ENVIRONMENTAL LAW: DEVELOPMENTS IN THE LAW OF SEQRA

Mark A. Chertok, Margaret Holden & Sahana Rao†

TABLE OF CONTENTS

INTRODUCTION

This Article will discuss notable developments in the law relating to the New York State Environmental Quality Review Act (SEQRA) for the

† Mark A. Chertok is a partner, and Margaret Holden and Sahana Rao are associates, at Sive, Paget & Riesel, P.C. in New York (www.sprlaw.com). The authors practice environmental law at the firm.

Survey period of 2018–2019.[1] This year did not see substantial regulatory developments. As noted in the prior *Survey*, regulatory activity in the 2017–2018 *Survey* period was more eventful, marked by the New York State Department of Environmental Conservation's (DEC) adoption of significant amendments to SEQRA.[2] These amendments were designed to streamline the environmental review process and align SEQRA with state initiatives, including the advancement of renewable energy and green infrastructure, and the consideration of climate change impacts.[3]

This year, lower and intermediate courts issued decisions discussing various legal issues relevant to the SEQRA practitioner—including standing, ripeness, and the statute of limitations; procedural issues, including the classification of an action, segmentation, and lead agency designation; the adequacy of agencies' determinations of significance; the sufficiency of agencies' Environmental Impact Statements (EIS); and supplementation of determinations of significance and impact statements.[4] Courts also issued two decisions of particular interest to the New York City practitioner, addressing a challenge to the *City Environmental Quality Review Technical Manual* and accounting for the ubiquity of certain contaminants in New York City when evaluating challenges to EISs.[5] The Court of Appeals did not issue any decisions concerning SEQRA during this most recent *Survey* period.

Part I of this Article provides a brief overview of SEQRA's statutory and regulatory requirements. Part II discusses the more important of the numerous SEQRA decisions issued during the *Survey* period. Part III discusses SEQRA and CEQR developments unique to New York City.

I. SUMMARY OVERVIEW OF SEQRA

SEQRA requires governmental agencies to consider the potential environmental impacts of their actions prior to rendering certain defined discretionary decisions, called "actions."[6] "The primary purpose of SEQRA is 'to inject environmental considerations directly into

1. The *Survey* period covered in this Article is July 1, 2018 to June 30, 2019. A prior *Survey* addresses SEQRA developments in the first half of 2018. *See* Mark A. Chertok & Katherine E. Ghilain, *Environmental Law: Developments in the Law of SEQRA for the 2017–18 Survey of New York Law*, 69 SYRACUSE L. REV. 837 (2019).

2. *See* Chertok & Ghilain, *supra* note 1, at 837.

3. *Id.*

4. *See infra* Part II.

5. *See infra* Part III.

6. SEQRA is codified at N.Y. ENVTL. CONSERV. LAW §§ 8-0101–8-0117 (McKinney 2018). *See* Mark A. Chertok & Ashley S. Miller, *Environmental Law: Climate Change Impact Analysis in New York Under SEQRA for the 2007–08 Survey of New York Law*, 59 SYRACUSE L. REV. 763, 764 (2009).

governmental decision making.'"[7] The law applies to discretionary actions by New York State, its subdivisions, or local agencies that have the potential to impact the environment, including direct agency actions, funding determinations, promulgation of regulations, zoning amendments, permits, and other approvals.[8] SEQRA charges DEC with promulgating general SEQRA regulations, but it also authorizes other agencies to adopt their own regulations and procedures, provided that those regulations and procedures are consistent with and "no less protective of environmental values" than those issued by DEC.[9]

A primary component of SEQRA is the EIS, which—if its preparation is required—describes the proposed action, assesses its reasonably anticipated significant adverse impacts on the environment, identifies practicable measures to mitigate such impacts, discusses unavoidable significant adverse impacts, and evaluates reasonable alternatives that achieve the same basic objectives as the proposal.[10]

Actions are grouped into three categories in DEC's SEQRA regulations: Type I, Type II, or Unlisted.[11] Type II actions are enumerated specifically and include only those actions that have been determined not to have the potential for a significant impact and thus not to be subject to review under SEQRA.[12] Type I actions, also specifically enumerated, "are more likely to require the preparation of an EIS than Unlisted actions."[13] Unlisted actions are not enumerated, but rather are a catchall

7. Akpan v. Koch, 75 N.Y.2d 561, 569, 554 N.E.2d 53, 56, 555 N.Y.S.2d 16, 19 (1990) (quoting Coca-Cola Bottling Co. v. Bd. of Estimate, 72 N.Y.2d 674, 679, 532 N.E.2d 1261, 1263, 536 N.Y.S.2d 33, 35 (1988)). For a useful overview of the substance and procedure of SEQRA, *see* Jackson v. N.Y. State Urban Dev. Corp., 67 N.Y.2d 400, 415–17, 494 N.E.2d 429, 435–36, 503 N.Y.S.2d 298, 304–05 (1986).

8. *See* 6 N.Y.C.R.R. § 617.2(b)–(c) (2018) (defining actions and agencies subject to SEQRA).

9. *See* ENVTL. CONSERV. § 8-0113(1), (3); 6 N.Y.C.R.R. § 617.14(b).

10. 6 N.Y.C.R.R. § 617.9(b)(1)–(2), (5).

11. *See id.* § 617.2(aj)–(al); *see also* ENVTL. CONSERV. § 8-0113(2)(c) (requiring the DEC to identify Type I and Type II actions).

12. 6 N.Y.C.R.R. § 617.5(a).

13. *Id.* § 617.4(a). This presumption may be overcome, however, if an environmental assessment demonstrates the absence of significant, adverse environmental impacts. *See, e.g.*, Hell's Kitchen Neighborhood Ass'n v. City of N.Y., 81 A.D.3d 460, 461–62, 915 N.Y.S.2d 565, 567 (1st Dep't 2011) ("[W]hile Type I projects are presumed to require an EIS, an EIS is not required when, as here, following the preparation of a comprehensive Environmental Assessment Statement (EAS), the lead agency establishes that the project is not likely to result in significant environmental impacts or that any adverse environmental impacts will not be significant."). It is commonplace for a lead agency to determine that a Type I action does not require an EIS.

of those actions that are neither Type I nor Type II.[14] In practice, the vast majority of actions are Unlisted.[15]

Before undertaking an action (except for a Type II action)[16], an agency must determine whether the proposed action may have one or more significant adverse environmental impacts, called a "determination of significance."[17] To reach its determination of significance, the agency must prepare an environmental assessment form ("EAF").[18] For Type I actions, preparation of a "full EAF" is required, whereas for Unlisted actions, project sponsors may opt to use a "short EAF" instead.[19] While the short and full EAFs ask for similar information, the full EAF is an expanded form that is used for Type I actions or other actions when a greater level of documentation and analysis is appropriate.[20] SEQRA regulations provide models of each form,[21] but allow that the forms "may be modified by an agency to better serve it in implementing SEQR[A], provided the scope of the modified form is as comprehensive as the model."[22] Where multiple decision-making agencies are involved, there is usually a "coordinated review" with these "involved agencies" pursuant to which a designated lead agency makes the determination of significance.[23] A coordinated review is required for Type I actions,[24] and

14. 6 N.Y.C.R.R. § 617.2(al).

15. N.Y. STATE DEP'T OF ENVTL. CONSERVATION, THE SEQRA HANDBOOK 29 (3d ed. 2010) [hereinafter SEQRA HANDBOOK], https://www.dec.ny.gov/docs/permits_ej_operations_pdf/dseqrhandbook.pdf.

16. *See* 6 N.Y.C.R.R. § 617.6(a)(1)(i).

17. *See id.* § 617.7(a)(1).

18. *See id.* § 617.6(a)(2)–(3).

19. *Id. See also* § 617.20 (providing that the project sponsor prepares the factual elements of an EAF (part 1), whereas the lead agency completes part 2, which addresses the significance of potential adverse environmental impacts, and part 3, which constitutes the agency's determination of significance).

20. *See id.* § 617.6(a)(2)–(3).

21. *See* 6 N.Y.C.R.R. § 617.20 (establishing model EAFs: "Appendices A and B are model environmental assessment forms that may be used to help satisfy this Part or may be modified in accordance with sections 617.2(m) and 617.14 of this Part."). DEC also maintains EAF workbooks to assist project sponsors and agencies in using the forms. *See Environmental Assessment Form (EAF) Workbooks*, N.Y. STATE DEP'T OF ENVTL. CONSERVATION, http://www.dec.ny.gov/permits/90125.html (last visited Sept. 26, 2019).

22. 6 N.Y.C.R.R. § 617.2(m). New York City, which implements SEQRA under its City Environmental Quality Review (*see infra* Part III discussion), uses an Environmental Assessment Statement, or EAS, in lieu of an EAF. *See, e.g.*, *Hell's Kitchen Neighborhood Ass'n.*, 81 A.D.3d at 461–62, 915 N.Y.S.2d at 567 (noting the preparation of a comprehensive Environmental Assessment Statement).

23. *See* 6 N.Y.C.R.R. § 617.6(b)(2)(i), (b)(3)(i)–(ii).

