

2018 SEQRA Amendments

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2018 Amendments – Timeline

- Process started in 2012 with a Notice of Intent and Draft Scope
- Proposed Rule and Draft Generic Environmental Impact Statement were not promulgated until January of 2017
- These documents were revised and re-issued in April of 2018
- The Rule was adopted June 27, 2018
- The Rule became effective January 1, 2019

2018 Amendments – Overview

- Type I List
- Type II List
- EIS Scoping
- EIS Preparation
- Document Preparation
- Fees

2018 Amendments – Type I List

- Type I actions require the lead agency to (1) complete the full Environmental Assessment Form (“EAF”), and (2) coordinate review among involved agencies.
- 6 NYCRR § 617.4 contains the full list of Type I actions.
- Changes include lower numeric thresholds for number of residential units to trigger a Type I action classification; addition of a threshold for parking spaces in smaller communities; and addition of thresholds and information available for historic properties.
- Always check for municipality-specific Type I list (authorized by 6 NYCRR 617.14).

Type I List – Residential Units

- Change #1: Lower triggering thresholds for number of residential units
 - Populations 150,000 persons or less – threshold is 200 (formerly 250) units.
 - Populations of 150,001 to 1,000,000 – threshold is 500 (formerly 1,000) units.
 - Populations of more than 1,000,000 – threshold is 1,000 (formerly 2,500) units.
- **Reasons:**
 - Former thresholds rarely triggered and therefore considered too high to provide effective comprehensive review for large scale residential projects (which run the risk of significant impacts due to the need for expanded infrastructure).
 - Studies showed lower limits captured additional positive declaration projects at about the same rate (no significant diminishing return).
- **Results:**
 - Greater chance for public comment
 - Small additional burden – full instead of short-form EAF and coordinated review
 - Still viewed as only impacting large, often complex projects.

Type I List – Parking Spaces

- Change #2: Add thresholds for parking spaces for small communities
 - Populations 150,000 persons or less – threshold is parking for 500 vehicles.
 - Populations of more than 150,000 – threshold is parking for 1,000.
- **Reasons:**
 - Parking generally involves risk of environmental impact – impervious surfaces, loss of green space, increase in stormwater, changes to traffic and community character.
 - There was no threshold for smaller communities
 - The number of parking spaces is calculated based on the gross floor area of the proposed project
- **Results:**
 - Greater chance for public comment
 - Small additional burden – full instead of short-form EAF and coordinated review
 - Most projects that require this level of parking will be Type I anyway.

Type I List – Historic Resources

- Change #3: Modified threshold for historic resources
 - Any Unlisted action that exceeds 25% of any other threshold, and occurs at least partially within or contiguous to any historic structure, site, or district listed on the National Register of Historic Places; the State Register of Historic Places; or eligible for listing per the Office of Parks, Recreation, and Historic Preservation.
- **Reasons:**
 - “25%” language added to avoid Type I listing of very minor actions
 - Consistency with other resource-based Type I criteria (agriculture, park land)
 - Consistency with National and State Historic Preservation Acts (“NHPA” and “SHPA”)
- **Results:**
 - Better coordination between SEQRA and SHPA
 - Better protection of historic resources
 - Prevents minor projects from burden of full EAF (still addressed through revised short EAF)

2018 Amendments – Type II List

- Type II actions are categorical exclusions that do not require further SEQRA review.
- 6 NYCRR § 617.5 contains the full list of Type II actions.
- Changes include additions of certain categories of projects that do not have a significant adverse impact on the environment.
- The overarching goal of the Type II list is to prevent unnecessary and repetitive work for projects that always, or almost always, result in a Negative Declaration of Significance.
- Broadening this list brings SEQRA in line with later-promulgated environmental policy of New York.

Type II List – Energy Code Compliance

- Change #1: Upgrading buildings to meet state energy code.
 - Replacement, rehabilitation, or reconstruction of a structure or facility, in kind, on the same site, in order to meet building, energy, or fire codes (unless it meets or exceeds thresholds in § 617.4).
- **Reasons:**
 - Former language only included building and fire codes.
 - In line with intent of section, as well as state and national policy.
- **Results:**
 - Practical and reasonable allowance for code compliance.
 - Potential positive impact on environment – encourages energy efficient updates and reuse of already developed sites.

