

How SEQRA Works – The Tie that Binds in Permitting and Environmental Review

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SEQRA's First Principles

- **Protection of New York's Environment**
- **Social, Economic and Environmental Factors shall be considered *together* in reaching decisions**
- **Effective public participation and awareness**
- **Timely and integrated proceedings and minimization of delay**

SEQRA's "Rule of Reason"

- **SEQRA must be construed in the "light of reason"**
- **"Not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before a FEIS will satisfy the substantive requirements of SEQRA"**
- **"The degree of detail with which each factor must be discussed will vary with the circumstances and nature of the proposal"**

SEQRA's "Rule of Reason"

- An agency “need not investigate every conceivable environmental problem; it may within reasonable limits, use its discretion in selecting which ones are relevant.” *Jackson v UDC*
- A “rule of reason...is applicable ...to its decisions about which matters require investigation.” *Save the Pine Bush v Albany*

Appellate Court Decisions Recognizing the Rule of Reason

- *H.O.M.E.S v NYS UDC (4th Dept. 1979)*
- *Town of Henrietta v DEC (4th Dept. 1980)*
- *Coalition Against Lincoln West v City of NY (1st Dept. 1983)*
- *EDF v Flacke (2d Dept. 1983)*
- *Aldrich v Pattison (2nd Dept. 1985)*
- *Con Ed v NYSDEC (2d Dept. 1985)*
- *Jackson v NYS UDC (1986)*
- *EFS Ventures v Foster (1988)*
- *Coca-Cola Bottling v Board of Estimate (1988)*
- *Apkan v Koch (1990)*
- *WEOK Broadcasting v Lloyd (1992)*
- *Merson v McNally (1997)*
- *West Village Committee v Zagata (3d Dept. 1998)*
- *Save the Pine Bush v Albany (3d Dept. 2002)*
- *Halperin v New Rochelle (2d Dept. 2005)*
- *Eadie v North Greenbush (2006)*
- *Riverkeeper v Town of Southeast (2007)*
- *Save the Pine Bush v Albany (2009)*

Determination of Significance

- Identify and consider the whole action
- Review EAF and other information to identify environmental concerns
- Analyze concerns and take a “hard look”
- Determine significance and provide written “reasoned elaboration” of the basis for the decision
- SEQRA regulations require the lead agency decision within 20 days of receipt of information it “reasonably” needs for the decision.

617.6((b)(3)(ii)

Determination of Significance

- **The determination of significance is a critical path step in the consideration of subdivision, site plan and permit applications**
- **The underlying application remains incomplete pending the issuance of a “neg dec” or acceptance of a DEIS as complete**
- **No formal public comment is required by SEQRA with respect to an EAF or the lead agency’s determination of significance**

Determination of Significance

- It is the lead agency's prerogative to decide whether or not and how to allow public comment
- *Merson* and *Kittredge* cases provide insight and implications of public comment opportunities
- SEQRA requires timely decisions with a minimum of administrative delay

Determination of Significance

- It is the lead agency's judgment on which environmental issues are important and likely to pose the potential for significant adverse effects---*Coca-Cola Bottling*
- It is the lead agency's responsibility to develop the administrative record to support its decisionmaking---*H.O.M.E.S., Merson, Kittredge*

Scoping

As defined in 617.2(*af*),
The process by which the lead agency identifies the potentially significant adverse impacts related to the proposed action that are to be addressed in the DEIS including:

Scoping

- *the content and level of detail of the analysis;*
- *the range of alternatives;*
- *the mitigation measures needed; and*
- *the identification of non-relevant issues.*

Scoping

**An EIS must assemble relevant and material facts upon which an agency's decision is to be made. It must analyze the significant adverse impacts and evaluate all reasonable alternatives. EISs must be analytical and not encyclopedic.
*617.9(b)(1)***

Scoping

- EISs must be clearly and concisely written in plain language that can be read and understood by the public
 - EISs should address only those potential significant adverse environmental impacts that can be reasonably anticipated and/or have been identified in the scoping process
 - EISs should not contain more detail than is appropriate considering the nature and magnitude of the proposed action and the significance of its potential impacts.
- 617.9(b)(2)***

Scoping

The primary goals of scoping are to focus the EIS on potentially significant adverse impacts and ***to eliminate*** consideration of those impacts that are irrelevant or nonsignificant. Scoping is not required. Scoping may be initiated by the lead agency or the project sponsor. *617.8(a)*

Scoping

The Final GEIS for the SEQRA Regulations Amendments (1995) advises:

“the primary goal of scoping ...is to produce a draft EIS that concisely and effectively discusses the potential significant adverse impacts from a proposed project.”