24. *Id.* § 617.4(a)(2).

the issuance of a negative declaration in a coordinated review binds other involved agencies.[25]

If the lead agency "determine[s] either that there will be no adverse environmental impacts or that the . . . impacts will not be significant," no EIS is required, and instead the lead agency issues a negative declaration.[26] If the answer is affirmative, the lead agency may in certain cases impose conditions on the proposed action to sufficiently mitigate the potentially significant adverse impacts[27] or, more commonly, the lead agency may issue a positive declaration requiring the preparation of an EIS.[28]

If an EIS is prepared, the first step is the scoping of the contents of the Draft EIS (DEIS).[29] Until this year, scoping had been commonplace but not required.[30] However, effective January 1, 2019, under the 2018 SEQRA amendments discussed in the prior *Survey*, scoping is now mandatory for all EISs, except for supplemental EISs.[31] Scoping involves focusing the EIS on relevant areas of environmental concern, with the goal (not often achieved) of eliminating inconsequential subject matters.[32] A draft scope, once prepared by a project sponsor and accepted as adequate and complete by the lead agency (and in some circumstances the project sponsor, when an agency, may also be the lead agency), is circulated for public and other agency review and comment.[33] A public meeting with respect to the proposed scope is typically held.[34] As discussed below in Part II, the project sponsor now must incorporate the information submitted during the scoping process into the DEIS or include the comment as an appendix to the document, depending on the relevancy of the information or comment.[35]

25. *See id.* § 617.6(b)(3)(iii).

26. *See id.* § 617.7(a)(2), (d).

27. *See id.* §§ 617.2(h), 617.7(d)(2)(i). This is known as a conditioned negative declaration (CND). For a CND, the lead agency must issue public notice of its proposed CND and, if public comment identifies "potentially significant adverse environmental impacts that were not previously" addressed or were inadequately addressed, or indicates the mitigation measures imposed are substantively deficient, an EIS must be prepared. 6 N.Y.C.R.R. § 617.7(d)(1)(iv), (2)(i), (3). CNDs cannot be issued for Type I actions or where there is no applicant. *See id.* § 617.7(d)(1).

28. 6 N.Y.C.R.R. § 617.7(d)(2)(i).

29. *See* SEQRA HANDBOOK, *supra* note 15, at 108.

30. *See id.*

31. *Id.*; 6 N.Y.C.R.R. § 617.8(a); *see also Environmental Law: Developments in the Law of SEQRA for the 2017–18 Survey of New York Law*, 69 SYRACUSE L. REV 837 (2019).

32. *See* 6 N.Y.C.R.R. § 617.8(a).

33. *See id.* § 617.8(b)–(d).

34. *See id.* § 617.8(d).

35. *Id.* § 617.8(g)–(f).

A DEIS must include an alternatives analysis comparing the proposed action to a "range of reasonable alternatives . . . that are feasible, considering the objectives and capabilities of the project sponsor."[36] This analysis includes a "no action alternative," which evaluates the "changes that are likely to occur . . . in the absence of the proposed action" and generally constitutes the baseline against which project impacts are assessed.[37]

In addition to "analyz[ing] the significant adverse impacts and evaluat[ing] all reasonable alternatives," the DEIS should include an assessment of "impacts only where they are relevant and significant," which the SEQRA regulations define as:

> (a) reasonably related short-term and long-term impacts, cumulative impacts and other associated environmental impacts;
>
> (b) those adverse environmental impacts that cannot be avoided or adequately mitigated if the proposed action is implemented;
>
> (c) any irreversible and irretrievable commitments of environmental resources that would be associated with the proposed action should it be implemented;
>
> (d) any growth-inducing aspects of the proposed action;
>
> (e) impacts of the proposed action on the use and conservation of energy . . . ;
>
> (f) impacts of the proposed action on solid waste management and its consistency with the State or locally adopted solid waste management plan; [and]
>
> (i) measures to avoid or reduce both an action's impacts on climate change and associated impacts due to the effects of climate change such as sea level rise and flooding.[38]

Although not required, the lead agency typically holds a legislative hearing with respect to the DEIS.[39] That hearing may be, and often is, combined with other hearings required for the proposed action.[40] The next step is the preparation of a final EIS ("FEIS"), which addresses any

36. *Id.* § 617.9(b)(5)(v). For private applicants, alternatives might reflect different configurations of a project on the site. 6 N.Y.C.R.R. § 617.9(b)(5)(v)(g). They also might include different sites if the private applicant owns other parcels. *Id.* The applicant should identify alternatives that might avoid or reduce environmental impacts. *Id.* § 617.9(b)(5)(iii)(i).

37. 6 N.Y.C.R.R. § 617.9(b)(5)(v).

38. 6 N.Y.C.R.R. § 617.9(b)(1), (b)(5)(iii)(a)–(f), (i).

39. *See id.* § 617.9(a)(4).

40. *See id.* § 617.3(h) ("Agencies must . . . provid[e], where feasible, for combined or consolidated proceedings . . . .").

project changes, new information and/or changes in circumstances, and responds to all substantive comments on the DEIS.[41] After preparation of the FEIS, and prior to undertaking or approving an action, each acting (i.e., involved) agency must issue findings that the provisions of SEQRA (as reflected in DEC's implementing regulations) have been met and, "consider[ing] the relevant environmental impacts, facts and conclusions disclosed in the [F]EIS," must "weigh and balance relevant environmental impacts with social, economic and other considerations."[42] The agency must then:

> 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.[43]

The substantive mitigation requirement of SEQRA is an important feature of the statute—a requirement notably absent from SEQRA's parent federal statute, the National Environmental Policy Act (NEPA).[44]

For agency actions that are "broader" or "more general than site or project specific" decisions, SEQRA regulations provide that agencies may prepare a generic EIS ("GEIS").[45] Preparation of a GEIS is appropriate if: (1) "a number of separate actions [in an area], if considered singly, may have minor impacts, but if considered together may have significant impacts;" (2) the agency action consists of "a sequence of actions" over time; (3) separate actions under consideration may have "generic or common impacts;" or (4) the action consists of an "entire program [of] wide application or restricting the range of future alternative policies or projects."[46] GEISs commonly relate to common or program-wide impacts, and set forth criteria for when supplemental EISs will be required for site-specific or subsequent actions that follow approval of the initial program.[47]

41. *See id.* § 617.11(a).

42. *See id.* § 617.11(a), (d)(1)–(2).

43. 6 N.Y.C.R.R. § 617.11(d)(5).

44. *See* 42 U.S.C. §§ 4321–74370 (2012) (establishing federal responsibilities for protecting and enhancing the quality of the environment); *Jackson*, 67 N.Y.2d at 415, 494 N.E.2d at 434, 503 N.Y.S.2d at 303 (quoting Philip H. Gitlen, *The Substantive Impact of the SEQRA*, 46 ALB. L. REV. 1241, 1248 (1982)).

45. *See* 6 N.Y.C.R.R. § 617.10(a).

46. *Id.* § 617.10(a)(1)–(4).

47. *See id.* § 617.10(c).

The City of New York has promulgated separate regulations implementing the City's and City agencies' environmental review process under SEQRA, which is known as City Environmental Quality Review (CEQR).[48] As previously explained, SEQRA grants agencies and local governments the authority to supplement DEC's general SEQRA regulations by promulgating their own.[49] Section 192(e) of the New York City Charter delegates that authority to the City Planning Commission.[50] In addition, to assist "city agencies, project sponsors, [and] the public" in navigating and understanding the CEQR process, the New York City Mayor's Office of Environmental Coordination has published the *CEQR Technical Manual*.[51] First published in 1993, the *Manual*, as now revised, is about 800 pages long and provides an extensive explanation of CEQR legal procedures; methods for evaluating various types of environmental impacts, such as transportation (traffic, transit and pedestrian), air pollutant emissions, noise, socioeconomic effects, and historic and cultural resources; and identifying thresholds for both detailed studies and significance.[52]

II. CASELAW DEVELOPMENTS

A. Threshold Requirements in SEQRA Litigation

SEQRA litigation invariably is a special proceeding under Article 78 of the Civil Practice Law and Rules (CPLR).[53] Article 78 imposes upon petitioners in such proceedings certain threshold and procedural requirements, separate and distinct from the requirements imposed by SEQRA.[54] A number of decisions during the *Survey* period addressed questions arising from these threshold and procedural requirements as well as obligations arising solely from SEQRA.

48. *See* N.Y.C. RULES tit. 43, §§ 6-01–6-15, tit. 62, §§ 5-01–6-15 (1991).

49. ENVTL. CONSERV. LAW § 8-0113(1), (3). That authority extends to the designation of specific categories of Type I and Type II actions. *See* 6 N.Y.C.R.R. §§ 617.4(2), 617.5(b).

50. N.Y.C. CHARTER § 192(e) (1990). *See also* N.Y.C. RULES, tit. 62 § 5-01.

51. N.Y.C. MAYOR'S OFFICE OF ENVTL. COORDINATION, CEQR: CITY ENVIRONMENTAL QUALITY REVIEW TECHNICAL MANUAL, Introduction-1 (2014), https://www1.nyc.gov/assets/oec/technical-manual/2014_ceqr_technical_manual_rev_04_27_2016.pdf [hereinafter CEQR MANUAL]. Limited revisions were added to the manual in 2016 to incorporate changes to the City's Waterfront Revitalization Program related to climate change. *See id.* at 1.

52. *See* CEQR MANUAL, *supra* note 51, at 1.

53. *See* N.Y. C.P.L.R. § 7803 (McKinney 2008).

54. *See id.* § 7804 (outlining the procedural requirements for Article 78 proceedings).

