Revised Draft Generic Environmental Impact Statement on the Proposed Amendments to the State Environmental Quality Review Act (SEQR) Regulations

6 NYCRR Part 617

-and-

Revised Regulatory Impact Statement, Revised Regulatory Flexibility Analysis for Small Businesses and Local Governments, Revised Rural Area Flexibility Analysis, and Statement In lieu of Job Impact Statement Pursuant to Section 202 of the State Administrative Procedure Act

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TABLE OF CONTENTS

EXECUTIVE SUMMARY

Enacted into law on August 1, 1975, the State Environmental Quality Review Act (SEQR) seeks to ~~requires a process that~~ ~~introduces~~ incorporate the consideration of environmental factors into the planning and approval of actions that are undertaken, funded or approved by local, regional or state agencies. It applies to 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. By incorporating a systematic, interdisciplinary approach to environmental review in the early planning stages of projects and approvals, SEQR enables agencies involved in the review of development projects and other types of governmental actions that may impact the environment to avoid or reduce any significant adverse impacts from such actions. The primary tool of the SEQR process is the environmental impact statement (EIS). If the lead agency determines that a proposed action may have a potentially significant adverse impact on the environment, then it must prepare an EIS or cause one to be prepared. The purpose of the EIS is to explore ways to minimize adverse environmental effects or to identify a potentially less damaging alternative. SEQR is both a procedural and substantive law. In addition to meeting strict procedural requirements, the law mandates that agencies act on the substantive information produced in the environmental review.[1] Such information could and often should result in project modification or even project denial if environmental concerns are overriding and adequate mitigation of adverse impacts or a reasonable alternative is not available.

To accomplish the purposes of SEQR, the Legislature directed the Commissioner of the Department of Environmental Conservation ("DEC" or "the Department") to establish procedures that would guide all agencies in its implementation. These procedures are set out in Part 617 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Part 617). Part 617 was initially promulgated in 1976. Over the years, a series of amendments were adopted to reflect the development of the SEQR process. The most significant amendments to Part 617 were made in 1978, 1987 and 1995.

The Department proposed to ~~once again~~ update Part 617 to reflect the Department's experience with SEQR ~~during the two decades~~ since the last major update of the SEQR regulations. The basic purpose of the proposed amendments is to streamline the SEQR process without sacrificing meaningful environmental review. ~~If adopted,~~ [T]he amendments would expand DEC's statewide Type II list of activities (actions not subject to further review under SEQR), modify certain thresholds in the Type I list of actions (actions deemed more likely to require the preparation of an environmental impact statement (EIS)), make scoping of EISs mandatory (scoping is now optional), and better define the acceptance procedures for draft EISs.

The Department also proposed an amendment to 6 NYCRR ~~section~~§ 617.10 (Generic EISs) that would clarify the ability of a lead agency to deny an action for which

it has prepared a generic EIS. This additional language would simply ~~make~~ express ~~something that is implicit, namely~~ that an agency, which has undertaken to prepare a programmatic generic environmental impact statement, can abandon the program or complete the EIS and make negative findings. Under the existing regulations, no final EIS need be filed if an action is withdrawn under 6 NYCRR ~~section~~§ 617.9 (a) (5) (i). The Department also proposes amendments to implement the statutory EIS on the web requirement (Chapter 641 of the Laws of 2005) and a number of other changes to encourage the electronic filing of EISs (see Express Terms, 6 NYCRR ~~section~~§ 617.12) and changes to § 617.13 to add greater transparency (benefitting the project sponsors and the public) when a lead agency engages private consulting firms and charges the costs back to project sponsors. The proposed changes to §§ 617.10 and 617.12 are not evaluated below since they are non-substantial, technical and would not under any circumstance have a significant, adverse impact on the environment.

The proposals were developed through an extensive stakeholder outreach effort (see Appendix A for the list of participants). In collaboration with the Empire State Development Corporation, the Department's staff met with stakeholders representing the development, municipal, and environmental communities at various locations throughout the state.[2]

Stakeholders agreed that SEQR continues to play a key role in ensuring that environmental concerns factor into agency decision making and on the need to update the regulations to make the process more efficient and less frustrating to the regulated community. Many participants expressed agreement on the need for additional classes of Type II actions. The most recurrent concern was the one expressed by participants representing business and industry over the length of time that some SEQR reviews took to complete and that the length of time of such reviews is an impediment to businesses contemplating a re-location from other states to New York. In response to this concern, the Department is proposing changes to the scoping process, and rules governing the acceptance of the draft environmental impact statement. The newly proposed Type II actions entirely exempt an additional list of activities, which the Department has determined would not have a significant impact on the environment, from SEQR review.

