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Comments on the New York State Department of Environmental Conservation Proposed Amendments to 6 NYCRR Part 617 SEQRA Implementing Regulations

ENVIRONMENTAL AND ENERGY LAW SECTION

Environmental #2 May 25, 2017

The New York State Environmental Quality Review Act, New York Environmental Conservation Law Sections 8-0101 et seq. ("SEQRA"), mandates that all state and local agencies incorporate a review of the environmental impacts of their decisions to undertake, fund or approve their actions. ECL Section 8-0113 directed the Commissioner of the Department of Environmental Conservation ("DEC") to establish, by regulation, procedures to guide state and local agencies in their implementation of SEQRA. DEC's regulations, which are codified in Part 617 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("NYCRR") were initially promulgated in 1976 and have been amended several times in the forty years since then, most notably in 1978, 1987 and 1995.[1]

On January 20, 2017, after a lengthy internal review process and with input from a large variety of stakeholders, DEC proposed a new set of regulatory amendments, designed to streamline SEQRA review. The Environmental & Energy Law Section of the New York State Bar Association (the "Section") is pleased to have the opportunity to comment on the proposed amendments to the SEQRA implementing regulations. The following comments were prepared by the Section's Environmental Impact Assessment Committee and have been approved by the Section's Executive Committee.

DEC is certainly to be commended for seeking to streamline the SEQRA process without overly narrowing the scope of environmental review where such review is necessary and desired. Expanding the Type II list, particularly for smaller projects, may help avoid unnecessary costs and delays. Moreover, the proposed regulations' attempt to make scoping a more meaningful process and tying the final scope and the concept of what is complete and adequate for public review will hopefully encourage and allow for more targeted EISs, eliminating the need to waste time and resources providing analyses of issues that are not necessary to a fulsome environmental review of an action.

DEC should also be commended for the significant outreach to all SEQRA stakeholders – environmental groups, the development community and state and local agencies – that

[1] Draft Generic Environmental Impact Statement on the Proposed Amendments to the State Environmental Quality Review Act (SEQRA) Regulations, January 20, 2017 ("DGEIS") at page i.

Opinions expressed are those of the Section/Committee preparing this memorandum and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

went into the creation of these proposals. DEC must walk a fine line between streamlining the process while at the same time avoiding the dilution of SEQRA's mandate to incorporate environmental consideration into agencies' decision-making processes. DEC has managed to walk this line better in some instances than others in the proposed regulations. For example, certain of the newly-proposed Type II exemptions appear to have strayed too far into the realm of policy-making through SEQRA exemptions. While adding sustainable development or renewable energy projects to the Type II list would expedite their approval and implementation throughout the state, the proposed regulations cannot promote such projects as a policy goal absent specific legislative authority, or without a showing that all proposed Type II actions have been categorically determined not to have a significant effect on the environment.

The comments below are arranged in sequential order by section of the proposed regulations, followed by proposals for further substantive amendments that were not covered by the proposed regulations and a statement regarding the legislative authority for DEC to adopt certain Type II exemptions in order to promote public policy goals.

Definitions

§ 617.2(af)

The proposed definition of "previously disturbed" is too narrow and contains undefined terms. The proposed definition is currently worded as follows:

> "Previously disturbed" means a parcel of land in a municipal center that was occupied by a principal building used for residential or commercial purposes where the building has been abandoned or demolished.

"Principal building" is an undefined term. It is unclear what this term means or what purpose it serves. We recommend eliminating the term. It is also unclear why it is important that the parcel of land have been used for "residential or commercial purposes" as opposed to industrial, governmental, or other purposes other than as parkland. Some examples of previously disturbed land that would be excluded from this definition include parking lots, churches, and manufacturing facilities, all of which are commonly found in municipal centers and may have been abandoned or demolished.

General Rules

§ 617.3(a)

Referenced section numbers in amended version are numbered incorrectly. Rather than § 617.5(c)(27), (30), and (37), the corresponding subsection numbers should be § 617.5(c)(29), (32), and (39).

Type I List

§ 617.4(b)(6)(iii)-(iv)

In the newly proposed subsections governing Type I thresholds for parking, there is an overlap in § 617.4(b)(6)(iii) and (iv) that needs to be corrected. § 617.4(b)(6)(iii) applies to municipalities with populations of 150,000 persons or less, and § 617.4(b)(6)(iv) applies to municipalities with populations of 150,000 persons or more. Municipalities with exactly 150,000 persons are covered by both (iii) and (iv).

§ 617.4(b)(9)

We support the proposal to raise the Type I threshold for Unlisted actions that occur in or contiguous to sites listed on the national or State Register of Historic Place to include only Unlisted actions that exceed 25 percent of other Type I thresholds, and support the proposal to include sites that have been determined to be eligible for listing in the State Register of Historic Places as part of this Type I threshold.