1. Standing

Standing is one of the more frequently litigated issues in SEQRA case law.[55] To establish standing, a SEQRA petitioner must demonstrate that the challenged action causes injury that is (1) within the "zone of interests" sought to be protected by the statute, and (2) different from any generalized harm caused by the action to the public at large.[56] To fall within SEQRA's "zone of interests," the alleged injury must be "environmental and not solely economic in nature."[57] The harm must be "'different in kind or degree from the public at large,' but it need not be unique."[58] An organization has standing to sue when "one or more of its members would have standing to sue," the interests asserted by the organization "are germane to its purposes," and "neither the asserted claim nor the appropriate relief requires the participation of the [organization's] individual members."[59]

Several SEQRA decisions addressed standing during this *Survey* period. *Bonacker Properties, LLC v. Village of East Hampton Board of Trustees* bolstered the presumption that ownership of affected property is sufficient to confer standing for SEQRA claims.[60] However, though proximity of a petitioner's property to the site of an action undergoing SEQRA review permits the inference of an injury-in-fact, prospective claimants were reminded in *City of Rye v. Westchester County Board of Legislators* that general allegations of proximity to a site are not sufficient to establish standing; an individual petitioner must establish proximity based on the distance between her property and the actual challenged

55. *See* Charlotte A. Biblow, *Courts Tackle Standing and SEQRA Review*, N.Y.L.J., May 22, 2014, at 3.

56. Save the Pine Bush, Inc. v. Common Council of Albany, 13 N.Y.3d 297, 308–09, 918 N.E.2d 917, 924, 890 N.Y.S.2d 405, 412 (2009) (Pigott, J., concurring) (quoting Soc'y of Plastics Indus., Inc. v. Cty. of Suffolk, 77 N.Y.2d 761, 772–74, 573 N.E.2d 1034, 1040–41, 570 N.Y.S.2d 778, 784–85 (1991)).

57. Mobil Oil Corp. v. Syracuse Indus. Dev. Agency, 76 N.Y.2d 428, 433, 559 N.E.2d 641, 644, 559 N.Y.S.2d 947, 950 (1990) (first citing Niagara Recycling, Inc. v. Town Bd., 83 A.D.2d 335, 341, 443 N.Y.S.2d 951, 955 (4th Dep't 1981); and then citing Webster Assocs. v. Town of Webster, 112 Misc. 2d 396, 402, 447 N.Y.S.2d 401, 405 (Sup. Ct. Monroe Cty. 1981)).

58. Sierra Club v. Vill. of Painted Post, 26 N.Y.3d 301, 311, 43 N.E.3d 745, 749, 22 N.Y.S.3d 388, 392 (2015) (quoting *Soc'y of Plastics*, 77 N.Y.2d at 778, 573 N.E.2d at 1044, 570 N.Y.S.2d at 788).

59. *Soc'y of Plastics*, 77 N.Y.2d at 775, 573 N.E.2d at 1042, 570 N.Y.S.2d at 786.

60. 168 A.D.3d 928, 929, 93 N.Y.S.3d 328, 331 (2d Dep't 2019) (first citing Gernatt Asphalt Prods. v. Town of Sardinia, 87 N.Y.2d 668, 687, 664 N.E.2d 1226, 1238, 642 N.Y.S.2d 164, 176 (1996); and then citing Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals, 69 N.Y.2d 406, 413–14 , 508 N.E.2d 130, 133, 515 N.Y.S.2d 418, 421–22 (1987)).

development project.[61] The Second Department further noted in *City of Rye* that the City could not establish standing based on its "involved agency" status or its interest in potential environmental impacts to community character.[62] The Second and Fourth Departments also issued decisions reinforcing the related requirement that a petitioner establish environmental injury distinct from that to the public at large.[63]

In *Real Estate Board of New York., Inc. v. City of New York*, the First Department held that the petitioner did not have organizational standing under SEQRA to challenge a local law imposing hotel use limitations.[64] The petitioner, a consortium of property owners, developers, and others involved in the New York City real estate industry, was unable to show that environmental concerns were germane to its organizational purposes, "which focus on the economic and political health of the real estate industry."[65] Likewise, the harm claimed by the petitioner—reduction in property values, loss of business opportunities, and the expense of compliance—was economic rather than environmental.[66]

2. Ripeness and Statute of Limitations

In addition to standing, a SEQRA petitioner also must satisfy several threshold requirements, including that the claim be ripe, that

61. 169 A.D.3d 905, 906, 94 N.Y.S.3d 610, 611 (2d Dep't 2019) (first citing Tuxedo Land Trust, Inc. v. Town Bd., 112 A.D.3d 726, 728, 997 N.Y.S.2d 272, 274 (2d Dep't 2013); then citing Gallahan v. Planning Bd., 307 A.D.2d 684, 685, 726 N.Y.S.2d 850, 850 (3d Dep't 2003)).

62. *See id.* at 905–06, 94 N.Y.S.3d 610, 611.

63. *See, e.g.*, Tilcon N.Y., Inc. v. Town of New Windsor, 172 A.D.3d 942, 945, 102 N.Y.S.3d 35, 40 (2d Dep't 2019) (quoting *Save the Pine Bush, Inc.*, 13 N.Y.3d at 306, 918 N.E.2d at 921, 890 N.Y.S.2d at 409) (citing Shapiro v. Torres, 153 A.D.3d 835, 836, 60 N.Y.S.3d 366, 368 (2d Dep't 2017)); Shieve v. Holley Volunteer Fire Co., 170 A.D.3d 1589, 1590, 95 N.Y.S.3d 700, 701 (4th Dep't 2019) (first citing *Tuxedo Land Trust*, 112 A.D.3d at 727–28, 977 N.Y.S.2d at 274; then citing *Save the Pine Bush, Inc.*, 13 N.Y.3d at 304, 918 N.E.2d at 921, 890 N.Y.S.2d at 409; and then citing *Soc'y of Plastics*, 77 N.Y.2d at 774, 573 N.E.2d at 1041, 570 N.Y.S.2d at 785).

64. 165 A.D.3d 1, 6, 84 N.Y.S.3d 33, 36 (1st Dep't 2018).

65. *Id.* at 7, 84 N.Y.S.3d at 37.

66. *Id.* at 8, 84 N.Y.S.3d at 38.

administrative remedies be exhausted,[67] and that the claim be timely brought within the statute of limitations period.[68]

B. Ripeness

With respect to ripeness, only final agency actions are subject to challenge in a SEQRA (or any other Article 78) proceeding.[69] Court of Appeals decisions issued in prior years have held that, in most instances, a positive SEQRA declaration is not a final agency action ripe for review; instead, it is an initial step in the decision-making process.[70] A Court of Appeals decision from 2003, *Gordon v. Rush*, did allow a challenge to a positive declaration, holding that a positive declaration is ripe for judicial review when (1) the action imposes an obligation, denies a right, or fixes "some legal relationship as a consummation of the administrative process;" and (2) when there is "a finding that the apparent harm inflicted by the action 'may not be prevented or significantly ameliorated by

67. Under the doctrine of administrative exhaustion, "courts generally refuse to review a determination on environmental or zoning matters based on evidence or arguments that were not presented during the proceedings before the lead agency." Miller v. Kozakiewicz, 300 A.D.2d 399, 400, 751 N.Y.S.2d 524, 526–27 (2d Dep't 2002) (first citing Long Island Pine Barrens Soc'y v. Planning Bd., 204 A.D.2d 548, 550, 611 N.Y.S.2d 917, 918–19 (2d Dep't 1994); then citing Harriman v. Town Bd., 153 A.D.2d 633, 635, 544 N.Y.S.2d 860, 862 (2d Dep't 1989); and then citing Aldrich v. Pattison, 107 A.D.2d 258, 267–68, 486 N.Y.S.2d 23, 30 (2d Dep't 1985)). *But see Jackson*, 67 N.Y.2d at 414–17, 494 N.E.2d at 434–35, 503 N.Y.S.2d at 303–04:

> No one raised the issue [of impairment of archaeological resources] during the lengthy hearing and comment periods before the FEIS was issued. Petitioners themselves participated actively in the administrative process, submitting several oral and written statements on the DEIS, yet failed to mention any impact on archaeology. While the affirmative obligation of the agency to consider environmental effects, coupled with the public interest, lead us to conclude that such issues cannot be foreclosed from judicial review, petitioners' silence cannot be overlooked in determining whether the agency's failure to discuss an issue in the FEIS was reasonable. The EIS process is designed as a cooperative venture, the intent being that an agency have the benefit of public comment before issuing a FEIS and approving a project; permitting a party to raise a new issue after issuance of the FEIS or approval of the action has the potential for turning cooperation into ambush.

(first citing Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc. 435 U.S. 519, 553–54 (1978); and then citing *Aldrich*, 107 A.D.2d at 267–68, 486 N.Y.S.2d at 30).

68. *See* C.P.L.R. § 7801(1).

69. *Id. See also e.g.*, Essex Cty. v. Zagata, 91 N.Y.2d 447, 453, 695 N.E.2d 232, 235, 672 N.Y.S.2d 281, 284 (1998).