The proposed amendments are intended to build on the modernization of the environmental assessment forms (EAFs) that became effective on October 7, 2013. The Department views the proposed changes to the text of Part 617, in combination with the new EAFs and their integration with web-based geographic information systems (spatial data platform), as part of a larger effort to modernize SEQR.

In response to public comment, the Department modified the environmental assessment forms with the Type I changes related to certain actions located next to properties listed on the National or State registers of historic places including a change allowing for the identification of properties that have been determined to be eligible for listing on the State Register of Historic Places. The modified forms are included with this revised rulemaking. In cooperation with the Office of Parks, Recreation and Historic Preservation, the Department expects to add the data sets for eligible properties so their locations will be identified with other place based resources in Part 1 of the EAF. The Department has also corrected some typographical errors in the forms and clarified

truck types in Part 1, D.2. of the Full EAF. In sum, the changes appear in Part 1 of the Short EAF. Parts 2 and 3 of the Short-EAF are unchanged. Parts 1 and 2 of the Full-EAF contain changes. Part 3 of the Full EAF is unchanged. The Department does not believe that these changes will have a significant effect on the environment but rather implement the substance of the revised proposal.

~~Finally, the Department appreciates the input of the stakeholder community~~ and ~~the general public who volunteered their time to help formulate~~ and then ~~comment on the proposals that follow.~~ The Department received hundreds of comments on the draft proposals, and carefully reviewed each and every one of them. In response to these comments, the Department has made numerous revisions, a few of which are substantial.

How to read this document

The organization of this document is as follows: Each section of the Revised draft GEIS (R-DGEIS) is followed by comments and responses to comments. In cases where the Department has chosen to withdraw an element of the original proposed rule, and thus selected the no-action alternative, the principal sections of the R-DGEIS are struck out using the ~~strikeout~~ symbol. Only the revised proposed text, comments and responses remain with a rationale for not continuing to propose the particular provision. Underlining indicates text that has been added to the revised EIS. Grammatical, citation and spelling corrections are not noted since they do not affect the meaning or substance of the document.

In some cases, comments are first grouped together and then followed by a single response or several similar comments are grouped together and then followed with a response and in other cases each comment is responded to. The source of each comment contains a number that has been assigned to each commenter. A master list of commenters is set out in Appendix G of the R-DGEIS. While the comments that appear below are only excerpts of all the comments received, they are representative and comprehensive.

To comply with the stylistic requirements of the State Administrative Procedure Act (SAPA) the accompanying revised express terms only contain the provisions or words that are being removed (shown as bracketed matter) and the provisions or terms that are proposed to be added to the final regulation (shown as underlined matter). The Department has incorporated the impact statements required by SAPA into the EIS.

The largest block of comments concerned the Department's proposed additions or changes to the Type II list of actions (actions that do not require further review under SEQR). To adopt an addition to the Statewide Type II list, the Commissioner must find that the action or category of action would not have a significant adverse impact on the environment. In addition to the comments that supported some or all of the proposed Type II additions, some commenters argued that one or more of the Department's proposals for Type II actions could have a significant impact on the environment depending on the context of the action or should have further modifying language to prevent such effects from occurring. The Department evaluated each of the proposed Type II actions against this criticism and either modified the proposed Type II action or

removed it from consideration. Overall, in response to public comment, the Type II additions have been pared back.

The Department is no longer proposing a number of Type II actions contained in the original proposal. The Type II for anaerobic digesters at waste water treatment plants is no longer being considered based on environmental justice concerns. The Type II for in-fill development is also no longer being considered based on comments pointing out the difficulty of defining municipal centers or in-fill areas on a state-wide level even though the promotion of in-fill development is environmentally beneficial. This particular Type II, while laudatory from a policy standpoint, is better suited for adoption at the municipal level. The proposed Type II for reuse of existing buildings is continued with some refinements to the language of the Type II. The Type II for co-location of cellular antennas is also no longer being proposed based on a number of concerns described in the R- DGEIS though from an environmental standpoint co-location is almost always preferable over construction of new cellular towers. The proposed Type II for small subdivisions is no longer proposed for a variety of reasons set forth in the R-DGEIS though minor subdivisions are typically the subject of a negative declaration. The Department is no longer proposing certain definitions associated with the Type II actions that have been discontinued (e.g., definition for municipal center). Other proposed Type II actions have been modified based on public comments. The Department has added “Superfund” sites (as fully set out in the revised regulations) to the sites where placement of solar arrays would be a Type II action.