Type II List – Green Infrastructure

- Change #2: Green infrastructure
 - Retrofit of an existing structure/appurtenant areas to incorporate green infrastructure (defined in § 617.2 – stormwater management via, e.g., green roofs and walls, rain gardens, urban forestry, etc.).
- **Reasons:**
 - Used to be limited to in kind construction, but now allows limited deviations from existing structure.
 - Encourages use of only proven techniques.
- **Results:**
 - Green infrastructure is exclusively defined by the regulations.
 - Potential positive impact on environment – encourages energy efficient updates and reuse of already developed sites.

Type II List – Telecommunications

- Change #3: Installation of telecommunications cables in Rights of Way (“ROWs”)
 - Only for cables placed in existing highway or utility ROWs utilizing trenchless burial or aerial placement of antennae/repeaters on existing poles
- **Reasons:**
 - Telecommunications cables are essential to business and provide access to educational and workforce development resources
 - Many areas in New York are under- or unserved.
 - Regulatory controls are already in place for existing lines in ROWs
- **Results:**
 - Encourages use of already existing infrastructure.
 - Minimizes soil disturbance and displacement.
 - Increased access to internet and phone services.
 - Still must obtain wetlands and other state/local/federal permits as needed

Type II List – Land Conveyance

- Change #4: Land Transfers for family housing development
 - Transfer of 5 acres or less from a municipality or public corporation to a not-for-profit for construction or rehabilitation of 1-3 family housing.
- Reasons:
 - Construction of 1-3 family housing was made Type II in 1995, and transfer of associated title does not result in significant adverse impact
 - In line with SEQRA “whole action” concept – land transaction and proposed activity classification should match.
- Results:
 - Easier to develop affordable housing – faster, less cost due to SEQRA
 - Encourages reuse of distressed/abandoned properties
 - Could result in net environmental positives for urban developments – reduce miles traveled, reduce new construction, retain ecosystems

Type II List – Solar Installation

▪ Change #5: Solar Installation

- Solar arrays with 25 acres or less of physical alteration for closed landfills, completed BCP sites, inactive hazardous waste sites, currently disturbed sites at wastewater treatment facilities or industrial use zones, or parking lots/garages
- Installation on existing structures (like roofs) unless listed on National/State Register of Historic Places (structure or district); eligible per OPRHP.

▪ Reasons:

- Utility and individual solar have no significant impact when sited accordingly
- Furthers goals of Reforming the Energy Vision (“REV”) and NY-Sun
- Roof tops already home to utility structures – in line with corporate goals

▪ Results:

- Additional usefulness of existing sites
- Targets already-disturbed sites to minimize impacts on undisturbed land

Type II List – Lot line adjustment

- Change #6: Lot line adjustments
 - Lot line variances already included; minor change to add adjustments
- Reasons:
 - Typically made by agreement of the owners of two parcels
- Results:
 - Variances already included; makes sense to include the lesser action of adjustment.

Type II List – Residential and Commercial Reuse

- Change #7: Reuse of existing residential and commercial structures
 - Reuse of a residential or commercial structure (individual or mixed use) where the residential and/or commercial use is permitted by zoning law or ordinance (including by special use permit) and the action does not meet or exceed any thresholds in § 617.4.
- Reasons:
 - Encourage reuse of existing structures and infrastructure
 - Minimize vacant/dilapidated structures
 - Minimize suburban flight
- Results:
 - May have predictable, limited, and regulated increases to traffic, noise, air emissions, solid waste, but avoids larger impacts associated with new construction – “the greenest building is the one that isn’t built.”
 - Use limitations only allow uses already permitted by municipality

Type II List – County Planning Referrals

- Change #8: Referrals to County or Regional Planning Board
 - Recommendations to a county or regional planning board under General Municipal Law § 239-m or 239-n.
- Reasons:
 - County planning boards provide advisory opinions (see *Headriver, LLC v. Town Bd. of Town of Riverhead*, 2 N.Y.3d 766 (2004)) and not subject to SEQRA
- Results:
 - Greater certainty by providing codified clarity.