70. *See* Ranco Sand & Stone Corp. v. Vecchio, 27 N.Y.3d 92, 100, 49 N.E.3d 1165, 1170, 29 N.Y.S.3d 873, 878 (2016) (citing Rochester Tel. Mobile Commc'ns v. Ober, 251 A.D.2d 1053, 1054, 674 N.Y.S.2d 189, 190 (4th Dep't 1998)). *But see* Gordon v. Rush, 100 N.Y.2d 236, 243, 792 N.E.2d 168, 172, 762 N.Y.S.2d 18, 22 (2003) (rejecting to adopt a bright-line rule that a positive declaration is not final or ripe for review).

further administrative action or by steps available to the complaining party.'"[71] *Gordon*, though, is the exception to the rule, which the Court of Appeals made clear in its 2016 decision *Ranco Sand & Stone Corporation v. Vecchio*.[72] There, the Court held that a positive declaration was not ripe for review under the *Gordon* framework because it did not satisfy the second prong of the *Gordon* inquiry—that the harm could not be ameliorated in the future.[73] The Court clarified that its holding in *Gordon* "was never meant to disrupt the understanding of appellate courts that a positive declaration imposing a DEIS requirement is usually not a final agency action, and is instead an initial step in the SEQRA process."[74]

One reported case during the *Survey* period addressed this issue. In *Lewis Homes of New York v. Board of Site Plan Review of Town of Smithtown*, petitioners challenged a positive SEQRA declaration for a condominium project's site plan application.[75] Petitioners contended, among other claims, that the respondents had not properly conducted the environmental review, had unjustifiably delayed the issuance of a SEQRA determination, and had issued a positive declaration in retaliation for petitioners' commencement of a prior action seeking an order compelling respondents to issue a negative declaration.[76] Applying the two-prong test articulated in *Gordon*, the court held that, unlike in *Gordon*, the positive declaration did not impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process, nor was it the case that any harm inflicted by the positive declaration could not be ameliorated by further administrative action.[77] Instead, the court noted that had the petitioners prepared an EIS, they "may well have obtained approval of their applications to the Town and gone forward with the building of the Project."[78] Therefore, the court held that the SEQRA challenge was not ripe for review.[79]

71. 100 N.Y.2d at 242, 792 N.E.2d at 172, 762 N.Y.S.2d at 22 (quoting *Zagata*, 91 N.Y.2d at 453, 695 N.E.2d at 235, 672 N.Y.S.2d at 284).

72. 27 N.Y.3d at 100, 49 N.E.3d at 1170, 29 N.Y.S.3d at 878.

73. *See id.* at 100–01, 49 N.E.3d at 1170, 29 N.Y.S.3d at 878.

74. *Id.* at 100, 49 N.E.3d at 1170, 29 N.Y.S.3d at 878 (citing *Rochester Tel. Mobile Commc'ns*, 251 A.D.2d at 1054, 674 N.Y.S.2d at 190).

75. No. 40966/2009, 2019 N.Y. Slip Op. 31376(U), at 2 (Sup. Ct. Suffolk Cty. May 20, 2019).

76. *Id.*

77. *See id*. at 5.

78. *Id.* at 6.

79. *Id.*

C. Statute of Limitations

Pursuant to the statute of limitations for Article 78 proceedings, a SEQRA challenge must generally be made "within four months after the determination to be reviewed becomes final and binding upon the petitioner,"[80] and that period begins to run when the agency has taken a "definitive position on the issue that inflicts an actual, concrete injury."[81] As a practical matter, it can be difficult to identify that point in time when the statute of limitations begins to run, and the trigger point has become an area of some confusion.[82] No reported case during the *Survey* period addressed this issue; however, several cases addressed whether the Article 78 statute of limitations could effectively be circumvented by including SEQRA claims as part of a plenary action.[83]

Under general principles of New York law, if a SEQRA claim is brought as part of a declaratory judgment action, courts will consider whether the claim could have been brought in an Article 78 proceeding.[84] If so, those claims are still subject to the four-month statute of limitations.[85] During the *Survey* period, there were two reported cases in

80. N.Y. C.P.L.R. § 217(1) (McKinney 2003). A plaintiff may be subject to a shorter statute of limitations period for challenging SEQRA decisions by statute. For example, New York Town Law § 267-c prescribes a thirty-day statute of limitations for persons aggrieved by a decision of a town's Zoning Board of Appeals regarding a use or area variance, and New York Town Law § 274-a prescribes a thirty-day statute of limitations for persons aggrieved by a decision regarding a site plan approval. *See* N.Y. TOWN LAW §§ 267-c(1), 274-a(11) (Consol. 2005). *See also, e.g.*, City of Saratoga Springs v. Zoning Bd. of Appeals, 279 A.D.2d 756, 758, 719 N.Y.S.2d 178, 181 (3d Dep't 2001) (citing TOWN LAW §§ 267-c(1), 274-a(11)); Purchase Envtl. Protective Ass'n v. Town Bd., 207 A.D.2d 351, 352, 615 N.Y.S.2d 444, 445 (2d Dep't 1994) (citing TOWN LAW § 274-a(3)).

81. Stop-The-Barge v. Cahill, 1 N.Y.3d 218, 223, 803 N.E.2d 361, 363, 771 N.Y.S.2d 40, 42 (2003) (quoting *Zagata*, 91 N.Y.2d at 453, 695 N.E.2d at 235, 672 N.Y.S.2d at 284. S*ee also* Young v. Bd. of Trs., 89 N.Y.2d 846, 848–49, 675 N.E.2d 464, 466, 652 N.Y.S.2d 729, 731 (1996) (quoting 6 N.Y.C.R.R. § 617.2(b)(2)–(3) (2016)) (citing *Save the Pine Bush, Inc.*, 70 N.Y.2d at 203, 512 N.E.2d at 529, 518 N.Y.S.2d at 946) ("[T]he Statute of Limitations was triggered when the Board committed itself to 'a definite course of future decisions.'").

82. The confusion stems from two Court of Appeals decisions, Stop-The-Barge v. Cahill and Eadie v. Town Board of North Greenbush. *See* Mark A. Chertok & Ghilain, *supra* note 1, at 857 (discussing these two cases).

83. *See, e.g.*, Ass'n for Cmty Reform Now v. Bloomberg, 824 N.Y.S.2d 752, 752 (Sup. Ct. N.Y. Cty. 2006) (first citing Fiala v. Metro. Life Ins. Co., 6 A.D.3d 320, 322, 776 N.Y.S.2d 29, 33 (1st Dep't 2004); then citing Brawer v. Johnson, 231 A.D.2d 664, 647, 647 N.Y.S.2d 553, 554 (2d Dep't 1996); and then citing N.Y. v. Kahn, 206 A.D.2d 732, 733, 615 N.Y.S.2d 771, 772 (3d Dep't 1994)).

84. *See, e.g.*, Laskin v. Athens, 1992 U.S. Dist. LEXIS 50, at *4 (N.D.N.Y. Jan. 3, 1992).

85. *See, e.g.*, Solnick v. Whalen, 49 N.Y.2d 224, 229–30, 401 N.E.2d 190, 193, 425 N.Y.S.2d 68, 71 (1980) ("In order to determine therefore whether there is in fact a limitation prescribed by law for a particular declaratory judgment action it is necessary to examine the substance of that action to identify the relationship out of which the claim arises and the relief sought . . . If that examination reveals that the rights of the parties sought to be stabilized in

which petitioners asserted SEQRA claims in declaratory judgment actions outside of the four-month statute of limitations applicable to Article 78 proceedings. In *Schulz v. Town Board of Queensbury*, a petitioner argued that its claims that an EAF had contained fraudulent responses was not one that could have been brought in an Article 78, and thus was not subject to the four-month statute of limitations.[86] Similarly, in *Lakeview Outlets, Inc. v. Town of Malta*, a plaintiff challenged the mitigation fee scheme established in a GEIS, but attempted to characterize the matter as a constitutional issue.[87] In both cases, the courts looked to the underlying claims and the nature of the relief sought and concluded that underlying claims were actually SEQRA challenges that could have been brought in the context of an Article 78 proceeding.[88] Thus, the courts held, the claims were subject to the four-month statute of limitations applicable to Article 78 proceedings and were not timely.[89]

D. Procedural Requirements Imposed by SEQRA on State Agencies

As explained in Part I, much of SEQRA's mandate is procedural; lead agencies must comply with SEQRA's requirements to identify the type of action at issue, complete a scoping process, issue a determination of significance, and, if the determination is positive, require preparation of an EIS.[90] Several reported cases during the *Survey* period concerned lead agencies' alleged failures to comply with one or more of these procedural mandates.

1. Classification of the Action

To ease the process of making a determination of significance and deciding whether the preparation of an EIS is required, DEC has sorted certain types of actions into categories by regulation. As noted above, a Type I action is any action or type of action that DEC describes at Section 617.4 of the SEQRA regulations; these actions carry the presumption that

the action for declaratory relief are, or have been, open to resolution through a form of proceeding for which a specific limitation period is statutorily provided, then that period limits the time for commencement of the declaratory judgment action.").

86. No. 65513, 2019 N.Y. Slip Op. 50256(U), at 2 (Sup. Ct. Warren Cty. Feb. 25, 2019).

87. 166 A.D.3d 1445, 1447, 89 N.Y.S.3d 733, 737 (3d Dep't 2018).

88. *See id.* (quoting Trager v. Town of Clifton Park, 303 A.D.2d 875, 877–78, 756 N.Y.S.2d 669, 671 (3d Dep't 2003)) (first citing Spinney at Pondview, LLC v. Town Bd., 99 A.D.3d 1088, 1089, 953 N.Y.S.2d 314, 316 (3d Dep't 2012); and then citing Valentino v. Cty. of Tompkins, 45 A.D.3d 1235, 1235, 846 N.Y.S.2d 745, 747 (3d Dep't 2007)); *Schulz*, 2019 N.Y. Slip Op. 50256(U), at 1.

