
May 19, 2017

**Via email to seqra617@dec.ny.gov**

James J. Eldred
Division of Environmental Permits
New York State Department
of Environmental Conservation
625 Broadway
Albany, NY 12233-1750

**Re: Comments on proposed modifications to the State Environmental Quality Review Act Regulations; 6 NYCRR part 617**

Dear Mr. Eldred:

Riverkeeper, Inc., with the support of Atlantic States Legal Foundation, Citizens' Environmental Coalition, Damascus Citizens for Sustainability, Inc., Earthjustice, Environmental Advocates of New York, Hudson River Sloop Clearwater, Inc., the Natural Resources Defense Council, New York Public Interest Research Group (NYPIRG), and Sierra Club Atlantic Chapter, respectfully submits the following comments on the Department of Environmental Conservation's ("DEC") proposed revisions to the regulations implementing the State Environmental Quality Review Act ("SEQRA") at 6 NYCRR part 617.[1] Collectively, our organizations represent thousands of New Yorkers who would bear the impacts of these changes.

We appreciate many of DEC's efforts to clarify and strengthen the regulations, such as explicitly addressing climate change and lowering certain size thresholds for large development projects that trigger a presumption of significant environmental impact. However, we are extremely concerned that certain other amendments proposed by DEC may undermine the role of lead agencies and the public in the environmental review process. We urge DEC to (i) withdraw its proposal to eliminate lead agencies' authority to reject deficient draft environmental impact statements based on information brought to light after a scope of review has been finalized and (ii) narrowly limit its Type II list expansion.

[1] The proposed regulations were noticed in the February 8, 2017 Environmental Notice Bulletin, available at http://www.dec.ny.gov/enb/20170208_not0.html.

We are also disappointed that DEC has not proposed any changes to the criteria for determining significance, or added activities to the list of Type I actions that have proven to cause significant environmental impacts. We submit in these comments proposed additional criteria for determining significance, as well as proposed additional project types to add to the Type I list.

## I. Importance of Strong SEQRA Regulations

The New York State Legislature passed SEQRA in 1975 to bestow on state, county and local governments and their agencies the duty to be "stewards of the air, water, land, and living resources" and assign the "obligation to protect the environment for the use and enjoyment of this and all future generations." ECL § 8-0103(8). The crucial function of SEQRA "is to ensure that the environmental impacts of an action are weighed and balanced with social, economic and other considerations" by governmental entities before actions are taken that can have an adverse environmental impact.[2] ECL § 8-0103(7).

The law requires governmental entities to consider, avoid and mitigate the potential significant environmental impacts of a determination or action. Under SEQRA, the lead agency must take a "hard look" at the "relevant areas of environmental concern" and make a "reasoned elaboration of the basis for its determination." *Jackson v. New York State Urban Dev. Corp*., 67 N.Y.2d 400, 417 (N.Y. 1986) (internal citations omitted). The legislature carefully inscribed a role for the public in this process. Citizens are afforded a right to participate in the environmental review through an opportunity for public review and comment.

The statute provides DEC authority to create a "Type II" list of actions exempted from environmental review if the agency deems the actions will have no significant environmental impacts. When an activity is classified as Type II, no environmental assessment is required. On the other hand, SEQRA also mandates that DEC create a "Type I" list of activities presumed to have a significant environmental impact. For Type I actions, as well as those actions that are categorized as neither Type I or Type II and known as "Unlisted" actions, an environmental assessment must be performed, and a determination of significance must be made. A lead agency must make a positive declaration of significance if a single potential significant environmental impact is identified. Otherwise, a negative declaration may be issued, concluding the environmental review.

In most instances, if a potential significant environmental impact is identified, the lead agency must then draft an environmental impact statement ("EIS"), providing information sufficient to understand the action's potential adverse environmental impacts, evaluate a range of reasonable alternatives, and/or identify mitigation measures to minimize any impacts that are deemed unavoidable. ECL §§ 8-0109(1)-(2); 6 NYCRR § 617.9. "The regulatory scheme requires public access to the information by making the draft and final EIS available with sufficient lead time to afford interested persons an opportunity to study the project, its

[2] DEC, SEQRA Handbook, *available at* http://www.dec.ny.gov/permits/56832.html (last visited May 9, 2017).

environmental effects and proposed mitigating measures, and then comment thereon." *Shawangunk v. Planning Bd.*, 157 A.D.2d 273, 276 (3d Dep't 1990).

