94</sup> the standard of review the New York courts use to determine whether a lead agency has complied with SEQRA is whether the agency "identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination."<sup>95</sup> However, only if the agency's EIS or determination of environmental consequences is irrational, arbitrary, and capricious or completely unsupported by the evidence, may the court overturn the agency's decision.<sup>96</sup> The New York courts maintain only a very limited supervisory role over state agencies, such as the DEC. Hence, SEQRA permits a lead agency, such as the DEC, "considerable latitude in evaluating the environmental impacts and alternatives discussed in an [EIS] to reach a determination concerning a proposed [action]."<sup>97</sup>

The New York courts have aptly commented upon the importance of the policies and requirements set forth in SEQRA.<sup>98</sup> For instance, in *Henrietta v. DEC*,<sup>99</sup> the court stated that, "[p]rocedurally, SEQRA requires the preparation of an [EIS] for any action which may have a significant effect on the environment."<sup>100</sup> Moreover, "[t]he EIS, the heart of SEQRA, clearly is meant to be more than a simple disclosure statement."<sup>101</sup> Hence, an EIS operates as the means through which the DEC can assess, analyze, and review the effects of a proposed action or method of ecological conservation and preservation. Indeed, an EIS is of primary importance in establishing that an agency has "taken a 'hard look' at the relevant areas of environmental concern, and has made a

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94. *Jackson v. N.Y. Urban Dev. Corp.*, 67 N.Y.2d 400, 416 (1986).

95. *Id.* at 417.

96. *Id.* at 416. See also N.Y. CIV. PRAC. L. & R. § 7803 (McKinney 1994).

97. *Horn v. Int'l Business Machines Corp.*, 493 N.Y.S.2d 184, 189 (1985) (citing *Aldrich v. Pattison*, 486 N.Y.S.2d 23, 30 (1985)).

98. SEQRA is not "merely procedural or informational since it states that all approving agencies involved in an action must actually consider the EIS and formulate its decision on the basis of all the adverse environmental impacts disclosed therein." *Henrietta v. DEC*, 430 N.Y.S.2d 440, 446 (1980).

99. 430 N.Y.S.2d 440.

100. *Id.* at 445.

101. *Id.*

reasoned judgment."<sup>102</sup> Thus, in enacting SEQRA, the New York Legislature intended for EISes to operate as procedural safeguards through which the lead agency informs itself and the public as to potential detrimental effects of a particular agency action on the environment.<sup>103</sup>

In addition to these procedural safeguards, SEQRA also creates important substantive requirements. The *Henrietta* court explained that "the general substantive policy of [SEQRA] is a flexible one. It leaves room for a responsible exercise of discretion and does not require particular substantive results in particular problematic instances. It does, however, make environmental protection a part of the mandate of every state agency and department."<sup>104</sup> In *Schenectady Chemicals v. Flacke*,<sup>105</sup> the court also addressed the substantive aspects of SEQRA, concluding that the New York Legislature designed SEQRA "specifically . . . to protect the environment by requiring parties to identify possible environmental changes 'before they have reached ecological points of no return.'"<sup>106</sup> Moreover, the *Schenectady Chemicals* court reaffirmed that, "[a]t the core of [SEQRA] is the EIS, which acts as an environmental 'alarm bell.'"<sup>107</sup> The court further stated that

the substance of SEQRA cannot be achieved without its [EIS] procedure, and that any attempt to deviate from its

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102. *Horn v. Int'l Business Machines Corp.*, 493 N.Y.S.2d 184, 189 (1985).

103. See N.Y. ENVTL. CONSERV. LAW § 8-0109(2) (McKinney Supp. 1995); N.Y. COMP. CODES R. & REGS. tit. 6, § 617.14 (1987) (stating requirements for the preparation and content of EISs). See also *id.* § 617.9 (requiring the lead agency to afford the public "a reasonable time period (not less than 10 calendar days) in which to consider the final EIS").

104. *Henrietta*, 430 N.Y.S.2d at 447 (1980). "Requiring strict compliance by agencies with SEQRA's initial determination requirements is more than a hollow procedural nicety." *Schenectady Chemicals v. Flacke*, 446 N.Y.S.2d 418, 420 (1981). "While an EIS does not require a public agency to act in any particular manner, it constitutes evidence which must be considered by the public agency along with other evidence which may be presented to such agency." *Henrietta*, 430 N.Y.S.2d at 447 (citing *Carmel Valley View, Ltd. v. Monterey County*, 58 Cal. App. 3d 817, 822 (1976)).

105. 446 N.Y.S.2d 418 (1981).

106. *Id.* at 420 (citing *Henrietta*, 430 N.Y.S.2d at 440).