89. *See Lakeview Outlets, Inc.*, 166 A.D.3d at 1448, 89 N.Y.S.3d at 737–38; *Schulz*, 2019 N.Y. Slip Op. 50256(U), at 9.

90. *See supra* Part I.

an EIS will be required.[91] Conversely, a Type II action is any action or type of action identified at Section 617.5 of the SEQRA regulations; these actions do not require further SEQRA review, as they "have been determined not to have a significant impact on the environment or are otherwise precluded from environmental review under Environmental Conservation Law, Article 8."[92] Any state or local agency may adopt its own list of additional Type I or Type II actions to supplement those provided by DEC.[93] An "unlisted" action is any action not identified as Type I or Type II by the above regulations or, where applicable, a lead agency's additional classification of actions by type.[94]

The inclusion of a particular action into one of these three categories is confirmed through a case-by-case comparison of the action to those listed by DEC and other agencies; thus, any discussion of such categorization by the courts is instructive. Two courts opined on the classifications applied by lead agencies in this *Survey* period. In *Carr v. Village of Lake George Village Board*, which encompassed two consolidated proceedings, the court affirmed two distinct categorizations made by the respondent, Village Board and Planning Board, respectively.[95] Prior to the petitioner's variance application at issue in this litigation, the Village Board adopted Local Law No. 8, essentially providing that the Planning Board could waive compliance with otherwise mandatory architectural guidelines in certain instances.[96] The Village Board correctly categorized this Local Law as an unlisted action, because Section 617.5 of the SEQRA regulations explicitly limits the application of the Type II category to actions of the State Legislature, not those of local legislative bodies.[97] Conversely, the area variance application was a Type II action because the application requested an individual setback, which fit squarely into Section 617.5(16).[98]

Likewise, in *Uncle Sam Garages, LLC v. Capital District Transport Authority*, the Third Department affirmed the characterization of a transit center project as Type II based on the actual work involved.[99] The project

91. *See* 6 N.Y.C.R.R. § 617.4.

92. *Id.* § 617.5.

93. *See id.* § 617.14(e). Note that "[a]n agency may not designate as Type I any action identified as Type II" by DEC at Section 617.5 of the SEQRA regulations. *Id.* at § 617.4(a)(2).

94. 6 N.Y.C.R.R.§ 617.2(al).

95. 102 N.Y.S.3d 404, 411–12 (Sup. Ct. Warren Cty. 2019).

96. *See id.* at 407–08.

97. *See id.* at 412 (citing 6 N.Y.C.R.R. § 617.6(a)(1), (3)). *See also* 6 N.Y.C.R.R. § 617.5(c)(46).

98. *See Carr*, 102 N.Y.S.3d at 412. *See also* 6 N.Y.C.R.R. § 617.5(c)(16).

99. 171 A.D.3d 1260, 1262, 97 N.Y.S.3d 776, 779 (3d Dep't 2019) (quoting Inc. Vill. Of Munsey Park v. Manhasset-Lakeville Water Dist., 150 A.D.3d 969, 971, 57 N.Y.S.3d 154,

entailed "replacing existing sidewalks and pavement without expanding their extent, limited work inside the [existing] parking garage and the construction of a [small non-residential building] that will comply with zoning and land use regulations."[100] The court classified these aspects of the project as fitting within the descriptions at Sections 617.5(c)(2) ("replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site") and 617.5(c)(9) ("construction or expansion of a . . . nonresidential structure or facility involving less than 4,000 square feet of gross floor area").[101]

2. Unlawful "Segmentation" of SEQRA Review

Defining the proper boundaries of an action can be a difficult task. SEQRA regulations provide that "[c]onsidering only a part or segment of an action is contrary to the intent of SEQR[A]."[102] As explained by the Third Department, impermissible segmentation occurs in two situations: (1) "when a project which would have a significant effect on the environment is split into two or more smaller projects, with the result that each falls below the threshold requiring [SEQRA] review;" and (2) "when a project developer wrongly excludes certain activities from the definition of his project for the purpose of keeping to a minimum its environmentally harmful consequence, thereby making it more palatable to the reviewing agency and community."[103] Segmentation is not strictly prohibited by SEQRA, but it is disfavored; DEC's SEQRA regulations provide that a lead agency permissibly may segment review if "the agency clearly states its reasons therefor and demonstrates that such review is no less protective of the environment."[104]

Two reported cases from this *Survey* period addressed segmentation. First, in *Carr v. Village of Lake George Village Board*, the court considered whether the Village of Lake George Planning Board had improperly segmented its SEQRA review when approving the site

157 (2d Dep't 2017)) (first citing 6 N.Y.C.R.R. § 617.6(a)(1)(i); then citing Hudson Falls v. N.Y.S. Dep't of Envtl. Conservation, 158 A.D.2d 24, 30, 557 N.Y.S.2d 702, 705 (3d Dep't 1990); and then citing McNerney v. Bainbridge-Gulford Cent. Sch. Bd. of Educ., 155 A.D.2d 842, 843, 548 N.Y.S.2d 103, 104 (3d Dep't 1989)).

100. *Id.* (citing former 6 N.Y.C.R.R. § 617.5(c)(7), (2)).

101. *See id*; 6 N.Y.C.R.R. § 617.5(c)(2), (9).

102. 6 N.Y.C.R.R. § 617.3(g)(1).

103. Schultz v. Jorling, 164 A.D.2d 252, 255, 563 N.Y.S.2d 876, 879 (3d Dep't 1990) (citing Sutton v. Bd. of Trs., 122 A.D.2d 506, 508, 505 N.Y.S.2d 263, 265 (3d Dep't 1986); and then citing MICHAEL B. GERRARD ET AL., ENVIRONMENTAL IMPACT REVIEW IN NEW YORK § 5.02(1) (2019)).

104. Concerned Citizens for the Env't v. Zagata, 243 A.D.2d 20, 22, 672 N.Y.S.2d 956, 958 (3d Dep't 1998). *See also* 6 N.Y.C.R.R. 617.3(g)(1).

application for a proposed boat storage facility.[105] The Planning Board had made clear during a January 2019 meeting that it intended for its SEQRA review to include not only the boat storage facility, but also the applicant's plans for boat storage on a neighboring parcel of land that the applicant also owned.[106] However, the application before the Planning Board only encompassed the site plan for the proposed boat storage facility on the applicant's property—not the neighboring property.[107] The court found this to be unlawful segmentation, holding that SEQRA required a review of the project as a whole, and thus not just a part of the overall boat storage facility.[108] Thus, the court remanded the application to the Planning Board for further SEQRA review consistent with its decision.[109]

Second, in *United Refining Company of Pennsylvania v. Town of Amherst*, an original proceeding in the Fourth Department seeking to annul the determination of the Town of Amherst's authorization of condemnation of petitioner's property, the petitioner alleged, among other claims, that the Town of Amherst had improperly segmented the SEQRA review of a proposed development project, which included a park, bus stop improvements, and a mixed-use building.[110] The court held that the Town's SEQRA determination reflected that it had considered the impact of each proposed improvement and therefore had not improperly segmented its review.[111]

3. Lead Agency Designation and Coordinated Review

One of the procedural requirements of SEQRA is that, for all Type I actions that involve more than one agency, the "lead agency" is the one "principally responsible for undertaking, funding, or approving an action," and it must conduct a coordinated review.[112] Under SEQRA regulations, "if [the] lead agency exercises due diligence in identifying all other involved agencies and provides written notice of its determination of significance to the identified involved agencies, then no [other] involved agency may later require the preparation of an EAF, a negative declaration or an EIS in connection with the action," and the

105. *See Carr* 102 N.Y.S.3d at 414.
106. *Id.*
107. *Id.* at 415.
108. *See id.*
109. *Id.*
110. *See* 173 A.D.3d 1810, 1810, 1811, 1812 (4th Dep't 2019).
111. *See id.* at 1812.
112. *See* 6 N.Y.C.R.R. §§ 617.2(v), 617.6(b)(3). Agencies have the option of conducting a coordinated review for Unlisted Actions, but it is not required. *Id.* § 617.6(b)(4).

lead agency's determination of significance "is binding on all other involved agencies."[113] Few reported cases dealt with the propriety of lead agency designation or coordinated review during this *Survey* period, and none substantively discussed coordinated agency review. The Second Department did reiterate the principle that a lead agency need not always be the agency with final approval power over an action.[114] In *Save Harrison v. Town/Village of Harrison*, the petitioners challenged a rezoning amendment over which the Town Board held final approval authority.[115] However, the Planning Board acted as lead agency for the purpose of SEQRA review.[116] Since the Town Board referred the rezoning application to the Planning Board for a recommendation, and the Planning Board was also considering whether to grant the applicant site plan approval and certain other permits, the Planning Board "had decision-making authority with respect to aspects of the project, [and] it was a proper lead agency."[117]

E. "Hard Look" Review and the Adequacy of Agency Determinations of Environmental Significance

Agency decisions are accorded significant judicial deference where the petitioners challenge an agency's conclusions regarding the environmental impacts of a proposal.[118] Courts have long held that "[j]udicial review . . . is limited to 'whether the agency identified the relevant areas of environmental concern, took a "hard look" at them, and made a "reasoned elaboration" of the basis for its determination.'"[119] Under Article 78's deferential standard of review for agencies'

113. *Id.* § 617.6(b)(3)(iii). When more than one agency is involved, and the lead agency determines that an EIS is required, it must engage in a coordinated review. *See id.* § 617.6(b)(2)(ii).