The procedural and substantive safeguards embodied by these processes facilitate consideration of significant environmental impacts by governmental entities and shine a public light on what would be closed-door decision making. Without these protections, our state, county and local governmental entities could disregard the impacts their actions will have on the environment and leave the affected public without recourse to protect their health and environment. In practice, decisions of monumental import, such as the fate of hydraulic fracturing in New York, would not necessarily incorporate review of environmental impacts, nor be subject to public participation. So too would locally impactful determinations, such as site plans for industrial and residential developments, escape assessment of environmental impacts.

Given the importance of SEQRA in protecting our communities and environment from harmful and unmitigated governmental actions, it is crucial that DEC maintain clear and strong regulations to implement the statute. Only by maintaining strong SEQRA regulations can DEC fulfill its duty to:

> conserve, improve and protect [New York's] natural resources and environment and to prevent, abate 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 protective of human health and our shared environment.

ECL §§ 0101(1), 0301(1). To ensure these requirements are met, we strongly urge DEC to revise the proposed regulations as set forth below.

## II. Explicitly Requiring Mitigation for Climate Change Impacts Is a Prudent Step to Confirm Existing SEQRA Requirements for Environmental Reviews.

The DEC proposes to modify the provision in 6 NYCRR part 617.9(b), which lists the requisite components of an EIS, to specify that the lead agency must consider impacts and vulnerability from climate change when imposing mitigation measures:

> (iv) a description of the mitigation measures, including measures to avoid or reduce both an action's environmental impacts and vulnerability from the effects of climate change such as sea level rise and flooding;

We strongly support the change to clarify that mitigation for climate change impacts warrants consideration in an EIS. This would mark the first time that climate change is explicitly acknowledged in the SEQRA regulations. The change would also serve to implement the conclusions of Governor Cuomo's 2100 Commission,[3] which evaluated vulnerabilities to New

[3] NYS 2100 Commission Recommendations to Improve the Strength and Resilience of the empire State's Infrastructure 139 (2013), *available at* http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/assets/documents/NYS2100.pdf.

York State's infrastructure in the wake of Hurricane Sandy and prudently recommended that climate change adaptation and resilience measures be considered in SEQRA analyses.

Based on DEC's predictions, it is clear that the climate change-related impacts of future actions could be significant. Thus, such impacts must be considered and mitigated under the existing SEQRA framework that mandates lead agencies review the "short-term and long-term effects" of a proposed action. ECL § 08-0109(2)(b).

As lead agencies would have to mitigate climate change impacts under DEC's proposed framework, it reasonably follows that lead agencies would first have to identify those impacts. We propose that DEC also explicitly incorporate identification of climate change impacts into the provision requiring lead agencies to identify "reasonably related short-term and long-term impacts, cumulative impacts and other associated environmental impacts." *See* 6 NYCRR § 617.9(b)(5)(iii)(a).

| | |
|---|---|
| **Recommendation:** | **The DEC should finalize the proposed language in 6 NYCRR part 617.9(b)(iv) to clarify that climate change-related impacts must be considered and mitigated, and add an explicit provision for climate change impacts in part 617.9(b)(5)(iii)(a) to confirm that those potential impacts must first be properly identified.** |

## III. Lowering the Type I Thresholds for Large Development Projects Presumed to Have a Significant Environmental Impact Will Help Ensure Significant Impacts Are Adequately Considered.

The proposed amendments to 6 NYCRR part 617.4(b) that would lower the thresholds in the Type I list for residential subdivisions and parking structures will confirm the existing understanding that many such projects will have a significant environmental impact:

> 617.4(b) (5) (iii) in a city, town or village having a population of [less than] 150,000 persons or less, [250] 200 units to be connected (at the commencement of habitation) to existing community or public water and sewage systems including sewage treatment works;
> 617.4(b)(5)(iv) in a city, town or village having a population of greater than 150,000 persons but less than 1,000,000, [1,000] 500 units to be connected (at the commencement of habitation) to existing community or public water and sewage systems including sewage treatment works;
> 617.4(b) (5) (v) in a city, town or village having a population of [greater than] 1,000,000 or more persons, [2,500] 1000 units to be connected (at the commencement of habitation) to existing community or public water and sewage systems including sewage treatment works;
> 617.4(b) (6) (iii) - parking for 500 vehicles in a city, town or village having a population of 150,000 persons or less;