Type II List – Parkland and Conservation Easements

- Change #9: Dedication of Parkland
 - Acquisition and/or dedication of 25 acres or less of parkland, or acquisition of a conservation easement.
- Reasons:
 - Limited exemption for acquisition and dedication – still leaves management and development plans open for SEQRA process
 - Streamline regulatory process for relatively simple action.
- Results:
 - Easier to obtain/dedicate parkland, which decreases greenhouse gases and contributes to the community
 - Any potential adverse impact of use still subject to SEQRA

Type II List – Sale and Conveyance by Public Auction

- Change #10: Sale and conveyance of property by public auction
 - Sale and conveyance of real property by public auction pursuant to Article 11 of Real Property Tax Law.
- Reasons:
 - State law requires such auction, with the property necessarily going to the highest bidder
 - Currently, transfer of over 100 acres is Type I, and less than 100 acres is Unlisted.
 - SEQRA review at this stage is meaningless – future use unknown
- Results:
 - Prevents unnecessary and unhelpful SEQRA review and costs
 - Subsequent development and use is still subject to SEQRA and state and federal permitting as applicable

Type II List – Anaerobic Digesters

- Change #11: Anaerobic digesters at landfills
 - Construction and operation of an anaerobic digester, within currently disturbed areas of an operating publicly-owned landfill, as long as the digester has a feedstock capacity of less than 150 wet tons per day, and only produces Class A digestate that can be beneficially used [f]or biogas to generate electricity, make vehicle fuel, or both.
- Reasons:
 - Encourages environmentally beneficial, organic breakdown process
 - Food waste is 2nd large component of landfills
- Results:
 - Minimize food waste going to landfills
 - Increase renewable energy generation. Example: If 50% of the food waste generated in the U.S. each year was anaerobically digested, enough electricity would be generated to power over 2.5 million homes for a year.

EIS Scoping

- **Change:** Scoping now mandatory for all EIS (except SEIS)
 - Scoping identifies potentially significant adverse impacts of a proposed action
- **Reasons:**
 - Scoping originally defined by lead agency ONLY. Not mandatory, no public participation requirement.
 - 1995 amendments strongly encouraged scoping, but not mandatory.
 - Scoping ensures that the real issues, not trivial or non-significant issues, are at the heart of the EIS.
- **Results:**
 - Stronger focus on potential significant impacts
 - Provides for input from interested agencies and public
 - Properly identified late-raised comments on scope must be incorporated into the DEIS (body or appendices).

EIS Preparation – DEIS

- Change #1: Adequacy of DEIS for public review
 - A DEIS is adequate in scope and content for public review if it meets the requirements of the final written scope, §§ 617.8(g) and 617.9(b), and provides the public and involved agencies the necessary information to evaluate impacts, alternatives and mitigation measures.
 - If inadequate, lead agency must provide list of deficiencies and evaluate later-submitted DEIS solely on that list unless there are changes in plan or circumstance, or newly discovered information.
- Reasons:
 - Desire to expedite SEQRA while ensuring full review
 - Seeking fairness to applicant
- Results:
 - Moves projects along and rewards good faith applicants
 - Adds predictability and consistency for re-submitting DEIS
 - Still allows changes – it is still a *draft* EIS.

EIS Preparation – Mitigation

- Change #2: Must consider climate change mitigation
 - Measures to avoid or reduce impacts of an action on climate change should be identified and discussed, where applicable and significant.
- Reasons:
 - Pressing need for state, county, and world per NASA and NOAA
 - Goal of protecting vulnerable locations from effects of climate change
- Results:
 - Furthers goal to prioritize adaptation and resilience to climate change
 - Reduction of vulnerability is also often associated with a reduction in impacts that the project may have on the environment.

Document Preparation

- **Change:** Adds draft and final scope to mandatory ENB publication list; adds draft and final scopes, and DEIS, FEIS, and SEIS to mandatory publication list for publicly available website.
- **Reasons:**
 - Conforms with new requirements for scoping
- **Results:**
 - Broader availability of project information

Fees

- Change: EIS cost statement transparency
 - Where applicant does not prepare the DEIS, the lead agency will provide the estimate of the costs for preparing *or reviewing* the DEIS. The applicant can also request copies of invoices or statements from a consultant who engaged in services for the lead agency to prepare the EIS.
- Reasons:
 - Goal for project sponsors to understand costs
- Results:
 - Transparency
 - Full understanding of costs associated with process

Part Two

Case Studies on SEQRA Mistakes

Dawley v. Whitetail 414, LLC, 130 A.D.3d 1570 (4th Dep't, 2015)

- SEQRA Issue: Must provide a written, reasoned elaboration
- Relevant Facts: Town of Tyre issued a negative declaration without a written, reasoned elaboration of the determination.
- Holding: SEQRA requires strict, literal compliance. Under the regulations, a declaration of significance requires a written, reasoned elaboration. The Town never adopted the elaboration as part of the negative declaration. The Court therefore annulled the negative declaration.

