ENVIRONMENTAL ASSESSMENT

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Section 7.1 The Evolution of Environmental Law

The early origins of environmental law can be traced from private tort remedies at common law to government control over coal burning in the 16th century and regulation of sewage disposal in the 19th century. By the early 20th century, pioneering legislation had set aside national parks and regulated mining and timber activities.

During the 1930s, government began to recognize its responsibility as the caretaker of our deteriorating resources. A soil conservation program led to the Soil Conservation Service. This was accompanied by watershed programs in the Forest Service and by the river basin plans of the U. S. Army Corps of Engineers, the Tennessee Valley Authority, and the Bureau of Reclamation. These programs continued into the 1940s and 1950s, but relatively little attention was paid to the consequences of development.

Beginning with World War II, the chemical industry moved our country and the world into a new era of environmental modification. Both the number of products and the volume of production increased dramatically, releasing into the environment through waste emissions, pesticides, herbicides, fungicides and solid waste disposal a steadily increasing quantity of synthetic organic compounds. Also beginning in the 1940s, questions started to be raised about the future capacity of the earth to support its rapidly growing population. Through a combination of these forces, the later years of the 1960s and the decade of the 1970s saw a shift in emphasis from development to the maintenance of environmental quality. Gilbert F. White, in his Essay, Environment, 209 Science 184 (1980) notes:

> The enthusiasm expressed in the 1970 Earth Day and the Stockholm Conference was not merely a response to the mounting scientific evidence concerning changes in environmental systems or the extent to which many of those changes in air and water involved external effects and the use of common resources. Rather, the environmental movement of the 1970s expressed frustration with the workings of big business, big government, and large universities; it apparently was in part a reaction to the material affluence of the time, to the moral and social impacts of the Vietnam war, and to other stresses in the social fabric that were widely publicized by the media. Whatever the precise climate and conjunction of the forces at work, they defied the observer seeking to explain the new emphasis.
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> Many a scientist or engineer was alternately confounded and entranced by the speed with which regulations were adopted with incomplete supporting evidence, by the rejection by some public interest groups of what previously had been hailed as beneficial measures -- like Echo Park dam or the Alaskan pipeline -- and by radically different values placed on various risks, such as

> nuclear power, automobile fatalities, and pesticides. In scores of cases public concern was voiced over the alleged miscarriage of well-intentioned technological projects. Anxiety grew over carcinogens and radiation hazard. Citizen groups became sensitive to hazards carried involuntarily by individuals. . . .

Throughout the 20th century, people have attempted to extend protection to the environment in various ways. Lawyers tested novel theories in court, attempting to gain greater judicial control over environmentally harmful activities. At the same time, state and federal legislators began to enact increasingly tighter controls on the exercise of discretion by both government agencies and private industry. By the 1970s, it was clear that legislation, rather than constitutional and other theories of law, would plot the course of environmental protection in our country.

But measures to improve environmental quality are not free from controversy. Some argue that environmental impact assessment and pollution control regulations hold back innovation and are cumbersome and unduly costly to society because they impede economic growth. Others point out that in some instances, like clean air standards, they are based on unsound or inadequate scientific evidence. Environmental activists are seen as hypocrites, not prepared to sacrifice the comforts of a modern society. The values and conflicts underlying the controversy will continue to affect the law throughout the 1980s.

At one level, environmental law appears to be a jumble of statutes and cases dealing with everything from automobile design and bottle deposits to dam and highway construction. But at a much higher level, it presents broad problems of social policy. Competence in this area of law requires a three-pronged approach, to develop (1) substantive knowledge of the law, (2) skill at statutory and judicial interpretation, and (3) a skeptical and independent attitude toward the public policy found in current laws and possible alternatives.

By the nature of its subject matter, environmental law is greatly influenced by ideas drawn from other disciplines, such as biology, engineering, and economics. It must demonstrate a concern for the preservation of the natural world, without being against progress. It must continue to address human problems amid continuing debate over attitudes toward technology, development, resource scarcity, population and the future of mankind.

[1] Environmental Impact Studies and Mitigation of Adverse Effects

Environmentalists emphasize the need to avoid unforeseen detrimental consequences of environmental modification which cancel out any promised gain, or actually create more problems than they solve. The purpose of environmental impact studies is to mitigate these adverse effects.

It is obvious that preservation of natural systems is important, but it is equally apparent that it cannot be the sole concern of policymakers.

Advocates of each perspective will continue to believe the law should be based on one to the exclusion of some or all of the others, but given the pluralism of American society, we can expect environmental law to continue to reflect a complex and uneasy mixture of different, and frequently competing or conflicting, social values.

[2] Economic Perspectives

Environmental law raises economic issues because it alters the way resources are allocated in a society. The classic economic model for the allocation of resources in a free society is market exchange. Through voluntary exchange transactions, scarce resources gravitate toward their most valuable uses because they are acquired by to whom they are most valuable, that is, those willing to pay the most for them. Thus value, defined as human satisfaction measured by aggregate willingness to pay, is maximized. Exchanges take place as long as both parties believe they will benefit. When an equilibrium is reached where no individual can improve his satisfaction without lowering the satisfaction of another, aggregate value is maximized. Since value has reached its highest point, the allocation is what economists call "efficient." This efficiency criterion presupposes the social goal of the maximization of wealth, defined as the market value of a society's capital, labor, and natural resources.

Market exchange as a system of allocation of resources has the advantage of requiring no intervention by government. Environmental law, in contrast, involves some form of government intervention. It is a system of regulation of access to scarce resources.

What is the function of economic analysis in environmental matters? Is it a useful tool? Consider E. F. Schumacher, Small is Beautiful at 40 (1973):

> . . . I am asking what it means, what sort of meaning the method of economics actually produces. And the answer to this question cannot be in doubt: Something is uneconomic when it fails to earn an adequate profit in terms of money. The method of economics does not, and cannot, produce any other meaning. Numerous attempts have been made to obscure this fact, and they have caused a very great deal of confusion; but the fact remains. Society, or a group of individuals within a society, may decide to hang on to an activity or asset for non-economic reasons -- social, aesthetic, moral, or political -- but this does in no way alter its uneconomic character. The judgment of economics, in other words, is an extremely fragmentary judgment; out of the large number of aspects which in real life have to be seen and judged together before a decision can be taken, economics supplies only one --whether a thing yields a money profit to those who undertake it or not.

But can environmentalism not be a tool of responsible resource management? Need it always be an adversary of sound economic management? Is it possible to have a healthy economy in the long term without long-range

efforts to preserve our natural resources? Environmentally protective methods are not always or necessarily inconsistent with economic principles. In many cases, the most economical solution is also the most environmentally benign. The most successful environmentalists are proving to be those who have learned to raise and argue the economic issues.

[3] The Philosophical Framework

To many people, economic approaches to problems of resource allocation seem narrow and overly pragmatic. These people believe the natural world has a value that transcends man's desires and needs. They assert a moral or philosophical responsibility to protect the natural environment. The validity of this position has been a subject of sharp debate. Justice Douglas stated the environmentalist position in his famous dissent in Sierra Club v. Morton, 405 US 727, 741 (1972):

> The critical question of "standing" would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. See Stone, Should Trees Have Standing? -- Toward Legal Rights for Natural Objects, 45 S Cal L Rev 450 (1972). This suit would therefore be more properly labeled as Mineral King v Morton.
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> Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes. The corporation sole -- a creature of ecclesiastical law -- is an acceptable adversary and large fortunes ride on its cases. The ordinary corporation is a "person" for purposes of the adjudicatory processes, whether it represents proprietary, spiritual, aesthetic, or charitable causes.
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> So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes -- fish, aquatic insects, water ouzels, otter, fishes, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water -- whether it be a fisherman, a canoeist, a zoologist, or a logger -- must be able to speak for the values

which the river represents and which are threatened with destruction.

. . .

Mineral King is doubtless like other wonders of the Sierra Nevada such as Tuolumne Meadows and the John Muir Trail. Those who hike it, fish it, hunt it, camp in it, frequent it, or visit it merely to sit in solitude and wonderment are legitimate spokesmen for it, whether they may be few or many. Those who have that intimate relation with the inanimate object about to be injured, polluted, or otherwise despoiled are its legitimate spokesmen.

The voice of the inanimate object, therefore, should not be stilled. That does not mean that the judiciary takes over the managerial functions from the federal agency. It merely means that before these priceless bits of Americana (such as a valley, an alpine meadow, a river, or a lake) are forever lost or are so transformed as to be reduced to the eventual rubble of our urban environment, the voice of the existing beneficiaries of these environmental wonders should be heard.

Perhaps they will not win. Perhaps the bulldozers of "progress" will plow under all the aesthetic wonders of this beautiful land. That is not the present question. The sole question is, who has standing to be heard?

Those who hike the Appalachian Trail into Sunfish Pond, New Jersey, and camp or sleep there, or run the Allagash in Maine, or climb the Guadalupes in West Texas, or who canoe and portage the Quetico Superior in Minnesota, certainly should have standing to defend those natural wonders before courts or agencies, though they live 3,000 miles away. Those who merely are caught up in environmental news of propaganda and flock to defend these waters or areas may be treated differently. That is why these environmental issues should be tendered by the inanimate object itself. Then there will be assurances that all of the forms of life which it represents will stand before the court -- the pileated woodpecker as well as the coyote and bear, the lemmings as well as the trout in the streams. Those inarticulate members of the ecological group cannot speak. But those people who have so frequented the place as to know its values and wonders will be able to speak for the entire ecological community.

Ecology reflects the land ethic; and Aldo Leopold wrote in A Sand County Almanac 204 (1949), "The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land."

This, as I see it, is the issue of "standing" in the present case and controversy.

The other side of the debate is expressed by M. Krieger, "What's Wrong with Plastic Trees?" 179 Science 446, 448, 453 (1973):

> In the past few years, a movement concerned with the preservation and careful use of the natural environment in this country has grown substantially. This ecology movement, as I shall call it, is beginning to have genuine power in governmental decision-making and is becoming a link between certain government agencies and the publics to which they are responsible. The ecology movement should be distinguished from related movements concerned with the conservation and wise use of natural resources. The latter, ascendant in the United States during the first half of this century, were mostly concerned with making sure that natural resources and environments were used in a fashion that resulted in a utilitarian conception of environments and in the adoption of means to partially preserve them -- for example, cost-benefit analysis and policies of multiple use on federal lands.
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> The ecology movement is not necessarily committed to such policies. Noting the spoliation of the environment under the policies of the conservation movement, the ecology movement demands much greater concern about what is done to the environment, independently of how much it may cost. The ecology movement seeks to have man's environment valued in and of itself and thereby prevent its being traded off for the other benefits it offers to man.
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> [But] [w]hat is considered a natural environment depends on the particular culture and society defining it.
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> . . . What a society takes to be a natural environment is one.
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> With some ingenuity, a transformation of our attitudes toward preservation of the environment will take place fairly soon. We will recognize the symbolic and social meanings of environments, not just their economic utility; we will emphasize their historical significance as well as the future generations that will use them.
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> At the same time, we must realize that there are things we may not want to trade at all, except in the sense of letting someone else have his share of the environment also. As

environments become more differentiated, smaller areas will probably be given greater significance, and it may be possible for more groups to have a share.

It is likely that we shall want to apply our technology to the creation of artificial environments. It may be possible to create environments that are evocative of other environments in other times and places. It is possible that, by manipulating memory through the rewriting of history, environments will come to have new meaning. Finally, we may want to create proxy environments by means of substitution and simulation. In order to create substitutes, we must endow new objects with significance by means of advertising and by social practice. Sophistication about differentiation will become very important for appreciating the substitute environments. We may simulate the environment by means of photographs, recordings, models, and perhaps even manipulations in the brain. What we experience in natural environments may actually be more controllable than we imagine. Artificial prairies and wildernesses have been created, and there is no reason to believe that these artificial environments need be unsatisfactory for those who experience them.

Rare environments are relative, can be created, are dependent on our knowledge, and are a function of policy, not only tradition. It seems likely that economic arguments will not be sufficient to preserve environments or to suggest how we can create new ones. Rather, conscious choice about what matters, and then a financial and social investment in an effort to create significant experiences and environments, will become a policy alternative available to use.

What's wrong with plastic trees? My guess is that there is very little wrong with them. Much more can be done with plastic trees and the like to give most people the feeling that they are experiencing nature. We will have to realize that the way in which we experience nature is conditioned by our society --which more and more is seen to be receptive to responsible inventions.

Is the only choice between plastic trees on the one hand and wilderness on the other? What about the value of modified environments? That man (or any other animal, for that matter) will modify his natural environment is inevitable. What matters is that it is done with sensitivity and responsibility.

Few would deny that environmental disruption is a major problem of our generation, affecting us all in our daily lives. Our air, rivers, lakes, and even underground water supplies are fouled. There are overwhelming problems of disposal of hazardous wastes and toxic chemicals. Every type of natural feature of the earth -- forests, swamps, deserts, and even the sea -- have

been damaged by man's activities. Our urban areas are plagued with problems of growth and urban decay.

But all these problems have come about because of human progress and economic development. They are the undesirable side effects of increasing the quality of human life. Most people want government to protect all the good effects, while eliminating as many of the bad effects as is possible. The process is uncontroversial if none of the good effects have to be sacrificed to eliminate any of the bad ones. As this is rarely possible, people begin to argue that some level of environmental disruption must be tolerated in a society as a trade-off for the benefits we want to keep. Controversy arises because there are differences of opinion about what level of environmental disruption we should tolerate. Law and policy makers respond by defining substantive standards, principles, and limits, as well as designing a fair process of decision-making. This is what environmental law is all about.

Understanding that technological developments produce burdens as well as benefits, we must decide how to deal with this fact. Consider the view of D. Landes, "The Unbound Prometheus," at 555 (1969):

> Adam and Eve lost Paradise for having eaten of the fruit of the Tree of Knowledge; but they retained the knowledge. Prometheus was punished, and indeed all of mankind, for Zeus sent Pandora with her box of evils to compensate the advantages of fire. Daedalus lost his son, but he was the founder of a school of sculptors and craftsmen and passed much of his cunning on to posterity. In sum, the myths warn us that the wresting and exploitation of knowledge are perilous acts, but that man must and will know, and once knowing, will not forget.
>
> One can hardly rest a serious prognosis on symbol and legend. Still, there is a certain wisdom in these old tales that has not been disproved by the experience of the last two centuries. The Industrial Revolution and the subsequent marriage of science and technology are the climax of millennia of intellectual advance. They have also been an enormous force for good and evil, and there have been moments when the evil has far outweighed the good. Still, the march of knowledge and technique continues, and with it the social and moral travail. No one can be sure that mankind will survive this painful course, especially in an age when man's knowledge of nature has far outstripped his knowledge of himself. Yet we can be sure that man will take this road and not forsake it; for although he has his fears, he also has eternal hope. This, it will be remembered, was the last item in Pandora's box of gifts.

Environmentalism has been criticized as reflecting the point of view of an elitist middle class in our society. What are the distributional effects of an environmental ethic? Lester C. Thurow, in The Zero Sum Game at 105 (1980) charges: "Environmentalism is not ethical values pitted against economic values. It is thoroughly economic. . . . Environmentalism is the product of

a distribution of income where many individuals find that a 'clean' environment is important to their real standard of living."

There is another view of the problem. Some people think we are in an environmental crisis of global proportions. They argue that the world is in danger of causing environmental disruption that will produce universal famine, economic depression, and societal breakdown.

Opponents argue that there really are not fixed limits to resources -- that scarcity of a good or resource tends to trigger economic adjustments, such as efficient use, conservation, and technological developments, and thus to increase supplies or substitutes.

The theory at the basis of Anglo-American political thought assumes that the personal wants of the individuals in a society should guide the use of the society's resources, that all markets should be competitive, that all participants in the market should be fully informed, and that all valuable assets can be individually owned and managed without violating the competition assumption. If this is accepted, it could be concluded that the best social solution to the problem of allocating society's scarce resources is to limit the role of government to deciding questions of income distribution, providing rules of property and exchange, enforcing competition and ensuring information, and letting the exchange of privately-owned assets take care of the rest.

For the economist, if existing conditions do not permit the operation of the market to maximize the value of capital, labor, and natural resources, "market failure" results. A typical case of market failure is the presence of externalities, which occur whenever the activities of one person affect the welfare of other persons who have no direct means of control over these activities.

Closely related to the problem of externalities is the concept of "public goods." A public good is something supplied jointly to two or more users so it can be enjoyed by one person without diminishing the enjoyment of another. This poses the "free rider" problem, and the market is not able to allocate or provide the good under the traditional efficiency criterion. Examples of public goods include highways, bridges, and many traditional public works projects, as well as reduction in air and water pollution. Because these goods usually cannot be supplied efficiently by the private sector, they are provided often by government.

The public goods problem is frequently related to environmental quality because government attempt to provide public goods usually cause some degree of environmental disruption, and environmental public goods such as national parks and protected wildlife areas may have adverse economic consequences.

How should government go about determining whether and when to supply these goods? What is the solution to what economists call market failure? Can we reduce common property resources to private property units? If not, do alternative solutions necessarily involve some level of government

intervention? Preservation of natural systems obviously is important, but not the sole concern. Government must also consider resource use, conflict resolution between competing user groups, and human health and safety. The question is where to draw the line.

Section 7.2 The National Environmental Policy Act (NEPA) and the Environmental Assessment Process

The early environmental movement in the United States, known generally by the term "conservation," was based primarily on a concern that the large private interests were exploiting resources that were a public heritage, to be used for the long-range benefit of all Americans. Conservationists turned to government to protect this public interest. As a result, many new agencies were formed and given control over particular resources, including soil, water and power, parks, land, and forests.

By the 1960s, however, the public had come to see government as a large and bloated bureaucracy, closely tied to the interests that stood to benefit from its decisions. There was a particular concern about government decision-making affecting the natural environment. Responding to this public perception, Congress passed legislation requiring that the environment be taken into account in certain types of decision-making. The most comprehensive of these laws is the National Environmental Policy Act of 1969 (NEPA). The text of NEPA is included as Appendix 1 hereto.

[1] The Environmental Assessment Procedure

The most significant provision of NEPA is undoubtedly section 102(2)(C), mandating the preparation and use of an environmental impact statement (EIS). The primary purpose of this provision is to force agencies to take environmental factors into consideration when making certain decisions. An EIS must be prepared for all "major federal actions significantly affecting the quality of the human environment."

Each agency is free to develop its own standards and procedures for assessing whether an impact statement must be prepared in a given case. The assessment process results in either a decision to prepare an EIS, or a negative declaration -- that is, a decision that no EIS is required. If the proposed action is similar to one that would normally require an EIS, or if it is without precedent, the agency must make its negative declaration available for public review for 30 days before it can begin the proposed action. 40 CFR section 1501.4 (1981).

An agency may determine at the outset to prepare an EIS. In that case, the assessment process is inapplicable. 40 CFR section 1501.3(a) (1981). But is there a statutory basis for requiring assessment where no EIS is required? Hanly v Kleindienst (Hanly II) involved a decision by the General Services Administration (GSA) to build an office building and a high-rise jail in lower Manhattan. In a prior opinion, Hanly v Mitchell, 460 F2d 640 (2d Cir 1972), cert denied 409 US 990 (1972) (Hanly I), the court determined that environmental effects to be considered included not only air and water

pollution, but also noise, crime, transportation and urban congestion impacts. On remand, GSA prepared an assessment that concluded no EIS was required. The court held this was insufficient:

> Notwithstanding the absence of statutory or administrative provisions on the subject, this Court has already held in Hanly I at 647 that federal agencies must "affirmatively develop a reviewable environmental record . . . even for purposes of a threshold section 102(2)(C) determination." We now go further and hold that before a preliminary or threshold determination of significance is made the responsible agency must give notice to the public of the proposed major federal action and an opportunity to submit relevant facts which might bear upon the agency's threshold decision. We do not suggest that a full-fledged formal hearing must be provided before each such determination is made, although it should be apparent that in many cases such a hearing would be advisable for reasons already indicated. The necessity for a hearing will depend greatly upon the circumstances surrounding the particular proposed action and upon the likelihood that a hearing will be more effective than other methods in developing relevant information and an understanding of the proposed action. The precise procedural steps to be adopted are better left to the agency, which should be in a better position than the court to determine whether solution of the problems faced with respect to a specific major federal action can better be achieved through a hearing or by informal acceptance of relevant data.
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> In view of the Assessment's failure to make findings with respect to the possible existence of a drug maintenance program at the MCC [Metropiitan Correction Center], the increased risk of crime that might result from the operation of the MCC, and the fact that appellants have challenged certain findings of fact, we remand the case for the purpose of requiring GSA to make a further investigation of these issues, with directions to accept from appellants and other concerned citizens such further evidence as they may proffer within a reasonable period, to make supplemental findings with respect to these issues, and to redetermine whether the MCC "significantly affects the quality of the human environment, ..."

The court set out a two-pronged test for the determination of "significantly affects the quality of the human environment." Two relevant factors must be investigated: "(1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from the contribution to existing adverse conditions or uses in the affected area." This two-part test was later codified in the CEQ [Council on Environmental Quality] regulations' definition of "significantly," which

require consideration of both the intensity of impact and the context in which it occurs. 40 CFR section 1508.27 (1981).

[2] Threshold Issues

NEPA is clear in its requirement that an EIS be prepared for "major federal actions significantly affecting the quality of the human environment." The difficulty with the statutory language is that the three elements which define the duty to prepare an impact statement are interdependent.

The Supreme Court has only twice decided issues relating to NEPA's threshold requirements and both involved atypical factual situations. In the absence of "guidance from above," the lower courts have fashioned their own solutions. With several years of experience with NEPA, most federal agencies have established rules to determine which categories of decisions require environmental impact statements, and deciding which actions are major with a significant effect on the human environment has become largely routine. In some cases, however, the application of the statutory test may be troublesome.

An initial question is whether "major" and "significantly" constitute two different tests, or only involve different aspects of the same test. Could an agency or court determine that an action has a significant impact but is not major? "[I]t makes little sense to find a project minor when its effects are significant." F. Anderson, NEPA in the Courts 90 (1973). The regulations of the CEQ agree: "Major reinforces but does not have a meaning independent of significantly." 40 CFR section 1508.18. See also Minnesota Public Interest Research Group v Butz, 498 F2d 1314 (8th Cir 1974), holding any action "significantly affecting" the environment to be "major."

But some courts have read NEPA's language and legislative history to establish two separate thresholds -- one for the "size" of federal actions (in financial terms or physical size) and one for the degree of "significance" or seriousness of environmental effects. See, e.g., Jicarilla Apache Tribe of Indians v Morton, 471 F2d 1275 (9th Cir 1973); Transcontinental Gas Pipeline Corp v Hackensack Meadowlands Development Commission, 464 F2d 1358 (3d Cir 1972), cert denied 409 US 990 (1972).