617.4(b) (6) (iv) - parking for 1000 vehicles in a city, town or village having a population of 150,000[4] persons or more;

As DEC acknowledged, the thresholds for these activities were "set far too high," as they "are rarely triggered," even though large subdivisions are commonly the subject of EISs because their scale, location and nature typically cause one or more potential significant impacts. Even though most of these types of projects would be subject to an EIS regardless of their status as a Type I activity, the difference between a Type I and an unlisted action is important because Type I activities receive coordinated agency review. Such coordinated review benefits all stakeholders by providing shared information and a streamlined process. We strongly support this change.

| **Recommendation:** | **The DEC should finalize the proposed language in 6 NYCRR part 617.4(b) that sets thresholds for Type I residential subdivision and parking garage developments at appropriate levels.** |
|---|---|

## IV. Limiting Lead Agencies' Authority to Reject Deficient Draft Environmental Impact Statements Will Unlawfully Preclude Lead Agencies from Fulfilling Their Duties Under SEQRA and Eliminate Meaningful Public Participation.

DEC proposes to make scoping mandatory for all EISs, which, taken alone, would benefit all stakeholders. Mandatory scoping would allow for the sharing of information among all interested stakeholders at an early stage in the SEQRA process and help to set expectations for the subsequent reviews. However, the proposed rule changes would also remove the authority of a lead agency to reject a draft EIS based on "information submitted following the completion of the final scope." Proposed 6 NYCRR § 617.9(a)(2)(i). Instead, new information regarding significant environmental impacts would be the subject of "a response to comment in the final EIS or [] a supplemental EIS." *Id.* DEC claims, "[t]his proposed change will reinforce the importance of identifying all pertinent issues during the scoping process."[5]

a. The DEC's proposed procedural approach would be incongruous with SEQRA.

Eliminating lead agencies' authority to require a new draft EIS based on information submitted after the publication of the final scope would undermine the structure of SEQRA. To begin with, it would grant project sponsors the ability to exclude relevant issues from the environmental review. Unless lead agencies meet the deadline to finalize the scope within 60 days of receiving a draft, the scoping provision in 6 NYCRR part 6178(h) allows project sponsors to "prepare and submit a draft EIS consistent with the submitted draft scope."

[4] To avoid confusion, DEC should make the categories in 6 NYCRR parts 617.4(b)(5) and (6) mutually exclusive. We recommend changing the language in proposed part 617.4(b)(5) to state: "parking for 500 vehicles in a city, town or village having a population of less than 150,000 persons."

[5] DEC, Draft Generic Environmental Impact Statement on the Proposed Amendments to the State Environmental Quality Review Act (SEQR) Regulations, 6 NYCRR Part 617, and Regulatory Impact Statement, Regulatory Flexibility Analysis for Small Businesses and Local Governments, Rural Area Flexibility Analysis, and Statement in lieu of Job Impact Statement Pursuant to Section 202 of the State Administrative Procedure Act, at 43 (2017) [hereinafter DGEIS].

Therefore, under the new proposed rules, any lead agency that misses the 60-day deadline would have no authority to reject the project sponsor's scope or draft EIS. The lead agency would be prevented from making its "own independent judgment of the scope, contents and adequacy of an environmental impact statement," a direct violation of SEQRA. ECL § 8-0109(3). The DEC previously argued before a court that the authority of a lead agency to require a new draft EIS could be relied upon to prevent this result, and its proposed new policy marks an ill-advised reversal of its previous position. *West Village Committee, Inc. v. Zagata* 171 Misc. 2d 454, 458 (Sup. Ct. Albany Cnty. 1996), *aff'd and modified*, 242 A.D. 2d 91 (3d Dep't 1998), *appeal denied*, 92 N.Y.2d 802 (1998).

DEC's proposed remedies for this pitfall are inadequate. A response to comments section in a final EIS cannot retroactively fix deficiencies in a draft EIS in all circumstances. The New York State Court of Appeals held that "the omission of a required item from a draft EIS cannot be cured simply by including the item in the final EIS," *Webster v. Town of Webster*, 59 N.Y.2d 220, 228 (1983). When a draft EIS is deficient, the lead agency fails to meet its requirement to "relate environmental considerations to inform the public and other public agencies as early as possible about proposed actions that may significantly affect the quality of the environment, and to solicit comments which will assist the agency in the decision making process in determining the environmental consequences of the proposed action. ECL § 0809(4). Therefore, a lead agency could not properly finalize an EIS where a significant environmental impact has been identified but not sufficiently addressed in the draft review and subjected to public review and comment. *Id; see also* ECL § 8-0109(2); 6 NYCRR § 617.9(b).