114. Save Harrison, Inc. v. Town/Vill. of Harrison, 168 A.D.3d 949, 952, 93 N.Y.S.3d 74, 78 (2d Dep't 2019) (first citing 6 N.Y.C.R.R. § 617.2(u); then citing Wooster v. Queen City Landing, LLC, 150 A.D.3d 1689, 1691, 54 N.Y.S.3d 812, 815 (4th Dep't 2017); then citing Seaboard Contracting & Material, Inc. v. Dep't of Envtl. Conservation of N.Y., 132 A.D.2d 105, 111, 522 N.Y.S.2d 679, 683 (3d Dep't 1987); and then citing Citizens Against Sprawl-Mart v. City of Niagara Falls, 35 A.D.3d 1190, 1192, 827 N.Y.S.2d 803, 806 (4th Dep't 2006)).

115. *See id.* at 951, 93 N.Y.S.3d at 77.

116. *See id.* at 950, 93 N.Y.S.3d at 77.

117. *See id.* at 952, 93 N.Y.S. 3d at 78 (first citing 6 N.Y.C.R.R. § 617.2(u); then citing *Wooster*, 150 A.D.3d at 1691, 54 N.Y.S.3d at 815; then citing *Seaboard Contracting & Material, Inc.*, 132 A.D.2d at 111, 522 N.Y.S.2d at 683; and then citing *Citizens Against Sprawl-Mart*, 35 A.D.3d at 1192, 827 N.Y.S.2d at 806).

118. *See, e.g.*, Riverkeeper, Inc. v. Planning Bd., 9 N.Y.3d 219, 231–32, 881 N.E.2d 172, 177, 851 N.Y.S.2d 76, 81 (2007) (quoting *Jackson*, 67 N.Y.2d at 417, 494 N.E.2d at 436, 503 N.Y.S.2d at 305).

119. *Id.*

discretionary judgments, a negative declaration or EIS issued in compliance with applicable law and procedures "will only be annulled if it is arbitrary, capricious or unsupported by the evidence."[120] Successful challenges to EISs are very uncommon because of this deferential standard of review.[121] Success is relatively more common in challenges to determinations of significance, but as several unsuccessful challenges from the *Survey* period show, even petitioners in such cases face a difficult burden.[122]

1. Adequacy of Determinations of Environmental Significance

The issuance of a negative declaration concludes an agency's obligations under SEQRA.[123] As a result, challenges to an agency's conclusion that no EIS is necessary often seek to show that the deciding agency's issuance of a negative declaration was arbitrary and capricious because a) it failed to consider relevant subject; b) the proposed action may have significant adverse environmental impacts; or c) the agency failed to provide a written, reasoned explanation for the determination (denominated the "reasoned elaboration").[124] Because judicial review of SEQRA determinations is "limited to 'whether the [lead] agency identified the relevant areas of environmental concern, took [the requisite] 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination,"[125] succeeding on an arbitrary and capricious challenge to a negative declaration can be difficult. During the *Survey* period, a number of decisions were issued upholding negative declarations by lead agencies and citing primarily to this standard.[126]

120. Schaller v. Town of New Paltz Zoning Bd. of Appeals, 108 A.D.3d 821, 823, 968 N.Y.S.2d 702, 704 (3d Dep't 2013) (first citing N.Y. C.P.L.R. § 7803(3); then citing *Riverkeeper, Inc.*, 9 N.Y.3d at 232, 881 N.E.2d at 177, 851 N.Y.S.2d at 81; and then citing Troy Sand & Gravel Co. v. Town of Nassau, 82 A.D.3d 1377, 1378, 918 N.Y.S.2d 667, 669 (3d Dep't 2011)).

121. *See* GERRARD ET AL., *supra* note 103, at § 7.04(4).

122. *See id.* at § 7.04(4).

123. *See id.* at § 3.01(1)(c).

124. *See* N.Y.C.P.L.R. § 7803(3) (listing the only issues that may be raised under an Article 78 proceeding, which, as noted, encompasses SEQRA litigation). Challenges to positive declarations are less common than challenges to negative declarations. *See* GERRARD ET AL., *supra* note 103, at § 3.05(2)(e). Part of the reason is that positive declarations generally are not considered final agency actions. *See id.* at § 3.01(1)(c).

125. *Riverkeeper, Inc.*, 9 N.Y.3d at 231–32, 881 N.E.2d at 177, 851 N.Y.S.2d at 81 (quoting *Jackson*, 67 N.Y.2d at 417, 494 N.E.2d at 436, 503 N.Y.S.2d at 305.

126. *See, e.g.*, Star Prop. Holding, LLC v. Town of Islip, 164 A.D.3d 799, 801, 83 N.Y.S.3d 146, 149 (2d Dep't 2018); Rimler v. City of N.Y., 172 A.D.3d 868, 871, 101 N.Y.S.3d 54, 58 (2d Dep't 2019); Edwards v. Zoning Bd. of Appeals, 163 A.D.3d 1511, 1513, 83 N.Y.S.3d 767, 770 (4th Dep't 2018); Pilot Travel Ctrs., LLC v. Town Bd., 163 A.D.3d 1409, 1411–12, 80 N.Y.S.3d 799, 802–03 (4th Dep't 2018); Johnson v. Town of Hamburg, 167 A.D.3d 1539,

By contrast, only two negative declarations were overturned, both on the basis of the lead agency's failure to provide a reasoned elaboration for its determination. In *Peterson v. Planning Board of the City of Poughkeepsie*, the Second Department found the respondent Planning Board's negative declaration arbitrary and capricious with respect to its conclusions on impacts to historic resources and vegetation.[127] In particular, the Planning Board's sole reliance on a letter from the New York State Office of Parks, Recreations and Historic Preservation resulted in a "conclusory statement [that] fails to fulfill the reasoned elaboration requirement of SEQRA."[128] Likewise, although the project at issue contemplated significant deforestation, reducing the wooded area of the 3.4-acre site from 2.75 acres to 0.30 acres, "the negative declaration inexplicably stated that '[t]he proposed action w[ould] not result in the removal or destruction of large quantities of vegetation or fauna.'"[129] Accordingly, the Second Department remitted the matter to the Planning Board for the preparation of an EIS.[130]

The Fourth Department found similar flaws in a negative declaration issued by the Town Board of Seneca Falls allowing the acquisition of an easement for installation of a sewer line along a nature trail in *Frank J. Ludovico Sculpture Trail Corporation v. Town of Seneca Falls.*[131] In particular, the court took issue with the lead agency's assessment of potential significant adverse environmental impacts to wildlife, which essentially consisted of listing in the EAF certain endangered/threatened species flagged as potentially present on the project site by DEC and

1540–41, 90 N.Y.S.3d 781, 783 (4th Dep't 2018); *Save Harrison, Inc.*,168 A.D.3d at 952, 93 N.Y.S.3d at 78–79; Blue Point Cmty. Civic Ass'n v. Town of Islip, No. 6054/2017, 2019 N.Y. Slip Op. 50906(U), at 3–4 (Sup. Ct. Suffolk Cty. June 11, 2019).

127. 163 A.D.3d 577, 580, 80 N.Y.S.3d 395, 398 (2d Dep't 2018).

128. *Id.* at 579, 80 N.Y.S.3d at 397–98 (first citing *Troy Sand & Gravel Co.*, 82 A.D.3d at 1379, 918 N.Y.S.2d at 669–70; then citing Serdarevic v. Town of Goshen, 39 A.D.3d 552, 554–55, 834 N.Y.S.2d 233, 235–36 (2d Dep't 2007); and then citing Pyramid Co. of Watertown v. Planning Bd., 24 A.D.3d 1312, 1315, 807 N.Y.S.2d 243, 246 (4th Dep't 2005)).

129. *Id.* at 579, 80 N.Y.S.3d at 398.

130. *See id.* at 580, 80 N.Y.S.3d at 398. Although the typical relief granted by a court would be to remand the matter to the lead agency for a new determination of significance, remand specifically for the preparation of an EIS may be required where, as here, the court finds that "it is clear that the proposed action may have significant adverse environmental impacts upon one or more areas of environmental concern." *Id.* (citing 6 N.Y.C.R.R. § 617.7(a)). *See generally* West Branch Conservation Ass'n v. Planning Bd. of Clarkstown, 207 A.D.2d 837, 616 N.Y.S.2d 550 (2d Dep't 1994) (remitting the matter for the preparation of an EIS after finding that the Planning Board acknowledged adverse environmental impacts but filed a negative declaration anyways); Holmes v. Planning Bd., 137 A.D.2d 601, 524 N.Y.S.2d 492 (2d Dep't 1988) (remitting the matter for the preparation of an EIS after concluding the agency failed to examine environmental impacts).

131. 173 A.D.3d 1718, 1720, 102 N.Y.S.3d 349, 352 (4th Dep't 2019).

providing no reasoning as to why they would not be impacted.[132] Further, the Town Board "merely set forth general practices for avoiding significant adverse impacts on surface water and stream corridors without" actually explaining how those practices would avoid such impacts—yet another failure to provide the required reasoned elaboration.[133]

These two cases are examples of the exception, rather than the norm. So long as a "particular record is adequate for [courts] to exercise [their] supervisory review to determine that the [lead agency] strictly complied with SEQRA procedures,"[134] it remains relatively unlikely that a negative declaration will be overturned as arbitrary and capricious.