Other courts have tried to distinguish between the two concepts, only to end up mixing them back together. For example, in Township of Ridley v Blanchette, 421 F Supp 435 (EDPa 1976), the court attempted to explain "major":

> Those cases which have found the existence of major federal action have ordinarily involved highway extensions, large structures which alter the neighborhood, major dams or river projects, and other projects which can generally be characterized as involving sizeable federal funding (over one-half-million dollars, and usually well over one million), large increments of time for the planning and construction stages, the displacement of many people or animals, or the reshaping of large areas of topography.

> In sum, "major" is a term of reasonable connotation, and serves to differentiate between projects which do not involve sufficiently serious effects to justify the costs of completing an impact statement, and those projects with potential effects which appear to offset the costs in time and resources of preparing a statement. . . . Ely v Velde, 451 F2d 1130 (4th Cir 1971) ($775,000 federal grant for construction of a correctional center -- major action); Kigner v Butz, 350 F Supp 310 (NDWVa 1972) (4.3 miles of road in national forest -- major action); Izaak Walton League v Schlesinger, 337 F Supp 287 (DDC 1971) (licensing of nuclear power plant -- major action); Goose Hollow Foothills League v Romney, 334 F Supp 877 (DOr 1971) ($3,000,000 high-rise student dormitory in neighborhood without any other high-rise buildings -- major action).
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> We recognize that there are some factual disputes, particularly concerning the wisdom of the particular choice of location, the anticipated noise levels, and the potential effect of this crossover on property values along Secane Road. However, none of the disputed facts are material with respect to the critical question: Is the project a major one? The crossover involves approximately 375 feet of track which will be used by only four trains daily (of a total of approximately forty-two daily trains that use the Media-West Chester line); moreover, it involves a cost allocation of only $168,973. These undisputed facts, when superimposed against the facts of the cases cited, lead us to conclude that the matter before us does not rise to the level of major federal action.

Can inaction by a federal agency constitute "major federal action" within the meaning of NEPA? In Defenders of the Wildlife v Andrus, 627 F2d 1238, 1243-44 (DC Cir 1980), the court held that the Secretary of the Interior did not need to prepare an EIS when he did not act to prevent the State of Alaska from conducting a wolf hunt on federal land because "if the agency decides not to act, and thus not to present a proposal to act, the agency never reaches the point at which it need prepare an impact statement."

Problems of statutory interpretation have also revolved around the question of what kind of environmental effects are covered by the law. Health effects, alterations in local ecological balance, pollution, disruption of wildlife, destruction of historic buildings, and degradation of scenic beauty are all fairly obvious environmental impacts. They all appear to be the type that, if significant enough, would give rise to the requirement to prepare an EIS, and if inadequately addressed in the EIS, would make it legally deficient. But what kinds of impacts on the "human environment," that is, the environment in which people live and work, are beyond the reach of NEPA? Is there a perfect correlation between what impacts give rise to a duty to prepare an EIS and what impacts must be addressed if an EIS is prepared?

The majority in Hanly II, 471 F2d 823 (2d Cir 1972), expressed its doubt whether "psychological and sociological effects upon neighbors" constitute the type of effects on the human environment that an EIS is intended to analyze, and therefore that can provide the basis for requiring that an EIS be prepared. In Nucleus of Chicago Homeowners Association v Lynn, 372 F Supp 147, 148-49 (NDIll 1973), the court considered a demand for an EIS by a nonprofit group purporting "to prevent the damage to neighborhood communities which will result if low-rent housing for low-income families is placed in working-class and middle-class neighborhoods of Chicago":

> In support of this position, the plaintiffs allege that they are members of the "middle class and/or working class", which emphasizes obedience and respect for lawful authority, has a much lower propensity toward criminal behavior and acts of physical violence, and possesses a high regard for the physical and aesthetic improvement of real and personal property. The plaintiffs further allege that, as a "statistical whole," tenants of public housing possess a higher propensity toward criminal behavior and acts of physical violence, a disregard for the physical and aesthetic maintenance of real and personal property, and a lower commitment to hard work. Therefore, so the plaintiffs insist, the construction of public housing will increase the hazards of criminal acts, physical violence, and aesthetic and economic decline in the immediate vicinity of the sites. The plaintiffs maintain that these factors will have a direct adverse impact upon the physical safety of the plaintiffs residing in close proximity to the sites, together with a direct adverse impact upon the aesthetic and economic quality of their lives.

Both plaintiffs and defendants put expert witnesses on the stand to testify on the behavior of prospective tenants and possible impacts on the environment. The court found that the conclusions of the experts were "difficult, if not impossible, to verify and substantiate," so the court could not find that the prospective low-income tenants would significantly affect the environment. The Court of Appeals agreed, and questioned whether NEPA was intended to cover an "impact" such as "the fears of neighbors of prospective public housing tenants." 524 F2d 225 (7th Cir 1975).

The courts have agreed uniformly that the social characteristics of people are not included within the meaning of "affecting the quality of the human environment." See, e.g., Maryland-National Capital Park & Planning Commission v United States Postal Service, 487 F2d 1029, 1037 (DCCir 1973); Hiram Clark Civic Club, Inc v Romney, 2 ELR 20,362, 20,363 (SDTex 1971), aff'd on other grounds 476 F2d 421 (5th Cir 1973). But if opposition to an action does not simply represent a bias against the poor, and the action has more traditional environmental impacts, an agency may have to weigh sociological, economic, or psychological effects, despite the Second Circuit's statement in Hanly II that they are incapable of measurement, and the Seventh Circuits's doubts in Nucleus whether fears are to be assessed. See Metropolitan Edison

Co v People Against Nuclear Energy, 460 US 766, 103 S Ct 1556 (1983) (psychological harm not an effect under NEPA unless connected to an impact on the physical environment). But cf City of New York v United States Department of Transportation, 715 F2d 732, 751 (2d Cir 1983), interpreting Metropolitan Edison to hold simply and broadly "that fear is not a cognizable environmental impact under NEPA."

In rejecting sociological effects as triggers for the duty to prepare an EIS, it would seem to follow that the courts would hold that the EIS, if prepared, would not have to address such effects. But the CEQ regulations define the "effects" that an EIS must analyze to include economic and social effects. 40 CFR section 1508.8. But see also 40 CFR section 1508.14:

> "Human environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" [section 1508.8].) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

Another aspect of the threshold determination is that the action is "federal." Federal involvement becomes an issue in two situations -- when the federal participation is minimal or ministerial, and when the federal involvement is contemplated but has not yet occurred. In the first case the "federal" requirement merges with the "major" requirement. In these cases, federal action in the form of the grant of a license, permit, loan, contract, insurance, or conveyance is usually enough to trigger the EIS requirement. A block grant with no strings attached for 20 percent of the cost of a state prison medical facility was held to be sufficient federal action in Ely v Velde, 451 F2d 1130 (4th Cir 1971), on remand 356 F Supp 726 (EDVa 1973). On the other hand, in Carolina Action v Simon, 389 F Supp 1244 (MDNC 1974), aff'd per curiam 522 F 2d 295 (4th Cir 1975), where general revenue sharing funds were used for the construction of a city hall and courthouse, there was no federal action. In the second category of cases, the issue is primarily one of timing. In City of Boston v Volpe, 464 F 2d 254 (1st Cir 1972), the court held that a preliminary and tentative allocation of funds was not federal action.

[3] Judicial Review

The field of environmental law has matured together with the development of administrative law since the 1930s. Environmental law is inseparable from administrative law. The primary regulatory statutes are administered by agencies, with courts having only a supervisory role. The key issues are what are the agency's powers, and to what extent may a court intervene?

Environmental decisions are frequently political in nature. They involve the interest of many people, rather than those of one or a small number of private litigants. Given that environmental decisions raise questions of a political nature that are resolved traditionally through the legislative process, is it appropriate for courts to intervene in that process? Can it be argued that courts are without authority to exercise decision-making responsibility over public policy? Does the exercise of such review lead to politicization of the judiciary?

[a] Reviewability

NEPA contains no provision for judicial review. It is not designed primarily to be applied by courts. Its purpose rather is to reform the decision-making processes of federal agencies. Whether a federal cause of action exists against a federal agency can be determined by looking at the Administrative Procedure Act (APA0, apart from any right to sue that a particular statute might grant to enable review of violators. See Abbott Laboratories v Gardner, 387 US 136 (1967). (The text of Chapter 7 of the Administrative Procedure Act -- Judicial Review -- is included as Appendix 2 hereto.) Although the APA is a procedural and, as such, can provide courts no independent source of subject matter jurisdiction, it does permit judicial review of agency actions whenever a complaint is based on a specific statutory mandate and there is no specific provision in the statutory scheme that precludes review.

Section 701 of the APA provides that the action of "each authority of the Government of the United States" is subject to judicial review, except where there is a statutory prohibition on review or where "agency action is committed to agency discretion by law." The legislative history of the APA indicates that the latter is applicable only in those rare instances where "statutes are drawn in such broad terms that in a given case there is no law to apply." Citizens to Preserve Overton Park v Volpe, 401 US 402 (1971), noting S Rep No 752, 79th Cong, 1st Sess, 26 (1945).

[b] Standing

The question whether a particular plaintiff has standing must be distinguished from the question whether the issues raised are within the power of a court to decide. It is possible to imagine a system in which any citizen could bring suit to halt any government action that violated the law. American law, however, has not evolved along this line. Instead, a plaintiff generally must have some specific interest in the controversy. Note that APA section 702 grants judicial review to "a person suffering legal wrong because of agency action" or to one "adversely affected or aggrieved by agency action within the meaning of a relevant statute" (emphasis added). This latter is the most important phrase in terms of standing. It creates "Private Attorneys General."

[c] Sovereign Immunity

Prior to 1976, the doctrine of sovereign immunity posed a potential barrier to judicial review. This doctrine was abrogated by statute. Section 702 of the APA now allows the United States to be named as a defendant in any suit for nonmonetary relief challenging official action. Other statutes, however, may expressly or impliedly bar the action, and equitable restraints on relief against the government are still possible.

[d] Scope of Review

[i] Adequacy of the Environmental Impact Statement

The question once the plaintiff gets past the courthouse door is what type of consideration the court will give his claim. Much of the litigation involving NEPA involves judicial review of the adequacy of an agency's EIS. The standard of judicial review is based on the "without observance of procedure required by law" provision of the Administrative Procedure Act, 5 USC 706(2)(D), but the determination is a pragmatic one, based on considerations of reasonableness and arbitrariness.

Judicial review of agency action is confined normally to the full administrative record before the agency at the time the decision was made, or such portions as the parties to a suit may cite. Additional evidence will not be admitted. The court's review is limited to three questions: (1) whether the action was within the scope of the agency's authority, (2) whether the agency's finding is supported by substantial evidence on the record, and (3) whether the applicable rules were followed. The full administrative record considered to be all the materials and documents directly or indirectly considered by the decision-maker.

Whether a decision is supported by substantial evidence on the record is actually a question of whether the decision had a rational basis. In deciding this question, a reviewing court must determine what facts were before the agency at the time it acted, and whether the basis for the action is clearly set forth in the record.

As a rule, a court is not authorized to weigh the evidence or to make its own independent determination of the facts. The traditional notion is that a court may not set aside an agency action which is based on the exercise of the agency's accumulated experience, merely because, with the court trying the matter anew, it might reach a different result. But courts can examine the weight of evidence where constitutional rights of liberty or property are involved. If, therefore, question is whether there was a "taking," the weight of the evidence is subject to judicial scrutiny.

It has been uniformly the view that a court may not concern itself with the wisdom of an agency's action. The reviewing court need not agree that an agency's choice is optimal or even preferable, so long as it is rational and has support in the record. The court cannot reverse a decision just because it thinks it was unwise. It need only be reasonable, not correct. This, of

course, raises the question whether an action that was unwise, incorrect, and not preferable can ever be reasonable.

Absent exceptional circumstances, courts will not consider contentions not presented before the administrative proceedings at the appropriate time. Ordinarily, this means not for the first time at judicial review. The rule is that review is restricted to the record certified by the agency, unless it can be shown that the agency relied on materials or evidence not included in the record.

If the court goes outside the record, it can only consider such evidence for background information or for the limited purpose of determining whether the agency considered all significant facts, considered those which were not significant, or fully explained its conduct. Plaintiffs experts may not testify as to the credibility or weight that should have been given to an agency's evidence. They may only testify as to the adequacy of the methods or procedures by which agency's facts were found. And even if a plaintiff can prove that the agency made a mistake, he is subject to the rule of prejudicial error, i.e., that the mistake must be material to the agency's ultimate finding.

In Nance v Environmental Protection Agency, 645 F2d 701, 717 (9th Cir), cert denied 454 US 1081 (1981), a Clean Air Act case, the court said: "The administrative process cannot provide for the constant reopening of the record to consider new facts [citing Vermont Yankee at 555], and it is for the agency, not this court to determine when such reopening is appropriate, unless the failure to reconsider can be characterized an abuse of discretion." As long as sufficient evidence exists that a reasonable mind might accept, the court must uphold the agency on the basis of the record. But the agency must consider all significant facts in order to be reasonable. The question for the court to decide is whether it was rational at the time the finding was made for the agency to decide without the additional facts.

[11] Adequacy of the Environmental Assessment

In the early years of NEPA, several of the circuit courts held that an agency must provide a reviewable environmental document supportive of a decision not to file an impact statement. See, e.g., Hanly v Mitchell, 460 F2d 640 (2d Cir), cert denied 409 US 990 (1972),and Hanly v Kleindienst, 471 F2d 823 (2d Cir 1972); First National Bank of Chicago v Richardson, 484 F2d 1369, 1381 (7th Cir 1973); Scientists' Institute for Public Information v AEC, 481 F2d 1079, 1094-95 (DC Cir 1973). The practice quickly spread among federal agencies. In 1978, the CEQ regulations made written environmental assessments (EA's) and "findings of no significant impact" (FONSI's) a mandatory requirement for all. Today, the odds are greater that a lawyer will be dealing with an EA and FONSI, or with a situation where an EA has not even been prepared, than with the adequacy of an EIS.

The rule that review of agency action is restricted to the record certified by the agency applies not only to formal proceedings with an evidentiary record, but also to informal adjudications on a nonevidentiary

record. The principles for assessing the adequacy of an EA are for the most part the same as those for an EIS, and cases interpreting the NEPA duties for one are freely transferable to the other. Courts, however, may be more likely to find an EA to be inadequate than an EIS. In the case of the EIS, the agency has at least gone through the procedure with a great deal of public involvement. In the case of an EA, not much has been done.

Agencies are permitted to establish by regulation "categorical exclusions" from any requirement for an EIS or an EA where actions can be said generally not to have significant impacts. Such categorical exclusions are themselves, however, subject to judicial review. See, e.g., Alaska Survival v Weeks, 12 ELR 20,949 (DAlaska 1982).

Even though the courts agree that the same principles that apply to an agency's failure to prepare an EIS apply to judicial review if the agency does prepare an EIS, there is some disagreement among the circuits as to the appropriate scope of review. There is also some disagreement among U. S. Supreme Court cases. It can be said fairly that a great deal depends on the predelictions of the judges before whom the case is heard and the exact factual setting presented to the court.

[4] Substantive Effect

Does an impact statement's disclosure of serious adverse environmental impacts have any effect on an agency's substantive decision whether to proceed with a project? The U. S. Supreme Court has determined conclusively that the environmental impact statement requirement of NEPA does not impose substantive duties. In Stryker's Bay Neighborhood Council Inc.,v Karlen, 444 US 223 (1980), a litigation challenging the location of a subsidized housing project on Manhattan's West Side, the Court held that the only role for a court is to determine whether the federal agency has properly considered the environmental consequences of its action. The Court's decision was foreshadowed in Vermont Yankee, 435 US 519 (1978).

What is the difference between substance and procedure? The difference is between finding the explanation for an action inadequate and finding the action itself unacceptable. To what extent, if any, can courts still use NEPA to overrule the merits of a particular agency decision? This is the essence of substantive judicial review of agency action.

The beginning of an answer cab found in a dictum in Calvert Cliffs' Coordinating Committee v Atomic Energy Comm'n, 449 F2d 1109 (DC Cir 1979), that "the reviewing courts probably cannot reverse a substantive decision on its merits under section 101, unless it can be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values." This provided a "foot in the door" for substantive review, and the courts have had a hard time reconciling it with the traditional administrative law principle that a court cannot substitute its judgment for that of an agency.

The resolution to this was that several of the Courts of Appeal held that substantive review was available under NEPA, but only under the relaxed standard of review which inquires whether the agency's conclusion was "arbitrary and capricious" (section 706(2)(A) of the Administrative Procedure Act), rather than under the stringent standard which asks whether the agency acted "without observance of procedure required by law" (section 706(2)(D) of the Administrative Procedure Act).

Footnote 2 of the Stryker's Bay decision seems to support this resolution: "If we could agree . . . that HUD had acted arbitrarily . . . , we might also agree that plenary review is warranted. . . ." The error the Court found in Stryker's Bay was not that the Court of Appeals conducted any substantive review at all, but that it sought to "elevate" environmental concerns over other considerations.

It should be noted that the distinction between substantive and procedural aspects of NEPA are somewhat artificial. In fact, the procedural requirements tend to merge with the substantive goals. A law with "substantive" requirements could express those standards in terms so vague that a permanent injunction against an agency would be unlikely. And can a law with mere "procedural" standards be interpreted so strictly that an agency would be obliged, in practical terms, to avoid certain actions because of the political consequences of proceeding in the face of fully disclosed adverse environmental impacts?

An adequate EIS removes much of the expense of fact-gathering and analysis for outside litigants and may bring to light environmental effects that would be otherwise ignored. These facts then can be used effectively in tandem with other statutes that do contain clearly substantive mandates.

When Congress passed NEPA, it was intended to be a means of improving the environmental assessment procedures of federal agencies. It imposes environmental responsibilities on all federal agencies. As federal legislation, it in no way affects state and local planning and land development controls. But the broad sweep of the EIS procedures covers a wide variety of land development projects by federal agencies and by federal developers receiving federal subsidies and mortgage guarantees.

Section 7.3 The New York State Environmental Quality Review Act (SEQRA)

[1] Scope of the Act

New York's State Environmental Quality Review Act (SEQRA), article 8 of the Environmental Conservation Law, was enacted into law in 1975 and following phased implementation, became fully effective in 1978. The text of SEQRA is included as Appendix 3 hereto. The language of section 8-0101 of SEQRA, declaring the purpose of the Act to "promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources," is taken largely from the declaration of purpose in NEPA, section 2.

SEQRA, similarly to NEPA, requires all state and local government agencies to give due consideration to environmental factors before reaching decisions. But the range of SEQRA is much more far-reaching than NEPA. Unlike NEPA which applies only to administrative agencies, SEQRA also applies, with some exceptions, to legislative bodies. Also unlike NEPA, SEQRA contains both procedural and substantive requirements. Procedurally, it requires that state and local government agencies assess environmental impacts and, when threshold tests have been met, prepare environmental impact statements. The EIS requirement was derived from section 102 of NEPA. Substantively, SEQRA requires that agencies "act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effect. . . ." Section 8-0109.1. This is beyond the scope of the federal Act.

SEQRA's section 8-0103 states legislative findings and declarations. Most important to practitioners are subdivision 9's clear expression of legislative intent that agencies give "due consideration . . ." to "preventing environmental damage," and subdivision 6's mandate "that to the fullest extent possible the policies, statutes, regulations, and ordinances of the state and its political subdivisions . . . be interpreted and administered in accordance with the policies set forth in this article." Taken together with the action-forcing language of section 8-0109.1, these provisions do not merely, like NEPA, require agencies of government to consider alternatives and prepare impact statements. See, e.g., Stryker's Bay Neighborhood Council, Inc v Karlen, 444 US 223 (1980), and Vermont Yankee Nuclear Power Corp v Natural Resources Defense Council, Inc, 435 US 519 (1978). Cf with Town of Henrietta v Department of Environmental Conservation, 76 AD2d 215, 430 NYS2d 440 (4th Dept 1980),in which the court required that SEQRA be given a "broad construction," and that the EIS be seen "not as a mere disclosure statement."

The most essential part of the SEQRA process is the analysis of alternatives, including the "no action alternative" (see section 617.14(f)(5) of the DEC regulations). Without this analysis, an agency's decision is vulnerable to attack by opponents of the proposed action. Although agencies have an affirmative obligation to select, from among the range of alternatives, that which minimizes or avoids adverse environmental effects, the statute subjects this obligation to two constraints. First, the alternative selected must be "consistent with social, economic and other essential considerations." A needed public facility will not be foregone simply because it will result in some environmental damage. Second, the alternative chosen need only minimize or avoid adverse environmental effects "to the maximum extent practicable." Agencies are not permitted to be blind to the environmental implications of their decision, but they need not be environmental zealots. They need not minimize or avoid all adverse environmental impacts, only those which are not justified by the proposed action's social, economic, and other essential considerations. The practicability constraint can be read fairly to impose a rule of reason into the decision-making process.

The substantive whole of SEQRA therefore requires that agencies address the issues raised in the EIS, including consideration of alternatives to the

proposed action; choose the least environmentally damaging alternative if, after balancing, competing essential interests do not clearly outweigh the adverse effects of a more damaging alternative; take all practicable measures to reduce or eliminate the adverse environmental consequences of whichever alternative is chosen; and file a written statement of the analysis and judgments forming the basis for the decision.

In practical terms, this means an agency must deny approval of a proposal if adverse environmental impacts disclosed in the EIS cannot be mitigated and the agency cannot find that the social, economic, or other essential benefits of the project outweigh the environmental damage. If the adverse environmental consequences can be mitigated, the agency must impose conditions on the project to eliminate them, even if the conditions relate to environmental consequences not within the purview of the agency's immediate jurisdiction.

[2] The Implementing Regulations

The New York Department of Environmental Conservation (DEC) has issued implementing regulations, 6 NYCRR Part 617, which furnish guidelines as to when an EIS is needed, and set out criteria for determining significance. These regulations are binding on all state and local agencies unless they adopt their own regulations, at least equally protective of the environment (see SEQRA sections 8-0113.3(a) and 8-0117.5, and regulations section 617.4). The DEC regulations, Part 617, are included as Appendix 4 hereto.

[3] The Assessment Process

As early as possible, an agency having responsibility for carrying out or approving a project or activity must determine whether an EIS should be prepared. If the agency determines that the proposed activity may have a significant effect on the environment, either the agency or the applicant, at the applicant's option, must prepare a draft EIS, or the review of the project must be terminated. If the draft EIS is accepted by the agency as satisfactory with respect to scope, content, and adequacy, it is then circulated to the DEC, other interested agencies, and interested members of the public. After allowing a period for receipt of comments, the agency must prepare a final EIS and circulate it in the same manner as the draft EIS, or determine that based on the draft EIS, a final EIS is not required. Finally, upon approval of the activity, the agency must make explicit findings that the requirements of SEQRA have been met and that any adverse environmental effects revealed by the EIS will be minimized or avoided to the maximum extent practicable.