Just as incorporating new information into a final EIS would not cure a deficient draft EIS in all circumstances, neither would completion of a supplemental EIS. The Second Department in *County of Orange v. Village of Kiryas Joel*, 44 A.D.3d 765, 769 (2d Dep't 2007), held that when inadequacies in a draft EIS do not arise from the three factors in 6 NYCRR part 617.9(a)(7)(i), an amended EIS is the appropriate remedy, as opposed to a supplemental EIS.[6] According to these factors, lead agencies' rights to require supplemental EISs are "limited to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS that arise from: (a) changes proposed for the project; or (b) newly discovered information; or (c) a change in circumstances related to the project." *Oyster Bay Assocs. Limited Partnership v. Town Bd. of Town of Oyster Bay*, 58 A.D.3d 855, 859-60 (2d Dep't 2009) (quoting *Riverkeeper, Inc. v. Planning Bd. of Town of Southeast*, 9 N.Y.3d 219 (2007); 6 NYCRR § 617.9(a)(7)(i)). If a project proponent submits an inadequate draft scope and the lead agencies fail to spot all the deficiencies, then the proponent could argue that those agencies could not require a supplemental EIS.

In addition to being strictly limited, supplemental EISs are also an inappropriate remedy because they are wholly within the discretion of the lead agency; a lead agency "*may* require a

[6] *See also Town of Woodbury v. County of Orange*, 35 Misc. 3d 1225(A), 2012 N.Y. Misc. LEXIS 2253, at **24 (Sup. Ct. Orange Cnty. 2012), *modified on other grounds*, 114 A.D.3d 951 (2d Dep't 2014). ("[A supplemental EIS] can not be used where the environmental impacts not addressed or inadequately addressed in the original [EIS] arose from the project under consideration as it was then contemplated, but may be used where the impacts arise from events or circumstances that occurred after the original EIS was adopted.").

supplemental EIS" based on its review of new information. 6 NYCRR § 617.9(a)(7)(i) (emphasis added). Thus, there is no regulatory mechanism that requires a supplemental EIS short of judicial intervention, even when the draft or final EIS is clearly deficient.

Even if lawful, use of a supplemental EIS to address a single new issue could undermine full assessment of the project. Many environmental issues are inter-related. Limiting lead agencies' options for further environmental review to only supplemental EISs could cause the holistic review to become disjointed or improperly segmented (*see* 6 NYCRR part 617.2(ag)) and necessitate preparation of a new, separate document that could actually slow down the process. To protect the rights of the lead agency and ensure the public has a meaningful opportunity to participate in the environmental review process, lead agencies must be allowed to require the consideration of newly discovered information after the scope is finalized and before the draft EIS is completed.

b. <u>The public and other involved agencies would be harmed.</u>

For their part, the public and involved agencies would not have a meaningful opportunity to review, fully understand, and voice their opinions on any significant environmental information that is missing or inadequately assessed in a flawed draft EIS. The public will be made fully aware of the new information only if it qualifies for a supplemental EIS or after the final EIS is published, when there is no meaningful opportunity to formally object short of judicial intervention.

This proposed procedural structure would put an enormous burden on stakeholders and interested agencies to draft detailed comments about significant environmental impacts, potential mitigation and alternatives at the scoping stage—accompanied by every bit of information they want included in the draft EIS—before the subject of the review has even been assessed by the lead agency. Rarely is there full public awareness of a proposed action at the scoping stage to make it possible for stakeholders to provide such substantial input. Substantial information necessitating additional public review will inevitably be omitted at the scoping stage. In those cases, involved agencies and the public would be beholden to the lead agencies' discretion and limited authority to require a supplemental EIS.

It is environmental justice communities that would likely be the most affected by the proposed rule changes. Such communities are less likely to receive notice about significant governmental actions on a timely basis and less likely to have ready access to environmental professionals and other resources that could help advocate for their interests. Moreover, with no mandatory hearing provisions for scoping procedures, the public would be forced to submit written, not oral, comments at the scoping stage.