Type II List

§ 617.5(c)(15)-(16)

The addition of solar project siting, while conceptually a positive addition to the Type II list, should not include urban brownfield sites in the Brownfield Cleanup Program. Part of the goal of the BCP is to promote urban infill. Solar installations may not be appropriate in all areas, may be counter to urban redevelopment goals, and may have potential impacts on neighborhood character.

We also recommend placing a limit on the acreage of solar installations that can be exempted as Type II actions, rather than relying strictly on a five megawatt limit. Solar energy projects involving the physical alteration of 10 acres or more should not be exempted from review. The 10-acre threshold is consistent with the Type I threshold set forth at 6 NYCRR § 617.4(b)(6)(i).

§ 617.5(c)(19)-(22)

We support the adoption of Type II exemptions for infill development/sustainable development in cities, towns, and villages of various sizes at set forth in proposed 6 NYCRR §§ 617.5(c)(19)-(22). We would further recommend the revision of proposed § 617.5(c)(22) to cover cities, towns, and villages of 250,000 to 1,000,000 persons only, and would add a fifth exemption for municipalities of greater than 1,000,000 persons. For the largest category, which would cover New York City, DEC should increase the maximum size for infill developments to 60,000 square feet and clarify that a subway station is a "commuter rail station" for the purposes of qualifying for the exemption. As proposed, the provision would have virtually no impact in New York City, which is in as much need of infill rehabilitation as the rest of the state.

§ 617.5(c)(22)

The language of the proposed new Type II category speaks of sites "within one quarter mile of a commuter railroad station," but the corresponding analysis in the DGEIS states that this category would be appropriate for sites "within one half mile of a passenger train station."[2] The proposed language should be consistent as between the DGEIS and the proposed language of the regulation.

§ 617.5(c)(23)

We support the inclusion of a Type II category for the reuse of existing structures (where consistent with zoning), but note that the term "commercial" is not defined (unlike the term "residential" which is defined). This category could also be expanded to include the reuse of municipally-owned structures and community facilities as they are defined in local zoning. It is not clear whether "reuse" limits the structure to its existing size or would also allow expansion of the structure as long as the expansion was consistent with the current zoning.

§ 617.5(c)(45)

While the typical acquisition of parkland would not have the potential for significant adverse environmental impacts, the proposed Type II exemption is overbroad as written and would allow the acquisition of environmentally-contaminated parcels for use as parkland, without further SEQRA review. The DGEIS notes that the proposed exemption "does not exempt from SEQR any accompanying management or development plans or construction projects intended for the parkland,"[3] but it is not clear how this exemption would protect against the acquisition and use of contaminated parcels.

We recommend that DEC amend the proposed exemption to include an exception for the acquisition of environmentally-contaminated parcels. Environmental contamination could be evaluated using brownfield cleanup standards (for example) in order to determine whether the proposed Type II exemption applies to the acquisition of a particular parcel.

§ 617.5(c)(46)

The proposed exemption for transfers of land for affordable housing should be revised to eliminate the requirement that the land be transferred to a not-for-profit corporation. The status of a corporation as not-for-profit is irrelevant to the appropriate SEQRA analysis, which reviews potential environmental impacts. The DGEIS itself suggests that an alternative would be to eliminate the not-for-profit requirement "since, according to the Division of Housing and Community Renewal, for-profit actors are also involved in the development of affordable housing and the impact would not change based on the

[2] DGEIS at 28.

[3] DGEIS at 31.

character of the transferee."[4] The DGEIS itself thus provides the justification for eliminating the not-for-profit requirement and provides no basis for the inclusion of such a requirement.

§ 617.5(c)(48)

The proposed exemption of brownfield cleanup agreements ("BCA") from SEQRA review is a common sense addition to the Type II list, but the proposed language should be modified. As proposed, the Type II exemption for BCAs is written:

> (48) brownfield site clean-up agreements pursuant to Title 14 of Article 27 of the Environmental Conservation Law, provided that design and implementation of the remedy do not commit the Department or any other agency to specific future uses or actions or prevent an evaluation of a reasonable range of alternative future uses of or actions on the remedial site;

The exemption for BCAs should be rewritten, either to strike the references to the "design and implementation of the remedy" and all that follows (strike out all text after "Environmental Conservation Law"), or to clarify that separate actions are being exempted: 1) entry into BCAs; and 2) selection of the remedy and implementation of remedial actions under DEC-approved work plans pursuant to ECL Article 27, Title 14.

A BCA is entered into at the outset of a brownfield cleanup and by nature does not discuss the design and implementation of the remedy, and does not commit agencies to specific future uses or actions. As noted in the DGEIS, remedy selection and implementation of remedial actions are already exempted from SEQRA under 6 NYCRR Part 375-3.11(b).[5] If DEC's intent is to have the Type II exemptions mirror the existing SEQRA exemption of 6 NYCRR Part 375-3.11(b), then the existing language in that brownfield regulation should be copied and added to the Type II list, or incorporated specifically by reference.

Scoping

§ 617.8(a)

We support the proposed revision to make EIS scoping a mandatory requirement.