[a] Exemptions and Exclusions

The first step in the environmental assessment process is to decide whether SEQRA applies to the proposed activity. Enforcement and criminal proceedings, ministerial acts which involve no exercise of discretion, maintenance or repair activities, emergency actions, and acts of the state legislature or decisions of the courts are exempt from SEQRA under section 8-

0105.5. Section 8-0111.5 excludes from the duty to prepare an EIS certain actions commenced prior to the statute's effective date, power plant and transmission line siting proceedings under the Public Service Law, and decisions involving Class A and Class B regional projects under the Adirondack Park Act. It should be noted, however, that the excluded actions are excluded only from the requirement of section 8-0109.2 to prepare an EIS, not from SEQRA itself. Thus, the duty to minimize environmental impacts (section 8-0109.1) and other responsibilities under the statute very much apply in these cases.

The decision to exclude the siting proceedings and the Adirondack Park projects was made in recognition of the nature of those actions. Proceedings under Public Service Law article 8 (for major steam electric generating plants) and Public Service Law article 7 (for major utility transmission lines) involve a determination as to the environmental compatibility and public need for the facilities, made on the basis of evidentiary hearings, and only after consideration of factors similar to those which the EIS process examines. Similarly, the Adirondack Park Act mandates environmental review by the Adirondack Park Agency of local land use programs and Class A and Class B regional projects over a threshold size. But see County of Franklin v Connelie, 68 AD2d 1000, 415 NYS2d 110 (3d Dept 1979), where approval of a state agency project to construct a state police building under Executive Law section 814 was held to be excluded, even though SEQRA section 8-0111.5(c) specifically excludes only actions under Executive Law "section eight hundred seven, eight hundred eight or eight hundred nine," not the sort of action involved in County of Franklin.

[b] The Regulatory Classification Scheme

If an activity is not exempt from SEQRA or excluded from the duty to prepare an EIS, it is categorized in the SEQRA regulations as a Type I, a Type II, or an "unlisted" action. SEQRA section 8-113.2(b) required the DEC to establish criteria to identify environmentally significant actions and to identify, on the basis of those criteria, specific actions which are likely to require impact statements and others which definitely will not require them.

Based on the established criteria (section 617.11 of the regulations promulgated by the DEC), Type I actions, listed in section 617.12 have been identified by DEC as likely to require the preparation of an EIS. This list includes such activities as the adoption of land use plans or zoning regulations, major rezoning requests by developers, construction of specified numbers of residential projects in different types of municipalities, and many major nonresidential projects. Agencies may expand, but not diminish, the Type I list.

Type II actions, listed in section 617.13, never require an EIS. This list includes in-kind replacements of facilities, individual set-back and lot-line variances, and construction of accessory facilities such as garages, swimming pools, and barns. There are no procedural requirements applicable to Type II activities. Agencies may expand the Type II list, but they may not include actions which may have a significant effect on the environment.

Type I and Type II actions represent only a very small percentage of the actions possible for government to undertake or approve. All those that fall in between are known as "unlisted" actions. Agencies must make their own determination of the significance of unlisted actions by reference to the section 617.11 criteria. The procedures applicable to unlisted actions are much briefer and simpler than those applicable to Type I actions. The vast majority of unlisted actions do not require any environmental review under SEQRA beyond a simple determination of nonsignificance, known as a "negative declaration."

[4] The Environmental Impact Statement

[a] When Is an EIS Required?

While NEPA mandates that an EIS be prepared for "major federal actions significantly affecting the quality of the human environment," SEQRA is, in contrast, broader in its terms, requiring an EIS for "any action [agencies] propose or approve which may have a significant effect on the environment." section 8-0109.2 (emphasis added). Section 8-0105 of SEQRA contains definitions to govern the construction of certain terms as they are used in the Act. The definitions of "state agency" and "local agency" in subdivisions 1 and 2 are broad and inclusive. They reveal the clear intent of the legislature to encompass every governmental entity, including those historically immune from public disclosure of their activities. The statute likewise contains broad definitions of "environment" in subdivision 6, and "actions" in subdivision 4. The statute does not, however, contain any definition of a "significant effect."

Because of differences in the statutes, NEPA jurisprudence is not directly applicable to SEQRA in determining when an EIS is required. The New York courts have described the SEQRA standard as a "low threshold." See, e.g., Onondaga Landfill Systems, Inc. v Flacke, 81 AD2d 1022, 440 NYS2d 788 (4th Dept 1981). In HOMES, 69 AD2d 222, 418 NYS2d 827 (4th Dept 1979), the leading case in this area, the court concluded that a negative declaration under SEQRA can be affirmed only where the record shows that an agency has (1) identified areas of possible environmental concern, (2) taken a "hard look" at such areas, and (3) made a reasoned elaboration of the rationale for the declaration of nonsignificance. This three-part test has been applied in a wide variety of settings by the courts. See, e.g., Niagara Recycling, Inc v Town of Niagara, 83 AD2d 335, 443 NYS2d 951 (4th Dept 1981), aff'd mem 56 NY2d 859, 453 NYS2d 427, 438 NE2d 1142 (1982) (local landfill law); Town of Yorktown v New York State Department of Mental Hygiene, 59 NY2d 999, 466 NYS2d 965, 453 NE2d 1254, affirming 92 AD2d 897, 459 NYS2d 891, (2d Dept 1983) (approval to operate substance abuse program); Tehan v Scrivani, 97 AD2d 769, 468 NYS2d 402 (2d Dept 1983) (subdivision approval); Save the Pine Bush v Planning Board of the City of Albany, 96 AD2d 986, 466 NYS2d 828 (3d Dept 1983) (plat approval); Cohalan v Carey, 88 AD2d 77, 452 NYS2d 639 (2d Dept 1982), appeal dismissed 57 NY2d 672, 452 NYS2d 77, 439 NE2d 886 (prison conversion); Soule v Town of Colonie, 95 AD2d 979, 464 NYS2d 576 (3d Dept 1983) (construction of a municipal sports stadium).

Conversion of an existing structure to different and arguably environmentally more adverse purposes has been held not necessarily to require an EIS. In the leading case in this area, Cohalan v Carey, 88 AD2d 77, 452 NYS2d 639 (2d Dept 1982), appeal dismissed 57 NY2d 672, 452 NYS2d 77, 439 NE2d 886, no EIS was required for conversion of state psychiatric hospital buildings to a prison. The test is whether the agency acted reasonably in reaching its decision, and the court found that it had, holding that socio-economic impact and fear in nearby communities alone did not require an EIS.

It is clear, however, that the socio-economic impacts included in SEQRA's definition of "environment" (i.e, population patterns and existing community character) can require preparation of an EIS. These impacts are listed in the implementing regulations as criteria for determining environmental significance. It has been argued widely that impacts that are purely socio-economic and that have no direct effect on the physical environment are not capable of triggering an EIS. The New York courts have held that socio-economic factors not impacting the environment, standing alone, are not within the zone of interests protected by SEQRA. See the section entitled "Standing to Sue," infra.

Subdivision 2 of section 8-0109 states that action triggering an EIS occurs when agencies "propose or approve" a project or activity. This includes actions actually undertaken by an agency, approvals in the form of state or municipal permits, and actions funded by government, as in the HOMES case. The Court of Appeals has held that the "environmental impact statement mandated by SEQRA section 8-0109 must be prepared and made available to the public before 'any significant authorization is granted for a specific proposal.'" Programming & Systems v New York State Urban Development Corp, 61 NY2d 738, 739, 472 NYS2d 912 (1984), citing Matter of Tri-County Taxpayers Assn v Town Board, 55 NY2d 41, 47, 447 NYS2d 699, 432 NE2d 592.

[b] Preparing the Statement

Under SEQRA section 8-0109.4, a private applicant may, at its option, prepare the draft EIS. If the applicant does not exercise this option, the agency must prepare the statement itself, contract for its preparation, or terminate the review of the project. In cases where the applicant elects not to prepare the draft statement, the DEC regulations, section 617.17, authorize agencies to charge the applicant a fee to recover the actual cost of its preparation. The regulations also establish an appeal procedure to deal with disputes concerning the amount of the fee.

It should be noted, however, that while an applicant may write the draft EIS, SEQRA section 8-0109.3 explicitly provides that "[n]otwithstanding any use of outside resources or work, agencies shall make their own independent judgment of the scope, content and adequacy of environmental impact statements."

[c] The Public Hearing

The SEQRA process is a uniquely democratic one. It provides extensive opportunity for public participation in the development of an EIS. In regard to activities to which it applies, it requires government to prepare a documented record upon which to base its decisions and make such record readily available to the public.

After a draft EIS is filed, an agency must determine whether to conduct a public hearing on the environmental impact of the proposed action (SEQRA section 8-0109.5). The regulations, section 617.8(d), provide: "In determining whether to conduct a public hearing, the lead agency shall consider the degree of interest shown by other persons in the action, and the extent to which a public hearing can aid the agency decision-making processes by providing a forum for, or an efficient mechanism for the collection of, public comment."

It has been alleged widely, however, that civic organizations, neighborhood associations, and similar groups, under the banner of forestalling environmental degradation, are using SEQRA as a delay tactic to achieve project default by escalating costs associated with administrative review, planning, engineering, and construction. Critics of these tactics fear that what they see as an abuse of the SEQRA process for short-term selfish motives may drain SEQRA of its intended effectiveness to the communities it is intended to benefit. The following description by Sidney Manes, entitled "Alice in the Wonderland of SEQR," appeared in the New York State Bar Journal at 115, February 1980:

> "The time has come the walrus said to talk of many things . . ." [Lewis Carroll, Alice in Wonderland.]
>
> I have been practicing law for almost 25 years. I have had extensive trial work. I have had extensive arbitration hearings. I have negotiated labor contracts. I have participated in grievance proceedings. I have practiced in the Federal Courts. I have appeared before immigration and naturalization boards. And nothing that I have done over the last 25 years prepared me for the surprises incurred in an extensive hearing under SEQR. [Environmental Conservation Law, Article 8.] Or should I say the Uniform Procedures Act? [Environmental Conservation Law, Article 70] Or a Permit Application Proceeding under the Environmental Conservation Law Article 27, Part 360.
>
> I offer this article to those who may be about to embark on hearings of this nature. Hearings in which the public is invited to participate in the decision making process, the hallmark of SEQR. I have never before felt myself to be so vulnerable and exposed on behalf of a client. It so much reminded me of the story of the king who was made to believe his clothes were of such fine cloth that he was convinced he was

wearing clothes of a magnificent nature. In fact, a child's observation, showed that he was naked. My client, in these proceedings, exposed his jugular vein and I had all I could do to keep him from bleeding to death.

It all started when my client made application for a permit to operate a sanitary landfill under Article 27 of the Environmental Conservation Law (ECL). His first permit was rejected as he was already operating an existing facility and though he made application for modification, it was suggested by the Department of Environmental Conservation (DEC) that his application be submitted on a form for Approval to Construct a Solid Waste Management Facility (as if none existed). He completed the second form and was advised by letter, very clearly, that the project would have a "significant effect on the environment," DEC would be a Lead Agency and that a Draft Environmental Impact Statement would be required, together with certain engineering plans.

A three page attachment of suggestions was proposed by DEC of matters to be covered in the DEIS and engineering plans. It was suggested also by DEC that a "SpDES" [state pollutant discharge elimination system] permit application also be made so that all permit requests in connection with the project could be considered at one time.

Subsequently, we received our letter from DEC wherein the application was deemed complete for purposes of commencing review of the permit application. We were instructed to proceed with public notices for a hearing. It would be the responsibility of my client to pay for the hearing hall as well as the stenographic expenses. And with that, my client was asked to post a $5,000.00 check. We did so! It was at the hearing that the fun began.

I had anticipated and in reading SEQR and its intent, thought, that the DEC was my partner. I assumed that we were working together. I believed our objectives were the same. After all, we were not in an "adversary" situation. We had made a "full and complete disclosure", in our DEIS. We had taken into account the adverse impacts, alternatives, mitigating measures. We hid nothing. We were naked! What I did not realize is that the DEC was sitting back telling me that our application and its attachments were complete, the DEC had even made suggestions, and that we were now going before the public to explain our application and to obtain their input and consent. I even suggested at the start of the hearing that it might be appropriate that the DEC join me at one table. Let me state unequivocally, without hesitation, and based upon actual experience, my brethren of the bar, that you, in a hearing of

this nature are engaged in an adversary proceeding. A matter of life and death!

You as the applicant's attorney have the burden of proof. Objectivity be damned! The DEC is not your partner, they are your adversaries. It was clear from the opening statement we were sitting ducks. The hearing officer is also of the DEC and the public is your greatest challenge. The Lead Agency has had our DEIS, engineering plans and our site plans for 60 days. It (the Lead Agency) has opportunity of review, inspection, reinspection, sampling, observations and the availability of all other departments within the DEC with their expertise at their disposal. The title of these proceedings should be the People of the State of New York v Applicant. That might at least give you some indication of things to come.

I would urge that upon the receipt of your letter of completeness, which does not mean what it says, that you prepare a Demand for a Bill of Particulars as to items which may not have satisfied the DEC. It is a Quasi-Legal proceeding. It might even be to your advantage to have a discovery proceeding or an examination before the hearing (trial) of the Lead Agency as to any adverse comments or positions which might place you in a better position to prepare your client and/or your experts and disciplines.

These proceedings fall under the Uniform Procedures Act as to the conduct of the hearings. They are Quasi-Legal. Motions may be made and argued. Do not be lulled into a false sense of security that a hearing of this nature, either under SEQR or the Uniform Procedures Act and/or Part 360, is in effect a proceeding wherein constructiveness will be the rule and there will be a discovery of new material. The cross-examination of witnesses was not to elicit more information but to challenge the professionalism of the disciplines. My assumption that this was, in fact, a DRAFT EIS and that the FINAL EIS, was not complete until after the hearing and was based upon additional information collected at the hearing, was one of complete and total surprise. (Let others not be naive) I kept having to remind the DEC attorneys that all of the documentation as submitted for examination was to be expanded upon at the hearing and not to be belittled; nor were the disciplines to be attacked, as if in a Court of Law.

It was interesting to note that many have indicated this was not an adversary proceeding, the demeanor of the attorneys for the DEC; and the public and the total atmosphere of the hearing became one of all of them against the applicant. As a protective measure if nothing else, the disciplines reacted by assuming a role of being antagonistic both to the attorney for the DEC and to the public. Were it not for the hearing officer

intervening, I am sure that chaos would have reigned supreme. The intent of SEQR did not take into account, basic human behavior.

I think it is incumbent upon DEC to supply the applicant with a Statement of Objection to the Permit to afford the applicant the knowledge of what to prepare for in his presentation; not to afford the applicant insight into what would satisfy the DEC raises questions of suspicion and I am afraid defeats the purpose of SEQR in its preamble of progress with reason. This is a discovery proceeding and discovery is as much an obligation of the DEC as it is the applicant's. I recognize that there is but one hearing to be held for all permits. SEQR does, in fact, spell out its own requirements of what should appear in the Draft Environmental Impact Statement but it would be nice to know whether or not SEQR is "the" controlling document. That may sound strange in some respects but I would like to know the umbrella under which to operate. [Is it] the permit procedure or the SEQR procedure? There has been a determination by the Lead Agency that the project will have significant environmental affect. If SEQR controls that may tend to calm down the DEC and eliminate some of their stings. SEQR seems to have a more cooperative tone. Where the permit application hearings control, the rules are so absolute that it makes progress with reason almost impossible. One cannot operate in a vacuum. No, I'm confused. We came to a hearing on an application for a permit. We complied with SEQR and Part 617 and Article 70, Part 621 and were nailed to the wall in trying to comply with ECL 27 Part 360. We acknowledged our problems and had our noses rubbed in it.

I think it is also incumbent upon the public to participate in a constructive manner, in these hearings. I was assured time and time again by the hearing officer that the statements by the public would be accepted for what they were worth; that this picture would be accepted for what it was worth and given the appropriate weight; that this document would be reviewed and given the appropriate weight; and that letter would be accepted with blatant exaggerations but would be given the appropriate weight; and where cross-examination was limited by sensitivity to public outcry. But don't worry! The hearing officer will give it the appropriate weight. Well, lay people or not; discovery or no; for the hearing; for the Draft Environmental Impact Statement; for the Engineering Plans; for the site plans; for the stenographic expenses; for witnesses; and paying the state to beat our brains out, it cost my client over $35,000.00. something tells me that progress with reason is an expensive proposition.

Another area of difficulty was that had the DEC participated in the "<u>intent</u>" of these proceedings and I mean all

of the proceedings would have provided my client with sufficient information to, in effect, conform his pleadings (permit) to the proof as in the CPLR so that modifications and exemptions in granting the permit could be handled on the basis of new material discussed and elaborated upon at the time of the hearing. I was prepared for the hearing. My witnesses all testified to their objectivity. I was taken back by the overkill attitude of the DEC and the alliance between the DEC and the public. Both positions should have been more constructive.

I would like to avoid an Article 78 proceeding by having it brought home clearly that we are engaged in a new process. I was compelled by law to participate in a forthright and open manner. I would expect the same from every other participant at the hearing.

I think an opening statement by the Hearing Officer as to the nature of these proceedings; creating a constructive attitude and partnership of the applicant, the public and the DEC, is mandatory, that <u>all</u> will mitigate and find alternatives to damage which may be imaginary or real in connection with the project. This I think is basic to the concept of SEQR. This I think is basic to the interests best served by these proceedings. I have other hearings coming up. I shall be prepared. I shall not discourage my client from full disclosure. I will not discourage my witnesses from being as candid as they can and from being as polite to the public as they can. But I shall insist that DEC participate in a meaningful way in the future. Any exposure of my client's jugular vein, will be after I have taken the razor out of DEC's hands.

In closing, let me say that you as the attorney for the applicant have the right to prepare a summation and be the last to be heard (except for the Hearing Officer who always seems to have the last word). Be prepared to spell out your client's position and to convey to the Hearing Officer on the record that you came to afford the public its opportunity to participate in the decision making process but that the decision may be to grant the permit with safeguards, modification, limitations and controls all within DEC's power, but to be very careful not to throw the baby out with the bathwater. I hope to have helped in the process.

"But it is certain that man has reacted upon organized and inorganic nature, and thereby modified . . . the material structure of his earthly home. . . ." [George Perkins, The Earth as Modified by Human Action (1874).]

[d] Adequacy

In contrast to the situation regarding when an EIS is required, the NEPA case law is directly applicable to SEQRA in determining the adequacy of the contents of a statement. With minor exceptions, SEQRA's requirements mirror the requirements of NEPA. A thorough analysis of questions raised by challenges to the adequacy of an EIS under SEQRA is set out in Webster Associates v Town of Webster, 112 Misc2d 396, 447 NYS2d 401 (Sup Ct Monroe Co), aff'd 85 AD2d 882, 446 NYS2d 955 (4th Dept 1981), rev'd on other grounds, 59 NY2d 220, 464 NYS2d 431 (1983).

The rule of reason approach set forth in Webster has been adopted by the Court of Appeals in Coalition Against Lincoln West v City of New York, 60 NY2d 805 (1983), aff'g 94 AD2d 483 (1st Dept 1983). See also Environmental Defense Fund, Inc v Flacke, 96 AD2d 862 (2d Dept 1983).

Another important adequacy issue is whether the procedural requirements of SEQRA will be strictly enforced, or whether courts will sanction procedures which are substantially equivalent to the SEQRA process. The courts have uniformly followed the lead of the Second Department in the case of Rye Town/King Civic Ass's v Town of Rye, 82 AD2d 474 (2d Dept 1981), and have declared void actions taken in violation of the procedural mandates of SEQRA. See, e.g., Tri-County Taxpayers Assn, Inc v Queensbury, infra; Devitt v Heimbach, 58 NY2d 925, 460 NYS2d 512, 447 NE2d 59 (1983); Schenectady Chemicals, Inc v Flacke, 83 AD2d 460, 446 NYS2d 418 (3d Dept 1981); City of Glens Falls v Board of Education, 88 AD2d 233, 453 NYS2d 891 (3d Dept 1982); Bender v Village of Fayetteville, 91 AD2d 1171, 460 NYS2d 1022 (4th Dept 1983).

A limited exception to this strict standard may be indicated by the Court of Appeals in its recent endorsement of "emergency action" which permitted limited activities to be undertaken prior to commencement and completion of the SEQRA process. In Board of Visitors - Marcy Psychiatric Center v Coughlin, 60 NY2d 14, 466 NYS2d 668, 453 NE2d 1085 (1983), the court took judicial notice of a critical shortage of correctional facilities in the state and gave great deference to the State's conclusion that an emergency existed. It is unlikely, however, that the court will permit an expansive use of the "emergency" theory.

[5] Actions Involving More Than One Agency

SEQRA section 8-0111.3 requires state and local agencies to coordinate their compliance with SEQRA. This provision must be read together with section 8-0111.6, dealing with lead agencies. For example, a development may require a town zoning change as well as one or more permits from the Department of Environmental Conservation. The agencies must agree which will be the lead agency, responsible for making the environmental assessment and, if necessary, preparing the EIS. Which agency becomes the lead agency can be a vital issue to the practitioner because that agency "calls the tune to which the others must dance." By agreeing to the designation of the lead agency, the other agencies automatically delegate to the lead agency the power to

determine the significance of an action. Thus, the lead agency's determination is binding on all the others.

Section 8-0111.4 provides that the decision shall be made as early in the process as possible. The DEC regulations (section 617.6[d]) provide that in Type I actions, the lead agency should be agreed to among those involved on the basis of whether the impacts are chiefly local, regional, or statewide, and which agency can best investigate and assess those impacts. If the agencies cannot agree, the DEC may select one, using the same criteria (section 617.6[e]).

In unlisted actions, each individual agency may independently assess environmental impact. An agency may decide to become the lead agency and remain so if no other objects. Objections are dealt with as in a Type I action (section 617.7).

In Town of Poughkeepsie v Flacke, 105 Misc2d 149, 151-52, 431 NYS2d 951, 953 (Sup Ct, Dutchess Co, 1981), aff'd 84 AD2d 1, 445 NYS2d 233 (2d Dept), the court underscored the absence of any intent in SEQRA to change jurisdiction between agencies:

> The State Environmental Quality Review Act . . . does not change jurisdiction between or among State or local agencies. Even though SEQRA mandates agencies to avoid or minimize adverse environmental impacts before approving a project, agencies must recognize jurisdictional claims and defer when an impact revealed in the EIS relates directly to a specific jurisdiction claim of another agency. Neither SEQRA nor the regulations thereunder provides that an agency must determine a project complies with all applicable statutes prior to deciding whether a project satisfies the requirements of the statutes administered by that agency. The SEQRA regulations expressly contemplates [sic] that each and every agency continue its practice of determining whether a project complies with the particular statutes it administers. There is no change in the existing jurisdiction of the various agencies throughout the State with the SEQRA.