The second largest block of comments concerned the proposed rules to streamline the environmental impact statement process. Many of the commenters criticized the Department’s proposal to bring more certainty to the EIS process by a combination of making scoping mandatory and requiring that lead agencies evaluate the completeness of the project sponsor’s draft EIS based on the final scope. The last provision, which is already set out in the regulations, says that a project sponsor can respond to late filed comments as a response to comment in the final EIS if they have not responded to the comments in the draft EIS. Many commenters criticized these changes by arguing that the public often finds out about a project after scoping is complete and that leaving the project sponsor the option of only responding to the comments in the final EIS means that the public would not find out about a late filed comment until the EIS is finalized. The exact same concern was raised in the 1995 regulatory amendments to SEQR. In point of fact, project sponsors usually like to address issues with a project as soon as possible in the review process. Nonetheless, in response to the comments, the Department proposes to modify the language of the regulation currently in effect to say that a project sponsor must include the late filed comments as an appendix to the draft. The Department is seeking public comment on this change as well as all other revisions from the original proposal as noted.

Finally, commenters pointed out that while the Department has proposed to create a threshold for actions occurring substantially contiguous to properties on the National Register of Historic Places in the Type I list of actions to 25 percent of any other threshold in the Type I list and to include properties determined to be eligible for listing on the National Register, it needs to update the environmental assessment forms to reflect the proposed change in the regulations. As discussed above, the Department

now proposes to do so and has included those minor typographic fixes and clarifications to the environmental assessment forms. The revised forms are also available on the Department's website.

On account of the revisions made in response to public comment, the Department has completed this revised draft generic EIS (R-DGEIS) for public review and comment.

Collectively~~, their suggestions and~~ the comments on ~~the workings of~~ the regulations embody the considerable wisdom and experience of professionals, municipal officials and ordinary citizens who have been practicing SEQR at the state and local level for many years.

REVISED DRAFT GENERIC ENVIRONMENTAL IMPACT STATEMENT (DGEIS)

1.0 ENVIRONMENTAL SETTING

The environmental setting of an action includes the existing environment, any existing uses of the project site, and a general characterization of adjoining areas. However, since DEC is undertaking a rule making, with state-wide applicability, rather than a specific development project there is no environmental setting as that term is usually understood. In lieu of the normal discussion of environmental setting, the Department will discuss environmental setting in terms of the historical background to the present rule making (as it has done in past rule makings under Part 617), which is useful in understanding the Department's regulatory intent and the trajectory that SEQR rule making has taken over the years.[3]

The SEQR statute (ECL §8-0113, in particular) directed the Commissioner to establish rules to guide all agencies in the implementation of SEQR. The rules, which were codified in Part 617, were initially promulgated in 1976. A series of substantial amendments were adopted in 1978, ~~1982,~~ 1987 and 1995 to clarify and fine tune the regulations as well as to reflect developments in case law.

In 1978, the Department amended the Type I and Type II lists. DEC also provided procedures for excluded (grandfathered actions) and Unlisted actions. The amendment also revised the Type I list of actions so that it could be used more easily by nontechnical agency decision-makers. Model environmental assessment forms were added to the rule. In 1987, the Department made some procedural additions to Part 617. The changes added the options of scoping of EISs, and of using conditioned negative declarations. The amendment also added procedures for supplementation of draft and final EISs, rescission of negative declarations, re-designation of lead agency, and agency consideration of reasonably foreseeable catastrophic impact analysis. Clarifications were made regarding EIS alternatives. The Department added new and modified definitions and criteria for legally sufficient negative declarations and documentation requirements for Unlisted actions.

In the 1995 revisions, the Department made significant changes to the regulations governing scoping and created additional Type II actions. The 1995 revised regulations provided that if scoping is initiated, the project sponsor was required to submit a draft scope, and that, within 60 days of its submission, the lead agency must provide a final written scope to the project sponsor. The revisions further provided that all relevant issues should be raised before the issuance of the final written scope. If a person or agency raises issues after that time, the project sponsor may incorporate such information into the draft EIS at its discretion. Language was added to clarify that the results of a coordinated review are binding on all involved agencies, and the Type II list was revised to include exempt and excluded actions so there would be a single list

of actions not subject to further review under SEQR rather than three lists from the statute and earlier versions of the regulations (i.e., excluded, exempt and Type II).