Public participation at the draft EIS stage serves as a litmus test of the EIS's sufficiency and ability to survive judicial review. Without authority to require a revised draft EIS on the basis of new information and subject its new evaluation to review by the public and other involved agencies prior to the final EIS, the lead agency would be in the unenviable position of determining whether to certify the final EIS without first hearing and responding to all possible objections.

c. The proposed 60-day deadline for a final scope would be insufficient for a meaningful review

Another extremely concerning aspect of the proposal is that the lead agency would remain under a deadline to provide a final written scope to the project sponsor within 60 days of receipt of a draft scope. Proposed 6 NYCRR § 617.8(e). Under this compressed timeframe, the lead agency will have no discretion to extend its time to review extensive public comments and ensure the scope is adequate. This proposed timeframe undermines the clear directive in SEQRA to inform and involve the public. In the case of complicated proposed actions it would be extremely difficult to allow for meaningful public comment on draft scopes and then respond adequately to those comments within 60 days.

The proposed short timeframe for scoping review, coupled with the restrictions on scope expansion if the scoping proves inadequate, provide incentives for project proponents to propose narrow scopes that omit emerging or less obvious issues. At present, project proponents have a strong incentive to provide a comprehensive scope, because new issues that come up during the drafting of an EIS have the potential to cause delays. Thus, the proposal has the potential to make the quality of the draft scopes worse, leading to a more difficult review task for the lead agencies and the public.

d. History shows that lead agencies' authority to reject deficient draft EISs facilitates fully informed SEQRA determinations.

If these proposed regulations had been finalized five years ago, the momentous hydraulic fracturing ban would never have had a chance. Much of the literature on public health impacts—the eventual basis for banning the highly industrial gas and oil production operation—had piled up only after the scope of review had been finalized, and it was only through the EIS drafting process that the health impacts were identified and understood to be so grave that DEC and the Department of Health concluded hydraulic fracturing could not take place safely in this state. Indeed, many of the studies cited by the Department of Health in its public health review of fracking were dated after the publication of the final scope.[7] If the proposed regulations were in place, DEC would have been disempowered and left without authority to control its SEQRA process and ensure that the draft EISs were on the right track towards legally sufficient final documents.

Even assuming DEC would have exercised its limited discretion to complete multiple supplemental EISs, such a piecemeal approach to this process through would have segmented the SEQRA review and left DEC responsible to draft multiple additional documents. That process would have stymied the purpose of SEQRA to provide a comprehensive environmental review and confused the concerned public.

Hydraulic fracturing is only one noteworthy example; the consequences of the proposed

[7] N.Y. State Dep't of Health, A Public Health Review of High Volume Hydraulic Fracturing for Shale Gas Development (2014), *available at* https://www.health.ny.gov/press/reports/docs/high_volume_hydraulic_fracturing.pdf

rulemaking would have far reaching consequences. All lead agencies, from DEC to municipal boards, can expect to uncover relevant new information during future EIS drafting processes, triggering their duty to take the requisite "hard look" at that information. *Jackson*, 67 N.Y.2d at 417. The onus should be placed on project proponents to submit comprehensive draft scopes, not on governmental agencies and the public to work under strong time pressure to spot issues that proponents failed to identify. And when information arises after scopes are finalized, lead agencies should have the discretion to require the inclusion of additional pertinent analyses in the draft EIS.

e. The proposed justifications for curtailing lead agencies' authority are without merit.

The DEC asserts it is unfair that "a lead agency can undermine the decision of a project sponsor by simply rejecting a draft EIS as inadequate for failure to include issues that were deferred by the project sponsor," calling that process a "form of double jeopardy."[8] It is unclear what DEC means by invoking double jeopardy, a term typically used in the criminal context to mean multiple punishments for a single crime. As New York State Courts have held, project sponsors suffer no injury or punishment before a final action is taken under SEQRA. *See*, *e.g.*, *In re PVS Chemicals, Inc. v. New York State Department of Environmental Conservation*, 256 A.D.2d 1241 (4th Dep't 1998).