This language raises neatly a question concerning the roles of individual agencies when a project requires multiple agency approvals. How does an agency defer consideration of an impact? Does deferral not run counter to SEQRA's requirement of a comprehensive review imposed on all agencies? If an agency defers a decision on one aspect of a project to another agency, will it not fail to include all relevant factors in the balancing analysis it must perform in order to approve, modify, or deny a project?

This is related to the problem known as "segmentation." Typically, a complex project may involve a series of applications (e.g., for a zoning change, extension of sewer service, and a building permit) or phases (e.g., several separate dredging operations for the same boat channel). It may also involve separate project sites (e.g., channel dredging with disposal at

another site). SEQRA clearly directs agencies to address the overall action. Considering only a part, a step, or a component of an overall action is contrary to the purposes and intent of the statute because it fails to consider the combined impacts of the various related components of the action. The DEC considers segmentation acceptable only "in unusual circumstances where there are compelling reasons to review components or related activities separately and where such review is clearly no less protective of the environment." The SEQR Handbook at B-21.

[6] Enforcement

SEQRA itself contains no enforcement provisions. As a consequence, no agency is charged with the duty of enforcing its provisions. Although the DEC has been delegated the responsibility for promulgating regulations to implement SEQRA, it has been given no power to require compliance either with the statute or its regulations. SEQRA is therefore unique in that it is almost entirely dependent on private parties for its enforcement.

Private litigants are, of course, more interested in obtaining practical results than in establishing legal precedents. They view SEQRA as a means of halting a particular project to which they object.

[a] Standing to Sue

Review of administrative actions in New York is accomplished by a proceeding under article 78 of the Civil Practice Law and Rules, attached hereto as Appendix 5. To establish standing to bring an article 78 proceeding, a petitioner must demonstrate that the action complained of will, in fact, have a harmful effect on him and that the interest he is asserting is within the "zone of interest" protected by the statute. Dairylea Cooperative, Inc v Walkley, 38 NY2d 6, 377 NYS2d 451, 339 NE2d 865 (1965).

Although the concept of standing to challenge administrative actions has been greatly broadened in recent years [see, e.g., Boryszewski v Brydges, 37 NY2d 361, 372 NYS2d 623, 334 NE2d 579 (1975) and Douglaston Civic Assn v Galvin, 36 NY2d1, 364 NYS2d 830, 324 NE2d 317 (1974)], New York takes a narrower view of standing under SEQRA than the federal courts take under NEPA. NEPA cases allow standing to one asserting economic injury alone. See, e.g., Sheffler v Schlesinger, 548 F2d 96 (3d Cir 1979) and National Helium Corp v Morton, 455 F2d 650 (10th Cir 1971). The leading case for the proposition that economic injury is not within the zone of interest protected by SEQRA is New York State Builders Assn, Inc v State of New York, 98 Misc2d 1045, 414 NYS2d 956 (Sup Ct, Albany Co, 1979) in which the Builders Association was denied standing under SEQRA to challenge the validity of the State Energy Conservation Construction Code. See also Webster Associates v Town of Webster, 112 Misc2d 396, 447 NYS2d 401 (Sup Ct, Monroe Co), aff'd 85 AD2d 882, 446 NYS2d 955 (4th Dept 1981), rev'd on other grounds 59 NY2d 220, 464 NYS2d 431 (1983), where the court denied standing to an optionee of a parcel of land which was a potential competitor of another shopping mall developer. The courts also have been reluctant to grant standing to a municipality attempting to challenge a neighboring municipality's approval of actions where the courts

have determined that the real reason for concern is economic dislocation. See City of Plattsburg v Mannix, 77 AD2d 114, 432 NYS2d 910, (3d Dept 1980) and City of Kingston v Town of Ulster, slip opinion No. 80-2791,(Sup Ct, Ulster Co Oct 27, 1980).

This outcome is a little ironic since SEQRA, unlike NEPA, explicitly mandates that agencies consider economic as well as environmental factors. sections 8-0103.7 and 8-0109.1. But the New York courts have not interpreted the language of SEQRA as intending to inject purely economic concerns into the statute's "zone of interest," but merely as requiring that economic concerns be given appropriate weight in an agency's decision-making process. Although purely economic impacts fall on the "benefit" side of equation for balancing an action's environmental costs and its social and economic benefits, they provide no basis for standing because they are not entitled to the protection of the statute.

It should be noted again, however, that unlike NEPA, SEQRA's definition of "environment" is broad and nontraditional, embracing not only physical conditions of the environment, but socio-economic concerns such as "patterns of population concentration, distribution, or growth, and existing community or neighborhood character." Section 8-0105.6. It is also important to remember that petitioners who are motivated primarily by economic concerns are not automatically disqualified from bringing a SEQRA lawsuit, if they can establish environmental concerns as well.

In limiting standing to review SEQRA compliance to those asserting environmental injury, the courts generally have been liberal, almost uniformly finding that citizens groups and potentially effected neighbors have standing to challenge the SEQRA determinations of state or local agencies. See Bliek v Town of Webster, 104 Misc2d 852, 429 NYS2d 811 (Sup Ct, Monroe Co, 1980); Center Square Assn v Corning, 105 Misc2d 6, 430 NYS2d 953 (Sup Ct, Albany Co, 1980); Save the Pine Bush v Planning Board of the City of Albany, 105 Misc2d 168, 431 NYS2d 864 (Sup Ct, Albany Co 1980); HOMES v New York State Urban Development Corp, 69 AD2d 222, 418 NYS2d 827 (4th Dept 1979); New York Moratorium on Prison Construction v New York State Department of Correctional Services, 91 Misc2d 674, 398 NYS2d 525 (Sup Ct, Albany Co 1977); Webster Associates v Town of Webster, 112 Misc 2d 396, 447 NYS2d 401 (Sup Ct, Monroe Co), aff'd 85 AD2d 882, 446 NYS2d 955 (4th Dept 1981), rev'd on other grounds, 59 NY2d 220, 464 NYS2d 431 (1983); and Glen Head-Glenwood Landing Civic Council v Town of Oyster Bay, 88 AD2d 484, 453 NYS2d 732 (2d Dept 1982), all of which found neighboring landowners to have standing. But see Assn for the Development of a Healthy Oneonta Community, Inc v Kirkpatrick, 87 AD2d 934, 450 NYS2d 78 (3d Dept 1982), where the court upheld Special Term's dismissal for lack of standing of an incorporated civic group's petition to review a negative declaration by the town planning board in regard to a building permit to build a retail shopping mall in the Town of Oneonta; and Friends of the Pine Bush v Planning Board of the City of Albany, 71 AD2d 780, 419 NYS2d 295 (3d Dept 1981), where the court held that although individual residents of the city were persons aggrieved by a decision of the planning and thus had standing to challenge an action taken by the board in approving subdivision plats, an unincorporated association of which the residents were

members had not, where there was no indication in the record about the size or composition of such association (both citing Douglaston).

[b] Statute of Limitations

SEQRA contains no provision specifying a statute of limitations for challenging determinations made under the statute. The courts must determine whether each separate decision made during the SEQRA process (i.e., positive determination, negative declaration, acceptance of draft EIS, decision to hold or not to hold a public hearing, etc.) has its own time limit for bringing a challenge, or whether all SEQRA decisions should be viewed as preliminary steps merged into the underlying action. Generally, the four-month statute of limitations (Civil Practice Law and Rules [CPLR] section 217) applicable to article 78 proceedings governs proceedings to review SEQRA decisions, but where a different period specifically applies to the underlying action, courts will invoke it, on the theory that SEQRA procedures are preliminary steps that merge into the underlying action. See Town of Yorktown v New York State Department of Mental Hygiene, 59 NY2d 999, 466 NYS2d 965, 453 NE2d 1254, aff'g 92 AD2d 897, 459 NYS2d 891, (2d Dept 1983); Rome-Floyd Residents Assn, Inc v County of Oneida, 93 AD2d 979 (4th Dept 1983); and Ecology in Action v Van Cort, 99 Misc2d 664, 417 NYS2d 165 (Sup Ct, Tompkins Co, 1979).

It is the rule in New York that an article 78 action to review administrative actions cannot be brought until a "final determination" has been rendered. Thus the proceeding is not available to challenge an intermediate determination made during an administrative decision-making process. Also, the four-month statute of limitations contained in CPLR 217 does not begin to run until the decision at issue becomes "final and binding" in the sense that it has an immediate substantive impact on the petitioner. See, e.g., Smith v Ingraham, 32 AD2d 188, 190, 301 NYS2d 266, 269 (3d Dept 1969). Applying these principles, the court in Save the Pine Bush v Planning Board of the City of Albany, 83 AD2d 698, 442 NYS2d 600, leave to appeal denied 54 NY2d 610 (1981), held that an action challenging the validity of a negative declaration concerning a permit application does not accrue until the agency's final permit determination is made. The same conclusion was reached by the court in Ecology Action v Van Cort, 99 Misc2d 664, 668, 417 NYS2d 165, 169 (Sup Ct, Tompkins Co 1979), a case involving a challenge to a negative declaration issued prior to a grant of subdivision approval. In the Ecology Action case, the court concluded that the action was governed not by CPLR 217, but by the specific period of limitation applicable to the underlying government action. The court characterized the SEQRA process as "incidental" to an agency's permit procedures, reasoning, at 99 Misc2d 669-70, 417 NYS2d at 170:

> The environmental impact statements which [SEQRA requires], however, are merely a preliminary step in the process of denying, approving or modifying a proposed action, to insure that environmental factors are given due consideration in arriving at the final decision.

It is the final decision which petitioners reject here and which they in fact seek to review. Such a review would permit examination of all the steps necessarily involved in the decision, including the environmental statements which petitioners attack.

The SEQR determination, standing alone, was not determinative of the outcome of the subdivision request. It could well have been denied on other than SEQR grounds. Therefore, the determination of non-significance itself could not have aggrieved petitioners. In this sense, it was not final and could not be the basis for Article 78 review.

SEQRA section 8-0109.5 provides, in part: "An application for a permit or authorization for an action upon which a draft environmental impact statement is determined to be required shall not be complete until such draft statement has been filed and accepted by the agency as satisfactory with respect to scope, content and adequacy . . . ." In Sun Beach Real Estate Development Corp v Anderson, 62 NY2d 965 (1984), the Court of Appeals in a memorandum decision affirmed the Second Department's opinion [98 AD2d 367, 469 NYS2d 964 (1983)], for the reasons stated therein, that a preliminary subdivision plat application was not complete until a draft EIS had either been dispensed with or accepted, and the 45-day limitations period in the Town Law for action on the application did not commence until the application was complete.

[c] Judicial Review

Following a general rule of deference to the exercise of discretion by agencies with expertise, courts tend to confirm an agency's certification that it has adequately considered the factors demanded by SEQRA section 8-0109, so long as the procedural requirements were followed. See Town of Henrietta v Department of Environmental Conservation, 76 AD2d 215, 430 NYS2d 440 (4th Dept 1980), and Webster Associates v Town of Webster, 85 AD2d 882, 446 NYS2d 955 (4th Dept 1982), rev'd on other grounds, 59 NY2d 220, 464 NYS2d 431.

Similarly, in reviewing section 8-0109.2(d)'s requirement that agencies choose alternatives which minimize environmental impacts, courts defer to agency experience in weighing alternatives, whether the lead agency is the Department of Environmental Conservation (Concerned Citizens Against Crossgates v Flacke, 89 AD2d 759, 453 NYS2d 939 [3d Dept 1982], aff'd 58 NY2d 919, 460 NYS2d 531, 447 NE2d 80 [1983]), or a town board (Webster Associates v Town of Webster, 85 AD2d 882, 446 NYS2d 955 [4th Dept 1981], rev'd on other grounds, 59 NY2d 220, 464 NYS2d 431), following the lead of the federal courts under NEPA (see City of New York v United States Department of Transportation, 715 F2d 732 [2d Cir 1983]).

[d] The Remedy for Failure to Comply

In the case of Tri-County Taxpayers Ass'n v Town Bd of the Town of Queensbury, 55 NY2d 41, 447 NYS2d 699, 432 NE2d 592 (1982), the Court of

Appeals held that the appropriate remedy for SEQRA violations is not merely to require SEQRA compliance, but to declare the underlying agency action void:

It should be noted that along with the element of remedy, Tri-County is important for what it has to say about the timing of EIS preparation, and for its interpretation of the relationship of the public to the SEQRA process.

[7] Implications of SEQRA for the Land Development Process

The most interesting and controversial aspect of state environmental policy laws is their interaction with the traditional zoning and land use process. If a prudent and feasible alternative which would be less harmful to the environment is presented, must it be chosen, or should a further balance be struck between environmental and developmental interests?

[a] The "Taking" Issue

Environmental land use laws have survived most constitutional law challenges, but the resolution of the "taking" issue is still unclear. In Pennsylvania Coal Co v Mahon, 260 US 393, 415 (1922), Chief Justice Holmes handed down the seminal proposition that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking," for which government must pay. This overturned prior judicial interpretations that rejected any requirement for compensation for police power regulations and tested their validity against due process concepts of having a reasonable relationship to a valid public purpose. After Pennsylvania Coal, police power validity is merely a threshold requirement. A regulation can be reasonably related to the health, safety, or general welfare of society, but still violate the "taking" clause of the 5th Amendment of the United States Constitution, applicable to the states through the 14th Amendment.

Environmental land use regulations are subject particularly to attack as a taking, not because they diminish the value of property (diminution, while relevant to the taking question, is not conclusive), but because they are enacted generally for a preservation purpose and because they frequently "downzone" (that is, they require less intensive, more restrictive development), effectively taking one of the "sticks" out of a landowner's bundle of property rights. Because the purpose of environmental laws is preservation, it can be argued that their real purpose is to secure a public benefit for which the affected landowner should be compensated.

The Supreme Court has refused to adopt a mechanical test to decide this issue, preferring to weigh the public and private interests involved in each particular case. Where there is little benefit to the public and serious injury to the landowner, the land use restriction will not be upheld. On the private side, courts will consider diminution of the value of the land (the test set forth by the Supreme Court in Agins v City of San Diego, 447 US 255 (1980) -- whether the landowner still can derive a reasonable return on his investment). The application of this test can be very difficult. On the public benefit side, the correct analysis is equally elusive. Courts typically will look at the character, need for, and purpose of a regulation.

Another aspect of this burden/benefit analysis is whether a regulatory measure secures an "average reciprocity of advantage," meaning that it applies over a broad cross-section of land and subjects all or most landowners to the public-interest serving prohibition. Zoning ordinances usually are upheld on this ground. It can be argued that the same is true for environmental preservation measures.

[b] Other Problems

Other problems that SEQRA poses for the land development process are described in a commentary by Langdon Marsh, 46 Albany Law Review 1298, 1304-05 (1982):

> SEQRA has made the most fundamental change in the way land development proposals are handled by local governments since the enactment of zoning and planning legislation over half a century ago. It has introduced both new procedures and new substantive requirements into the development approval process.
>
> Unfortunately, the drafters of SEQRA were not well versed in zoning and planning law and did not, therefore, take into account some of the idiosyncrasies of zoning and subdivision practice. As a result, SEQRA does not always mesh well with local procedures. More importantly, the kind of analysis that SEQRA requires both overlaps and goes beyond traditional land use considerations, causing confusion for practitioners and local officials. SEQRA imposes considerable new burdens on both developers and local officials, placing both in new dilemmas. A developer, to protect against uncontrollable costs and delays, must produce the draft EIS. Unless guided by municipal officials, the developer can only guess what issues will be of greatest significance. Worse, the developer has to address policies of community-wide significance, which in many cases may run counter to the developer's own proposal. Even the most public-spirited developer can hardly be expected to examine all the issues dispassionately.
>
> Local planning officials and legislative bodies are faced with other dilemmas. They do not usually have the expertise to evaluate the nontraditional elements of the draft EIS and must rely on the developer's experts with whatever assistance they can obtain from local citizens, county and regional planning agencies or state agencies. More significantly, local officials are now faced with a far more sophisticated decision analysis than the seat-of-the-pants political judgments that all but the most sophisticated municipalities have traditionally engaged in. In the absence of a specific enforcement mechanism, most officials are tempted to ignore SEQRA's attempt to force them to reach decisions on a rational, holistic basis. Finally, SEQRA implies that land use decisions must be made in light of well

articulated community plans and goals, so that adverse environmental effects can be weighed against reasoned policies for growth, conservation of natural areas and orderly provision of services. This tends to force municipalities to do what neither they, nor the courts, have wanted them to do, namely, to make land use decisions in the context of orderly comprehensive planning, the original goal of the zoning and planning enabling statutes.

Section 7.4 Projects Subject Both to NEPA and SEQRA

Examples of projects within New York subject both to NEPA and SEQRA are federally funded highways or housing developments, and construction along a waterway requiring a permit under the Clean Water Act (33 USC section 1344). Section 8-0111.1 of SEQRA provides for a simple, coordinated reporting procedure where a state or local agency participates in preparing, or comments on, an EIS under NEPA. Where it does neither, compliance with NEPA satisfies SEQRA's EIS requirement as well, but the other requirements of SEQRA still apply.

Appendix 1

The National Environmental Policy Act of 1969

42 USC §§ 4321 et seq.

§ 2. The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

§ 101. (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may --

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

§ 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall:

(A) Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) Identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) Include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

(i) The environmental impact of the proposed action,

(ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) Alternatives to the proposed action,

(iv) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the

President, the Council on Environmental Quality and to the public as provided by Section 552 of Title 5 [United States Code], and shall accompany the proposal through the existing agency review processes;

. . .

(E) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) Recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) Make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) Initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) Assist the Council on Environmental Quality established by title II of this Act.

§ 103. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in the Act.

§ 104. Nothing in section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

§ 105. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

. . .

Appendix 2

Section 10 of the Administrative Procedure Act, 5 USC

§ 701.

(a) This chapter applies, according to the provisions thereof, except to the extent that --

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter --

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include --

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) military authority exercised in the field in time of war or in occupied territory; or

(G) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(H) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

§ 702. A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof. An action in a court of the United States seeking relief other that [sic] money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensible party. The United

States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny any relief on any other ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

§ 703. The form of proceeding for judicial review is the special statutory proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

§ 704. Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required, agency action otherwise final is final for purposes of this action whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

§ 705. When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

§ 706. To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall --

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions

found to be --

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Appendix 3

New York Environmental Conservation Law

Article 8 -- Environmental Quality Review

§ 8-0101. Purpose

It is the purpose of this act to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state.

§ 8-0103. Legislative findings and declaration

The legislature finds and declares that:

1. The maintenance of a quality environment for the people of this state that at all times is healthful and pleasing to the senses and intellect of man now and in the future is a matter of statewide concern.

2. Every citizen has a responsibility to contribute to the preservation and enhancement of the quality of the environment.

3. There is a need to understand the relationship between the maintenance of high-quality ecological systems and the general welfare of the people of the state, including their enjoyment of the natural resources of the state.

4. Enhancement of human and community resources depends on a quality physical environment.

5. The capacity of the environment is limited, and it is the intent of the legislature that the government of the state take immediate steps to identify any critical thresholds for the health and safety of the people of the state and take all coordinated actions necessary to prevent such thresholds from being reached.

6. It is the intent of the legislature that to the fullest extent possible the policies, statutes, regulations, and ordinances of the state and its political subdivisions should be interpreted and administered in accordance with the policies set forth in this article. However, the provisions of this article do not change the jurisdiction between or among state agencies and public corporations.

7. It is the intent of the legislature that the protection and enhancement of the environment, human and community resources shall be given appropriate weight with social and economic considerations in public policy.

Social, economic, and environmental factors shall be considered together in reaching decisions on proposed activities.

8. It is the intent of the legislature that all agencies conduct their affairs with an awareness that they are stewards of the air, water, land, and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations.

9. It is the intent of the legislature that all agencies which regulate activities of individuals, corporations, and public agencies which are found to affect the quality of the environment shall regulate such activities so that due consideration is given to preventing environmental damage.

§8-0105. Definitions

Unless the context otherwise requires, the definitions in this section shall govern the construction of the following terms as used in this article:

1. "State agency" means any state department, agency, board, public benefit corporation, public authority or commission.

2. "Local agency" means any local agency, board, district, commission or governing body, including any city, county, and other political subdivision of the state.

3. "Agency" means any state or local agency.

4. "Actions" include:

(i) projects or activities directly undertaken by any agency; or projects or activities supported in whole or in part through contracts, grants, subsidies, loans, or other forms of funding assistance from one or more agencies; or projects or activities involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use or permission to act by one or more agencies;

(ii) policy, regulations, and procedure-making.

5. "Actions" do not include:

(i) enforcement proceedings or the exercise of prosecutorial discretion in determining whether or not to institute such proceedings;

(ii) official acts of a ministerial nature, involving no exercise of discretion;

(iii) maintenance or repair involving no substantial changes in existing structure or facility.

6. "Environment" means the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise,

objects of historic or aesthetic significance, existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character.

7. "Environmental impact statement" means a detailed statement setting forth the matters specified in section 8-0109 of this article. It includes any comments on a draft environmental statement which are received pursuant to section 8-0109 of this article, and the agency's response to such comments, to the extent that such comments raise issues not adequately resolved in the draft environmental statement.

8. "Draft environmental impact statement" means a preliminary statement prepared pursuant to section 8-0109 of this article.

§ 8-0107. Agency implementation

All agencies shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this article, and shall recommend or effect such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this article. They shall carry out its terms with minimum procedural and administrative delay, shall avoid unnecessary duplication of reporting and review requirements by providing, where feasible, for combined or consolidated proceedings, and shall expedite all proceedings hereunder in the interests of prompt review.

§ 8-0109 Preparation of environmental impact statement

1. Agencies shall use all practicable means to realize the policies and goals set forth in this article, and 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.

2. All agencies (or applicant as hereinafter provided) shall prepare, or cause to be prepared by contract or otherwise an environmental impact statement on any action they propose or approve which may have a significant effect on the environment. Such a statement shall include a detailed statement setting forth the following:

(a) a description of the proposed action and its environmental setting;

(b) the environmental impact of the proposed action including short-term and long-term effects;

(c) any adverse environmental effects which cannot be avoided should the proposal be implemented;

(d) alternatives to the proposed action;

(e) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented;

(f) mitigation measures proposed to minimize the environmental impact;

(g) the growth-inducing aspects of the proposed action, where applicable and significant;

(h) effects of the proposed action on the use and conservation of energy resources, where applicable and significant; and

(i) such other information consistent with the purposes of this article as may be prescribed in guidelines issued by the commissioner pursuant to section 8-0113 of this chapter.