The text of the proposed regulation in section 617.8(a) should be changed to strike the comma after "potentially significant" in the penultimate sentence so that it is clear that what is being included in the scope of the EIS are "potentially significant adverse environmental impacts." The sentence should be changed to read "Scoping should result in EISs that are focused on relevant, potentially significant adverse environmental impacts."

[4] DGEIS at 33.

[5] DGEIS at 35.

Online Publication of EIS Documents

§ 617.12(c)(5)

We support the requirement that the lead agency publish its draft and final EIS scopes and draft and final EISs on a publicly-available website, but would clarify the phrase "to the extent practicable." In 2017, the cost and technological requirements of posting even large documents such as draft and final EISs, is "practicable" for all lead agencies. We recognize that the text of ECL § 8-0109(4) and (6) contains the phrase "unless impracticable," but DEC should clarify its interpretation of that phrase in order to strictly limit the ability of lead agencies to claim that it is not practicable to publicly post EISs on the basis of cost or availability of website space.

The revisions to this section should also allow for a lead agency to discontinue the website posting of scopes and EISs upon the withdrawal of a proposed action in addition to the current trigger for discontinuance of website publication ("may be discontinued one year after all necessary permits have been issued by the federal, state and local governments").

Further Proposed Amendments

Elimination of Environmental Assessment for Projects in which Sponsor and Lead Agency Agree an EIS Will Be Required

With the addition of mandatory scoping, consideration should be given to eliminating the need for an Environmental Assessment Form (called an Environmental Assessment Statement in New York City) in situations where it is clear that an EIS will be required. In such cases, the applicant should be permitted to provide a draft scoping memorandum with its application for the underlying approval or funding, upon which a Positive Declaration can be properly based. This would eliminate an unnecessary interim step that does not add anything of substance to the analysis of the potential environmental impacts of a proposed action. Where it is obvious that an EIS will be required, there is no need to delay starting the process for the preparation, filing and administrative review of a form that is in almost all instances superseded by a published EIS scope and a DEIS.

Allow for Conditioned Negative Declarations for Type I Actions

DEC should propose allowing for Conditioned Negative Declarations in Type I Actions. A Conditioned Negative Declaration (CND) may currently be used for an Unlisted action that may have significant adverse environmental impacts, but the impact can be eliminated or adequately mitigated by conditions imposed by the lead agency. The existing regulations in 6 NYCRR § 617. 2(h) limit the use of CNDs to Unlisted Actions; however, there is little reason to continue to exclude Type I actions, which are only *presumed* to have impact, from this more efficient, yet similarly protective procedure.

<u>Promoting particular uses is not consistent with SEQRA's enabling legislation</u>

As noted in the introduction, the proposed SEQRA regulations cannot promote particular uses (i.e. sustainable development or renewable energy) without a showing that those uses have been categorically determined not to have a significant effect on the environment.

No matter how well intentioned, DEC is overreaching and usurping the role of the legislature in seeking to establish a policy that so-called "sustainable" development is favored. Such a policy can only be established by the legislature.

The ECL explicitly directs DEC to draft regulations, including actions that DEC has labeled "Type II" actions, based on specific criteria. ECL 8-0113 provides that DEC **"shall include . . . [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 under this article. In adopting the rules and regulations, the commissioner shall make a finding that each action or class of actions identified does not have a significant effect on the environment."**[6]

DEC cannot make such a finding for many if not all of these "sustainable" favorites. 10 or 25 acres of disturbance for a solar field would have environmental impacts just as a 10 or 25-acre disturbance for billboards or windfarms or anything else. These items would also contradict the existing Type II regulation that says that an agency may adopt its own Type II list but that none of its Type II actions can be Type I actions under the list at 6 NYCRR § 617.4.[7]

There are other provisions that confirm that the intent of SEQRA is for agencies to look, uniformly, at the impact to the environment only. ECL § 8-0111(6) requires that a lead agency render a "determination of whether the action may have a significant effect on the environment." This is the lead agency's only charge in SEQRA, regardless of the other perceived benefits of the project its effects on the environment must be considered.

ECL § 8-0109 also requires that agencies "shall act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, **minimize or avoid adverse environmental effects,** including effects revealed in the environmental impact statement process."[8] Their mandate is to minimize adverse environmental effects, through, if necessary, an EIS. Section 4 goes on to state "The purpose of a draft environmental statement is to relate environmental considerations to the inception of the planning process, 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**

[6] ECL § 8-0113(2)(c)(ii) (emphasis added).

[7] *See* 6 NYCRR § 617.5(b)(2).

[8] ECL § 8-0109(1) (emphasis added).

action."[9] Further, when findings are issued they similarly have to find that "consistent with social, economic and other essential considerations, **to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided."**[10]

In sum, the agency's charge to is look at "adverse environmental effects" in determining how to proceed under SEQRA, not at whether the action is desirable or sustainable.

[9] ECL § 8-0109(4) (emphasis added).
[10] ECL § 8-0109(8) (emphasis added).