107. *Id.*

provisions will undermine the law's express purposes. Accordingly, . . . an agency must comply with both the letter and the spirit of SEQRA before it will be found to have discharged its responsibilities thereunder.<sup>108</sup>

The letter and the spirit of SEQRA are primarily set forth in ECL sections 8-0101, 8-0103(8) & (9), and 8-0109(2). SEQRA mandates the development of an EIS for activities that may have a significant effect on the environment,<sup>109</sup> and for the purpose of promoting efforts "which will prevent or eliminate damage to the environment and enhance human and community resources."<sup>110</sup> In determining whether a particular agency activity will have a significant effect on the environment, "the reviewing agencies must compare impacts which may be reasonably expected to result from the proposed action against an illustrative list of criteria contained [in the New York regulations]."<sup>111</sup>

Furthermore, the New York courts have recognized the procedural importance of the EIS as a means through which the DEC, specifically the Division of Fish and Wildlife, must educate itself and the public regarding the potential effects of proposed wildlife management actions.<sup>112</sup> The DEC must

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108. *Id.* (citing *Rye Town/King Civic Assoc. v. Rye*, 442 N.Y.S.2d 67, 70-71 (1981), *appeal dismissed*, 55 N.Y.2d 747 (1981)).

109. N.Y. ENVTL. CONSERV. LAW § 8-0109(2) (McKinney Supp. 1995).

110. N.Y. ENVTL. CONSERV. LAW § 8-0101 (McKinney 1984).

111. *West Branch Conservation Ass'n v. Clarkstown Planning Bd.*, 616 N.Y.S.2d 550, 552 (1994). *See* N.Y. COMP. CODES R. & REGS. tit. 6, § 617.11(a)(1)-(11) (1987) (stating criteria for determining significance). These criteria include:

(2) the removal or destruction of large quantities of vegetation or fauna; substantial interference with the movement of any resident or migratory . . . wildlife species; . . . or other significant adverse effects to natural resources; . . . (10) changes in two or more elements of the environment, no one of which has a significant effect on the environment, but when considered together result in a substantial adverse impact on the environment; . . . or (11) two or more related actions undertaken, funded or approved by an agency, none of which has or would have a significant effect on the environment, but when considered cumulatively would meet one or more of the criteria in this section.

*Id.* § 617.11(a)(2), (10), (11).

112. *See supra* text accompanying notes 98-103.

view the EIS as a means through which detrimental effects on the environment can be discovered and prevented, rather than merely a descriptive overview of the agency's objectives.<sup>113</sup> The New York Court of Appeals has held that "it is the role of the court not to weigh the desirability of [a] proposed action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, [both] procedurally and substantively."<sup>114</sup>

The Generic EIS prepared by the DEC in 1980 has failed to meet SEQRA's mandates, because it simply describes the agency's theories without supplying a detailed statement of the potential adverse effects on the areas in which game management of Canada geese was to be implemented.<sup>115</sup> Essentially, the reason for developing an EIS is to compel the lead agency to consider the effects of a proposal which may alter the intricate balance of an entire ecosystem.<sup>116</sup> Thus, the DEC violated SEQRA's mandate because its fifteen-year-old Generic EIS lacks sufficient detail regarding the possible significant effects of managing Canada geese through excessive habitat manipulation and prolonged recreational hunting.<sup>117</sup>

The DEC has consistently asserted that, in formulating the Generic EIS, it fully complied with the requirements of

113. See generally *GENERIC ENVTL. IMPACT STATEMENT*, *supra* note 17.

114. *Neville v. Koch*, 79 N.Y.2d 416, 424 (1992). "Substantively, the courts in this limited adjudicative function must assure that the agency has identified the relevant areas of environmental concern, taken a 'hard look' at them, and made a reasoned elaboration of the basis for its determination." *Id.* at 424-25.

115. Petitioners' Memorandum, *supra* note 22, at 2.

116. See *supra* text accompanying notes 40-50 for a discussion of SEQRA and its EIS requirements.

117. See Petitioners' Memorandum, *supra* note 22, at 2. However, in its memorandum of law in opposition to the Coalition's petition, the DEC argued that "[t]he mere passage of time does not warrant reopening of environmental review." Respondents' Memorandum, *supra* note 7, at 14 (citing *Stewart Park and Reserve Coalition v. N.Y. Dep't of Transp.*, 555 N.Y.S.2d 481, 485 (1990) *aff'd*, 77 N.Y.2d 970 (1991)). However, since the ultimate effect of prolonged hunting on Canada geese is not yet fully understood, the DEC must reopen environmental review and assess more closely the effect of its management tactics on Canada geese. Close examination of the DEC's management techniques will most likely reveal that such wildlife management is significantly affecting Canada geese and their habitat.