Such a statement shall also include copies or a summary of the substantive comments received by the agency pursuant to subdivision four of this section, and the agency response to such comments. The purpose of an environmental impact statement is to provide detailed information about the effect which a proposed action is likely to have on the environment, to list ways in which any adverse effects of such an action might be minimized, and to suggest alternatives to such action so as to form the basis for a decision whether or not to undertake or approve such action. Such statement should be clearly written in a concise manner capable of being read and understood by the public, should deal with the specific significant environmental impacts which can be reasonably anticipated and should not contain more detail than is appropriate considering the nature and magnitude of the proposed action and the significance of its potential impacts.

3. An agency may require an applicant to submit an environmental report to assist the agency in carrying out its responsibilities, including the initial determination and, (where the applicant does not prepare the environmental impact statement), the preparation of an environmental impact statement under this article. The agency may request such other information from an applicant necessary for the review of environmental impacts. 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.

4. As early as possible in the formulation of a proposal for an action, the responsible agency shall make an initial determination whether an environmental impact statement need be prepared for the action. When an action is to be carried out or approved by two or more agencies, such determination shall be made as early as possible after the designation of the lead agency.

With respect to actions involving the issuance to an applicant of a permit or other entitlement, the agency shall notify the applicant in writing of its initial determination specifying therein the basis for such determination. Notice of the initial determination along with appropriate

supporting findings on agency actions shall be kept on file in the main office of the agency for public inspection.

If the agency determines that such statement is required, the agency or the applicant at its option shall prepare or cause to be prepared a draft environmental impact statement. If the applicant does not exercise the option to prepare such statement, the agency shall prepare it, cause it to be prepared, or terminate its review of the proposed action. Such statement shall describe the proposed action and reasonable alternatives to the action, and briefly discuss, on the basis of information then available, the remaining items required to be submitted by subdivision two of this section. The purpose of a draft environmental impact 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 action. The draft statement should resemble in form and content the environmental impact statement to be prepared after comments have been received and considered pursuant to subdivision two of this section; however, the length and detail of the draft environmental impact statement will necessarily reflect the preliminary nature of the proposal and the early stage at which it is prepared.

The draft statement shall be filed with the department or other designated agencies and shall be circulated to federal, state, regional and local agencies having an interest in the proposed action and to interested members of the public for comment, as may be prescribed by the commissioner pursuant to section 8-0113.

5. After the filing of a draft environmental impact statement the agency shall determine whether or not to conduct a public hearing on the environmental impact of the proposed action. If the agency determines to hold such a hearing, it shall commence the hearing within sixty days of the filing and unless the proposed action is withdrawn form consideration shall prepare the environmental impact statement within forty-five days after the close of the hearing, except as otherwise provided. The need for such a hearing shall be determined in accordance with procedures adopted by the agency pursuant to section 8-0113 of this article. If no hearing is held, the agency shall prepare and make available the environmental impact statement within sixty days after the filing of the draft, except as otherwise provided.

Notwithstanding the specified time periods established by this article, an agency shall vary the times so established herein for preparation, review and public hearings to coordinate the environmental review process with other procedures relating to review and approval of an action. An application for a permit or authorization for an action upon which a draft environmental impact statement is determined to be required shall not be complete until such draft statement has been filed and accepted by the agency as satisfactory with respect to scope, content and adequacy for purposes of paragraph four of this section. Commencing upon such acceptance, the environmental impact statement process shall run concurrently with other procedures relating to review and

approval of the action so long as reasonable time is provided for preparation, review and public hearings with respect to the draft environmental impact statement.

6. To the extent as may be provided by the commissioner pursuant to section 8-0113, the environmental impact statement prepared pursuant to subdivision two of this section together with the comments of public and federal agencies and members of the public, shall be filed with the commissioner and made available to the public prior to acting on the proposal which is the subject of the environmental impact statement.

7. An agency may charge a fee to an applicant in order to recover the costs incurred in preparing or causing to be prepared or reviewing a draft environmental impact statement or an environmental impact statement on the action which the applicant requests from the agency; provided, however, that an applicant may not be charged a separate fee for both the preparation and review of such statements. The technical services of the department may be made available on a fee basis reflecting the costs thereof, to a requesting agency, which fee or fees may appropriately be charged by the agency to an applicant under rules and regulations to be issued under section 8-0113.

8. When an agency decides to carry out or approve an action which has been the subject of an environmental impact statement, it shall make an explicit finding that the requirements of this section have been met and 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.

§ 8-0111. Coordination of reporting; limitations; lead agency

1. State and federal reports coordinated. Where an agency as herein defined directly or indirectly participates in the preparation of or prepares a statement or submits material relating to a statement prepared pursuant to the requirements of the National Environmental Policy Act of 1969, whether by itself or by another person or firm, compliance with this article shall be coordinated with and made in conjunction with federal requirements in a single environmental reporting procedure.

2. Federal report. Where the agency does not participate, as above defined, in the preparation of the federal environmental impact statement or in preparation or submission of materials relating thereto, no further report under this article is required and the federal environmental impact statement, duly prepared, shall suffice for the purpose of this article.

3. State and local coordination. Necessary compliance by state or local agencies with the requirements of this article shall be coordinated in accordance with section 8-0107 and with other requirements of law in the interests of expedited proceedings and prompt review.

4. Effective date of coordinated reporting. The requirements of the section with regard to coordinated preparation of federal and state impact

materials and reporting shall not apply to statements prepared and filed prior to the effective date of this article.

5. Exclusions. The requirements of subdivision two of section 8-0109 of this article shall not apply to:

(a) Actions undertaken or approved prior to the effective date of this article, except:

(i) in the case of an action where it is still practicable either to modify the action in such a way as to mitigate potentially adverse environmental effects or to choose a feasible and less environmentally damaging alternative, in which case the commissioner may, at the request of any person or on his own motion, in a particular case, or generally in one or more classes of cases specified in rules and regulations, require the preparation of an environmental impact statement pursuant to this article; or

(ii) in the case of an action where the responsible agency proposes a modification of the action and the modification may result in a significant adverse effect on the environment, in which case an environmental impact statement shall be prepared with respect to such modification.

(b) Actions subject to the provisions requiring a certificate of environmental capability and pubic need in articles seven and eight of the public service law; or

(c) Actions subject to the class A or class B regional project jurisdiction of the Adirondack park agency or a local government pursuant to section eight hundred seven, eight hundred eight or eight hundred nine of the executive law.

6. Lead Agency. When an action is to be carried out or approved by two or more agencies, the determination of whether the action may have a significant effect on the environment shall be made by the lead agency having principal responsibility for carrying out or approving such action and such agency shall prepare, or cause to be prepared by contract or otherwise, the environmental impact statement for the action if such a statement is required by this article. In the event that there is a question as to which is the lead agency, any agency may submit the question to the commissioner and the commissioner shall designate the lead agency, giving due consideration to the capacity of such agency to fulfill adequately the requirements of this article.

§ 8-0113. Rules and regulations

1. After consultation with the other agencies subject to the provisions of this article, including state agencies and representatives of local governments and after conducting public hearings and review of any other comments submitted, the commissioner shall adopt rules and regulations implementing the provisions of this article within one hundred and twenty days after the effective date of this section.

2. The rules and regulations adopted by the commissioner specifically shall include:

(a) Definition of terms used in this article;

(b) Criteria for determining whether or not a proposed action may have a significant effect on the environment, taking into account social and economic factors to be considered in determining the significant of an environmental effect;

(c) Identification on the basis of such criteria as:

(i) Actions or classes of actions that are likely to require preparation of environmental impact statements;

(ii) Actions 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;

(d) Typical associated environmental effects, and methods for assessing such effects, of actions determined to be likely to require preparation of environmental impact statements;

(e) Categorization of actions which are or may be primarily of statewide, regional, or local concern, with provisions for technical assistance including the preparation or review of environmental impact statements, if requested, in connection with environmental impact review by local agencies.

(f) Provision for the filing and circulation of draft environmental impact statements pursuant to subdivision four of section 8-0109, and environmental impact statements pursuant to subdivision six of section 8-0109;

(g) Scope, content, filing and availability of findings required to be made pursuant to subdivision eight of section 8-0109;

(h) Form and content of and level of detail required for an environmental impact statement; and

(i) Procedures for obtaining comments on draft environmental impact statements, holding hearings, providing public notice of agency decisions with respect to preparation of a draft environmental statement; and for such other matters as may be needed to assure effective participation by the public and efficient and expeditious administration of the article.

(j) Procedure for providing applicants with estimates, when requested, of the costs expected to be charged them pursuant to subdivision seven of section 8-0109 of this article.

(k) Appeals procedure for the settlement of disputed costs charged by state agencies to applicants pursuant to subdivision seven of section 8-0109 of this article. Such appeal procedure shall not interfere or cause delay in the determination of environmental significance or prohibit an action from being undertaken.

(l) A model assessment form to be used during the initial review to assist an agency in its responsibilities under this article.

3. Within the time periods specified in section 8-0107 of this article the agencies subject to this article shall, after public hearings, adopt and publish such additional procedures as may be necessary for the implementation by them of this article consistent with the rules and regulations adopted by the commissioner.

(a) Existing agency environmental procedures may be incorporated in and integrated with the procedures adopted under this article, and variance in form alone shall constitute no objection thereto. Such individual agency procedures shall be no less protective of environmental values, public participation, and agency and judicial review than the procedures herein mandated.

(b) Such agency procedures shall provide for interagency working relationships in cases where actions typically involve more than one agency, liaison with the public, and such other procedures as may be required to effect the efficient and expeditious administration of this article.

§8-0115. Severability.

The provisions of this article shall be severable, and if any clause, sentence, paragraph, subdivision or part of this article shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision or part thereof directly involved in the controversy in which such judgment shall have been rendered.

§ 8-0117. Phased implementation

1. With respect to the actions directly undertaken by any state agency, the requirement of an environmental impact statement pursuant to subdivision two of section 8-0109 of this article shall take effect on the first day of September, nineteen hundred seventy-six.

2. With respect to actions or classes of actions identified by the department as likely to require preparation of environmental impact statements pursuant to subparagraph (i) of paragraph (c) of subdivision two of section 8-0113 of this article directly undertaken by any local agency, whether or not such actions are supported in whole or in part through contracts, grants, subsidies, loans, or other forms of funding assistance from one or more state

agency; and all other actions or classes of actions identified by the department as likely to require preparation of environmental impact statements pursuant to subparagraph (i) of paragraph (c) of subdivision two of section 8-0113 of this article supported in whole or in part through contracts, grants, subsidies, loans, or other forms of funding assistance from one or more state agency, the requirement of an environmental impact statement pursuant to subdivision two of section 8-0109 of this article shall take effect on the first day of June, nineteen hundred seventy-seven.

3. With respect to actions or classes of actions identified by the department as likely to require preparation of environmental impact statements pursuant to subparagraph (i) of paragraph (c) of subdivision two of section 8-0113 of this article supported in whole or in part through contracts, grants, subsidies, loans, or other forms of funding assistance from one or more local agency; and with respect to actions or classes of actions identified by the department as likely to require preparation of environmental impact statements pursuant to subparagraph (i) of paragraph (c) of subdivision two of section 8-0113 of this article involving the issuance to a person of a lease, permit, certificate or other entitlement for use or permission to act by one or more state of local agency, the requirement of an environmental impact statement pursuant to subdivision two of section 8-0109 of this article shall take effect on the first day of September, nineteen hundred seventy-seven.

4. With respect to all other actions not included in subdivision two or three of this section which are subject to this article, the requirement of an environmental impact statement pursuant to subdivision two of section 8-0109 of this article shall take effect on the first day of November, nineteen hundred seventy-eight.

5. Agencies subject to this article shall adopt and publish the additional necessary procedures described in subdivision three of section 8-0113 of this article, as follows:

(a) With respect to actions included within subdivision one of this section, no later than August 1, 1976.

(b) With respect to actions included within subdivision two of this section, no later than April 1, 1977.

(c) With respect to actions included within subdivision three of this section, no later than July 1, 1977.

(d) With respect to actions included within subdivision four of this section, no later than November 1, 1978.

Any agency which has not adopted and published the additional necessary procedures described in subdivisions two and three of section 8-0113 of this article according to the dates set forth in this section shall utilize those procedures found in Part 617 of title six (environmental conservation) of the official compilation of the codes, rules and regulations of the state of New York for purposes of implementing this article until such time as such agency has adopted and published its own procedures.

Appendix 4

PART 617

STATE ENVIRONMENTAL QUALITY REVIEW
(Statutory authority: Environmental Conservation Law, § 8-0113)

Section

Section 617.1 Authority, intent and purpose.

(a) This Part is adopted pursuant to section 8-0113 of the Environmental Conservation Law to implement the provisions of the State Environmental Quality Review Act ("SEQR").

(b) In adopting SEQR it was the Legislature's intention that all agencies conduct their affairs with an awareness that they are stewards of the air, water, land, and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations.

(c) The basic purpose of SEQR is to incorporate the consideration of environmental factors into the planning, review and decision making processes of state, regional and local government agencies at the earliest possible time. To accomplish this goal, SEQR requires that all agencies determine whether the actions they directly undertake, fund or approve may have a significant effect on the environment; and if it is determined the action may have a significant effect, to prepare or request an environmental impact statement.

(d) It was the intention of the Legislature that the protection and enhancement of the environment, human and community resources should be given appropriate weight with social and economic considerations in public policy, and that those factors be considered in reaching decisions on proposed activities. Accordingly, it is the intention of these regulations that a suitable balance of social, economic and environmental factors be incorporated in the planning and decision making processes of state, regional and local agencies. It is not the intention of SEQR that environmental factors be the sole consideration in decision making.

(e) This Part is intended to provide a statewide regulatory framework for SEQR's implementation by all state and local agencies. It includes:

(1) procedural requirements for compliance with the law;

(2) provisions for coordinating multiple agency environmental reviews through a single lead agency (617.6 and 617.7);

(3) criteria to determine whether a proposed action may have a significant effect on the environment (617.11);

(4) model assessment forms to aid in determining whether an action may have a significant effect on the environment (Appendices A and B); and

(5) examples of actions and classes of actions which are likely to require an EIS (617.12), and those which will not require an EIS (617.13).

617.2 Definitions

As used in this Part, unless the context otherwise requires:

(a) "Act" means article 8 of the environmental conservation law (SEQR).

(b) "Actions" include:

(1) projects or physical activities, such as construction or other activities, which change the use or appearance of any natural resource or structure which:

(i) are directly undertaken by an agency, or

(ii) involve funding by an agency, or

(iii) require one or more permits from an agency or agencies;

(2) planning activities of an agency that commit the agency to a course of future decisions;

(3) agency rule, regulation, procedure and policy making; and

(4) combinations of the above.

Capital projects commonly consist of a set of activities or steps (i.e., planning, design, contracting, construction and operation). For purposes of this Part, the entire set of activities or steps can be considered an action. If it is determined that an EIS is necessary, only one draft and one final EIS need be prepared on the action if the statements address each step at a level of detail sufficient for an adequate analysis of environmental effects. In the case of a project or activity involving funding or a permit from an agency, the entire project shall be considered an action, whether or not such funding or permit relates to the project as a whole or to a portion or component of it.

(c) "Agency" means a state or local agency.

(d) "Applicant" means any person making an application or other request to an agency to provide funding or to grant an approval in connection with a proposed action.

(e) "Approval" means a decision by an agency to issue a permit or to otherwise authorize a proposed project or activity.

(f) "Commissioner" means the commissioner of environmental conservation.

(g) "Community or publicly owned utilities" means community or publicly owned water system, sewerage system and sewage treatment works.

(h) "Department" means the department of environmental conservation.

(i) "Direct action" or "directly undertaken action" means an action and proposed for implementation by an agency. Direct actions include but are not limited to capital projects, rule-making, procedure making and policy-making.

(j) "Environment" means the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution or growth, and existing community or neighborhood character.

(k) "Environmental assessment form" (EAF) means a form used by an agency to assist it in determining the environmental significance or non-significance of actions. A properly completed EAF shall contain enough information to describe the proposed action, its location, its purpose and its potential impacts on the environment. A model EAF contained in Subdivision (a) of Section 617.19 of this Part may be modified by an agency to better serve it in implementing SEQR, or a different EAF may be adopted, provided its scope is similar to that of the model. The term, "short form EAF," used in 617.7, means a simplified EAF that may be used by an agency to determine whether it has sufficient information on which to determine the environmental significance or non-significance of an unlisted action. A model short form EAF, contained in Subdivision (b) of Section 617.19 of this part may be modified by an agency to better serve it in implementing SEQR, or a different short form EAF may be adopted, provided its scope is similar to that of the model and its use shall be limited to unlisted actions.

(l) "Environmental impact statement" means a written document prepared in accordance with 617.14. An environmental impact statement (EIS) may either be a "draft" or a "final" and, as appropriate in context, it may include a federal draft or final EIS.

(m) "Excluded action" means an action which was undertaken, funded approved prior to the effective dates set forth in SEQR (see, Chapters 228 of the Laws of 1976, 252 of the Laws of 1977 and 460 of the Laws of 1978).

(n) "Exempt action" means any one of the following:

(1) enforcement or criminal proceedings or the exercise of prosecutorial discretion in determining whether or not to institute such proceedings;

(2) ministerial acts;

(3) maintenance or repair involving no substantial changes in an existing structure or facility;

(4) with respect to the requirements of subdivision 2 of 8-0109 of SEQR, actions requiring a certificate of environmental compatibility and public need under article VII or VIII of the public service law and the consideration of, granting or denial of any such certificate;

(5) with respect to the requirements of subdivision 2 of section 8-0109 of SEQR, actions subject to the jurisdiction of the Adirondack park agency pursuant to section 809 of the executive law including actions of the

Adirondack park agency thereunder, and actions subject to the jurisdiction of local governments pursuant to section 808 of the executive law and actions of such local governments pursuant thereto;

(6) actions which are immediately necessary on a limited emergency basis for the protection or preservation of life, health, property or natural resources; and

(7) actions of the Legislature of the state of New York or of any court.

(o) "Funding" means any financial support given by an agency including contracts, grants, subsidies, loans or other forms of direct or indirect financial assistance in connection with a proposed action.

(p) "Involved agency" means an agency that has jurisdiction by law to fund, approve, or directly undertake a given action.

(q) "Lead agency" means an agency principally responsible for carrying out, funding, or approving an action, and therefore responsible for determining whether an environmental impact statement is required in connection with the action and for the preparation and filing of the statement if one is required.

(r) "Local agency" means any local agency, board, authority, district, commission or governing body, including any city, county and other political subdivision of the state.

(s) "Ministerial act" means an action performed upon a given state of facts in a prescribed manner imposed by law without the exercise of any judgment or discretion as to the propriety of the action, such as the granting of a driver's license, although such law may require, to a limited degree, a construction of its language or intent.

(t) "Person" means any agency, individual, corporation, governmental entity, partnership, association, trustee or other legal entity.

(u) "Permit" means a permit, lease, license, certificate or other entitlement for use or permission to act that may be granted or issued by an agency.

(v) "Physical alteration" includes but is not limited to the following activities: vegetation removal; demolition; stockpiling materials; grading and other forms of each work; dumping, filling or depositing; excavation or trenching; dredging; flooding or draining; paving; construction of buildings, structures or facility.

(w) "Residential" means any facility used for permanent or seasonal habitation including, but not limited to, realty subdivisions, apartments, mobile home parks, and campsites offering any utility hookups for recreational

vehicles. It shall not include such facilities as hotels, hospitals, nursing homes, dormitories, or prisons.

(x) "State agency" means any state department, agency, board, public benefit corporation, public authority or commission.

(y) "Type I action" means an action or class of actions listed in 617.12. When the term is applied in reference to an individual agency's authority to review or approve a particular proposed project or action, it shall also mean an action or class of actions listed at Type I actions in that agency's own procedures to implement SEQR adopted pursuant to 617.4.

(z) "Type II" action means an action or class of actions which is listed in 617.13. When the term is applied in reference to an individual agency's authority to review or approval a particular proposed project or action, it shall also mean an action or class of actions listed as Type II actions in that agency's own procedures to implement SEQR adopted pursuant to 617.4. The fact that an action is listed as a Type II action in one involved agency's procedures does not mean that it is to be treated as a Type II action by any other involved agency not listing it as a Type II action in its procedures.

(aa) "Unlisted action" shall mean all actions not excluded or exempt, not listed as a Type I or Type II action in this Part, or in the case of a particular agency action, not listed at Type I or Type II actions in the agency's own SEQR procedures. If an action is an unlisted action, the limited procedural requirements of 617.7 apply to it.

617.3 General rules.

(a) No agency involved in an action shall carry out, fund or approve the action until it has complied with the provisions of SEQR. No agency shall issue a decision on an action that it knows any other agency has determined may have a significant effect on the environment until a final EIS has been filed.

(b) SEQR does not change the existing jurisdiction of agencies nor the jurisdiction between or among state and local agencies.

(c) Nothing in this Part shall prevent an agency or an applicant from either

(1) conducting contemporaneous environmental, engineering, economic, feasibility and other studies and preliminary planning and budgetary processes necessary to the formulation of a proposal for action provided those activities do not commit the agency to commence, engage in or approve such action; or

(2) engaging in review of any part of an application to determine compliance with technical requirements, provided that no such determination shall entitle or permit the applicant to commence the action unless and until all requirements of the Part have been fulfilled.

(d) No application for funding or approval of a Type I action shall be considered complete unless accompanied by an EAF properly completed by the applicant and a list prepared by the applicant of all other involved agencies which the applicant has been able to ascertain exercising all due diligence. An agency may waive the requirement for an EAF if the application is accompanied by an acceptable draft EIS.

(e) An application for agency funding or approval of an action shall not be complete until a determination of no significance has been made or until a draft EIS has been accepted by the lead agency as satisfactory with respect to scope, content and adequacy. Commencing upon such acceptance, the SEQR process shall run concurrently with other procedures relating to the review and approval of the action, so long as reasonable time is provided for preparation, review and public hearings with respect to the draft environmental impact statement.

(f) Agencies shall make every reasonable effort to involve applicants, other agencies and the public in the SEQR process. Early consultations initiated by agencies can serve to narrow issues of significance and to identify areas of controversy, thereby focusing the issues requiring in-depth analysis in an EIS.

(g) The effect of an applicant or agency exercising due diligence in ascertaining and identifying all other agencies having funding or approval authority over the action or project, and of the agency or applicant providing written notice of the agency's determination of environmental significance to such other involved agencies, shall be that unless an involved agency formally objects to the designation of lead agency pursuant to 617.7(f), no other involved agency may later require the preparation of an EIS in connection with the action or project.

(h) All agencies involved in or interested in a proposed action are strongly encouraged to make known their views on the action, particularly with respect to their areas of expertise and jurisdiction.