2. Adequacy of Agencies' EISs and Findings Statements

As noted, successful challenges to EISs are very uncommon because of the deferential standard of review.[135] This *Survey* period, petitioners were unsuccessful in challenging the adequacy of EISs. For example, in *Carnegie Hill Neighbors, Inc. v. City of New York*, petitioners challenged a proposed development that involved the temporary alienation[136] of a playground, arguing that the FEIS was improper.[137] The court found that

132. *Id.* at 1719, 102 N.Y.S.3d at 351 (first citing Wellsville Citizens for Responsible Dev., Inc. v. Wal-Mart Stores, Inc., 140 A.D.3d 1767, 1769, 33 N.Y.S.3d 653, 655–56 (4th Dep't 2016); and then citing Rochester Eastside Residents for Appropriate Dev., Inc. v. City of Rochester, 150 A.D.3d 1678, 1680, 54 N.Y.S.3d 484, 486–87 (4th Dep't 2017)). *See also Wellsville Citizens for Responsible Dev., Inc.*, 140 A.D.3d at 1769–70, 33 N.Y.S.3d at 655–56 (finding the negative declaration was arbitrary and capricious with respect to project's impact on wildlife where it solely relied on form letters from agencies stating that they lacked data as to whether endangered species were present on site, and no site survey was conducted); Kittredge v. Planning Bd., 57 A.D.3d 1336, 1338, 870 N.Y.S.2d 582, 584–85 (3d Dep't 2008) (finding the negative declaration was arbitrary and capricious in light of the board's failure to consider whether endangered species were present on the property).

133. *Frank J. Ludovico Sculpture Trail Corp*., 173 A.D.3d at 1720, 102 N.Y.S.3d at 352.

134. Micklas v. Town of Halfmoon Planning Bd., 170 A.D.3d 1483, 1486, 97 N.Y.S.3d 339, 342–43 (3d Dep't 2019) (quoting Ellsworth v. Town of Malta, 16 A.D.3d 948, 950, 792 N.Y.S.2d 227, 230 (3d Dep't 2005)) (first citing 6 N.Y.C.R.R. § 617.7; and then citing Friends of Shawangunks, Inc. v. Zoning Bd. of Appeals, 56 A.D.3d 883, 884–85, 867 N.Y.S.2d 238, 240-41 (3d Dep't 2008)).

135. *See* GERRARD ET AL., *supra* note 103, at § 7.04(4).

136. Alienation is the use of parkland for a non-park purpose. Under the judicially-developed public trust doctrine, the New York State Legislature must authorize municipal parkland alienation. *See, e.g*, Avella v. City of N.Y., 131 A.D.3d 77, 82, 13 N.Y.S.3d 358, 362 (1st Dep't 2015) (explaining that alienation of parkland must be authorized under the Public Trust Doctrine). Here, although there was some dispute about whether the playground was actually parkland, respondents nevertheless obtained approval from the State Legislature permitting the playground's temporary alienation. Carnegie Hill Neighbors, Inc. v. City of N.Y., No. 161375/2017, 2019 N.Y. Slip Op. 31182(U), at 4 (Sup. Ct. N.Y. Cty. April 24, 2019).

137. *See Carnegie Hill Neighbors, Inc.*, 2019 N.Y. Slip Op. 31182(U), at 1–2.

the hard look standard had been met because the lead agency had "explicitly addressed the impacts anticipated if the current playground were discontinued, reconstructed, and relocated . . . to another portion of the project site" and had addressed the concerns raised during the comment period in the final environmental impact statement (FEIS) and the SEQRA/CEQR findings statement.[138] The New York Supreme Court also rejected a challenge to an FEIS in *Community United to Protect Theodore Roosevelt Park v. City of New York*,[139] which is further discussed in Section III.B., *infra*.

F. Supplementation

1. Amending a Determination of Significance

The SEQRA regulations provide for certain enumerated situations in which new information or changes in circumstance arise that require an amendment to the determination of significance.[140] These include: (1) substantive changes proposed for the project; (2) the discovery of new information; or (3) changes in circumstances relating to the project.[141] Where such amendment takes place, it typically involves a negative declaration; information that could prompt amendment to a positive declaration usually arises after an EIS has been issued, and thus is typically dealt with through the supplemental EIS process instead.[142] In these instances, the lead agency is required to "discuss the reasons supporting the amended determination" and follow the same filing and publication requirements that apply to the original determination.[143]

A lead agency's ability to amend its determination of significance is not strictly limited to the situations enumerated in the regulations. For instance, in *Village of Ballston Spa v. City of Saratoga Springs*, the Third Department permitted the use of a supplemental resolution to cure a defect in the initial resolution: namely, its failure to provide sufficient information that would satisfy the requirement of a written "reasoned elaboration" for its decision.[144] The Court noted that in such situations, it must be wary of the potential for such supplemental information to retroactively replace the required "reasoned elaboration" of a

138. *Id.* at 10.
139. 171 A.D.3d 567, 568–69, 98 N.Y.S.3d 576, 578 (1st Dep't 2019).
140. *See* 6 N.Y.C.R.R. § 617.8(e).
141. *Id.*
142. *See infra* Section D.2.
143. 6 N.Y.C.R.R. § 617.8(e)(2).
144. 163 A.D.3d 1220, 1225, 82 N.Y.S.3d 179, 185 (3d Dep't 2018).

determination of significance in the initial decision document.[145] Here, the City reaffirmed the initial determination and that it formally considered and adopted the supplemental resolution *before* the action at issue—condemnation of property for a bike trail—was approved.[146] Thus, the Third Department held that this was a permissible amendment to the negative declaration.[147] It further held that, although curing a defect in review is not one of the enumerated reasons provided in the regulations for amending a negative declaration, the regulations "were intended to prescribe how a lead agency should or must respond when confronted with those listed situations . . . although [the court agreed] that none of the bases for amendment listed in the regulation were raised [], that did not preclude the City from adopt[ing] the supplemental resolution."[148] The court noted that:

> [t]o hold otherwise would prevent a lead agency from ever correcting a mistake in a negative declaration unless one of the listed situations existed, and would require annulment of determinations and remittal for the agency to approve a 'new' determination that often will be the same as the agency's revised determination; we reject an interpretation that elevates form over substance.[149]

2. Supplementing an EIS

SEQRA provides for the preparation of a supplemental EIS (SEIS) when project changes, newly-discovered information, or changes in circumstances give rise to potential significant adverse environmental impacts not addressed, or not adequately addressed, in the original EIS.[150] Whether issues, impacts, or project details omitted from an initial EIS require preparation of an SEIS is a frequent subject of litigation.[151] One reported case addressed this issue during the *Survey* period. *Berg v. Planning Board of City of Glen Cove* involved a change to a proposed action that ultimately was held not to warrant the preparation of an SEIS.[152] The Glen Cove Planning Board undertook environmental review of a project aimed to redevelop over fifty acres of formerly industrial waterfront land and, in 2011, adopted a final EIS and granted the

145. *See id.* at 1224–25, 82 N.Y.S.3d at 184.
146. *See id.* at 1225, 82 N.Y.S.3d at 184.
147. *See id.* at 1225, 82 N.Y.S.3d at 185.
148. *Id.* at 1226, 82 N.Y.S.3d at 185.
149. *Vill. of Ballston Spa*, 163 A.D.3d at 1226, 82 N.Y.S.3d at 185.
150. *See* GERRARD ET AL., *supra* note 103, at § 3.13(2); 6 N.Y.C.R.R. § 617.9(a)(7).
151. *See* Chertok & Ghilain, *supra* note 1, at 837.
152. *See* 169 A.D.3d 665, 669, 93 N.Y.S.3d 407, 412 (2d Dep't 2019).

developer a permit for a planned unit development (PUD).[153] In 2015, the developer submitted a modified application intended to decrease the footprint and density of the private buildings in favor of more public parks and amenities; after public hearings, the Planning Board issued a twenty-three page resolution declining to require an SEIS "because the proposed modifications would not result in any new potential significant adverse environmental impacts that had not been previously studied."[154] The Second Department affirmed the Planning Board's decision, noting that, under SEQRA, a lead agency has discretion to decide whether an SEIS is necessary, and "courts must view the record to determine whether the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination."[155]

III. NYC UPDATES

For the most part, New York City practitioners must stay apprised of the same SEQRA principles that apply to practitioners across the state. However, there are certain aspects of the environmental review process that are unique to New York City. The most obvious of these is the application of CEQR regulations, which contain specific procedures to address and mesh SEQRA with the City's unique land use procedures.[156] As discussed in Part I, the CEQR regulations are often implemented with the guidance of the *CEQR Technical Manual*.[157] This *Survey* period saw a challenge to the *Manual*.

In addition, there are certain characteristics of development in New York City that affect the environmental review process, and that, as discussed further below, specifically came into play during this *Survey* period. To the extent that these principles may be extended to SEQRA review outside of New York City, it is a useful exercise for any New York practitioner to remain alert to them.

A. CEQR Technical Manual

One reported case decided during the *Survey* period raised a fundamental challenge to the *CEQR Technical Manual*.[158] As noted in

153. *Id*. at 666, 93 N.Y.S.3d at 409–10.

