What Developers and Land Use Practitioners Need to Know About the New SEQRA Amendments

By Andrea Tsoukalas Curto and Jessica A. Leis

The first major State Environmental Quality Review Act (SEQRA) revisions since 1996 will be taking effect January 1, 2019. The following are key points.

SEQRA Overview

The first step in the SEQRA process is classifying an "action" or project, which then determines the extent of environmental review under the regulations. There are three types of actions that a project will continue to be classified under: Type I, Type II, and Unlisted.

A Type I SEQRA action is one that is more likely to have an adverse impact on the environment. If an action meets the criteria listed in 6 N.Y.C.R.R. Section ("Section") 617.4,[1] then it is Type I and a Full Environmental Assessment Form (FEAF) must be prepared. If it is determined from the FEAF that a significant adverse impact is likely to occur, then an Environmental Impact Statement (EIS) is prepared to explore ways to avoid or reduce the adverse environmental impacts or to identify a potentially less damaging alternative.

On the other hand, if an action meets the criteria for a Type II action pursuant to Section 617.5, then it is not subject to the SEQRA process—thus saving time and expenses related to preparing environmental assessments and impact statements to comply with SEQRA.

If an action does not meet either the Type I or Type II criteria, it is Unlisted, but this does not excuse an action from SEQRA. Initially, an Unlisted action is only required to prepare a Short Environmental Assessment Form (SEAF), rather than a FEAF. Type I and Unlisted actions alike, however, are subject to the same "hard look" test.[2] To fulfill the "hard look" standard, an agency must (1) identify relevant areas of environmental concern, (2) thoroughly analyze them for significant adverse impact, and (3) support the determination with reasoned elaboration.[3] Failure on the part of the agency to take a "hard look" at the potential environmental impacts can result in a nullified action.[4]

If an Unlisted action is found to have potential and significant environmental concerns, the action may ultimately need to undergo the same SEQRA process as a Type I action. For all Type I actions, all actions that require an EIS, and all Unlisted actions subject to a Conditioned Negative Declaration, coordinated review is necessary. The coordinated review process involves choosing a lead agency for the project and coordinating with other involved agencies to ensure that their concerns are considered.[5]

Revisions to SEQRA Categories

Though the three (3) classification categories will not change, the Department of Environmental Conservation (DEC) has adopted amendments that will impact how projects are now classified.

The January 2019 amendments will expand upon the list of Type II actions—actions that "have been determined not to have a significant impact on the environment."[6] These are the actions that are not subject to the SEQRA process and do not require an EIS. The goal of the DEC in adopting these amendments was to support policies that favor green infrastructure, renewable energy and smart growth.[7]

The list is becoming more extensive to encourage "green infrastructure" and the reuse of existing buildings. In particular, Section 617.5(c)(18), which will be in effect January 2019, states:

> Reuse of a residential or commercial structure, or of a structure containing mixed residential and commercial uses, where the residential or commercial use is a permitted use under the applicable zoning law or ordinance, including permitted by special use permit, and the action does not meet or exceeds any of the thresholds in Section 617.4 [Type I actions] of this Part.[8]

Further, where the Type II list previously allowed for upgrading buildings to meet building or fire codes, the amendment now also provides for upgrades to meet energy codes.[9] Additionally, a new Type II category involves the retrofitting of an existing structure and its appurtenant areas to incorporate green infrastructure.[10] The DEC has also adopted a new definition of "green infrastructure"[11] to remove any subjectivity and allow for an exhaustive list for the purposes of Type II actions.[12]

While development of a single-family, two-family, or three-family residence is already classified as a Type II action, the new amendments will include the conveyance of land in connection therewith.[13] The sale and conveyance of real property by public action pursuant to Article

Andrea Tsoukalas Curto is a partner and **Jessica A. Leis** is an associate in the Land Use and Zoning Practice Group at Forchelli Deegan Terrana LLP in Uniondale, New York. The authors would like to thank Sara Moriarty, a third-year law student and law clerk, for her assistance with this article

11 of the Real Property Tax Law will also now be considered a Type II action.[14]

With these new regulations, a project that involves redevelopment of an existing building could be classified as a Type II action and, as such, would not require the SEQRA process. This is a significant change because currently, the reuse of an existing building for residential or commercial uses would either be considered an Unlisted action or a Type I action, subject to review to determine any potential adverse environmental impact. Once the new regulations take effect, a project involving retrofitting and reusing old buildings could potentially be removed from the SEQRA process.