SEQRA.<sup>118</sup> The agency maintains that, since the early hunting season on Canada geese was a Type II action not constituting a significant effect on the environment, it did not have to prepare a new EIS.<sup>119</sup> The DEC rested its argument on the assertion that the setting of an early hunting season constitutes only a minor action because it "[did] not involve [a] significant departure from established and accepted practices."<sup>120</sup> The DEC further contended that it took site specific considerations into account in its actions, because the early hunting season applied only to limited portions of New York State.<sup>121</sup> Finally, the DEC has insisted that its Generic EIS "identified the various environmental and socio-economic factors relevant to wildlife game management and the setting of hunting seasons, thereby satisfying the purposes and spirit of SEQRA."<sup>122</sup>

Despite these arguments, the DEC failed even to acknowledge, let alone to address, the cumulative impact of its management techniques, including excessive habitat manipulation and prolonged recreational hunting, on Canada geese.<sup>123</sup> In amending the ECL in 1975, the New York Legislature authorized the Commissioner of the DEC, "when making any determination in connection with any license, order, permit, certification or other similar action[,] to take into account the *cumulative impact* of the proposal on water, land, fish, wildlife and air resources."<sup>124</sup> However, the DEC does

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118. Respondents' Memorandum, *supra* note 7, at 2.

119. *Id.* at 11-12.

120. *Id.* at 12 (citing N.Y. COMP. CODES R. & REGS. tit. 6, § 618.2(b) (1988)).

121. *Id.* at 15. See *supra* note 53 for a list of counties affected by the early hunting season on Canada geese.

122. Respondents' Memorandum, *supra* note 7, at 11.

123. This may be, in part, a result of the New York Legislature's failure to define clearly the term "cumulative impact" or to provide relevant guidelines to develop such an assessment. See *infra* note 127.

124. *Henrietta v. DEC*, 430 N.Y.S.2d 440, 447 (1980) (citing N.Y. ENVTL. CONSERV. LAW § 3-0301(1)(b) (emphasis added)).

In connection with projects that are to be developed in phases or stages, agencies should address not only the site specific impacts of the individual project under consideration, but also, in more general or conceptual terms, the cumulative effects on the environment and the existing natural resource base of subsequent phases of a larger project or series of projects that may be developed in the fu-

maintain discretion to choose not to consider the cumulative impact of agency actions within any one geographic area.<sup>125</sup>

Unfortunately, the Atlantic Flyway population of Canada geese is now suffering the consequences of the DEC's abuse of discretion and mismanagement of the species. Therefore, the New York Legislature must further amend the ECL to mandate the DEC to assess the cumulative impact of excessive habitat manipulation and recreational hunting of Canada geese. Furthermore, until the DEC completes such an assessment, the New York Legislature must prohibit all future hunting on Canada geese. Since the DEC has failed to consider the cumulative impact of hunting on Canada geese, and since the Atlantic Flyway population has plummeted to only 29,000 migratory breeding pairs, the DEC's failure to suspend all hunting on Canada geese is irrational and capricious. Indeed, without consideration and examination of the cumulative impact of habitat manipulation and prolonged hunting on Canada geese, any further risk to the species is extremely imprudent.

Reopening environmental review would accomplish two objectives. First, the New York Legislature intended wildlife management to include consideration of current scientific knowledge, so that, as the state agencies acquire new information, the agencies can develop more ecologically-oriented game management techniques and can make more accurate determinations of environmental impacts.<sup>126</sup> The DEC has failed to take such new information into account, and the temporary cancellation of one or two hunting seasons will not resolve the situation. Since the DEC has not yet addressed and considered the cumulative impact of hunting on Canada geese, the DEC must now acknowledge that its current man-

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ture. In these cases, this part of the generic EIS shall discuss the important elements and constraints present in the natural and man-made environment that may bear on the conditions of an agency decision on the immediate project.

N.Y. COMP. CODES R. & REGS. tit. 6, § 617.15(e) (1987).

125. *Ecumenical Task Force of the Niagara Frontier, Inc. v. Love Canal Area Revitalization Agency*, 583 N.Y.S.2d 859, 864 (1992).

126. *See* N.Y. ENVTL. CONSERV. LAW § 8-0109(2) (McKinney Supp. 1995).

agement of Canada geese may be significantly altering the species and that it must develop alternative policies.

Second, reopening environmental review of the scheduling of hunting seasons and the setting of bag limits for Canada geese would facilitate the development of a cumulative impact assessment.<sup>127</sup> The New York regulations authorize "the use of a programmatic or generic EIS to evaluate the cumulative environmental effects of a number of separate actions proposed for a single geographic area. However, the preparation of a generic EIS to explore cumulative impact is not mandatory under [the regulations]."<sup>128</sup> Unfortunately, the New York regulations provide no concrete definition of cumulative impacts to aid the DEC in its environmental review.<sup>129</sup> Furthermore, the DEC, in the text of its Generic EIS, concedes that "[t]oo little [was] known at [the] time to determine [the] magnitude of the effects of various game species management programs on endangered species."<sup>130</sup> Moreover, the DEC admits that "[m]aintenance of wildlife populations at levels optimum for recreational purposes can have unwanted side effects."<sup>131</sup> These statements alone suggest the need to reopen review and fully assess the cumulative impact of excessive habitat manipulation and prolonged hunting on Canada geese.