Furthermore, project sponsors cannot, and should not be able to, "defer" issues for consideration outside the SEQRA process. Instead, it is the lead agency that is ultimately responsible for complying with SEQRA's procedural as well as substantive requirements. In fact, the project sponsor has no authority to determine whether investigation of a new issue or information should be studied or, as DEC puts it, "deferred." ECL § 8-0109(3) ("Notwithstanding any use of outside resources or work, agencies shall make their own independent judgment of the scope, contents and adequacy of an environmental impact statement."). The public is also entitled to weigh in on those decisions. *See In re Matter of Merson v. McNally*, 90 N.Y.2d 742, 753 (1997) ("The environmental review process was not meant to be a bilateral negotiation between a developer and lead agency but, rather, an open process that also involves other interested agencies and the public."). Project sponsors should be given every incentive to identify potential impacts in their draft scopes. Consequences for any omissions in the draft scopes should fall on the project sponsor, not on the lead agencies, the public, or ultimately the environment. And when important new information arises after the scope is finalized, it is critical that it be analyzed in the draft EIS for SEQRA review to be meaningful.

The lead agency must therefore remain in charge of determining when and how environmental issues are evaluated. *Glen Head-Glenwood Landing Civic Council, Inc. v. Oyster Bay*, 88 A.D.2d 484, 491 (2d Dep't 1982) ("The lead agency is the one which must co-ordinate the social, economic and environmental factors involved in order to arrive at a decision, and therefore it is the lead agency which must render the requisite environmental findings as part of the decision."). When balancing of environmental concerns against social and economic ones—the very purpose behind SEQRA—requires modification of a project sponsor's decision, lead agencies must retain authority make those changes.

[8] DGEIS at 43.

| | |
|---|---|
| **Recommendation:** | **DEC should withdraw the proposed new language in 6 NYCRR part 617.9(a)(2)(i) and allow lead agencies authority to reject flawed draft environmental impact statements.** |

## V. The Proposed Vast Expansion of the Type II List Will Prevent Legally Sufficient Review of Potential Significant Environmental Impacts.

The proposed amendments would dramatically expand the Type II list of actions exempt from full SEQRA review. The asserted goal of the Type II changes "is to try and encourage environmentally compatible development" by creating "a regulatory incentive for project sponsors to further the State's policy of sustainable development" and by promoting "development on previously disturbed sites in municipal centers with supporting infrastructure and [] green infrastructure projects and solar energy development."[9]

While incentivizing smart growth is a laudable state objective, exempting projects from SEQRA review is not an effective, prudent, or necessary mechanism for doing so. The purpose of SEQRA is to ensure the potential significant adverse environmental impacts of any substantial development are adequately considered. A project that truly adheres to "smart growth" principles will have fewer and less significant adverse impacts and therefore should encounter fewer difficulties in the environmental review process than proposals that fail to embody smart growth ideas. Thus, SEQRA currently works to encourage smart growth. The changes proposed would actually undermine this effect, not enhance it, because many of the actions that would escape SEQRA review as a result of the proposed exemptions could have significant adverse environmental impacts not consistent with smart growth principles.

Some of the proposed additions to the Type II list at 6 NYCRR part 617.5(c) should be withdrawn while others require clarification. Those that should be withdrawn are:

> (18) On a previously disturbed site in the municipal center of a city, town or village having a population of 20,000 persons or less, with an adopted zoning law or ordinance, construction of a residential or commercial structure or facility involving less than 8,000 square feet of gross floor area, not requiring a change in zoning or a use variance or the construction of new roads, where the project is subject to site plan review, and will be connected (at the commencement of habitation) to existing community owned or public water and sewerage systems including sewage treatment works that have the capacity to provide service;
> (19) On a previously disturbed site in the municipal center of a city, town or village having a population of more than 20,000 persons but less than 50,000 persons, with an adopted zoning law or ordinance, construction of a residential or commercial structure or facility involving less than 10,000 square feet of gross floor area, not requiring a change in zoning or a use variance or construction of new roads, where the project is subject to site plan review, and will be connected (at the

[9] DGEIS at 5.

commencement of habitation) to existing community owned or public water and sewerage systems including sewage treatment works that have the capacity to provide service;

(21) On a previously disturbed site in the municipal center of a city, town or village having a population more than 50,000 persons but less than 250,000 persons, with an adopted zoning law or ordinance, construction of a residential or commercial structure or facility involving less than 20,000 square feet of gross floor area, not requiring a change in zoning or a use variance or construction of new roads, where the project is subject to site plan review, and will be connected (at the commencement of habitation) to existing community owned or public water and sewerage systems including sewage treatment works that have the capacity to provide service;

(22) On a previously disturbed site, within one quarter of a mile of a commuter railroad station, in a municipal center of a city, town or village having a population of 250,000 persons or more, with an adopted zoning law or ordinance and within a transit oriented zoning district or transit oriented overlay zoning district, construction of a residential or commercial structure or facility involving less than 40,000 square feet of gross floor area, not requiring a change in zoning or a use variance or construction of new roads, where the project is subject to site plan review, and will be connected (at the commencement of habitation) to existing community owned or public water and sewerage systems including sewage treatment works that have the capacity to provide service.

