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## Environmental LAW

# A look at New York DEC's proposed SEQR form revisions

The New York State Environmental Quality Review Act was adopted in 1976 and requires that state and local agencies evaluate potential environmental impacts of projects prior to granting approval. Since enactment, it has served as the principle environmental planning tool for New York agencies and municipalities prior to decisions to fund, undertake or approve projects across the state.

Although SEQR has been the focus of significant discussion and litigation since its enactment, the purpose of this article is merely to highlight some fundamental changes that have been proposed to the short and long Environmental Assessment Forms (EAF). The Department of Environmental Conservation issued proposed regulatory changes consisting of revised draft forms for public comment through April 8, 2011.

The full EAF, or long form used for large projects, has not been significantly revised since 1978. The short EAF, used for smaller projects, was last subject to substantial revisions in 1987. The DEC's proposed changes seek to incorporate refinements in the process gained from experience over the years. However, DEC also intends to include consideration of emerging environmental issues such as climate change, energy conservation, environmental justice, smart growth and pollution prevention.

In terms of a basic overview, when a project applicant submits a land-use application for a new project it is generally accompanied by an EAF to provide information to the agency regarding the proposed action, site location and environmental resources.

The agency must first determine whether the proposed action is subject to SEQR, using basic regulatory criteria: 1) is the project included in the list of Type 1 actions (SEQR review required), unlisted, or listed as a Type 2 action (SEQR exempt); 2) is there a potential for significant impact on the environment; and 3) will the planning and design of the project benefit from SEQR review.

In determining the significance of potential environmental impacts from a project, the SEQR regulations require agencies to identify and assess relevant areas of environmental concern in

order to address impacts that are reasonably foreseeable. The reasonableness standard is key, since potential impacts which are not reasonably foreseeable and are speculative do not have to be addressed.

The EAF forms are central to this process. The short form EAF is used for unlisted actions. The long form EAF is used for Type 1 actions, or larger projects that may require preparation of an environmental impact statement.

The EAFs consist of the following: Part 1 — prepared by the project sponsor regarding background information on the proposed action; Part 2 — completed by the lead agency, serves to identify potentially significant adverse environmental impacts; and Part 3 — completed by the lead agency to support the agency's determination of significance.

In the event that the agency determines that there will be no significant impacts on the environment (negative declaration) the agency completes the record for reaching that determination and environmental review of the action is concluded. In the event that a positive declaration is issued by the agency, an environmental impact statement must be prepared to further evaluate potential environmental impacts of a project.

The current version of the short form EAF consists of two pages and has three parts: Part 1 — Project and Sponsor Information; Part 2 — Impact Assessment; and Part 3 — Determination of Significance. The DEC's revised form is four pages with expanded details in each section.

Aside from format changes, there are a number of substantive changes that make the short form EAF significantly more detailed.

A few of the key changes to Part 1 include additional questions regarding: public transportation and pedestrian accommodations near the site; whether the action maximizes use of energy efficient design or on-site renewable energy technology; whether the proposed action will connect to existing public water and sewer

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utilities; whether the proposed action is on or adjacent to an environmental justice community of concern as defined by the U.S. Environmental Protection Agency; whether the proposal will create new point source storm water discharges; whether the proposed action includes construction of on-site impoundments such as retention ponds, waste lagoons, etc.; and whether solid or hazardous waste has ever been stored on-site or on adjacent property.

DEC has added similar questions to the Part 2 Impact Assessment that is prepared by the lead agency for the project.

Among the additions, one new question asks the agency to determine whether “[t]he proposed action may create a substantial hazard to environmental resources or human health.”

Finally, Part 3 of the new short form EAF will require the lead agency to discuss why each potential impact checked as a “yes” in Part 2 will not result in a significant adverse environmental impact. In particular, DEC’s form will require the agency to discuss in detail the impacts, mitigation measures included by the applicant, and an explanation of how the lead agency determined that the impact will not be significant.

The revised Part 3 appears to place a much greater burden on the lead agency to discuss and explain each element of Part 2, which forms the basis for its decision.

The DEC’s revisions to the long form EAF are similar to, but much more detailed than, the changes to the short form. The current version is 21 pages. The DEC’s revised EAF is 31 pages. Substantively, the long form is much more detailed than the current version. The DEC has added similar questions to Part 1 regarding climate change, environmental justice, renewable energy and impacts on existing infrastructure.

In addition, DEC has added much more detailed sub-parts regarding existing questions on potential environmental impacts. For example, the revised form requests information about whether the project will create a new demand for water, antici-

pated daily use, capacity of the public system, and need for expansion of the system or district.

In addition, Part 2, which is prepared by the lead agency, is now exceptionally detailed with new questions and sub-parts to existing questions to conform with the expanded Part 1.

While updating the SEQR forms is certainly appropriate given the length of time since the last revisions, in reviewing the proposed EAF forms there are a variety of questions and concerns that are raised.

While the SEQR process has been around for decades, many smaller municipalities and project sponsors still struggle with it under the existing framework. The proposed forms appear to transform the preparation process away from the project sponsor and agency to an engineering function.

In addition, the level and extent of detail which will be required at the initial stage of project review will be significant, and hence the EAF will be much more expensive and time-consuming to prepare. Further, questions regarding climate change, environmental justice, energy conservation and similar issues, while part of public discussion, are rather amorphous and difficult for applicants and municipalities to quantify.

The nature of many of the new questions may subject the SEQR process to further litigation because applicants will argue that the new and expanded considerations are speculative and not reasonably foreseeable based on the proposed action.

Finally, due to New York’s current tax and regulatory climate, the state faces substantial problems attracting and retaining new business investment. If the revised SEQR EAF forms are adopted by DEC they will inevitably require substantially more time, review and expense for project sponsors and agencies and will only add to these problems.

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