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Another significant addition to the list of Type II actions includes the granting of lot line adjustments.[15] The installation of telecommunication cables in existing highways or utility rights of way that utilize trenchless burial or aerial placement on existing poles have also been added to the list.[16]

Further, a new Type II category will include the installation of solar panels on 25 acres or less of physically altered land where the site is: (i) a closed landfill, (ii) a brownfield site, (iii) sites that have received an inactive hazardous waste disposal fill liability release, (iv) currently disturbed areas at publicly owned wastewater treatment facility, (v) currently disturbed areas at sites zoned for industrial use, or (vi) parking lots or parking garages.[17] Installation of solar energy arrays on an existing structure will be considered a Type II action where the structure is not: (i) listed on the National or State Register of Historic Places, (ii) located within a district listed in the National or State Register of Historic Places, (iii) been determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places, or (iv) within a district that has been determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places.[18]

But while factors like retrofitting, reusing and "going green" could move an action from Unlisted to Type II once the amendments take effect, other factors named in the new amendments may cause an action to fall under Type I.

Some Type I thresholds have been lowered, meaning that more projects may be classified as Type I. Among the revisions to Type I actions, Section 617.4(b)(5)(iii), will now include projects involving the connection of 200 units to a public water or sewage system "in a city, town, or village having a population of 150,000 persons or less." This is a reduction from the current threshold, set at 250 units.[19] Similarly, for populations of greater than 150,000 persons but less than 1,000,000, the threshold lowered from 1,000 units to 500 units,[20] and for populations of greater than 1,000,000, the threshold lowered from 2,500 units to 1,000 units.[21]

Additionally, certain types of projects have been added as Type I, including activities relating to non-residential construction that involves parking for 500 vehicles in a city, town or village having a population of 150,000 persons or less,[22] or parking for 1,000 vehicles in a city, town of village having a population of more than 150,000 persons.[23] These thresholds are reduced by half for projects involving the expansion of existing nonresidential facilities.[24]

The adopted rule corrects a longstanding issue with the Type I category. As currently drafted, any Unlisted action, *regardless of size*, (a) within the vicinity of a listed property on the National Register of Historic Places, or (b) that has been proposed for inclusion on the National Register, or (c) that is listed on the State Register of Historic Places, is classified as a Type I action.[25] Under the new regulations, projects that do not meet the 25 percent threshold would instead continue to be classified as Unlisted, which provides some relief to developers.

To the detriment of developers, however, the criteria for properties included in this section have broadened. While the DEC has removed properties that have been proposed by the State for nomination for inclusion in the National Register, Type I actions will now capture those actions occurring wholly or partially within or substantially contiguous to properties that the Commissioner of Parks, Recreation and Historic Preservation has determined to be *eligible for inclusion* on the State Register of Historic Places.[26] Previously, this Section only touched upon properties that were actually listed on the State Register, rather than just eligible for inclusion.

This amendment has previously been considered by the DEC and was finally adopted for the January 2019 amendments due to the ease of quickly identifying eligible properties using the Office of Parks, Recreation and Historic Preservation's Cultural Resource Information System (CRIS).[27] While this revision adds protections and review for potentially historic properties, it ultimately

becomes an additional hurdle for developers and property owners alike. In regard to historic properties, Section 617.4(b)(9) has been amended as follows (new requirements in bold):

> Any Unlisted action (unless the action is designed for the preservation of the facility of site), **that exceeds 25 percent of any threshold established in this section**, occurring wholly or partially within, or substantially contiguous to, any historic building, structure, facility, site or district or prehistoric site that is listed on the National Register of Historic Places. . . or that is listed on the State Register of Historic Places **or that has been determined by the Commissioner of the Office of Parks, Recreation, and Historic Preservation to be eligible for listing on the State Register of Historic Places pursuant to sections 14.07 or 14.09 of the Parks, Recreation, and Historic Preservation Law**. . .

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Revisions to SEQRA Scoping

In addition to the 2019 SEQRA amendments affecting categorizing properties as either Type I, Type II, or Unlisted, there are new scoping requirements.[28] Scoping comes into play right after a positive declaration is made. While scoping was previously optional, the January 2019 amendments now make it **mandatory** for all Environmental Impact Statements.[29]

Mandatory scoping adds an additional hurdle to the SEQRA process. This in turn makes the SEQRA process more cumbersome for developers.

Scoping serves to narrow the significant and relevant issues before completing a draft EIS. Each involved agency participates in scoping, providing written comments to "ensure that the EIS will be adequate to support their SEQRA findings."[30] Public participation is also required; the lead agency must provide time for public review and comments on a draft scope, or provide for some form of public meetings.[31]

The written final scope compiled by the lead agency should include all that is relevant or significant for inclusion in the EIS. Where the regulations currently require the lead agency to list the prominent issues raised during scoping that were determined to not be relevant or environmentally significant, the amendment expands upon this requirement. Under the amendments, the final scope must now also provide a brief description of the prominent issues considered and provide reasons why those issues were not included in the final scope.[32] This amendment places more accountability—and requires more labor—on the part of the lead agency. While initially scoping will be more time-consuming, the requirement to detail prominent issues that were determined to be neither relevant nor environmentally significant will serve to create a solid record, should an Article 78 appeal ever ensue.