617.4 Individual agency procedures to implement SEQR.

(a) Article 8 of the environmental conservation law requires all agencies to adopt and publish, after public hearing, any additional procedures which may be necessary for them to implement SEQR. Until an agency adopts these additional procedures, its implementation of SEQR shall be governed by the provisions of this Part.

(b) To the greatest extent possible, the procedures prescribed in this Part shall be incorporated into existing agency procedures. An agency shall vary the time periods established in this Part for the preparation and review of SEQR materials and for the conduct of public hearings in order to coordinate the SEQR environmental review process with other procedures relating to the review and approval of actions. Individual agency procedures to implement SEQR shall be no less protective of environmental values, public

participation and agency and judicial review than the procedures contained in this Part.

(c) Agencies may find it helpful to seek the advice and assistance of other agencies, groups and persons on SEQR matters, including the following:

(1) advice on preparation and review of EAF's;

(2) recommendations on the significance and non-significance of actions;

(3) preparation of EIS's and recommendations on the scope, adequacy, and contents of EIS's;

(4) preparation and circulation of SEQR notices and documents;

(5) conduct of public hearings; and

(6) recommendations to decision-makers.

(d) Agencies are strongly encouraged to enter into cooperative agreements with other agencies regularly involved in carrying out or approving the same actions for the purposes of coordinating their procedures.

(e) All agencies are subject to the list of Type I actions contained in 617.12. In addition, agencies may adopt their own lists of Type I actions, may adjust the thresholds for Type I actions contained in section 617.12 to make them more inclusive, and may continue to use previously adopted lists of Type I actions to complement those contained in 617.12. They may also develop criteria in addition to those listed in 617.11 for determining significance and non-significance of actions.

(f) All agencies are subject to the list of Type II actions contained in 617.13. In their own procedures agencies may include additional Type II action subject to conditions contained in 617.13.

(g) Agencies may use the model EAF's in Appendices A and B to assist them in determining significance of an action, may modify them to meet their own needs, or may adopt different EAF's provided their scope is similar to that of the models in Section 617.19.

(h) Every agency which adopts, has adopted or amends SEQR procedures shall file them with the commissioner who shall maintain them to serve as a resource service for agencies and interested persons. Such procedures shall also be filed with other agencies regularly involved in carrying out or approving the same actions or projects.

(i) Upon request the commissioner shall review individual items in an agency's Type II list to determine whether they meet the criteria for Type II actions contained in 617.13.

(j) A local agency may, following written public notice and public hearings, designate specific geographic areas within its boundaries as critical areas of environmental concern. To be designated as a critical area, an area should have an exceptional or unique character covering one or more of the following:

(1) a benefit or threat to the public health or public safety;

(2) a natural setting (e.g., fish and wildlife habitat, forest and vegetation, open space and aesthetics);

(3) social, cultural, historic, archaeological, recreational, or educational purposes;

(4) an inherent ecological, geological, or hydrological sensitivity to change which could be adversely effected by any change.

Following designation by the local agency, notification that an area has been designated as a critical area shall be filed with the commissioner. This designation shall take effect 30 days after such filing.

617.5 Initial review of actions.

As early as possible in an agency's formulation of an action it proposes to undertake, or as soon as an agency receives an application for a funding or approval action, it shall do the following:

(a) Determine whether the action is subject to SEQR. If the action is an exempt, an excluded, or a Type II action the agency shall have no further responsibilities under this Part.

(b) Determine whether the action involves a federal agency. If the action involves a federal agency, the provision of 617.16 shall apply.

(c) Determine whether the action involves one or more other agencies.

(1) If the action is a Type I action, the provisions of 617.6 shall govern the designation of lead agency.

(2) If the action is an unlisted action, the provisions of 617.7 shall govern the designation of lead agency.

(d) For State agencies only, determine whether the action is located in the coastal area. If the action is either a Type I or unlisted action, as defined in section 617.2 of this Part, and is in the coastal area, the provision of 19 NYCRR 600 apply.

617.6 Designation of lead agency and determination of significance for Type 1 actions.

(a) The provisions of this section shall govern the designation of lead agency and determination of significance for all Type I actions.

(b) An EAF shall be completed for every Type I action which is directly undertaken, funded, or approved by an agency unless an acceptable draft EIS has already been or will be prepared on the action. No EAF shall be considered complete unless it contains a list prepared by the applicant of all other involved agencies which the applicant has been able to ascertain, exercising all due diligence.

(c) Actions involving one agency. When an agency proposes to directly undertake an action which does not require funding or approval from any other agency or receives an application to fund or approve an action over which no other agencies have approval authority, it shall be the lead agency and shall determine the significance of the action in accordance with 617.11, 617.12 and 617.13 within the following time periods:

(1) If the agency is directly undertaking the action it shall determine the significance of the action as early as possible in the design or formulation of the actions.

(2) If the agency has received an application for funding or approval of the action it shall determine the significance of the action within 15 calendar days of its receipt of the application, an EAF, and any additional information it deems necessary to make that determination.

(d) Actions involving more than one agency.

(1) When an agency proposes to directly undertake an action which requires funding or approval from one or more other agencies, or receives an application for funding or approval which other agencies have approval authority over, it shall, as soon as possible, mail the completed EAF and a copy of any application it has received to all involved agencies notifying them that within 30 calendar days of the date the EAF was mailed to them a lead agency must be designated by agreement among them. The following criteria in order of importance, shall be used to designate lead agency:

(i) whether the anticipated impacts of the action being considered are primarily of statewide regional, or local significance, i.e., if such impacts are of primarily local significance, all other considerations being equal, the local agency involved shall be lead agency;

(ii) which agency has the broadest governmental powers for investigation into the impacts of the proposed action; and

(iii) which agency has the greatest capability for providing the most thorough environmental assessment of the proposed action.

(2) The lead agency shall determine the significance of the action in accordance with 617.11, 617.12 and 617.13 within 15 days of its designation as lead agency, or within 15 days of its receipt of any information it may need to make the determination of significance, whichever occurs later, and shall immediately notify all other involved agencies of its determination.

(e) Actions for which lead agency cannot be designated by agreement.

(1) If within the 30 day period allotted for designation of lead agency the involved agencies are unable to agree upon which agency shall be the lead agency, any involved agency or the applicant may write to the commissioner requesting that a lead agency be designated. Simultaneously, copies of the request shall be mailed to all involved agencies and the applicant.

(2) Within 5 business days of the date a copy of the request is mailed to them, involved agencies and the applicant may submit to the commissioner any comments they may have on the issue.

(3) The commissioner, within 12 business days of the date the request was mailed, shall designate a lead agency based on a review of the facts, the criteria in subdivision (d) of this section, any comments received.

(4) Notification of the commissioner's designation of lead agency shall be mailed to all involved agencies and the applicant.

(5) A lead agency designated by the commissioner shall determine the significance of the action in accordance with 617.11, 617.12 and 617.13 within 15 days of its designation as lead agency or within 15 days of its receipt of whatever information it deems necessary to make the determination of significance, whichever occurs later, and shall immediately notify all other involved agencies of its determination.

617.7 Designation of lead agency and determination of significance for unlisted actions.

(a) The provisions of this section shall govern the designation of lead agency and determination of significance for all unlisted actions. These provisions are designed to simplify the SEQR procedure that applies to unlisted actions.

(1) When an agency is reviewing an unlisted action, coordinated review is required only when the agency determines that an EIS will be prepared (see 617.10). If an agency determines that the unlisted action will not have a significant effect on the environment, coordinated review and notification is strictly optional. However, when an agency or applicant wants to finalize, in the shortest possible time, lead agency status and the agency's determination of non-significance, the agency or applicant is advised to follow the notification procedures specified in subdivision (d) of this section. Unless and until written notification of lead agency status and determination of significance has been given to all other involved agencies,

each subsequent involved agency shall make its own determination of significance and may require an EIS.

(2) For unlisted actions lead agency status is not confirmed and an individual agency's determination of non-significance can be superseded at any time until one of the following occurs: (i) all involved agencies receive written notification pursuant to subdivision (d) of this section and fail to respond to the notice within the prescribed time period; or (ii) all involved agencies have issued all final decisions on the action.

(b) An EAF is not required in connection with every unlisted action. However, an agency may use a short form EAF (see Subdivision (b) of Section 617.19) to determine whether it has sufficient information on which to base its determination of the environmental significance of an action. If after considering the completed short form EAF, it has insufficient information, it shall use a standard form EAF (see Appendix A) to elicit the information it needs to determine the environmental significance of the action.

(c) As early as possible in the formulation of plans for an unlisted action to be directly undertaken, or within 15 days of receipt of an application for funding or approval of an unlisted action, an agency shall make an initial determination of the significance of the action in accordance with 617.11, 617.12 and 617.13.

(d) An agency or applicant, if it chooses to coordinate the review of involved agencies and promptly designate a lead agency and confirm initial determinations of significance, may ascertain, exercising all due diligence, all other involved agencies and notify such agencies of the initial determination, supplying them with a copy of any EAF and any applications which have been prepared, and reasons supporting the initial determination.

(e) If within 15 calendar days from the date of mailing notification described in subdivision (d) of this section no involved agency submits a written objection to the agency which made the initial determination of significance being lead agency, that agency shall be the lead agency and shall:

(1) follow the provision of 617.8 if it has determined an EIS is required; or

(2) maintain a file of its determination and supporting reasons available for public inspection if it has determined an EIS is not required.

(f) If within 15 calendar days from the date of notification described in subdivision (d) of this section any involved agency submits a written objection to the agency which made the initial determination of significance being the lead agency, it shall be the responsibility of all involved agencies to follow the procedures prescribed in 617.6(d) and (e) for designation of lead agency. The lead agency shall then determine significance of the action and proceed as described in 617.8.

617.8 Environmental Impact Statement Procedures.

(a) When an agency is lead agency for an action involving an applicant, and has determined that an EIS is required, it shall immediately notify the applicant and all other involved agencies in accordance with 617.10(c) in writing that it is the lead agency and that an EIS is required. The applicant or the agency, at the applicant's option, shall prepare the draft EIS. If the applicant does not exercise the option to prepare the draft EIS, the lead agency shall prepare it, cause it to be prepared or terminate its review of the action.

(b) When the applicant prepares the draft EIS, the draft EIS shall be submitted to the lead agency which shall determine whether to accept it as satisfactory with respect to its scope, content and adequacy for purposes of this Part.

(c) When the lead agency has completed a draft EIS or when it has accepted a draft EIS prepared by an applicant, the lead agency shall file a notice of completion of the draft EIS and a copy of the draft EIS in accordance with the requirements set forth in 617.10. Agencies shall provide for a commenting period on the draft EIS to be not less than 30 calendar days.

(d) When the lead agency has completed a draft EIS or when it has accepted a draft EIS prepared by an applicant, the lead agency shall determine whether or not to conduct a public hearing concerning the action. In determining whether or not to hold a hearing, the lead agency shall consider the degree of interest shown by other persons in the action and the extent to which a public hearing can aid the agency decision-making processes by providing a forum for, or an efficient mechanism for the collection of, public comment. If a hearing is to be held the lead agency shall:

(1) file notice thereof in accordance with 617.10. Such notice may be contained in the notice of completion of the draft EIS. The notice of hearing shall also be published at least 14 calendar days in advance of the public hearing in a newspaper of general circulation in the area of the potential impacts and effects of the action.

(2) the hearing shall commence no less than 15 calendar days or more than 60 calendar days after the filing of the draft EIS pursuant to 617.10. When a SEQR hearing is to be held, it shall be incorporated into existing hearing procedures wherever practicable.

(e) Except as provided in paragraphs (1) and (2) below, the lead agency shall prepare or cause to be prepared a final EIS within 45 calendar days after the close of any hearing or within 60 calendar days after the filing of the draft EIS whichever last occurs.

(1) If the proposed action has been withdrawn or if, on the basis of the draft EIS or hearing, the lead agency has determined that the action will not have significant effect on the environment, no final EIS need be prepared. Notice of such determination shall be filed in accordance with 617.10.

(2) The last date for preparation of the final EIS may be extended

(i) where it is determined that additional time is necessary to prepare the statement adequately, or

(ii) where problems with the proposed action requiring material reconsideration or modification have been identified, or

(iii) for other good cause.

(f) Notice of completion of the final EIS and copies of the final EIS shall be filed in accordance with 617.10.

617.9 Decision making and findings requirements.

(a) Prior to the lead agency's decision on an action which has been the subject of a final EIS, it shall afford agencies and the public a reasonable time period (not less than 10 calendar days) in which to consider the final EIS.

(b) In the case of an action involving an applicant, the lead agency's decision on whether or not to approve or fund an action which has been the subject of a final EIS shall be made within 30 calendar days after the filing of the final EIS except for good cause.

(c) No agency (whether lead agency or not) shall make a final decision to commence, engage in, fund, or approve, an action that has been the subject of a final federal or a final SEQR EIS until it has:

(1) given consideration to the final EIS;

(2) made a written finding that the requirements of this Part have been met and

(i) consistent with social, economic and other essential considerations from among the reasonable alternatives thereto, the action to be carried out or approved is one which minimizes or avoids adverse environmental effects to the maximum extent practicable; including the effects disclosed in the relevant environmental impact statement, and

(ii) 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 by incorporating as conditions to the decision those mitigative measures which were identified as practicable.

(3) prepared a written statement of the facts and conclusions relied upon in the EIS supporting its decision and indicating the social, economic and other factors and standards which formed the basis of its decision.

(d) No agency shall make a decision not to approve an action, until it has prepared a written statement of the facts and conclusions relied on in the EIS or comments provided thereon.

(e) State agency actions in the coastal area must be consistent with the applicable policies of article 42 of the Executive Law, as implemented by 19 NYCRR 600.5, whose intent is to achieve a balance between the protection of natural resources and the need to accommodate social and economic considerations. When the State agency action in the coastal area is within the boundaries of an approved local waterfront revitalization program and the action is one identified by the Secretary of State pursuant to section 916(1)(a) of the Executive Law, the action must be consistent, to the maximum extent practicable, with the applicable policies of such program.

617.10 Notice and filing requirements.

(a) All notices, EIS's and other SEQR documents shall be prepared, filed, circulated and made available as prescribed in this section.

(b) Determination of non-significance. In the case of all Type I actions, a notice of determination that an EIS will not be prepared based on a determination that the proposed action will not have a significant effect on the environment (negative declaration), shall be prepared and filed as indicated below by the lead agency. The notice shall state that it is a negative declaration for the purposes of article 8 of the environmental conservation law, shall state the name and address of the lead agency and the name and telephone number of a person who can provide further information, shall briefly and precisely describe the nature, extent and location of the action, and shall briefly state the reasons supporting the determination. Agencies shall maintain files of the written analyses and findings leading to their determinations on all actions subject to SEQR. The notice of determination for Type I actions shall be filed simultaneously as follows:

(1) with the commissioner at 50 Wolf Road, Albany, New York 12233;

(2) with the appropriate regional office of the department;

(3) in the office of the chief executive officer of the political subdivision in which the action will be principally located.

(4) in the main office and appropriate regional office, if any, of the lead agency;

(5) if the action involves an applicant, with the applicant;

(6) if other agencies are involved in approval of the action, with each other agency.

In addition, agencies may:

(i) further provide for filing of these determinations with agencies which may be affected by the action; and

(ii) further provide for public notice of these determinations as shall afford the opportunity for public response by: readily accessible files in agency offices; posting on sign boards; incorporation in public notices otherwise required by law; or other appropriate means.

(c) Determination of significance. In the case of all Type I and unlisted actions, a notice of determination that a draft EIS will be prepared based on a determination that the proposed action may have a significant effect on the environment (positive declaration) shall be prepared and filed as indicated below by the lead agency. The notice shall state that it is a positive declaration for purposes of article 8 of the environmental conservation law, shall state the name and address of the lead agency and the name and telephone number of a person who can provide further information, shall briefly and precisely describe the nature, extent and location of the action, shall briefly describe the possible significant environmental effects that have been identified and shall briefly state the reasons supporting the determination. Agencies shall maintain files of the written analyses and findings leading to their determinations. The notice of determination shall be filed as prescribed in subdivision (b) of this section.

(d) Notices of completion of draft EIS's. Whenever a draft EIS has been prepared, a notice of its completion shall be prepared and filed as indicated below by the lead agency. The notice shall state that it is a notice of completion of a draft EIS, shall state the name and address of the lead agency and the name and telephone number of a person who can provide further information and shall also contain the following:

(1) a brief and precise description of the action covered by the statement, the location and nature of its potential environmental impacts and effects;

(2) a statement indicating where and how copies of the statement can be obtained from the lead agency; and

(3) a statement that comments on the statement are requested and will be received and considered by the agency at a given address for a stated period (not less than 30 calendar days from the first filing and circulation of the notice of completion, or not less than 10 calendar days following a public hearing at which the environmental impacts of the proposed action are considered).

The notice of completion shall be filed as prescribed in subdivision (b) of this section and, shall be sent to the state clearinghouse and the relevant regional clearinghouse designated under federal office of management and budget circular A-95. The department shall publish all notices of completion of all draft EIS's in the Environmental Notice Bulletin.

(e) Draft EIS's. The draft EIS, together with the notice of its completion shall be filed and made available for copying as follows:

(1) one copy with the commissioner;

(2) one copy with the appropriate regional office of the department;

(3) one copy with the chief executive officer of the political subdivision in which the action will be principally located;

(4) if other agencies are involved in the approval of the action, with each such agency; and

(5) one copy with persons requesting it. Where sufficient copies of a statement are not available, the lead agency may charge a fee to persons requesting the statement to cover its costs in making the additional statement available.

(6) for State agency actions in the coastal area, one copy with the Secretary of State.

(f) Notices of hearing. A notice of hearing, if the lead agency determines that one is to be held, shall be prepared by the lead agency. It shall specify the time, place and purpose of the hearing and shall contain a summary of the information contained in the notice of completion of the draft EIS. The notice of hearing shall be filed as prescribed in subdivision (b) of this section. A notice of hearing may be given in the notice of completion of the draft EIS and shall be published at least 14 calendar days in advance of the hearing date in a newspaper of general circulation in the area of the potential impacts and effects of the action.

(g) Notices of completion of final EIS's. A notice of completion of a final EIS shall be prepared by the lead agency. It shall state that it is a notice of completion of a final EIS, shall state the name and address of the lead agency and shall contain the items prescribed in paragraphs (1) and (2) of subdivision (d) of this section. It shall be filed as prescribed in subdivision (b) of this section. The department shall publish all notices of completion of all final EIS's in the Environmental Notice Bulletin.

(h) Final EIS's. The final EIS together with the notice of its completion shall be filed in the same manner as a draft EIS.

(i) Each agency which prepares notices, statements and findings required in this Part shall retain copies thereof in a file which is readily accessible for public inspection.

617.11 Criteria.

(a) In order to determine whether a proposed Type I or unlisted action may have a significant effect on the environment, the impacts which may be reasonably expected to result from the proposed action must be compared

against the criteria in this section, whether or not an EAF has been prepared. The following list is not exhaustive; however, these criteria are considered indicators of significant effects on the environment.

(1) a substantial adverse change in existing air quality, water quality, or noise levels; a substantial increase in solid waste production; a substantial increase in potential for erosion, flooding, or drainage problems;

(2) the removal or destruction of large quantities of vegetation or fauna; the substantial interference with the movement of any resident or migratory fish or wildlife species; impacts on a significant habitat area; or substantial adverse effects on a threatened or endangered species of animal or plant or the habitat of such a species;

(3) the encouraging or attracting of a large number of people to a place or places for more than a few days compared to the number of people who would come to such place absent the action;

(4) the creation of a material conflict with a community's existing plans or goals as officially approved or adopted;

(5) the impairment of the character or quality of important historical, archeological, architectural, or aesthetic resources or of existing community or neighborhood character;

(6) a major change in the use of either the quantity or type of energy;

(7) the creation of a hazard to human health or safety;

(8) a substantial change in the use, or intensity of use of land or other natural resources or in their capacity to support existing uses;

(9) the creation of a material demand for other actions which would result in one of the above consequences; or

(10) changes in two or more elements of the environment, no one of which has a significant effect on the environment, but which when taken together result in a substantial adverse impact on the environment;

(11) two or more related actions undertaken, funded or approved by an agency, no one of which as or would have a significant effect on the environment, but which cumulatively meet one or more of the criteria in this section.

(b) For the purpose of determining whether an action will cause one of the foregoing consequences, the action shall be deemed to include other simultaneous or subsequent actions which are:

(1) included in any long-range plan of which the action under consideration is a part;

(2) likely to be undertaken as a result thereof; or

(3) dependent thereon.

(c) The significance of a likely consequence, (that is whether it is material, substantial, large, or important) should be assessed in connection with:

(1) its setting (i.e., urban or rural);

(2) its probability of occurring;

(3) its duration;

(4) its irreversibility;

(5) its geographic scope; and

(6) its magnitude.

617.12 Type I Actions.

(a) The purpose of the list of actions identified as Type I in this section is to identify for agencies, project sponsors, and the public those actions and projects that are more likely to require the preparation of EIS's than those not so listed (i.e., "unlisted actions"). This Type I list is not exhaustive of those actions that any agency may determine have a significant effect on the environment and require the preparation of an EIS. Therefore, the fact that an action or project has not been listed as a Type I action does not carry with it the presumption that it will not have a significant effect on the environment. For all individual actions which are Type I or unlisted, the determination of significance must be made by comparing the impacts which may be reasonably expected to result from the proposed action with the criteria listed in 617.11.

The Type I actions on this list are considered more likely to require the preparation of an EIS than other actions and are likely to involve review by more than one governmental agency and therefore the procedural requirements for Type I actions (617.6) are more extensive than for those unlisted actions (617.7).

(b) The following actions are Type I if they are directly undertaken, funded, or approved by an agency:

(1) The adoption of a municipality's land use plan or zoning regulations or the adoption by any agency of a comprehensive resource management plan.

(2) The following changes in the allowable uses within any zoning district, affecting 25 or more acres of the district:

(i) authorizing industrial or commercial uses within a residential or agricultural district; or

(ii) authorizing residential uses within an agricultural district.

(3) The granting of a zoning change at the request of an applicant for an action that meets or exceeds one or more of the thresholds given in other sections of this list.

(4) The acquisition, sale, lease or other transfer of 100 or more contiguous acres of land by a state or local agency.

(5) Construction of new residential units which meet or exceed the following thresholds:

(i) 10 units in municipalities which have not adopted zoning regulations;

(ii) 50 units not to be connected (at commencement of habitation) to community or publicly-owned utilities;

(iii) in a city, town or village having a population of less than 150,000: 250 units to be connected (at the commencement of habitation) to community or publicly-owned utilities;

(iv) in a city, town of village having a population of greater than 150,000 but less than 1,000,000: 1,000 units to be connected (at the commencement of habitation) to community or publicly-owned utilities;

(v) in a city or town having a population of greater than 1,000,000: 2,500 units to be connected (at the commencement of habitation) to community or publicly-owned utilities.