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127. See Gail Kamaras, *Cumulative Impact Assessment: A Comparison of Federal and State Environmental Review Provisions*, 57 ALB. L. REV. 113, 120 (1993). Kamaras discusses how "[a]gencies, project sponsors, the interested public, and the courts need clearer direction on what cumulative impacts are and when they need to be addressed for the envisioned environmental reviews to fulfill their statutory objectives." *Id.* at 114. Cumulative impact is defined as the "incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . . . Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7 (1995).

128. *Long Island Pine Barrens Soc'y v. Brookhaven*, 581 N.Y.S.2d 803, 819 (1992). See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.15 (1987). An EIS must include "a statement and evaluation of the environmental impacts of the proposed action, including the reasonably related short- and long-term effects, cumulative effects and other associated environmental effects." N.Y. COMP. CODES R. & REGS. tit. 6, § 617.14(f)(3) (1987).

129. Kamaras, *supra* note 127, at 119.

130. GENERIC ENVTL. IMPACT STATEMENT, *supra* note 17, at 105-06.

131. *Id.* at 81.

The DEC's basic wildlife management methods<sup>132</sup> also need revision, because they are themselves repugnant to SEQRA. For instance,

[w]hen the [DEC] manipulates habitats to provide more food and cover for game species, it clears trees, sprays herbicides, burns to control vegetable growth, and traps, hunts, and poisons members of some species to encourage the increase of others. This also results in a reduction in food and cover for some non-target species, and in severe damage to the land.<sup>133</sup>

It is evident that the practices of the DEC may not only be endangering the welfare of Canada geese, a target species, but also the overall welfare of non-target species and their related ecosystems.<sup>134</sup>

In light of the DEC's definition of wildlife management<sup>135</sup> and of the DEC's wildlife management techniques, the inference can be made that the DEC considers conservation to be "the practice of attempting to insure in perpetuity a sufficient supply of game for those wishing to hunt and trap it, while at the same time attempting to keep the total population of a species from dropping below a given size."<sup>136</sup> Indeed, the DEC concedes that the "desire to increase recreational hunting opportunities"<sup>137</sup> was a factor in developing its current

132. The methods are "game species population manipulation, habitat management to increase food and cover for target species, and public use development to open up inaccessible areas of the state for hunting and trapping." Marion, *supra* note 16, at 413.

133. *Id.* at 419 (citing DIV. OF FISH & WILDL., N.Y. DEP'T OF ENVTL. CONSERV., FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT ON HABITAT MANAGEMENT ACTIVITIES at 5, 8-9, 44 (1979)).

134. In its Generic EIS, the DEC conceded that, "[s]ince all species in an environment have different habitat requirements and tolerances, any change in that environment must benefit some species and have adverse effects on others." GENERIC ENVTL. IMPACT STATEMENT, *supra* note 17, at 81.

135. See *supra* text accompanying note 89 for the definition of wildlife management.

136. Marion, *supra* note 16, at 407-08. See GENERIC ENVTL. IMPACT STATEMENT, *supra* note 17, at 41, 45.

137. Respondents' Memorandum, *supra* note 7, at 4. This conceded desire implies that "a major goal of [the DEC] has been to 'manage' wildlife by increasing the population levels of so-called 'game' animals for hunting and trapping."

management policies and programs regarding Canada geese.<sup>138</sup>

Authors and wildlife advocacy groups have accused the DEC of promoting recreational hunting over biodiversity and the overall welfare of New York State's ecology for the benefit of its citizens.<sup>139</sup> Indeed, "the well-being of wildlife [such as Canada geese] and the environment necessarily suffer because of the [DEC's] bias, and because so much of [the DEC's] time, energy, and budget is invested in game management."<sup>140</sup> The DEC, in allowing the state's recreational hunters to kill Canada geese, necessarily deprives the rest of the state's citizens of the ability to enjoy, and thus benefit from, this natural resource. Therefore, in order to protect and conserve the species and to fully comply with the policies and mandates of New York's SEQRA, the DEC must reopen environmental review and revise its wildlife management techniques regarding Canada geese to include termination of all hunting of the species.

