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New York State Proposes Revisions to Its Environmental Review Regulations

Article By:

Steven C. Russo

Evan J. Preminger

Late last month the ***New York State Department of Environmental Conservation (DEC)*** proposed to revise its Part 617 regulations, which are the rules governing the conduct of environmental impact review under New York's "Little NEPA," known as the ***State Environmental Quality Review Act (SEQRA)***. The proposal was officially noticed in today's issue of the New York State Register and DEC's Environmental Notice Bulletin. The proposed rules offer alterations in a number of key areas:

Lessening the Type I Threshold

Under SEQRA, all possible actions fall into one of three classes: Type I actions, which are presumed to have an environmental impact requiring an Environmental Impact Statement (EIS), Type II actions, which are presumed to not have an impact and are exempt from further SEQRA review, and unlisted actions. Both Type I and unlisted actions require an environmental assessment to determine whether an EIS is required. To reduce some uncertainty and promote new policy goals, DEC has changed the requirements so that fewer actions fall in the unlisted gray area. The rules propose lowering a number of thresholds for what would be deemed Type I actions, sweeping in a greater number of residential subdivision and parking lot projects than under current regulations.

Areas where the threshold for a Type I action was changed include:

- Large residential subdivisions, defined as 200 units or more in a municipality of less than 150,000, 500 units for a municipality with a population between 150,000 and 1 million, and 1000 units in a municipality with a population above 1 million
- Parking lots adding:
    - 500 additional spaces for a municipality with a population of less than 150,000
    - 1000 additional spaces for a municipality with a population greater than 150,000
- For actions near landmarked or registered historic places, or near sites that have been

determined to be eligible for listing on the State Register of Historic Places, any activity that meets 25 percent of a given threshold for an action is considered a Type I action. This cuts back Type I coverage, which previously swept in all activities near landmarks and historic places.

Expanding the List of Type II Exempt Actions and Promoting Smart Growth

DEC also added a number of new actions to the list of Type II projects, eliminating the need for an environmental review of lower impact activities like reusing a building or selling property by public auction. The list of proposed actions also evidences a clear policy preference toward encouraging both environmentally friendly and socially equitable development, reducing the regulatory burden for green infrastructure, solar energy, and affordable housing projects. It also includes favorable treatment for “infill” development projects that are considered smart growth because they avoid suburban sprawl. These revisions are significant as they represent a new approach to the Type II exempt list, focusing not merely on the lack of impact from such actions, but also seeking to release certain types of development that are deemed environmentally or socially preferred from more exhaustive environmental review.

Some key new type II actions include:

- Retrofit of an existing structure or facility to incorporate green infrastructure;
- Installation of fiber-optic or other broadband cable technology in existing highway or utility rights of way
- Installation of cellular antennas or repeaters on an existing structure that is not subject to federal, state, or local landmarking
- Subdivisions of four or fewer lots involving less than 10 acres of land
- Development on a “previously disturbed” site within a “municipal center”
- Reuse of a commercial or residential structure where the use is consistent with zoning
- Anaerobic digesters

Scoping

Scoping—the previously optional public process under which the lead agency determines what issues need to be assessed in an EIS—will no longer be optional under the new SEQRA rules. This is currently the practice under New York City’s rules; if adopted this would be the practice throughout the state.

Limiting Factors to be Considered in Order to Expedite Environmental Review

One of the greatest complaints about the SEQRA process is that it moves too slowly. The proposed SEQRA revisions do not include changes that will significantly address that problem, but do attempt a

few minor revisions that may in certain instances result in a slightly shorter review. The addition of mandatory scoping is employed to limit what would be required in a subsequently-published EIS to the issues identified in such scope. Under the regulations as currently written, tremendous uncertainty exists as to whether an EIS sufficiently identifies all potential areas of environmental concern; even if a lead agency engages in optional scoping, a draft EIS could still be found inadequate for failing to address a concern that was raised after the scoping process ended. Moreover, under current rules, a lead agency can reject a draft EIS even if they meet the requirements outlined by the optional scoping process. The new rules attempt to address those uncertainties.

First, the draft rule proposes that “Information submitted following completion of the final scope and not included by the project sponsor in the draft EIS cannot be the basis for the rejection of a draft EIS as inadequate.” This means that any issues raised after the final scope was produced would be treated as comments to the EIS, permitting a project sponsor to address those concerns after the fact.

The rules also attempt to further clarify what constitutes an “adequate” EIS. Under the proposed rules, an EIS “is adequate with respect to scope and content for the purpose of commencing public review if it meets the requirements of the final written scope, section 617.9(b) of this Part, and provides the public and involved agencies with the necessary information to evaluate project impacts, alternatives, and mitigation measures.” This revision is aimed at addressing the rare cases where a lead agency refuses to certify a draft EIS as complete for the purposes of commencing public review even though the matters specified in the scope have been addressed.

Finally, the proposed rule revisions provide that if an agency rejects a DEIS for inadequacy, they must accept a subsequently filed DEIS if it meets the list of deficiencies they provided upon review, avoiding circumstances where agencies seek to move the goal posts in successive iterations of preliminary draft EISs.

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