The 1995 revisions were challenged in the case of *West Village Committee v. Zagata*.[4] The petitioners in that case challenged the newly enacted scoping provisions on the ground that they would allow the project sponsor to determine the content of the EIS rather than the lead agency, which under the law has ultimate responsibility for the environmental review process. The Court rejected petitioners' argument since the regulations still required the lead agency to determine the final scope of the EIS. The Appellate Division, on appeal, also upheld DEC's additions to the Type II list. The challenged additions included commercial structures up to 4,000 square feet; school building expansions up to 10,000 square feet; one- to three-family residences in approved subdivisions; accessory structures; all area variances for one- to three-family residences; forest management practices on less than ten acres of land; and the interpretation of existing codes, rules or regulations. In upholding the Department's Type II expansion, the Court stated: "Our examination of DEC's final generic EIS discloses that it separately discussed each proposed addition to the type II list, identified the primary impacts such addition would have on the environment, explained why they were not significant and addressed the comments submitted during the SEQRA process. Inasmuch as petitioners have not come forward with evidentiary proof establishing that DEC's analysis is founded upon spurious data or is otherwise deficient, we shall defer to DEC's expertise."[5]

In 2009, the Department, through its Region 3 office, in collaboration with Mid-Hudson Patterns for Progress (now Hudson Valley Patterns for Progress), convened a workgroup of Hudson Valley SEQR stakeholders to consider finding ways to improve the implementation of SEQR that did not require regulatory or legislative changes. Participants, however, also discussed amending the regulations to make scoping mandatory, expanding the "Type II" list, and making timelines and deadlines longer but mandatory and enforceable with default provisions. This effort culminated in a 2010 report entitled "State Environmental Quality Review (SEQR) Dialog, a regional effort to identify opportunities to improve the SEQR process," which contained specific recommendations.

Beginning in 2011, the Department, in collaboration with the Empire State Development Corporation, convened a series of stakeholder meetings around the state to discuss possible improvements to the SEQR regulations (see Appendix A for a partial list of persons who attended stakeholder meetings as well as organizations represented at those meetings). Specifically, the stated goal of such possible improvements would be to reduce compliance costs, speed the process where possible, and eliminate unnecessary reviews, all without sacrificing environmental protection. Echoing the earlier Hudson River dialogue, the Department heard the following suggestions:

- Institute mandatory scoping;
- Add to the Type II list (actions not subject to SEQR), including revisions to encourage smart growth;
- Improve and require more realistic time frames for determining significance and completing environmental impact statements (EISs);
- Make changes to some of the Type I thresholds;

- Adopt improved remedies where time frames are exceeded consistent with SEQR legal authority; and
- Consider an advisory role for the Department in determining whether another lead agency's draft environmental impact statement (DEIS) is adequate to begin the public review process.

The stakeholder meetings continued through spring 2013, and included private, municipal, and state agency stakeholders as well as environmental organizations.

In 2012, DEC updated the environmental assessment forms (EAFs) that appear in the appendices to Part 617 with electronic forms tied to a geographic information system.[6] The EAFs are intended to assist the lead agency in determining whether a particular action may have a potentially significant adverse impact on the environment. Such a determination triggers the requirement for the preparation of an environmental impact statement. The full EAF and short EAF had not been updated since 1978 and 1985, respectively. Although the forms are only model forms, they are used without modification by most units of state and local government in New York —the City of New York being a notable exception.[7] EAFs are the primary implementing tool of SEQR as they are used to determine whether an EIS is required and serve as a gathering tool for environmental data and analysis — whether or not an EIS is ultimately prepared.[8]

The Department has engaged in thousands of SEQR reviews since the 1995 amendments to the SEQR regulations. Through its experience associated with these reviews it believes that the proposed changes to the SEQR regulations, if adopted, as revised, would make SEQR a ~~more precise and meaningful~~ better tool for evaluating, avoiding, and mitigating adverse environmental impacts from governmental decisions while ~~lifting~~ decreasing some of the burdens imposed on municipal agencies and the regulated community. ~~Other factors call for the Department to improve SEQR, including changes in other environmental laws that interact with SEQR such as enhanced stormwater regulations, and increased local capacity for environmentally compatible planning through adoption of comprehensive plans and development controls. In addition, the Department seeks to improve the speed and efficiency of the SEQR regulatory process without sacrificing environmental protection.~~

2.0 DESCRIPTION OF ACTION, POTENTIAL IMPACTS AND ALTERNATIVES

This section discusses the objectives and rationale, impacts and alternatives for the major proposed changes. In some instances, there is no discussion of alternatives, as none, other than the no action alternative, have been identified. To focus the discussion, this section also includes the draft express terms. Regulatory language that is proposed to be deleted is shown in brackets, e.g., [Type I], and new language is underlined, e.g., new language. Grammatical, citation and spelling corrections are not noted since they do not affect the meaning or substance of the document.