Falcon Group Ltd. Liab. Co. v. Town/Village of Harrison Plan. Bd., 131 A.D.3d 1237, (2d. Dep't, 2015)

- SEQRA Issue: Findings Statement inconsistent with FEIS
- Relevant Facts: Planning Board adopted an FEIS outlining minimization and alternatives, but also adopted a Findings Statement that indicated that the action did not minimize or avoid, and would result in, significant adverse environmental impacts.
- Holding: The Findings Statement directly contradicted the scientific and technical data in the FEIS. The Findings Statement, however, must be supported by the record. The Court annulled the Findings Statement.

J. Owens Bldg. Co., Inc. v. Town of Clarkstown,
128 A.D.3d 1067 (2d. Dep't, 2015)

- SEQRA Issue: Segmentation of SEQRA process
- Relevant Facts: The Town was attempting to acquire petitioner's property for drainage and stormwater management via eminent domain in furtherance of a Downtown Revitalization Project plan, but its SEQRA review was only of the acquisition of the property for drainage.
- Holding: Segmentation is appropriate where the larger project is hypothetical or speculative, or where the agency clearly states in its determination of significance how and why segmentation is no less protective to the environment. The Town did not do so, so the Court sent it back to the Town to either complete SEQRA for the entire project, or make the required findings for segmentation.

Wellsville Citizens ex rel. Responsible Development, Inc. v. Wal-Mart Stores, Inc., 140 A.D.3d 1767 (4th Dep't, 2016)

- SEQRA Issue: Must take a “hard look” at environmental impacts
- Relevant Facts: The Town Board issued a negative declaration regarding proposed construction of a Wal-Mart Supercenter. Petitioners alleged failure to take a hard look at wildlife and surface water impacts.
- Holding: The record showed that certain avian species listed as threatened or of special concern had been seen on the site. Despite that knowledge, the Town relied only on select material in the record that indicated certain agencies were not aware of such species' presence. The surface water impacts evaluated by the Town were similarly selective and limited only to the footprint of the building, not the project construction as a whole. The Court annulled the negative declaration for failure to take a hard look at project impacts.

*Ramapo Pinnacle Properties, LLC v. Village of Airmont
Plan. Bd., 145 A.D.3d 729 (2d. Dep't, 2016)*

- SEQRA Issue: Determinations require rational basis in the record
- Relevant Facts: The Planning Board denied an application that sought access to an abutting roadway as an additional means of ingress from a medical office seeking to add parking/driveway space. The Board issued a negative declaration finding that there would be no additional traffic generated as a result of the proposed road access, particularly considering the speed bumps added to mitigate cut-through traffic. Some community members opposed, but only on a basis of general traffic concerns. The Board denied the application.
- Holding: The Court held that there was no basis in the record supporting the denial regarding traffic concerns, which were equally unsupported by the Town's consultants. The denial was annulled.

Green Earth Farms Rockland, LLC v. Town of Haverstraw Plan. Bd., 153 A.D.3d 823 (2d Dep't, 2017)

- SEQRA Issue: Must take a “hard look” at environmental impacts, including for changed site plans.
- Relevant Facts: An applicant initially proposed a development in part residential, and in part café/deli. A DEIS and SEIS were prepared regarding this site plan. When the applicant applied for final site plan approval, the café/deli had been revised to a 7,000 sq. ft. convenience store and 16-pump gas station. The Town issued a resolution that a second SEIS was not required prior to approval.
- Holding: After resolving a standing question (one petitioner dismissed), the Court found that the Board failed to even mention the gas station or petroleum storage in its resolution finding that a second SEIS was not required. A lead agency may not rely on future state regulatory and permitting approvals but rather must make an independent determination on the impact of a project. The resolution was annulled based on the Town’s failure to take a hard look at the impacts of the change in plans.