## V. Proposals For Future Action

Effective wildlife management in New York State would recognize and incorporate the two distinct goals of the DEC. First, the DEC is required to conserve New York State's natural resources for the benefit of the people of New York State.<sup>141</sup> Second, the DEC is expected to promote recreational hunting and to provide means through which recrea-

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Marion, *supra* note 16, at 401. The DEC's intent is to "solv[e] an immediate purported problem, while insuring an exploded population for the following year." *Id.* at 416 (indicating that the immediate purported problem is the overabundance of Canada geese throughout New York State).

138. If the early hunting seasons on Canada geese were eliminated altogether, alternative opportunities for hunting waterfowl would still exist. *See, e.g.,* Bryan Swift, Affidavit in Opposition to Motion for Preliminary Injunction at 5-6, Coalition to Prevent the Destruction of Canada Geese v. DEC (No. 93/6295) (stating that there are early hunting seasons open for snipe, gallinules, and some species of rails).

139. *See generally* Marion, *supra* note 16; RON BAKER, THE AMERICAN HUNTING MYTH (1985).

140. Marion, *supra* note 16, at 418.

141. *See* N.Y. ENVTL. CONSERV. LAW § 1-0101(1)-(3) (McKinney 1984).

tional,<sup>142</sup> rather than subsistence, hunting can thrive in the state.<sup>143</sup> The ultimate query, however, is whether the goals of effective species conservation and the promotion of recreational hunting can be reconciled under the DEC's current approach to wildlife management.

The DEC could improve its current wildlife management activities by pursuing ecologically sound alternatives that would comply with SEQRA.<sup>144</sup> The New York Legislature must mandate that the DEC change the focus of its wildlife management, including wildlife management of Canada geese, from game harvesting to the continued health of ecosystems statewide.<sup>145</sup> By simply changing the focus of the agency's management programs, the New York Legislature could facilitate the creation of "conditions favorable to the greatest number of animals of each species to be found in

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142. See *GENERIC ENVTL. IMPACT STATEMENT*, *supra* note 17, at 9. The main difference between sport hunting and subsistence hunting is that the former is engaged in for recreational purposes and the latter for survival purposes. See Gregory C. Cook, *Government and Geese in Alaska*, 5 J. ENVTL. L. & LITIG. 29, 50-51, 57-58 (1990). For instance, while the vast majority, if not all, hunters in New York State consider themselves recreational, or sport, hunters, there does exist a population of subsistence hunters in states such as Alaska, who rely on the harvesting of Canada geese for survival. *Id.*

143. The DEC is the agency in New York which sells and regulates hunting licenses and weaponry. See N.Y. ENVTL. CONSERV. LAW § 11-0305(2) (McKinney 1984); *GENERIC ENVTL. IMPACT STATEMENT*, *supra* note 17, at 5-6.

144. An environmentally conscious solution which also accommodates hunters would be a reduction and restructuring of the land available for hunting. *BAKER*, *supra* note 139, at 239. The purpose would be to reduce the number of hunters eligible to hunt on public lands. *Id.* at 239. New York would achieve this goal through a system of licensing involving the issuance of two types of hunting licenses, subject to agency review and approval. *Id.* at 240. "The first [type of license] would allow the holder to hunt legal 'game' on private land belonging to himself or a consenting landowner." *Id.* The State of Connecticut has implemented such a program, allowing owners of ten or more acres of rural land to sign a form permitting a specified number of hunters to hunt on their property. *Id.* "The second type of license, which would be issued in steadily declining numbers, based upon hunter training performance, would allow the holder to hunt on unprotected public lands." *Id.* This would increase licensing fees, and the excess funds could be used for the purchase of wildlife habitats to be protected from consumptive uses. *Id.* The goal of this licensing program is to "make hunting a privilege rather than a self-ordained and self-perpetuated 'right.'" *Id.*

145. See *BAKER*, *supra* note 139, at 243.

each natural area.”<sup>146</sup> The purpose of such a policy would be to “reflect a concern for the welfare . . . of all species normally found on public wildlands.”<sup>147</sup> Consistent with this objective, the New York Legislature must force the DEC to develop an updated EIS, incorporating a cumulative impact assessment of the potential effects of excessive habitat manipulation and prolonged hunting on Canada geese. Therefore, the DEC must reopen environmental review to determine the best course of action consistent with the policies and mandates of the ECL, particularly SEQRA.<sup>148</sup>

Although resolution of the problems created by the DEC’s management of Canada geese is, ultimately, a matter of legislative action and agency reform, there exist several non-lethal nuisance-abatement options that individuals and organizations, including businesses and local governments, can implement. These non-lethal nuisance-abatement options include population dissuasion, population attraction, and population relocation.<sup>149</sup>

Methods of population dissuasion are nuisance-abatement options used to discourage unwanted Canada geese from congregating in certain areas.<sup>150</sup> For example, the pro-

146. *Id.*

147. *Id.* at 242.