These four new additions to the Type II list would dramatically expand the existing "Stewart's loophole" of 4,000 square foot developments. The loophole currently allows construction of structures of less than 4,000 square feet of gross floor area without environmental review. Depending on the size of the municipality, the new threshold exemptions would range from projects of fewer than 8,000 square feet in a population under 20,000, to projects of less than 40,000 square feet (almost an acre in size) in a population over 250,000. While the intent is to steer projects to locations where there is existing infrastructure such as water, sewerage and roads, this exemption could actually exacerbate sprawl development.

The DEC is making the erroneous assumption that communities exceeding these population thresholds have "municipal centers," a term that is loosely defined in the proposed regulations to mean "areas of concentrated and mixed land uses that serve as central business districts, main streets, and downtown areas." Proposed 6 NYCRR § 617.2(y). The towns in New York meeting these proposed size thresholds would have wide discretion to designate an area as a "main street," "business district," or "downtown area." Thus, the proposed regulations would allow major development projects to avoid SEQRA review and impose significant environmental impacts on New Yorkers so long as the corresponding infrastructure is completed by the time the developments are occupied.

Even if the regulations achieve the desired goal of steering development towards urban centers with existing infrastructure, it would not mean that significant adverse impacts associated with the actions would be avoided. Such projects could result in stormwater runoff, noise, traffic, air pollution, changes in aesthetics, population increase, and community character changes, etc.

These impacts should be assessed and mitigated to the extent possible through the SEQRA process.

The following three Type II modifications require clarification:

(3) retrofit of an existing structure or facility to incorporate green infrastructure

While we advocate for increased investment in green infrastructure, DEC has proposed no limit to the amount of disturbance allowed for this green infrastructure exemption from environmental review, nor is there an exception for disturbance of sensitive environmental areas. Furthermore, green infrastructure would be defined without bound to *include* "practices that manage storm water through infiltration, evapo-transpiration and reuse . . . bioretention; green roofs and green walls; tree pits," etc. Proposed 6 NYCRR § 617.2(r). Thus, there is no proposed limit on the types of projects that could be considered green infrastructure, nor the size of those projects. In order to assert that green infrastructure projects will have no significant impacts, DEC must at least establish a project size limit, a clear, narrow definition of the term, and an exception for projects that disturb sensitive environmental areas.

(7) installation of fiber-optic or other broadband cable technology in existing highway or utility rights of way;

There is similarly no limit on the amount of disturbance allowed for fiber optic installation, nor an exception for disturbance of streams or sensitive environmental areas or for major construction impacts on local communities. These types of projects could potentially have significant water quality impacts, and, at a minimum, reasonable limits must be set for the magnitude of the projects in this Type II category.

(46) transfer or conveyance of five acres or less by a municipality or a public corporation to a not-for-profit corporation for the construction or rehabilitation of one, two or three family housing.

The DEC states that the proposed exception from environmental review for land transfers of five acres or less is meant "to provide affordable housing."[10] We would not necessarily oppose limited SEQRA review to incentivize construction of one, two or three family *affordable* homes, but there is no such specification in the proposed rule limiting the exception to only affordable housing. Other not-for-profit developers could take advantage of this loophole. The DEC should specify that the loophole may only be used for the purposes of appropriately-defined affordable housing.

[10] DGEIS at 32.

| | |
|---|---|
| **Recommendation:** | **DEC should modify its proposed expansion of its Type II list to 1) withdraw the expansion of the Stewart's loophole for development projects; 2) set narrow limits and exclusions for green infrastructure, fiber optic and broadband developments; and 3) specify that the exception for five-acre land transfers applies only to affordable housing construction.** |

## VI. The Type I List Should Be Updated and Expanded.

The current list of Type I actions includes only eleven types of actions that are likely to have a significant effect on the environment. *See* 6 NYCRR 617.4(b). Of these, seven focus on municipal zoning actions and local residential and commercial development. None of the listed actions specifically include the construction or modification of major industrial facilities, which can be sources of air and water pollution, hazardous wastes, noise, and other significant environmental impacts. Moreover, many industrial facilities are located in or adjacent to environmental justice communities, which are already bearing disproportionate impacts from industrial operations.