(6) Construction of new non-residential facilities which meet or exceed any of the following thresholds; or the expansion of existing non-residential facilities by more than 50 percent of any of the following thresholds, providing that the expansion and the existing facilities, when combined, meet or exceed any threshold contained in this section.

(i) a project or action which involves the physical alteration of 10 acres;

(ii) a project or action which would use ground or surface water in excess of 2,000,000 gallons per day;

(iii) parking for 1,000 vehicles;

(iv) in a city, town or village having a population of 150,000 persons or less: a facility with more than 100,000 square feet of gross floor area;

(v) in a city, town or village having a population of more than 150,000 persons: a facility with more than 240,000 square feet of gross floor area.

(7) Any structure exceeding 100 feet above original ground level in a locality without any zoning regulation pertaining to height.

(8) Any non-agricultural use occuring wholly or partially within an agricultural district (certified pursuant to Agriculture and Markets Law, Article 24, Section 303) which exceeds 10 percent of any threshold established in this section.

(9) Any action (unless the action is designed for the preservation of the facility or site) occuring wholly or partially within, or contiguous to any facility or site listed on the National Register of Historic Places, or any historic building, structure, or site, or prehistoric site that has been proposed by the Committee on the Registers for consideration by the New York State Board on Historic Preservation for a recommendation to the State Historic Officer for nomination for inclusion in said National Register.

(10) Any project or action, which exceeds 25 percent of any threshold in this section, occuring wholly or partially within or substantially contiguous to any publicly-owned or operated park land, recreation area or designated open space.

(11) Any action which exceeds the locally established thresholds or if no such thresholds are established, any action which takes place wholly or partially within or substantially contiguous to any Critical Environmental Area designated by a local agency pursuant to 617.4.

617.13. Type II Actions.

(a) Actions or classes of actions which have been determined not to have a significant effect on the environment are classified as Type II actions, and do not require environmental impact statements or any other determination or procedure under this Part.

(b) Each agency may adopt its own Type II list provided it finds that each of the actions contained on it:

(1) is no less protective of the environment than the list in this section; and

(2) will in no case have a significant effect on the environment based on the criteria contained in 617.11 and any additional criteria contained in its procedures adopted pursuant to 617.4.

(c) An agency may not designate as Type I any action on the Type II list.

(d) The following actions are Type II actions:

(1) Replacement of a facility, in kind, on the same site unless such facility meets any of the thresholds in 617.12;

(2) The granting of individual setback and lot line variances;

(3) Agricultural farm management practices including construction, maintenance and repair of farm buildings and structures and land use changes consistent with generally accepted principles of farming;

(4) Repaving of existing highways not involving the addition of new travel lanes;

(5) Street openings for the purpose of repair or maintenance of existing utility facilities;

(6) Installation of traffic control devices on existing streets, roads, and highways;

(7) Public or private forest management practices other than the removal of trees or the application of herbicides or pesticides;

(8) Construction or placement of minor structures accessory or appurtenant to existing facilities including garages, carports, patios, home swimming pools, fences, barns or other buildings not changing land use or density;

(9) Maintenance of existing landscaping or natural growth;

(10) Mapping of existing roads, streets, highways, uses, and ownership patterns;

(11) Inspections and licensing activities relating to the qualifications of individuals or businesses to engage in their business or profession;

(12) Sales of surplus government property other than land, radioactive material, pesticides, herbicides, or other hazardous materials;

(13) Collective bargaining activities;

(14) Investments by or on behalf of agencies or pension or retirement systems;

(15) Routine or continuing agency administration and management not including new programs or major reordering of priorities;

(16) License and permit renewals where there will be no material change in permit conditions or the scope of permitted activities;

(17) Routine activities of educational institutions which do not include capital construction;

(18) Information collection including basic data collection and research, masterplan study components, water quality and pollution studies, traffic counts, engineering studies, boring studies, surveys and soils studies that are not a preliminary step towards any given Type I project;

(19) Minor temporary uses of land having negligible or no permanent effect on the environment.

(20) The extension of utility distribution facilities to serve new or altered single or two-family residential structures or to render service in approved subdivisions.

617.14 Preparation and content of environmental impact statements.

(a) An EIS provides a means for agencies to give early consideration to environmental factors and it facilitates the weighing of social, economic and environmental issues in planning and decision making. Therefore, the preparation of an EIS is to be integrated into existing agency review process and should occur at the same time as other agency reviews are being undertaken. In cases where an EIS is prepared by an applicant or agency directly undertaking an action, the EIS provides a means for project sponsors to systematically consider environmental effects along with other aspects of their project planning and design and to identify and mitigate unnecessary adverse environmental effects.

(b) An EIS should assemble relevant and material facts upon which the decision is to be made, should identify the essential issues to be decided, should evaluate all reasonable alternatives and, on the basis of these, should make recommendations. In order to accomplish this, EIS's shall be analytical and not encyclopedic. Agencies shall cooperate with applicants who are preparing EIS's by making available to them information contained in their files relevant to the EIS.

(c) EIS's shall be clearly and concisely written in plain language that can be read and understood by the public. Within the framework presented in subdivision (d) of this section, EIS's should address in detail only those specific adverse or beneficial environmental impacts which can be reasonably anticipated. They should not contain more detail than is appropriate considering the nature and magnitude of the proposed action and the significance of its potential impacts. Highly technical material shall be summarized, and if it must be included in its entirety, it shall be referenced in the statement and included in an appendix.

(d) All draft and final EIS's shall be preceded by a cover sheet stating:

(1) whether it is a draft or final EIS;

(2) the name or descriptive title of the action;

(3) the location (county and town, village or city) of the action;

(4) the name and address of the agency which required its preparation and the name and telephone number of a person at the agency who can provide further information;

(5) the names of individuals or organizations that prepared any portion of the statement;

(6) the date of its acceptance by the agency responsible for its preparation; and

(7) in the case of a draft EIS, the date by which comments must be submitted.

(e) If a draft or final EIS exceeds ten pages in length, it shall have a table of contents following the cover sheet and a precise summary which adequately and accurately summarizes the statement, focussing on issues of controversy, matters to be decided, and major conclusions.

(f) The body of all draft and final EIS's shall at least contain the following:

(1) a concise description of the proposed action, its purpose and need;

(2) a concise description of the environmental setting of the areas to be affected, sufficient to understand the effects of the proposed action and alternatives;

(3) a statement of the important environmental impacts of the proposed action, including short and long-term effects and typical associated environmental effects;

(4) an identification and brief discussion of any adverse environmental effects which cannot be avoided, if the proposed action is implemented;

(5) a description and evaluation of reasonable alternatives to the action which would achieve the same or similar objectives. (The description and evaluation should be at a level of detail sufficient to permit a comparative assessment of the alternatives discussed. The no action alternative must also be discussed and evaluated);

(6) an identification of any irreversible and irretrievable commitments of resources which would be associated with the proposed action should it be implemented;

(7) a description of mitigation measures to minimize the adverse environmental impacts;

(8) a description of any growth-inducing aspects of the proposed actions, where applicable and significant;

(9) a discussion of the effects of the proposed action on the use and conservation of energy, where applicable and significant;

(10) For State agency actions in the coastal area:

(i) when the action is not in an approved local waterfront revitalization program area, an identification of the applicable coastal policies of Executive Law, article 42 as contained in 19 NYCRR 600.5, and a discussion of the effects of the proposed action on such policies;

(ii) when the action is in an approved local waterfront revitalization program area and the action is one identified by the Secretary of State pursuant to section 916(1) (a) of the Executive Law, an identification of the applicable policies of the local program and a discussion of the effects of the proposed action on such policies.

(11) a list of any underlying studies, reports and other information obtained and considered in preparing the statement;

(12) (in the case of a final EIS only) copies or a summary of the substantive comments received and a response to such comments; and

(13) all changes made to the draft EIS incorporated in the final EIS shall be specifically indicated and identified as such.

(g) An EIS may incorporate by reference all or portions of other documents, including EIS's which contain information relevant to the statement. The referenced document shall be made available for inspection by the public within the time period for comment in the same places where the agency makes available copies of such statement. When a statement incorporates by reference, the referenced document shall be briefly described, its applicable findings summarized, and the date of its preparation provided.

(h) A final EIS may consist of: the draft EIS including any necessary revisions to it, copies or a summary of the substantive comments received and their source (whether or not the comments were received in the context of a hearing); and the lead agency's substantive responses to the comments. All revisions made to the draft EIS shall be specifically indicated and identified as such in the final EIS.

617.15 Programmatic or generic environmental impact statements.

(a) A programmatic or generic environmental impact statement may be used to assess the environmental effects of:

(1) a number of separate actions in a given geographic area which, if considered singly may have minor effects, but if considered together may have significant effects,

(2) a sequence of actions, contemplated by a single agency or individual,

(3) separate actions having generic or common impacts, or

(4) programs or plans having wide application or restricting the range of future alternative policies or projects.

(b) Generic or programmatic statements should set forth specific conditions or criteria under which future actions will be undertaken or approved and shall include procedures and criteria for amendments or supplements to reflect impacts, such as site specific impacts, which cannot be adequately addressed or analyzed in the initial statement. Such procedures shall include provision for public notice of amendments or supplements which allow for comment thereon in the same manner as was provided in respect to the original statement.

(c) When an individual action is proposed which was encompassed in a programmatic EIS and the action is to be carried out in conformance with the conditions discussed in the programmatic statement, a subsequent EIS should be prepared only if site specific impacts need to be addressed.

(d) Local agencies may find it advantageous to prepare programmatic or generic EIS's on new, existing or significant changes to existing land use plans, development plans and zoning regulations so that individual actions carried out in conformance with these plans or regulations will require only site specific EIS's as described in subdivision (c) of this section.

(1) It is recognized that EIS's on these and similar kinds of actions will be of a different character than EIS's on individual projects and their site specific impacts. Accordingly, they may be short, broad and a more general discussion of the logic and rationale for the choices advanced. They will be based on conceptual information in some cases. They will identify the important elements of the natural resource base as well as the existing and projected man-made features, patterns and character. They will discuss in general terms the constraints and consequences of any narrowing of future options. They will present and analyze in general terms a few hypothetical scenarios that could and are likely to occur in light of the plan or zoning regulations.

(2) If an agency prepares an EIS along these lines, the need to prepare subsequent, individual EIS's on actual, specific projects that are

developed in conformity with the plan or zoning regulations will be limited to those cases when the particular impacts associated with given projects warrant treatment in a more narrowly focused supplement to the original, broad EIS. In such cases the programmatic EIS can be a useful tool for scoping the supplementary EIS.

(e) In connection with projects that are to be developed in phases or stages, agencies should address not only the site specific impacts of the individual project under consideration, but also, in more general or conceptual terms, the cumulative effects on the environmental and existing natural resource base of subsequent phases of a larger project or series of projects that may be developed in the future and that are under the ownership or control of the same project sponsor. In these cases, this part of the EIS shall discuss the important elements and constraints present in the natural and man-made environment that may bear on the conditions of an agency decision on the immediate project.

617.16. Actions involving a federal agency.

(a) When a draft and final EIS for an action has been prepared under the national environmental policy act of 1969, an agency shall have no obligation to prepare an additional EIS under this Part. However, except in the case of excluded or exempt actions, no agency may undertake or approve the action until the federal final EIS has been completed and the agency has made the findings prescribed in 617.9.

(b) Where a negative declaration or other written threshold determination that the action will not require a federal impact statement has been prepared under the national environmental policy act of 1969, the determination shall not constitute compliance with SEQR. In such cases, agencies remain responsible for compliance with SEQR.

(c) In the case of an action involving a federal agency for which either a federal negative declaration or a federal draft and final EIS has been prepared, except where otherwise required by law, a final decision by a federal agency shall not be controlling on any state or local agency decision on the action.

(d) No SEQR findings are required for actions which are excluded or exempt from SEQR.

617.17 Fees and costs.

(a) When an action subject to this Part involves an applicant, the lead agency may charge a fee to the applicant in order to recover the actual costs of preparing or reviewing the EIS, provided, however, that an applicant may not be charged a separate fee for both the preparation and review of an EIS and provided further that any fee charged must reflect the actual costs to the lead agency for such preparation or review.

Where an applicant does not choose to prepare the EIS, the agency shall provide the applicant, upon request, with an estimate of the costs for preparing such statement based on the total cost of the project for which funding or approval is sought.

(b) For residential projects the total project cost shall be the cost of the land plus the cost of all site improvements required, not including the cost of buildings and structures.

In the case of a residential project, the fee charged by an agency may not exceed two percent of the total project cost.

(c) For non-residential construction projects the total project cost shall be the cost of supplying utility service to the project, the cost of site preparation and the cost of labor and material as determined with reference to a current cost data publication in common usage such as: Building Construction Cost Data by Means.

In the case of construction projects the fee charged may not exceed one-half of one percent of the total project cost.

(d) Appeals procedure. When a dispute arises concerning fees charged to an applicant by a state agency the applicant may make a written request to the agency setting forth reasons why it is felt that such fees are inequitable. Upon receipt of a request the chief fiscal officer of the agency or his designee shall examine the agency record and prepare a written response to the applicant setting forth reasons why the applicant's claims are valid or invalid.

(e) The technical services of the department may be made available to other agencies on a fee basis reflecting the costs thereof and the fee charged to any applicant pursuant to subdivision (a) of this section may reflect such costs.

617.18 Confidentiality.

When an applicant submits a completed EAF, draft or final EIS or otherwise provides information concerning the environmental impacts of a proposed project, the applicant may request that specifically identified information be held confidential upon a showing by the applicant that such information constitutes a trade secret. Prior to divulging any such information, the agency shall notify the applicant of its determination of whether or not it will hold the information confidential.

ENVIRONMENTAL ASSESSMENT - PART I

Project Information

NOTICE: This document is designed to assist in determining whether the action proposed may have a significant effect on the environment. Please complete the entire Data Sheet. Answers to these questions will be considered as part of the application for approval and may be subject to further verification and public review. Provide any additional information you believe will be needed to complete PARTS 2 and 3.

It is expected that completion of the EAF will be dependent on information currently available and will not involve new studies, research or investigation. If information requiring such additional work is unavailable, so indicate and specify each instance.

NAME OF PROJECT:

_____

_____

ADDRESS AND NAME OF APPLICANT:

_____
(Name)

_____
(Street)

_____
(P.O.) (State) (Zip)

NAME AND ADDRESS OF OWNER (If Different)

_____
(Name)

_____
(Street)

_____
(P.O.) (State) (Zip)

BUSINESS PHONE: _____

DESCRIPTION OF PROJECT: (Briefly describe type of project or action) _____

_____

_____

(PLEASE COMPLETE EACH QUESTION - Indicate N.A. if not applicable)

A. SITE DESCRIPTION

(Physical setting of overall project, both developed and undeveloped areas)

1. General character of the land: Generally uniform slope _____ Generally uneven and rolling or irregular _____.

2. Present land use: Urban _____, Industrial _____, Commercial _____, Suburban _____, Rural _____, Forest _____, Agriculture _____, Other _____.

3. Total acreage of project area: _____acres.

Approximate acreage:	Presently	After Completion		Presently	After Completion
Meadow or Brushland	_____acres	_____acres	Water Surface Area	_____acres	_____acres
Forested	_____acres	_____acres	Unvegetated (rock, earth or fill)	_____acres	_____acres
Agricultural	_____acres	_____acres	Roads, buildings and other paved surfaces	_____acres	_____acres
Wetland (Freshwater or Tidal as per Articles 24, 25 or F.C.L.)	_____acres	_____acres	Other (indicate type)	_____acres	_____acres

4. What is predominant soil type(s) on project site? _____

5. a. Are there bedrock outcroppings on project site? _____Yes _____No

b. What is depth to bedrock? _____(In feet)

9/1/78

6. Approximate percentage of proposed project site with slopes: 0-10% _____%; 10-15% _____%; 15% or greater _____%.

7. Is project contiguous to, or contain a building or site listed on the National Register of Historic Places? _____Yes _____No

8. What is the depth to the water table? _____feet

9. Do hunting or fishing opportunities presently exist in the project area? _____Yes _____No

10. Does project site contain any species of plant or animal life that is identified as threatened or endangered - _____Yes _____No, according to - Identify each species _____

_____

11. Are there any unique or unusual land forms on the project site? (i.e. cliffs, dunes, other geological formations - _____Yes _____No. (Describe _____

12. Is the project site presently used by the community or neighborhood as an open space or recreation area - _____Yes _____No.

13. Does the present site offer or include scenic views or vistas known to be important to the community? _____Yes _____No

14. Streams within or contiguous to project area:

a. Name of stream and name of river to which it is tributary _____

_____

15. Lakes, Ponds, Wetland areas within or contiguous to project area:

a. Name _____; b. Size (in acres) _____

16. What is the dominant land use and zoning classification within a 1/4 mile radius of the project (e.g. single family residential, R-2) and the scale of development (e.g. 2 story).

B. PROJECT DESCRIPTION

1. Physical dimensions and scale of project (fill in dimensions as appropriate)

a. Total contiguous acreage owned by project sponsor _____ acres.

b. Project acreage developed: _____ acres initially; _____ acres ultimately.

c. Project acreage to remain undeveloped _____.

d. Length of project, in miles: _____(if appropriate)

e. If project is an expansion of existing, indicate percent of expansion proposed: building square footage _____; developed acreage _____.

f. Number of off-street parking spaces existing _____; proposed _ _____.

g. Maximum vehicular trips generated per hour _____(upon completion of project)

h. If residential: Number and type of housing units:

	One Family	Two Family	Multiple Family	Condominium
Initial	_____	_____	_____	_____
Ultimate	_____	_____	_____	_____

i. If:

	Orientation Neighborhood-City-Regional	Estimated Employment
Commercial	_____	_____
Industrial	_____	_____

j. Total height of tallest proposed structure _ _____feet.

2. How much natural material (i.e. rock, earth, etc.) will be removed from the site - _____tons _____cubic yards.

3. How many acres of vegetation (trees, shrubs, ground covers) will be removed from site - _____acres.

4. Will any mature forest (over 100 years old) or other locally-important vegetation be removed by this project? _____Yes _____No

5. Are there any plans for re-vegetation to replace that removed during construction? _____Yes _____No

6. If single phase project: Anticipated period of construction _____months, (including demolition).

7. If multi-phased project:
   a. Total number of phases anticipated _____No.
   b. Anticipated date of commencement phase 1 _____month _____year (including demolition)
   c. Approximate completion date final phase _____month _____year.
   d. Is phase 1 financially dependent on subsequent phases? _____Yes _____No

8. Will blasting occur during construction? _____Yes _____No

9. Number of jobs generated: during construction _____; after project is complete _____.

10. Number of jobs eliminated by this project _____.

11. Will project require relocation of any projects or facilities? _____Yes _____No. If yes, explain:

_____.

12. a. Is surface or subsurface liquid waste disposal involved? _____Yes _____No.
    b. If yes, indicate type of waste (sewage, industrial, etc.) _____.
    c. If surface disposal name of stream into which effluent will be discharged _____.

13. Will surface area of existing lakes, ponds, streams, bays or other surface waterways be increased or decreased by proposal? _____Yes _____No.

14. Is project or any portion of project located in the 100 year flood plain? _____Yes _____No

15. a. Does project involve disposal of solid waste? _____Yes _____No
    b. If yes, will an existing solid waste disposal facility be used? _____Yes _____No
    c. If yes, give name: _____; location _____.
    d. Will any wastes not go into a sewage disposal system or into a sanitary landfill? _____Yes _____No

16. Will project use herbicides or pesticides? _____Yes _____No

17. Will project routinely produce odors (more than one hour per day)? _____Yes _____No

18. Will project produce operating noise exceeding the local ambience noise levels? _____Yes _____No

19. Will project result in an increase in energy use? _____Yes _____No. If yes, indicate type(s) _____

_____.

20. If water supply is from wells indicate pumping capacity _____ gals/minute.

21. Total anticipated water usage per day _____gals/day.

22. Zoning: a. What is dominant zoning classification of site? _____.
    b. Current specific zoning classification of site _____.
    c. Is proposed use consistent with present zoning? _____.
    d. If no, indicate desired zoning _____.

26. Approvals: a. Is any Federal permit required? _____Yes _____No

b. Does project involve State or Federal funding or financing? _____Yes _____No

c. Local and Regional approvals:

	Approval Required (Yes, No)	(Type)	Submittal (Date)	Approval (Date)
City, Town, Village Board				
City, Town, Village Planning Board				
City, Town, Zoning Board				
City, County Health Department				
Other local agencies				
Other regional agencies				
State Agencies				
Federal Agencies				

C. INFORMATIONAL DETAILS

Attach any additional information as may be needed to clarify your project. If there are or may be any adverse impacts associated with the proposal, please discuss such impacts and the measures which can be taken to mitigate or avoid them.

PREPARER'S SIGNATURE: _____

TITLE: _____

REPRESENTING: _____

DATE: _____

EAF

ENVIRONMENTAL ASSESSMENT - PART II

Project Impacts and Their Magnitude

General Information (Read Carefully)

- In completing the form the reviewer should be guided by the question: Have my decisions and determinations been reasonable? The reviewer is not expected to be an expert environmental analyst.
- Identifying that an effect will be potentially large (column 2) does not mean that it is also necessarily significant. Any large effect must be evaluated in PART 3 to determine significance. By identifying an effect in column 2 simply asks that it be looked at further.
- The Examples provided are to assist the reviewer by showing types of effects and wherever possible the threshold of magnitude that would trigger a response in column 2. The examples are generally applicable throughout the State and for most situations. But, for any specific project or site other examples and/or lower thresholds may be more appropriate for a Potential Large Impact rating.
- Each project, on each site, in each locality, will vary. Therefore, the examples have been offered as guidance. They do not constitute an exhaustive list of impacts and thresholds to answer each question.
- The number of examples per question does not indicate the importance of each question.

INSTRUCTIONS (Read Carefully)

a. Answer each of the 18 questions in PART 2. Answer Yes if there will be any effect.

b. Maybe answers should be considered as Yes answers.

c. If answering Yes to a question then check the appropriate box (column 1 or 2) to indicate the potential size of the impact. If impact threshold equals or exceeds any example provided, check column 2. If impact will occur but threshold is lower than example, check column 1.

d. If reviewer has doubt about the size of the impact then consider the impact as potentially large and proceed to PART 3.

e. If a potentially large impact or effect can be reduced by a change in the project to a less than large magnitude, place a Yes in column 3. A No response indicates that such a reduction is not possible.