148. Although the DEC is ultimately bound by the findings and conclusions of the USF&WS, the DEC, as a state agency, has the authority to conduct environmental review and ultimately promulgate more stringent regulations than the federal government. *See, e.g.,* Migratory Bird Treaty Act, 16 U.S.C. § 708 (1994) (allowing states to pass and enforce laws which are either consistent with the act or “which shall give further protection to migratory birds, their nests, and eggs”).

149. Coalition, *Selected Research Findings*, *supra* note 57, at 3-4 (stating methods proposed by the Office of Animal Damage Control of the U.S. Dep’t of Agric.); William Lishman, *Operation Migration*, 43 SPORT AVIATION 26, 26-33 (1994) (explaining the method of population relocation).

150. Coalition, *Selected Research Findings*, *supra* note 57, at 3-4. *See also* OFFICE OF ANIMAL DAMAGE CONTROL, ANIMAL AND PLANT HEALTH INSPECTION SERV., U.S. DEP’T OF AGRIC., *NUISANCE CANADA GEESE* at 2-4 (May 1986) (suggesting other methods of population dissuasion, such as building fences, creating noise by discharging shellcrackers or using automatic exploders, and flying balloons at low altitudes because geese will not remain under low-flying objects).

mulgation of no-feeding laws<sup>151</sup> could help prevent the creation of food-rich areas that attract Canada geese.<sup>152</sup> Moreover, these laws would deter people from feeding geese food that can cause the birds injury.<sup>153</sup> In addition, landowners can alter the landscaping of their property to deter Canada geese from landing, remaining, and nesting on their land.<sup>154</sup> Since Canada geese are attracted to open areas near bodies of water, such as ponds, lakes, and reservoirs, various plantings can be used to decrease the amount of feeding areas open to Canada geese.<sup>155</sup> For instance, population dissuasion can be achieved by letting grasses grow in length or by using different types of grasses that are unappetizing to Canada geese.<sup>156</sup> Another method of population dissuasion is the use of border collies, which are dogs specially trained to chase unwanted Canada geese from designated areas.<sup>157</sup>

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151. See, e.g., Town of Mamaroneck, Local Law # 11-1995 (1995) (imposing a minimum fine of \$25 and a maximum fine of \$200 for a first offense and imposing a minimum fine of \$100 and a maximum fine of \$250 and/or imprisonment up to fifteen days for a second or subsequent offense).

152. See OFFICE OF ANIMAL DAMAGE CONTROL, ANIMAL AND PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., NUISANCE CANADA GEESE at 2 (May 1986). However, effective enforcement of no-feeding laws may, ultimately, prove difficult.

153. Young geese that are fed bread, popcorn, or other low-protein foods "develop deformed wings and lose the ability to fly throughout life." OFFICE OF ANIMAL DAMAGE CONTROL, ANIMAL AND PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., DON'T FEED GEESE at 1 (May 1986).

154. See Coalition, *Selected Research Findings*, *supra* note 57, at 3.

155. OFFICE OF ANIMAL DAMAGE CONTROL, ANIMAL AND PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., NUISANCE CANADA GEESE at 1-2 (May 1986).

156. *Id.*

157. Border collies are instinctively herding dogs, which can be trained to herd Canada geese. Telephone Interview with Mary Ann O'Grady, Cara Na Madra Dog Training, Inc. Greenwich, Conn. (Oct. 2, 1995). Since Canada geese do not like to be herded or fenced-in, the geese will learn to avoid an area regularly patrolled by border collies. *Id.* The dogs, however, pose no physical threat to the geese, their nests, or their eggs. *Id.* See Marlon Vaughn, *Village Goes to the Dog*, REPORTER DISPATCH, Dec. 26, 1995 at 3A (stating that the Village of Mamaroneck in New York rented three border collies for a two month period to chase Canada geese from its Harbor Island Park area and now has plans to purchase a border collie for permanent dissuasion of the geese from the area). See also Evelyn Nieves, *Goose-Herding Dogs Are Park's Heroes*, N.Y. TIMES, Oct. 20, 1995, at B1 (discussing the use of border collies to chase Canada geese).