Shapiro v. Plan. Bd. of Town of Ramapo, 155 A.D.3d 741
(2d Dep't 2017)

- SEQRA Issue: Must take a “hard look” at environmental impacts
- Relevant Facts: The Planning Board approved three separate but related applications for three housing developments on the same day. Petitioners allege that the Board failed to take a hard look at wetlands impacts. The Board relied on letters from the Army Corps of Engineers, which expressly state that they are not jurisdictional determinations and did not review the applicant’s wetlands delineations. Further, NYSDEC specifically stated that the ACOE letters were not jurisdictional determinations and advised the applicant to obtain the same.
- Holding: The Board unreasonably and irrationally relied on the ACOE letters in determining that there would be no significant impact to wetlands from the proposed project. The Court found that the Board failed to take a hard look or provide a written, reasoned elaboration, and it was directed to prepare a SEIS regarding wetlands impacts.

Youngewirth v. Town of Ramapo Town Bd.,
155 A.D.3d 755 (2d. Dep't, 2017)

- SEQRA Issue: Must take a “hard look” at environmental impacts
- Relevant Facts: In regards to the same development in *Shapiro*, the Town Board approved the project, and amended its Comprehensive Plan and zoning on the property to allow it. Petitioner alleges that the Board failed to take a hard look at impacts related to the project’s proximity to the Columbia Gas Pipeline. Columbia Gas was not listed as an interested agency, and the DEIS contained a brief mention of the pipeline but the Town’s written elaboration regarding the Findings Statement did not.
- Holding: The Town Board did not take a hard look either at the placement of the project in this close proximity to the pipeline, or at the cumulative impacts of this project and the pipeline together. The Court annulled the Town’s Findings Statement and, consequently, the changes to the Comprehensive Plan and zoning, which cannot be completed without a valid SEQRA review process.

*Rochester Eastside Residents for Appropriate Dev., Inc.
v. City of Rochester*, 150 A.D.3d 1678 (4th Dep't, 2017)

- SEQRA Issue: Must provide a written, reasoned elaboration
- Relevant Facts: Petitioners challenged the City of Rochester Director of Planning and Zoning's negative declaration regarding the proposed construction of an ALDI supermarket because there was known, undisputed presence of soil contamination on the site that was not addressed in the negative declaration.
- Holding: The Town Board did not provide a written, reasoned elaboration for its negative declaration, and the explanation it *did* provide was provided post hoc. The Town's declaration was annulled because it appeared to have relied solely on the developer's promise that the condition would be remediated prior to construction.

Peterson v. Plan. Bd. of City of Poughkeepsie,
163 A.D.3d 577 (2d Dep't 2018)

- SEQRA Issue: Must provide a written, **reasoned** elaboration
- Relevant Facts: Petitioners challenged a negative declaration regarding proposed development adjacent to a historic district. In this case, the Board *did* provide a written elaboration, but it was unreasonable and not supported by evidence in the record. Rather, it relied on one letter from OPRHP stating that there would be no impact on the historic district. Further, the written elaboration stated there would be no removal or destruction of large quantities of vegetation, but of the 3.4-acre parcel, 2.45 acres of forested land would be cleared.
- Holding: The Court annulled the negative declaration and written elaboration as incapable of meeting the “reasoned” requirement and impermissibly conclusory in nature. The Court directed the Town to prepare an EIS.

Adirondack Historical Assn. v. Village of Lake Placid/Lake Placid Village, Inc., 161 A.D.3d 1256, (3d. Dep't, 2018)

- SEQRA Issue: Must take a “hard look” at environmental impacts
- Relevant Facts: The Village issued a negative declaration pertaining to its eminent domain acquisition of property needed for a parking garage pursuant to a redevelopment project. Petitioner challenged on the grounds of segmentation and failure to take a hard look at traffic impacts.
- Holding: The Court agreed with the Village that segmentation was appropriate because the Village did not include this particular property taking in its overall SEQRA review because it did not anticipate the need to take the property via eminent domain. However, the Village issued the negative declaration with no evidence in the record or written elaboration that the traffic issues raised by public meeting and written comment were considered or addressed. The Village argued that traffic concerns were fully explored in the full redevelopment project SEQRA evaluation, but the Court annulled the negative determination because this was a separate review with a separate record that provided no evidence for these conclusions.

Thank you!