			1. SMALL TO MODERATE IMPACT	2. POTENTIAL LARGE IMPACT	3. CAN IMPACT BE REDUCED BY PROJECT CHANGE
	IMPACT ON LAND	NO YES			
1.	WILL THERE BE AN EFFECT AS A RESULT OF A PHYSICAL CHANGE TO PROJECT SITE?	○ ○			
	Examples that Would Apply to Column 2				
___	Any construction on slopes of 15% or greater, (15 foot rise per 100 foot of length), or where the general slopes in the project area exceed 10%.		___	___	___
___	Construction on Land where the depth to the water table is less than 3 feet.		___	___	___
___	Construction of paved parking area for 1,000 or more vehicles.		___	___	___
___	Construction on land where bedrock is exposed or generally within 3 feet of existing ground surface.		___	___	___
___	Construction that will continue for more than 1 year or involve more than one phase or stage.		___	___	___
___	Excavation for mining purposes that would remove more than 1,000 tons of natural material (i.e. rock or soil) per year.		___	___	___
___	Construction of any new sanitary landfill.		___	___	___

	NO	YES	1. SMALL TO MODERATE IMPACT	2. POTENTIAL LARGE IMPACT	3. CAN IMPACT BE REDUCED BY PROJECT CHANGE
___ Construction in a designated floodway.			___	___	___
___ Other impacts: _____			___	___	___
_____			___	___	___
2. WILL THERE BE AN EFFECT TO ANY UNIQUE OR UNUSUAL LAND FORMS FOUND ON THE SITE? (i.e. cliffs, dunes, geological formations, etc.)	○	○			
___ Specific land forms: _____			___	___	___
_____			___	___	___
IMPACT ON WATER					
3. WILL PROJECT AFFECT ANY WATER BODY DESIGNATED AS PROTECTED? (Under Articles 15, 24, 25 of the Environmental Conservation Law, E.C.L.)	○	○			
Examples that Would Apply to Column 2					
___ Dredging more than 100 cubic yards of material from channel of a protected stream.			___	___	___
___ Construction in a designated freshwater or tidal wetland.			___	___	___
___ Other impacts: _____			___	___	___
_____			___	___	___
4. WILL PROJECT AFFECT ANY NON-PROTECTED EXISTING OR NEW BODY OF WATER?	○	○			
Examples that Would Apply to Column 2					
___ A 10% increase or decrease in the surface area of any body of water or more than a 10 acre increase or decrease.			___	___	___
___ Construction of a body of water that exceeds 10 acres of surface area.			___	___	___
___ Other impacts: _____			___	___	___
_____			___	___	___
5. WILL PROJECT AFFECT SURFACE OR GROUNDWATER QUALITY?	○	○			
Examples that Would Apply to Column 2					
___ Project will require a discharge permit.			___	___	___
___ Project requires use of a source of water that does not have approval to serve proposed project.			___	___	___
___ Project requires water supply from wells with greater than 45 gallons per minute pumping capacity.			___	___	___
___ Construction or operation causing any contamination of a public water supply system.			___	___	___
___ Project will adversely affect groundwater.			___	___	___
___ Liquid effluent will be conveyed off the site to facilities which presently do not exist or have inadequate capacity.			___	___	___
___ Project requiring a facility that would use water in excess of 20,000 gallons per day.			___	___	___
___ Project will likely cause siltation or other discharge into an existing body of water to the extent that there will be an obvious visual contrast to natural conditions.			___	___	___

		1. SMALL TO MODERATE IMPACT	2. POTENTIAL LARGE IMPACT	3. CAN IMPACT BE REDUCED BY PROJECT CHANGE
___	Other Impacts: _____	___	___	___
	_____	___	___	___
6.	WILL PROJECT ALTER DRAINAGE FLOW, PATTERNS OR SURFACE WATER RUNOFF? ..... NO ○ YES ○			
	Example that Would Apply to Column 2			
___	Project would impede flood water flows.	___	___	___
___	Project is likely to cause substantial erosion.	___	___	___
___	Project is incompatible with existing drainage patterns.	___	___	___
___	Other impacts: _____	___	___	___
	IMPACT ON AIR			
7.	WILL PROJECT AFFECT AIR QUALITY?..... NO ○ YES ○			
	Examples that Would Apply to Column 2			
___	Project will induce 1,000 or more vehicle trips in any given hour.	___	___	___
___	Project will result in the incineration of more than 1 ton of refuse per hour.	___	___	___
___	Project emission rate of all contaminants will exceed 5 lbs. per hour or a heat source producing more than 10 million BTU's per hour.	___	___	___
___	Other impacts: _____	___	___	___
	_____	___	___	___
	IMPACT ON PLANTS AND ANIMALS			
8.	WILL PROJECT AFFECT ANY THREATENED OR ENDANGERED SPECIES? NO ○ YES ○			
	Examples that Would Apply to Column 2			
___	Reduction of one or more species listed on the New York or Federal list, using the site, over or near site or found on the site.	___	___	___
___	Removal of any portion of a critical or significant wildlife habitat.	___	___	___
___	Application of Pesticide or herbicide over more than twice a year other than for agricultural purposes.	___	___	___
___	Other impacts: _____	___	___	___
	_____	___	___	___
9.	WILL PROJECT SUBSTANTIALLY AFFECT NON-THREATENED OR ENDANGERED SPECIES? ..... NO ○ YES ○			
	Example that Would Apply to Column 2			
___	Project would substantially interfere with any resident or migratory fish or wildlife species.	___	___	___
___	Project requires the removal of more than 10 acres of mature forest (over 100 years in age) or other locally important vegetation.	___	___	___

	NO	YES	SMALL TO MODERATE IMPACT	POTENTIAL LARGE IMPACT	CAN IMPACT BE REDUCED BY PROJECT CHANGE
IMPACT ON VISUAL RESOURCE					
10. WILL THE PROJECT AFFECT VIEWS, VISTAS OR THE VISUAL CHARACTER OF THE NEIGHBORHOOD OR COMMUNITY?	○	○			
Examples that Would Apply to Column 2					
___ An incompatible visual affect caused by the introduction of new materials, colors and/or forms in contrast to the surrounding landscape.			___	___	___
___ A project easily visible, not easily screened, that is obviously different from others around it.			___	___	___
___ Project will result in the elimination or major screening of scenic views or vistas known to be important to the area.			___	___	___
___ Other impacts: _____			___	___	___
_____			___	___	___
IMPACT ON HISTORIC RESOURCES					
11. WILL PROJECT IMPACT ANY SITE OR STRUCTURE OF HISTORIC, PRE-HISTORIC OR PALEONTOGICAL IMPORTANCE?	○	○			
Examples that Would Apply to Column 2					
___ Project occuring wholly or partially within or contiguous to any facility or site listed on the National Register of historic places.			___	___	___
___ Any impact to an archeological site or fossil bed located within the project site.			___	___	___
___ Other impacts: _____			___	___	___
_____			___	___	___
IMPACT ON OPEN SPACE & RECREATION					
12. WILL THE PROJECT AFFECT THE QUANTITY OR QUALITY OF EXISTING OR FUTURE OPEN SPACES OR RECREATIONAL OPPORTUNITIES?.....	○	○			
Examples that Would Apply to Column 2					
___ The permanent foreclosure of a future recreational opportunity.			___	___	___
___ A major reduction of an open space important to the community.			___	___	___
___ Other impacts: _____			___	___	___
_____			___	___	___
IMPACT ON TRANSPORTATION					
13. WILL THERE BE AN EFFECT TO EXISTING TRANSPORTATION SYSTEMS?	○	○			
Examples that Would Apply to Column 2					
___ Alteration of present patterns of movement of people and/or goods.			___	___	___
___ Project will result in severe traffic problems.			___	___	___
___ Other impacts: _____			___	___	___
_____			___	___	___

			1	2	3
			SMALL TO MODERATE IMPACT	POTENTIAL LARGE IMPACT	CAN IMPACT BE REDUCED BY PROJECT CHANGE
	IMPACT ON ENERGY				
14.	WILL PROJECT AFFECT THE COMMUNITIES SOURCES OF FUEL OR ENERGY SUPPLY?	NO ○ YES ○			
	Examples that Would Apply to Column 2				
___	Project causing greater than 5% increase in any form of energy used in municipality.		___	___	___
___	Project requiring the creation or extension of an energy transmission or supply system to serve more than 50 single or two family residences.		___	___	___
___	Other impacts: _____		___	___	___
	_____		___	___	___
	IMPACT ON NOISE				
15.	WILL THERE BE OBJECTIONABLE ODORS, NOISE, GLARE, VIBRATION or ELECTRICAL DISTURBANCE AS A RESULT OF THIS PROJECT?	NO ○ YES ○			
	Examples that Would Apply to Column 2				
___	Blasting within 1,500 feet of a hospital, school or other sensitive facility.		___	___	___
___	Odors will occur routinely (more than one hour per day).		___	___	___
___	Project will produce operating noise exceeding the local ambient noise levels for noise outside of structures.		___	___	___
___	Project will remove natural barriers that would act as a noise screen.		___	___	___
___	Other impacts: _____		___	___	___
	_____		___	___	___
	IMPACT ON HEALTH & HAZARDS				
16.	WILL PROJECT AFFECT PUBLIC HEALTH AND SAFETY?	NO ○ YES ○			
	Examples that Would Apply to Column 2				
___	Project will cause a risk of explosion or release of hazardous substances (i.e. oil, pesticides, chemicals, radiation, etc.) in the event of accident or upset conditions, or there will be a chronic low level discharge or emission.		___	___	___
___	Project that will result in the burial of "hazardous wastes" (i.e. toxic, poisonous, highly reactive, radioactive, irritating, infectious, etc., including wastes that are solid, semi-solid, liquid or contain gases.)		___	___	___
___	Storage facilities for one million or more gallons of liquified natural gas or other liquids.		___	___	___
___	Other impacts: _____		___	___	___
	_____		___	___	___

17. WILL PROJECT AFFECT THE CHARACTER OF THE EXISTING COMMUNITY? ..... NO ◯ YES ◯

Example that Would Apply to Column 2

___ The population of the City, Town or Village in which the project is located is likely to grow by more than 5% of resident human population.	___	___	___
___ The municipal budgets for capital expenditures or operating services will increase by more than 5% per year as a result of this project.	___	___	___
___ Will involve any permanent facility of a non-agricultural use in an agricultural district or remove prime agricultural lands from cultivation.	___	___	___
___ The project will replace or eliminate existing facilities, structures or areas of historic importance to the community.	___	___	___
___ Development will induce an influx of a particular age group with special needs.	___	___	___
___ Project will set an important precedent for future projects.	___	___	___
___ Project will relocate 15 or more employees in one or more businesses.	___	___	___
___ Other impacts: _____	___	___	___
_____	___	___	___

18. IS THERE PUBLIC CONTROVERSY CONCERNING THE PROJECT? ..... NO ◯ YES ◯

Examples that Would Apply to Column 2

___ Either government or citizens of adjacent communities have expressed opposition or rejected the project or have not been contacted.	___	___	___
___ Objections to the project from within the community.	___	___	___

IF ANY ACTION IN PART 2 IS IDENTIFIED AS A POTENTIAL LARGE IMPACT OR IF YOU CANNOT DETERMINE THE MAGNITUDE OF IMPACT, PROCEED TO PART 3.

PORTIONS OF EAF COMPLETED FOR THIS PROJECT:

PART I ___ PART II ___ PART 3 ___

DETERMINATION

Upon review of the information recorded on this EAF (Parts 1, 2 and 3) and considering both the magnitude and importance of each impact, it is reasonably determined that:

A. The project will result in no major impacts and, therefore, is one which may not cause significant damage to the environment.

PREPARE A NEGATIVE DECLARATION ___ ◯

B. Although the project could have a significant effect on the environment, there will not be a significant effect in this case because the mitigation measures described in PART 3 have been included as part of the proposed project.

PREPARE A NEGATIVE DECLARATION ___ ◯

C. The project will result in one or more major adverse impacts that cannot be reduced and may cause significant damage to the environment.

PREPARE POSITIVE DECLARATION PROCEED WITH EIS ___ ◯

_____
Date

_____
Signature of Preparer (if different from responsible officer)

_____
Signature of Responsible Official in Lead Agency

_____
Print or type name of responsible official in Lead Agency

ENVIRONMENTAL ASSESSMENT - PART III

EVALUATION OF THE IMPORTANCE OF IMPACTS

INFORMATION

- Part 3 is prepared if one or more impact or effect is considered to be potentially large.
- The amount of writing necessary to answer Part 3 may be determined by answering the question: In briefly completing the instructions below have I placed in this record sufficient information to indicate the reasonableness of my decisions?

INSTRUCTIONS

Complete the following for each impact or effect identified in Column 2 of Part 2:

1. Briefly describe the impact.
2. Describe (if applicable) how the impact might be mitigated or reduced to a less than large impact by a project change.
3. Based on the information available, decide if it is reasonable to conclude that this impact is important to the minicipality (city, town or village) in which the project is located.

   To answer the question of importance, consider:

   - The probability of the impact or effect occurring
   - The duration of the impact or effect
   - Its irreversibility, including permanently lost resources or values
   - Whether the impact or effect can be controlled
   - The regional consequence of the impact or effect
   - Its potential divergence from local needs and goals
   - Whether known objections to the project apply to this impact or effect.

DETERMINATION OF SIGNIFICANCE

An action is considered to be significant if:

One (or more) impact is determined to both large and its (their) consequence, based on the review above, is important.

PART III STATEMENTS

(Continue on Attachments, as needed)

Short Environmental Assessment

INSTRUCTIONS:

a) In order to answer the questions in this short EAF it is assumed that the preparer will use currently available information concerning the project and the likely impacts of the action. It is not expected that additional studies, research or other investigations will be undertaken.

b) If any question has been answered Yes the project may be significant and a completed Environmental Assessment Form is necessary.

c) If all questions have been answered No it is likely that this project is not significant.

d) Environmental Assessment

1. Will project result in a large physical change to the project site or physically alter more than 10 acres of land?..... ___Yes ___No
2. Will there be a major change to any unique or unusual land form found on the site?..... ___Yes ___No
3. Will project alter or have a large effect on an existing body of water?..... ___Yes ___No
4. Will project have a potentially large impact on groundwater quality?..... ___Yes ___No
5. Will project significantly affect drainage flow on adjacent sites?..... ___Yes ___No
6. Will project affect any threatened or endangered plant or animal species?..... ___Yes ___No
7. Will project result in a major adverse effect on air quality?..... ___Yes ___No
8. Will project have a major effect on visual character of the community or scenic views or vistas known to be important to the community?..... ___Yes ___No
9. Will project adversely impact any site or structure of historic, pre-historic, or paleontological importance or any site designated as a critical environmental area by a local agency?..... ___Yes ___No
10. Will project have a major effect on existing or future recreational opportunities?..... ___Yes ___No
11. Will project result in major traffic problems or cause a major effect to existing transportation systems?..... ___Yes ___No
12. Will project regularly cause objectionable odors, noise, glare, vibration, or electrical disturbance as a result of the project's operation?..... ___Yes ___No
13. Will project have any impact on public health or safety? ___Yes ___No
14. Will project affect the existing community by directly causing a growth in permanent population of more than 5 percent over a one-year period or have a major negative effect on the character of the community or neighborhood?..... ___Yes ___No
15. Is there public controversy concerning the project?.... ___Yes ___No
16. Is this project being funded in whole or in part with Federal or State funds?..... ___Yes ___No
17. Does proposed operation include use, storage or disposal of hazardous or potentially hazardous toxic, flammable or explosive materials?..... ___Yes ___No

PREPARER'S SIGNATURE:_____ TITLE:_____
REPRESENTING:-_____ DATE:_____

9-1-78 - - Revised 5-19-82

Appendix 5

New York Civil Practice Law and Rules

Article 78

Proceeding Against Body or Officer

§ 7801. Nature of proceeding

Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article. Wherever in any statute reference is made to a writ or order of certiorari, mandamus or prohibition, such reference shall, so far as applicable, be deemed to refer to the proceeding authorized by this article. Except where otherwise provided by law, a proceeding under this article shall not be used to challenge a determination:

1. which is not final or can be adequately reviewed by appeal to a court or to some other body or officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application unless the determination to be reviewed was made upon a rehearing, or a rehearing has been denied, or the time within which the petitioner can procure a rehearing has elapsed; or

2. which was made in a civil action or criminal matter unless it is an order summarily punishing a contempt committed in the presence of the court.

§ 7802. Parties

(a) Definition of "body or officer". The expression "body or officer" includes every court, tribunal, board, corporation, officer, or other person, or aggregation of persons, whose action may be affected by a proceeding under this article.

(b) Persons whose terms of office have expired; successors. Whenever necessary to accomplish substantial justice, a proceeding under this article may be maintained against an officer exercising judicial or quasi-judicial functions, or member of a body whose term of office has expired. Any party may join the successor of such officer or member of a body or other person having custody of the record of proceedings under review.

(c) Prohibition in favor of another. Where the proceeding is brought to restrain a body or officer from proceeding without or in excess of jurisdiction in favor of another, the latter shall be joined as a party.

(d) Other interested persons. The court may direct that notice of the proceeding be given to any person. It may allow other interested persons to intervene.

§ 7803. Questions raised

The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or

2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or

3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

§ 7804. Procedure

(a) Special proceeding. A proceeding under this article is a special proceeding.

(b) Where proceeding brought. A proceeding under this article shall be brought in the supreme court, special term, in the county specified in subdivision (b) of section 506 except as that subdivision otherwise provides.

(c) Time for service of notice of petition and answer. Unless the court grants an order to show cause to be served in lieu of a notice of petition at a time and in a manner specified therein, a notice of petition, together with the petition and affidavits specified in the notice, shall be served on any adverse party at least twenty days before the time at which the petition is noticed to be heard. An answer and supporting affidavits, if any, shall be served at least five days before such time. A reply, together with supporting affidavits, if any, shall be served at least one day before such time. In the case of a proceeding pursuant to this article against a state body or officers, or against members of a state body or officers whose terms have expired as authorized by subdivision (b) of section 7802 of this chapter, commenced either by order to show cause or notice of petition, in addition to the service thereof provided in this section, the order to show cause or notice of petition must be served upon the attorney general by delivery of such order or notice to an assistant attorney general at an office of the attorney general in the county in which venue of the proceeding is designated, or if there is no office of the attorney general within such county, at the office of the attorney general nearest such county. In the case of a proceeding pursuant to this article against members of bodies of governmental subdivisions whose terms have expired as authorized by subdivision (b) of section 7802 of this chapter, the order to show cause or notice of petition

must be served upon such governmental subdivision in accordance with section 311 of this chapter.

(d) Pleadings. There shall be a verified petition, which may be accompanied by affidavits or other written proof. Where there is an adverse party there shall be a verified answer, which must state pertinent and material facts showing the grounds of the respondent's action complained of. There shall be a reply to a counterclaim denominated as such and there shall be a reply to new matter in the answer or where the accuracy of proceedings annexed to the answer is disputed. The court may permit such other pleadings as are authorized in an action upon such terms as it may specify.

(e) Answering affidavits; record to be filed; default. The body or officer shall file with the answer a certified transcript of the record of the proceedings under consideration, unless such a transcript has already been filed with the clerk of the court. The respondent shall also serve and submit with the answer affidavits or other written proof showing such evidentiary facts as shall entitle him to a trial of any issue of fact. The court may order the body or officer to supply any defect or omission in the answer, transcript or an an answering affidavit. Statements made in the answer, transcript or an answering affidavit are not conclusive upon the petitioner. Should the body or officer fail either to file and serve an answer or to move to dismiss, the court may either issue a judgment in favor of the petitioner or order that an answer be submitted.

(f) Objections in point of law. The respondent may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition, made upon notice within the time allowed for answer. If the motion is denied, the court shall permit the respondent to answer, upon such terms as may be just; and unless the order specifies otherwise, such answer shall be served and filed within five days after service of the order with notice of entry. The petitioner may re-notice the matter for hearing upon two days' notice. The petitioner may raise an objection in point of law to new matter contained in the answer by setting it forth in his reply or by moving to strike such matter on the day the petition is noticed or re-noticed to be heard.

(g) Hearing and determination; transfer to appellate division. Where an issue specified in question four of section 7803 is not raised, the court in which the proceeding is commenced shall itself dispose of the issues in the proceeding. Where such an issue is raised, the court shall make an order directing that the proceeding be transferred for disposition to a term of the appellate division held within the judicial department embracing the county in which the proceeding was commenced; the court may, however, itself pass on objections in point of law. When the proceeding comes before it, whether by appeal or transfer, the appellate division shall dispose of all issues in the proceeding, or, if the papers are insufficient, it may remit the proceeding.

(h) Trial. If a triable issue of fact is raised in a proceeding under this article, it shall be tried forthwith. Where the proceeding was transferred to the appellate division, the issue of fact shall be tried by a

referee or at a trial term of the supreme court and the verdict, report or decision rendered after the trial shall be returned to, and the order thereon made by, the appellate division.

(l) Appearance by judicial officer. Notwithstanding any other provision of law, where a proceeding is brought under this article against a justice, judge, referee or judicial hearing officer appointed by a court and (1) it is brought by a party to a pending criminal action or a pending action or proceeding involving the custody of a child, and (2) it is based upon an act or acts performed by the respondent in that pending action or proceeding either granting or denying relief sought by a party thereto, and (3) the respondent is not a named party to the pending action or proceeding, in addition to service on the respondent, the petitioner shall serve a copy of the petition together with copies of all moving papers upon all other parties to the pending action or proceeding. All such parties shall be designated as respondents. Unless ordered by the court upon application of a party the respondent justice, judge, referee or judicial hearing officer need not appear in the proceeding in which case the allegations of the petition shall not be deemed admitted or denied by him. Upon election of the justice, judge, referee or judicial hearing officer not to appear, any ruling, order or judgment of the court in such proceeding shall bind such respondent. If such respondent does appear he shall respond to the petition and shall be entitled to be represented by the attorney general. If such respondent does not elect to appear all other parties shall be given notice thereof.

§ 7805. Stay

On the motion of any party or on its own initiative, the court may stay further proceedings, or the enforcement of any determination under review, upon terms including notice, security and payment of costs, except that the enforcement of an order or judgment granted by the appellate division in a proceeding under this article may be stayed only by order of the appellate division or the court of appeals. Unless otherwise ordered, security given on a stay is effective in favor of a person subsequently joined as a party under section 7802.

§ 7806. Judgment

The judgment may grant the petitioner the relief to which he is entitled, or may dismiss the proceeding either on the merits or with leave to renew. If the proceeding was brought to review a determination, the judgment may annul or confirm the determination in whole or in part, or modify it, and may direct or prohibit specified action by the respondent. Any restitution or damages granted to the petitioner must be incidental to the primary relief sought by the petitioner, and must be such as he might otherwise recover on the same set of facts in a separate action or proceeding suable in the supreme court against the same body or officer in its or his official capacity.