154. *Id*. at 666–67, 93 N.Y.S.3d at 411.

155. *See id.* at 668–69, 93 N.Y.S.3d at 412 (quoting Chinese Staff & Workers' Ass'n v. Burden, 19 N.Y.3d 922, 924, 973 N.E.2d 1277, 1279–80, 950 N.Y.S.2d 503, 505–06 (2012)).

156. *See* N.Y.C. RULES tit. 43, §§ 6-01–6-15, tit. 62, §§ 5-01–6-15.

157. *See* CEQR MANUAL, *supra* note 51.

158. *See* Ordonez v. City of N.Y., No. 450100/2018, 2018 N.Y. Slip Op. 51093(U), at 1 (Sup. Ct. N.Y. Cty. July 11, 2018).

Part I, the *CEQR Technical Manual* is published by the New York City Mayor's Office of Environmental Coordination in order to assist city agencies, project sponsors, and the public in navigating and understanding the CEQR process.[159] In *Ordonez v. City of New York*, two groups of petitioners, who challenged two different environmental reviews, argued that the *Manual* consisted of rules that were not promulgated pursuant to the New York City Administrative Procedure Act (CAPA), and therefore that the *Manual* should be declared null and void.[160] In addition, petitioners sought a stay of all rezoning projects that were approved in reliance on the *Manual*.[161]

According to petitioners, the policies set forth in the *Manual* constituted rules under CAPA.[162] A rule is subject to CAPA, and thus must undergo a mandatory review process, if it is a "fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers constitutes a rule or regulation."[163] Petitioners claimed that the *Manual* meets this definition because it provides mandatory rules for CEQR review, and alleged that City agencies apply the *Manual* without deviation in almost all CEQR applications.[164] Thus, because the *Manual* did not undergo CAPA review, petitioners argued, it should be declared null and void.[165] In response, respondents argued that the *Manual* provides guidance to agencies when they perform CEQR reviews, but allows agencies considerable discretion during the process.[166] Specifically, the respondents pointed to the introduction to the technical guidance in the *Manual*, which states that its methodologies are "appropriate for assessment of projects undergoing CEQR review, but are not required [by CEQR]."[167] The court disagreed with petitioners, determining that the publication of the *Manual* did not trigger the rulemaking requirements of CAPA, because the *Manual* provided guidelines for lead agencies to implement within their discretion.[168] The

159. *See* CEQR MANUAL, *supra* note 51, at Introduction-1.

160. 2018 N.Y. Slip Op. 51093(U), at 1.

161. *Id.*

162. *Id.* at 3.

163. *Id.* at 22 (quoting Council of the City of N.Y. v. Dep't of Homeless Servs., 22 N.Y.3d 150, 154, 3 N.E.3d 128, 130, 980 N.Y.S.2d 62, 64 (2013).

164. *Id.* at 10.

165. *Ordonez*, 2018 N.Y. Slip Op. 51093(U), at 10.

166. *Id.* at 11.

167. *Id.* (quoting CEQR MANUAL, *supra* note 51, at Introduction-1).

168. *Id.* at 23.

court also rejected petitioners' challenges to the application of the *Manual* in the environmental reviews at issue in the case.[169]

B. Consideration of "Typical" Contamination

There is a new potential trend in SEQRA/CEQR analysis for actions involving construction in New York City. In this *Survey* period, when addressing petitioners' claims that potential significant impacts from construction activities were not adequately reviewed, two courts took into account whether the activities or potential contaminants in question were typical or ubiquitous in the City.[170]

In *Community United to Protect Theodore Roosevelt Park v. City of New York*, petitioners challenged the Museum's construction of an addition on grounds that included alleged failure of the NYC Parks Department's FEIS to properly review and establish appropriate mitigation measures for construction-related disturbance of soil containing hazardous materials such as metals and volatile organic compounds (VOCs).[171] The Supreme Court, New York County, which was subsequently affirmed by the First Department, found there could be "no dispute that the FEIS met the Park Department's obligation under SEQRA," noting that the FEIS outlined sufficient mitigation procedures for a project site that, "like many construction projects in New York City, contain metals, [VOCs], and other hazardous materials."[172] The court's statement here refers to the use of urban or historical fill in many parts of the City, which often contains contaminants such as metals, VOCs, and semi-volatile organic compounds (SVOCs).[173] In its affirming decision,

169. *Id.*

170. *See* Cmty. United to Protect Theodore Roosevelt Park v. City of N.Y., 171 A.D.3d 567, 568, 98 N.Y.S.3d 576, 578 (1st Dep't 2019); Preserve Our Brooklyn Neighborhoods v. City of N.Y., No. 159401/2018, 2019 N.Y. Slip Op. 31751(U), at 3 (Sup. Ct. N.Y. Cty. June 18, 2019).

171. *See Cmty. United to Protect Theodore Roosevelt Park*, 171 A.D.3d at 568, 98 N.Y.S.3d at 577. *See also* Cmty. United to Protect Roosevelt Park, No. 152354/2018, 2018 N.Y. Slip Op. 33153(U), at 12 (Sup. Ct. N.Y. Cty. Dec. 10, 2018) (noting that the project site contained metals, VOCs, and other hazardous materials).

172. *See Cmty. United to Protect Theodore Roosevelt Park*, 2018 N.Y. Slip Op. 33153(U), at 12.

173. *See* 6 N.Y.C.R.R 375-1.2(x) (2006). "Historic fill material" is defined by DEC as:

> non-indigenous or non-native material, historically deposited or disposed in the general area of, or on, a site to create useable land by filling water bodies, wetlands or topographic depressions, which is in no way connected with the subsequent operations at the location of the emplacement, and which was contaminated prior to emplacement. Historic fill may be solid waste including, but not limited to, coal ash, wood ash, municipal solid waste incinerator ash, construction and demolition debris, dredged sediments, railroad ballast, refuse and land clearing debris, which was used

the First Department similarly noted that "the hazardous vapors cited by petitioners did not violate any code or standard, and the [FEIS] articulated reasonable mitigation plans for toxins located at the project site."[174]

Community United has already been favorably cited by the Supreme Court, New York County, in a subsequent case, *Preserve Our Brooklyn Neighborhoods v. City of New York*.[175] In *Preserve Our Brooklyn Neighborhoods*, the petitioners argued that the City violated both SEQRA and CEQR in its issuance of a negative declaration for an application to up-zone a site in Fort Greene for commercial development.[176] Although the court held that the SEQRA and CEQR claims brought under Article 78 were not timely served on the developers (necessary parties to the proceeding), it also noted that even if it did consider those claims, "they nonetheless fail on the merits."[177] The court found that the EAS demonstrated the requisite "hard look."[178] With respect to potential impacts from construction of the project in particular, the court further stated that:

> To the extent that petitioners take issue with the construction itself, they have not demonstrated that the construction will pose any risks greater than those ordinarily accompanying construction-related activities in New York City. On that note, such risks should be properly accounted for by the City's Department of Buildings and other applicable rules and regulations. Such a conclusion is rational and should not be second-guessed by the court.[179]

The court's statement that the "typical" environmental impacts from construction in New York City inform the baseline from which potential environmental impacts arising from temporary construction activity

---

> prior to October 10, 1962. Any soil or soil-like wastes from any area which was operated by a municipality or other person as a landfill is not considered historic fill. For purposes of a remedial program, historic fill does not include any material which is chemical production waste or waste produced on the site from processing of metal or mineral ores, residues, slag or tailings.

Id.

174. *Cmty. United to Protect Theodore Roosevelt Park*, 171 A.D.3d at 568–69, 98 N.Y.S.3d at 578.

175. 2019 N.Y. Slip Op. 31751(U), at 3.

176. *Id.* at 2.

177. *Id.* at 3.

178. *Id.*

179. *Id.* (first citing Friends of P.S. 163, Inc. v. Jewish Home Lifecare, 30 N.Y.3d 416, 430, 90 N.E.3d 1253, 1260, 68 N.Y.S.3d 382, 389 (2017); and then citing *Cmty. United to Protect Theodore Roosevelt Park*, 171 A.D.3d at 568, 98 N.Y.S.3d at 578).

should be assessed is a notable outcome for New York City developers.[180] However, although the deciding courts in *Community United* and *Preserve Our Brooklyn Neighborhoods* appear to be treating "ordinary construction activity" in NYC developments as a shorthand for potential impacts that are easily mitigated, this does not mean that lead agencies may forgo the site-specific justifications and conclusions required under SEQRA in favor of merely relying on a developer's commitment to comply with other applicable regulatory schemes. It does suggest, however, that challengers cannot assert that construction impacts are significant without demonstrating that they are "atypical" and thus warranted further analysis.

CONCLUSION

Case law from this *Survey* period demonstrates that SEQRA continues to present the courts with difficult legal questions related to standing, ripeness, and the statute of limitations; procedural issues, including the classification of an action, segmentation, and lead agency designation; the adequacy of agencies' determinations of significance; the sufficiency of agencies' environmental impact statements; and supplementation of determinations of significance and environmental impact statements. These issues will continue to evolve as the courts are presented with new SEQRA challenges. These and other developments in the law of SEQRA will be covered in future installments of the *Survey of New York Law*.

180. *See Preserve Our Brooklyn Neighborhoods*, 2019 N.Y. Slip Op. 31751(U), at 3 (noting that the construction would not "pose any risks greater than those ordinarily accompanying construction-related activities in New York City").