Revisions to Publication Requirements

In an effort to make the SEQRA process more transparent to the general public, Section 617.12(c)(5) has been added to require that all draft and final scopes, and draft and final EISs' must be published on a publicly available website. The posting must remain on the website for at least one year after all necessary federal, state and local permits have been issued or after the action is funded or undertaken.

Take Away Points

The DEC has made efforts to modernize the SEQRA process and to make it more transparent for developers, lead agencies, and the general public. Most notably, the amendments have expanded on the list of Type II actions with a goal of encouraging "green" building and the reuse of existing buildings in an effort to reduce waste. Developers will now benefit from the new list of projects that are no longer subject to SEQRA review.

However, where actions are considered Type I or Unlisted and have received a Positive Declaration, the process will become more labor-intensive and developers should be prepared for the additional time and costs that can result.

Endnotes

1. SEQRA Express Terms (new amendments taking effect 2019), *available at* https://www.dec.ny.gov/docs/permits_ej_operations_pdf/617fnlexptrms.pdf.
2. State Environmental Quality Review Act Findings Statement for Amendments to 6 N.Y.C.R.R. Part 617 ("Findings Statement") (2018) at 7, *available at* https://www.dec.ny.gov/docs/permits_ej_operations_pdf/617fnlfindings.pdf.
3. *See* SEQR Handbook, at 207, citing *H.O.M.E.S. v. UDC* hard look test. In the *H.O.M.E.S.* case, the agency failed to consider the increased traffic from a proposed sports stadium. Therefore, the agency did not meet the "hard look" standard, so their negative declaration could not be upheld and the action was nullified.

http://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf.

4. *Id.*
5. SEQR Handbook, at 58.
6. SEQR Handbook, C. What are the Key Elements?, *available at* https://www.dec.ny.gov/permits/57238.html.
7. *See* Finding Statement, at 1.
8. State Environmental Quality Review Act- Adopted Amendments 2018, *available at* https://www.dec.ny.gov/docs/permits_ej_operations_pdf/617fnlexptrms.pdf.
9. 2019 amended 6 N.Y.C.R.R. § 617.5(c)(2).
10. 2019 amended 6 N.Y.C.R.R. § 617.5(c)(3).
11. 2019 amended 6 N.Y.C.R.R. § 617.2(r) ("Green infrastructure" means practices that manage storm water through infiltration, evapo-transpiration and reuse including only the following: the use of permeable pavement; bio-retention; green roofs and green walls; tree pits and urban forestry; storm water planters; rain gardens; vegetated swales; downspout disconnection; or storm water harvesting and reuse").
12. *See* Finding Statement, at 10.
13. 2019 amended 6 N.Y.C.R.R. § 617.5(c)(11).
14. 2019 amended 6 N.Y.C.R.R. § 617.5(c)(40).
15. 2019 amended 6 N.Y.C.R.R. § 617.5(c)(16).
16. 2019 amended 6 N.Y.C.R.R. § 617.5(c)(7).
17. 2019 amended 6 N.Y.C.R.R. § 617.5(c)(14).
18. 2019 amended 6 N.Y.C.R.R. § 617.5(c)(15).
19. 6 N.Y.C.R.R. § 617.4(5)(iii).
20. 6 N.Y.C.R.R. § 617.4(b)(5)(iv).
21. 6 N.Y.C.R.R. § 617.4(b)(5)(v).
22. 2019 amended 6 N.Y.C.R.R. § 617.5(4)(b)(iii).
23. 2019 amended 6 N.Y.C.R.R. § 617.4(b)(6)(iv).
24. 2019 amended 6 N.Y.C.R.R. § 617.4(b)(6)(iii) & (iv).
25. Findings Statement, at 7.
26. *Id.* at 6.
27. *Id.* at 7-8.
28. *See* SEQRA 617.8, available at https://www.dec.ny.gov/docs/permits_ej_operations_pdf/617fnlexptrms.pdf.
29. 2019 amended 6 N.Y.C.R.R. § 617.8(a).
30. 6 N.Y.C.R.R. § 617.8(c).
31. 6 N.Y.C.R.R. § 617.8.
32. 2019 amended 6 N.Y.C.R.R. § 617.8(e)(7).