Scoping

“...lead agencies often open the discussion of all potential impacts for inclusion in the EIS regardless of significance or relevance. Impacts which were determined to be non-significant in the assessment phase of the process should not be brought back into the analysis. EISs should not be bloated with information irrelevant to the decision-making process.”

Scoping

- **Lead agencies must take command and manage the scoping process**
- **An opportunity for public participation is required; blind acceptance of suggested issues for analysis is not**
- **Critical analysis of environmental concerns, mitigating measures and alternatives is required for effective scoping**

DEIS Completeness

The lead agency will use the final written scope, if any, and the standards set forth in 617.9 (b) to determine whether to accept the draft EIS as adequate with respect to its scope and content for the purpose of commencing public review. This determination must be made within 45 days of receipt of the draft EIS. *617.9(a)(2)*

DEIS Completeness

- **The lead agency must manage its responsibilities in the DEIS completeness review**
- **Consider receiving and reviewing DEIS in sections to ease the burden on staff, consultants and board members**
- **Distinguish completeness of the studies and methods of analysis from conclusions about specific impacts**

DEIS Completeness

- **Hold special meetings or separate work sessions to review the DEIS**
- **Set a schedule for receipt and review of the DEIS with realistic timeframes for review by staff, consultants and board members**
- **Obtain the applicant's agreement for extension of review periods where necessary. *617.3(i)***

DEIS Completeness

Recurring issues concerning completeness or adequacy:

- **Alternative Discussion- *Webster, EDF, Coalition Against Lincoln West, Jackson***
- **Mitigation measures-*Save the Pine Bush***
- **Cumulative Impacts-Permissive vs mandatory**

FEIS Completeness

FEIS Contents (*617.9(b)(8)*):

- The DEIS (incorporate by reference)
- Revisions to the DEIS (including addenda or supplemental information)
- Copies and/or summaries substantive public comments
- Responses to the substantive public comments

FEIS Completeness

- **The lead agency is responsible for the adequacy and accuracy of the final EIS, regardless of who prepares it; the response to public comments can be drafted by an applicant, the agency staff or consultants**
- **The FEIS can present competing perspectives on complex issues of concern- “scientific unanimity” is not required. *EDF vs Flacke***

FEIS Completeness

- **Timeframe- 60 days from DEIS completeness or 45 days from a DEIS hearing! *617.9(a)(5)***
- **Obtain an extension of time from the applicant and map out a schedule for preparation and issuance of the FEIS that is reasonable and fair.**

FEIS Completeness

- **Managing controversial and often complex environmental issues:**
 - **Alternatives- *EDF, Coalition Against Lincoln West***
 - **Supplemental EIS-Project or other changes; new information- *Jackson, Riverkeeper, Save the Pine Bush***

SEQRA Findings

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. *ECL 8-0103.7*

SEQRA Findings

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.

ECL 8-0109.8

SEQRA Findings

No involved agency may make a final decision to undertake, fund, approve or disapprove an action that has been the subject of a final EIS, until the time period (10 calendar days) provided in subdivision 617.11(a) has passed and the agency has made a written findings statement. *617.11(c)*

SEQRA Findings

Section 617.11(d) provides that Findings must:

- **(1) consider the relevant environmental impacts, facts and conclusions disclosed in the final EIS**
- **(2) weigh and balance relevant environmental impacts with social, economic and other considerations**
- **(3) provide a rationale for the agency's decision**

SEQRA Findings

- **(4) certify that the requirements of this Part have been met**
- **(5) certify that consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable**

SEQRA Findings

New York Courts have long recognized and respected the discretion SEQRA provides to involved agencies when making SEQRA decisions.

SEQRA Findings

“ SEQRA ...requires a decision maker to balance the benefits of a proposed project against its unavoidable environmental risks in determining whether to approve the project. While an [EIS] does not require an agency to act in a particular manner, it constitutes evidence which must be considered by the public agency along with other evidence which may be presented to such agency....”

SEQRA Findings

“Thus the general substantive policy of the act is a flexible one. It leaves room for a responsible exercise of discretion and does not require particular substantive results in particular problematic instances.” - *Town of Henrietta (1979)*

SEQRA Findings

“Problematic Instances” and the “Rule of Reason”:

- *Town of Henrietta*- Mitigation conditions
- *EDF , Con Ed, Jackson* –Alternatives

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Comments or questions?

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