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Environmental Law

DEC adopts updated SEQR regulations

Almost everyone who has applied for a permit or other approval from a government board or agency has encountered the State Environmental Quality Review Act, more commonly known by its acronym, SEQR. Since 1975, SEQR has required the consideration of environmental impacts of proposed projects by all state and local agencies in New York when they are making a discretionary decision to undertake, fund or approve an action that may affect the environment.

If an agency determines that a proposed action may have a potentially significant adverse impact on the environment, then it must prepare an environmental impact statement or EIS. The law mandates that agencies act on the information produced by an EIS, by requiring modifications to the project to mitigate the impacts or even by denying approval if significant environmental impacts cannot be mitigated. As every applicant has learned, SEQR is a powerful tool, and its use has spawned more litigation than any other environmental law.

Consequently, when DEC — the appointed maker of the SEQR rules — changes the rules it is a significant event to applicants, decision-makers and project opponents, who are bound by those rules. Over the years, DEC has amended the SEQR regulations only a few times, and the last significant amendments were made in 1995. It has done so again. In June, DEC finally adopted revisions that have been in the works since 2012. The revised rules take effect on Jan. 1, 2019.

If you are a SEQR geek who has followed every step of this seemingly interminable process, you already know that the revisions are important, but modest in scope. For everyone else, the work is done, the rules have been changed, and now is the time to pay attention so that you are not caught unaware on Jan. 1.

First, the good news for most will be that the basic structure of SEQR is unchanged. Actions are still classified as Type I, Type II or Unlisted; the critical decision for most projects will still occur with the determination of significance, where a project receives a Negative Declaration (ending environmental review) or a Positive Declaration (leading to the preparation of an EIS). However, DEC has expanded the Type II list — the list of projects that never require a determination of significance or an EIS — and has modified some of the threshold criteria for Type I actions. Overall, the changes are modest, as DEC has pared back or eliminated some classes of projects which had been proposed as additions to the Type II list.

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For example, the final rule eliminated a proposed exemption for redevelopment projects on previously used sites in municipal centers, and a proposed exemption for minor subdivisions. In both instances, DEC decided that a statewide exemption would not be appropriate and reminded local officials that they have the power to adopt their own lists of Type II actions (authority which has rarely been used).

Overall, the Type II list has expanded from 37 to 46 types of actions and now includes green infrastructure upgrades or retrofits; installation of solar arrays on closed landfills, cleaned-up brownfield sites, wastewater treatment facilities and sites zoned for industrial use; installation of solar arrays on existing structures (other than listed historic sites); some installations of telecommunication cables; reuse of residential and commercial structures; acquisition and dedication of parkland and conservation easements; land transfers in connection with one-, two- and three-family housing; and construction and operation of anaerobic digesters at publicly-owned landfills. While most of these additions have been scaled back from what was originally proposed, they are still useful additions to the Type II list.

DEC has also changed some of the Type I criteria, which will result in some previously unlisted actions now being considered as Type I, tipping the scale toward requiring an EIS before the project can be approved. DEC has lowered the threshold for construction of new residential units. It also created a new category for parking areas in communities of 150,000 persons or less. DEC has also made changes for projects affecting historic sites by adopting a new threshold whereby for Type I designation the project must exceed 25% of any other Type I threshold (which reduces the pool of Type I projects), and by including not only sites listed as historic, but also sites deemed by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places (which expands the pool of Type I projects).

DEC has also changed the EIS process: an initial scoping process is mandatory rather than optional for an initial EIS and the project sponsor is required to address qualified, but late-filed comments in the draft EIS or as an appendix to the draft EIS. Project sponsors had hoped that late comments would be excluded altogether to provide more certainty in determining when the scope of an EIS is actually completed, which would have helped streamline the process.

The revised rules also make official the policy of requiring consideration of climate change. An EIS must address both measures to avoid or reduce a project's impacts on climate change, i.e., discuss mitigation of greenhouse gas emissions related to the project and, if applicable, discuss a project's vulnerability or resiliency to the effects of climate change, such as sea level rise and flooding.

Overall, the revisions are important, but do not amount to the comprehensive streamlining that seemed to be DEC's initial aim when the process began in 2012.

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