The current list also omits projects that may cause or contribute to significant releases of greenhouse gases ("GHGs"). Given the magnitude of threats posed to New York by climate change, the complete absence of such projects from the Type I list should be addressed.

**Recommendation:** **We propose that 6 NYCRR part 617.4(b) be amended to add the following to the Type I list:**

**(1) Any project that qualifies as a "major project" as defined by 6 NYCRR part 621.2(r) and that is located in or adjacent to, or may affect, an "environmental justice area" as defined in Commissioner Policy 29, Environmental Justice and Permitting; and**

**(2) Any project that may cause or contribute to a substantial increase in emissions of greenhouse GHGs, as determined by the project's projected GHG emissions combined with all upstream and downstream GHG emissions associated with the project.**

## VII. The Criteria for Determining Significance Should Be Updated.

As noted above, the Department is not proposing any changes to Part 617.7, which lists the criteria for determining the significance of a proposed action. The criteria need to be updated to address impacts on environmental justice areas and GHG emissions.

**Recommendation:** **We therefore propose that Part 617.7(c)(1) be amended to add the following criteria:**

**(1) A substantial adverse impact to an environmental justice area as defined in Commissioner Policy 29, Environmental Justice and Permitting; and**

**(2) A substantial increase in emissions of GHGs, as determined by the project's projected GHG emissions combined with all upstream and downstream GHG emissions associated with the project.**

## VIII. The DEC Should Provide Resources to Make All SEQRA Documents Available Online

We are pleased to see new requirements for lead agencies to utilize file sharing technology to make SEQRA documents publicly available online. Under DEC's proposed 6 NYCRR part 617.12(c)(5), lead agencies would have to make draft and final EIS scopes publicly available on a free website, while draft and final EISs would be published online "to the extent practicable":

> (5) The lead agency shall publish or cause to be published on a publicly available website (that is free of charge) the draft and then final EIS scopes and, to the extent practicable, the draft and final EISs. The website posting of such scopes and statements may be discontinued one year after all necessary permits have been issued by the federal, state and local governments. Printed filings and public notices shall clearly indicate the address of the website at which such filings are posted.

Electronic document publication is a standard current business practice that will help facilitate public information sharing and participation. Therefore, the differentiation between scopes and EISs should be removed. Access to draft and final EISs is at least as important for meaningful public participation as access to draft scopes. Those documents should be required to be published online as well without exception.

We understand that lead agencies have varying levels of resources and access to technology. For those with less capacity for file sharing, it may be difficult to publish copies of large draft and final EISs. For that reason, we encourage DEC to create a file sharing website available for lead agencies to post SEQRA documents. A single clearinghouse website for SEQRA documents would help establish a uniform protocol for file publication and reduce confusion caused by differing lead agency processes. Such a website could also be used to file and publish public comments. The user-friendly federal website, regulations.gov, should serve as a model for DEC.

| | |
|---|---|
| **Recommendation:** | **DEC should finalize the new requirement for online sharing of SEQRA documents and extend those requirements, without limitation, to draft and final EISs. To ease the burden on lead agencies, DEC should create a file sharing website akin to the federal document sharing site regulations.gov.** |

## IX. Conclusion

The organizations listed above encourage DEC to proceed with its proposals to clarify that climate change impacts are relevant under SEQRA and to lower the Type I thresholds for residential subdivisions and parking structures. We respectfully urge DEC to reconsider its proposed restrictions on lead agencies' abilities to reject draft environmental impact statements and recommend that the Department narrowly limit the proposed Type II list expansion. In addition, we urge the Department to consider expanding the Type I list and the criteria for determining significance to incorporate consideration of impacts on environmental justice communities and projects that may result in substantial increases in GHG emissions. Finally, we encourage DEC to consider creating a clearinghouse website to help all lead agencies publish SEQRA documents online.

Thank you for your consideration of our comments. We look forward to continuing to work with DEC to shape these SEQRA policies that will have an enormous impact on the future of human health and the environment in New York.

Respectfully,

Michael Dulong
Staff Attorney
Riverkeeper, Inc.