An additional method of population dissuasion involves the use of methyl anthranilate, a substance which humanely repels unwanted Canada geese from designated areas.<sup>158</sup> Methyl anthranilate is a grape flavoring used in such products as beverages, chewing gum, ice cream, and gelatins.<sup>159</sup> Methyl anthranilate also occurs naturally in grapes and citrus fruits.<sup>160</sup> When feeding in areas treated with methyl anthranilate, Canada geese "have been observed shaking their heads, spitting out food, and rapidly passing through treated areas."<sup>161</sup> Methyl anthranilate poses no threat to Canada geese; the geese simply do not like the taste of the grape flavoring and, thus, learn to avoid inhabiting areas treated with methyl anthranilate.<sup>162</sup>

Methods of population attraction can be used to encourage Canada geese to congregate in certain areas.<sup>163</sup> For instance, the Coalition has suggested that local and state governments set aside portions of public parks as refuges for Canada geese and other waterfowl for the public to enjoy.<sup>164</sup>

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158. Marvin F. Prieser, a technical consultant with PMC Specialties Group, Inc., a division of PMC, Inc., developed methyl anthranilate for PMC. Telephone Interview with Marvin F. Prieser, Technical Consultant with PMC Specialties Group, Inc., (Sept. 25, 1995). The trademark name for methyl anthranilate is ReJeX-iT. *Id.* "ReJeX-iT functions via aversion, rather than by toxicity and, therefore, it presents a very minimal risk to applicators, targets, people, pets, and wildlife." *Id.*

159. RJ ADVANTAGE, INC., PMC SPECIALTIES GROUP, INC., FOOD PRODUCT CONTAINING METHYL ANTHRANILATE (1995).

160. RJ ADVANTAGE, INC., PMC SPECIALTIES GROUP, INC., INFORMATION BULLETIN: NATURALLY OCCURRING SOURCES OF ACTIVE INGREDIENTS IN REJEX-IT BIRD AVERSION AGENTS (1995).

161. RJ ADVANTAGE INC., PMC SPECIALTIES GROUP, INC., REJEX-IT AG-36: BIRD REPELLENT FOR TURF 2 (1994).

162. Telephone Interview with Marvin F. Prieser, Technical Consultant with PMC Specialties Group, Inc., (Sept. 25, 1995). New York State approved ReJeX-iT in September 1995, with a prohibition of its use on fishbearing bodies of water. Letter of Registration from Norman H. Nosenchuck, Director, Div. of Solid & Hazardous Materials, N.Y. Dep't of Env'tl. Conserv. (Sept. 29, 1995) (on file with author). At the time of publication, only California and Colorado had not approved use of methyl anthranilate. Telephone Interview with Marvin F. Prieser, Technical Consultant with PMC Specialties Group, Inc., (Jan. 11, 1996). The federal government, however, has recognized methyl anthranilate as safe for its intended use as a synthetic flavoring. 21 C.F.R. § 182.60 (1989).

163. Coalition, *Selected Research Findings, supra* note 57, at 3.

164. *Id.*

This suggestion has several benefits. First, people would have the opportunity to observe Canada geese, feed them, and enjoy their splendor.<sup>165</sup> Second, Canada geese would have a haven from recreational hunters where they could exist and propagate without the threat of being killed.<sup>166</sup> However, the difficulty lies in making these areas attractive enough to Canada geese so that they remain out of the recreational hunters' range. Third, state and local legislatures could create revenue by selling non-harmful, nutritious food that the public can feed to the geese.<sup>167</sup>

An additional non-lethal method of nuisance-abatement is population relocation.<sup>168</sup> While relocation may not constitute a practicable method of nuisance-abatement for the average citizen, it remains an option for state agencies as well as for businesses and local governments that have the means to engage in such programs.<sup>169</sup> An example of a successful population relocation attempt is a program developed at Arlie Research and Convention Center in Arlington, Virginia.<sup>170</sup> William Lishman, a private pilot, and his crew of three, successfully taught a flock of Canada geese a new migratory route from Ontario, Canada to Virginia.<sup>171</sup> The experiment was a precursor to teaching the same route to trumpeter swans.<sup>172</sup> "The experiment, simply put, was to raise a flock of non-endangered Canada geese (rather than risking the rare swans), imprint them on an ultra-light aircraft and fly them

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165. *Id.*

166. *See id.*

167. Telephone Interview with Anne Muller, Co-founder of the Coalition to Prevent the Destruction of Canada Geese (Feb. 23, 1995). *See also* Coalition, *Selected Research Findings*, *supra* note 57, at 3.

168. *See, e.g.*, Lishman, *supra* note 149, at 26-33; Dean Rebuffoni, *Goose Relocation in Metro Area is a Success*, STAR TRIBUNE, Apr. 13, 1994, at B1.

169. Rebuffoni, *supra* note 168, at B1 (reporting on the successful relocation efforts of the Minnesota Department of Natural Resources).

170. Lishman, *supra* note 149, at 27.

171. *Id.* at 27-33. "Unlike some birds, which migrate by instinct, geese, cranes and swans learn their routes from their parents." D'Vera Cohn, *Planes Posing as Parents Lead Wild Goose Chase - Flight Part of Migration Study*, WASH. POST, Oct. 26, 1993, at E5.

172. Lishman, *supra* note 149, at 27. "The technique also could be used to lead away nuisance birds, including year round flocks of geese on golf courses or suburban ponds." D'Vera Cohn, *supra* note 171, at E5.

400 miles south to [Virginia]."<sup>173</sup> The experiment proved quite successful.<sup>174</sup>

Although both private and public land-owners would bear the cost of dissuading, attracting, or relocating Canada geese,<sup>175</sup> these solutions are far more equitable and humane than are the so-called wildlife management options of euthanization and recreational hunting, which unjustly and needlessly destroy Canada geese. Indeed, as one writer has stated, as

[u]npleasant as the Canada goose castings' texture and aroma may be, I suspect that we who dump tankerloads of sludge, bunker oil, contaminated hospital waste, and road chemicals around, over, under and into the geese's habitat, as well as our own, ought to show the same class the geese show. We should live with their castings, as they live with ours.<sup>176</sup>

Thus, if the DEC truly were concerned about preserving and protecting New York's natural resources, such as Canada geese, it would consider more humane, non-lethal nuisance-

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173. Lishman, *supra* note 149, at 27.

174. *Id.*

175. For example, the current cost of the application of ReJeX-iT to an area populated with unwanted Canada geese, such as a golf course, is approximately \$200 per acre per application, depending on the area's land and water conditions. Telephone Interview with Marvin F. Prieser, Technical Consultant with PMC Specialties Group, Inc. (Sept. 25, 1995). Reapplication of the chemical may be necessary before Canada geese will learn to totally avoid the area. *Id.* However, the chemical need only be applied to areas used by people, such as where golfers walk and play, which may be as little as ten percent of an entire golf course. *Id.* Therefore, the cost to the owner of a 100-acre golf course, for example, may be \$2,000, rather than \$20,000. *Id.* See PMC SPECIALTIES GROUP, INC., REJEX-iT AG-36: BIRD REPELLENT FOR TURF 2 (1994) (discussing the application rate of ReJeX-iT as well as turf and weather conditions, protective clothing, ventilation, and spray equipment). The Village of Mamaroneck paid \$7,000 for the use of three border collies and their trainer for two months. Evelyn Nieves, *Goose-Herding Dogs Are Park's Heroes*, N.Y. TIMES, Oct. 20, 1995, at B1, B6. To buy the dogs outright would cost about \$4,000-\$5,000, which would include the cost of training the dog and handler to work as a team. Telephone Interview with Mary Ann O'Grady, Cara Na Madra Dog Training, Inc., Greenwich, Conn. (Oct. 2, 1995).

176. Ed Lowe, *We're All In This Mess Together*, NEWSDAY, July 18, 1990, at 6.

abatement methods, rather than resorting to recreational hunting.

## VI. Conclusion

Compliance with the letter and the spirit of SEQRA is of significant import to the preservation of New York State's natural resources, such as Canada geese, and to the overall welfare of the state's ecology. The DEC's blatant disregard of the New York ECL's policies and mandates, in particular that of SEQRA, is not only repugnant to the New York Legislature's express intent, but also detrimental to Canada geese and the species' habitat throughout New York State. The cumulative effect of the DEC's current approach to the management of Canada geese has significantly, and perhaps permanently, altered the species, as evinced, in part, by the increase in the resident population existing within New York State. Indeed, the DEC's current wildlife management policies and programs could, effectively, be contributing to the decline in the Atlantic Flyway migratory population of Canada geese. Therefore, a more comprehensive study of the effects of prolonged hunting on Canada geese is not only necessary for full compliance with SEQRA, but also vital to the welfare of Canada geese.

The New York Legislature must enact provisions requiring the DEC to reopen environmental review in order for the DEC to update its fifteen-year-old Generic EIS to include a comprehensive cumulative impact assessment. Due to the extraordinarily detrimental effects of species manipulation, the DEC must especially identify, address, and analyze the probable long-term, cumulative effects of recreational hunting on Canada geese. Ideally, however, the New York Legislature should prohibit all future hunting of Canada geese for proper preservation of the species. Until the New York Legislature takes such action, wildlife advocacy groups, such as the Coalition, must continue to petition the New York courts to enjoin all future hunting seasons on Canada geese, including early and late hunting seasons.

Effective wildlife management of Canada geese must focus on species preservation for the purpose of biodiversity and for the benefit of the people of New York State. The DEC must recognize that emphasizing the promotion of recreational hunting of Canada geese, over the preservation of the species, undermines the furtherance of the goals and mandates of New York's environmental conservation laws. Without the promulgation of laws requiring an updated, species-specific EIS, Canada geese and their habitat will remain in the grasp of wildlife managers whose goals and interests are irreconcilable with effective species protection and conservation. The DEC must view the population of Canada geese present in New York State as a precious commodity requiring protection and conservation, rather than as an economic resource waiting to be pillaged for the so-called benefit of a select group of recreational hunters.