2.1 DEFINITIONS (6 NYCRR § 617.2)

The Department proposes to amend the definition section of the regulations (6 NYCRR § 617.2) to add a new definition for the terms "green infrastructure "municipal center," and "previously disturbed" as well as to make non-substantial or conforming changes to two six existing definitions ("critical environmental area," and "environmental assessment form," "environmental notice bulletin," "positive declaration," "scoping," and "Type II action"). The three new definition relates to the new Type II action (6 NYCRR § 617.5), which encourages retrofit of existing structures and appurtenant areas with green infrastructure and sustainable development. The Department further revised this definition, in response to public comment and as further discussed below, to limit the scope of the definition, and thus the scope of the new Type II, to only those practices expressly enumerated in the definition. They are discussed in their respective contexts (namely under the discussion of the Type II actions to which they relate). The Department has also proposed some clarifying modifications to the definition of "scoping" in section 617.2 in connection with the changes proposed for section 617.8 on scoping. definitions support the proposed Type II actions that encourage environmentally sound practices. These modifications, along with some modifications including ones to existing definitions ("critical environmental area," "environmental assessment form," "positive declaration," and "scoping"), will not result in any significant adverse impacts.

2.2 TYPE I LIST (6 NYCRR § 617.4)

2.2.1 Introduction

Under ECL § 8-0113(2) (c) (i), the Legislature has authorized the DEC Commissioner to adopt lists of "actions" or "classes of actions" that are more likely to require environmental impact statements. This list is called the list of Type I actions. Aside from the presumption as to potential environmental significance, if an action is classified as a Type I actions the lead agency must 1) complete the *full EAF* and 2) *coordinate its review among involved agencies*. The list of such actions is set out at 6 NYCRR § 617.4. The Type I list of actions also contains various thresholds by which actions that would otherwise be classified as Unlisted actions (actions subject to SEQR

~~that are not specifically called out as Type I)~~ are elevated to Type I actions. The Department proposes ~~three~~ modifications to the Type I List of actions that primarily involve changes to the thresholds set out in the Type I list as follows:

2.2.2 Lower Numeric Thresholds for Number of Residential Units

Revised Proposed Regulatory Language:

(5) construction of new residential units that meet or exceed the following thresholds:

(i) 10 units in municipalities that have not adopted zoning or subdivision regulations;

(ii) 50 units not to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works;

(iii) in a city, town or village having a population of [less than] 150,000 persons or less, [250] 200 units to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works;

(iv) in a city, town or village having a population of greater than 150,000 persons but less than 1,000,000 persons, [1,000] 500 units to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works; or

(v) in a city or town having a population of [greater than] 1,000,000 ~~or more~~ persons, [2,500] 1000 units to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works;

Objectives, Rationale, and Benefits:

The Department proposes to reduce the thresholds for residential subdivisions in the Type I list identified at 6 NYCRR § 617.4 (b) (5) (iii)–(v). There is little information in the 1978 draft and final EIS for the original classification that demonstrates a basis for the selection of the thresholds other than that numbers in a rural and urban area should be different.

The current thresholds are rarely triggered, however, because they were set far too high and fail to include some truly large-scale development projects that should be classified as Type I. If such projects were to be classified as Type I, project sponsors and lead agencies would be required to complete the more comprehensive full EAF. Further, for these larger projects, their continued treatment as Unlisted actions means that they may not receive the coordinated review required for Type I actions despite their scale, unless a positive declaration is identified during review by an involved agency acting in the role of lead agency.

Large ~~subdivisions~~ residential developments are frequently the subject of an EIS and because of their scale, location and nature, when proposed on new sites, often have one or more potentially significant impacts on the environment due to the need for

the expansion of infrastructure such as water, sewer and roads to serve the new development. The proposed changes will bring the review of an additional number of larger ~~subdivisions~~ residential developments into conformance with the reasoning behind the Type I list as discussed in 6 NYCRR § 617.4 (a), that being the identification of "...actions and projects that are more likely to require the preparation of an EIS than Unlisted actions."

To evaluate how the threshold reductions might affect projects that would now be treated as Type I actions, but are not currently treated as such, DEC staff evaluated a sample of housing construction projects reported in the Environmental Notice Bulletin (ENB) for four different years (2006, 2008, 2010 and 2012). ~~(The Department does not believe that a more recent sampling of projects would yield a significantly different evaluation.)~~ In response to comments, a more recent sampling was done using the years 2016 and 2017. The recent sampling of projects did not yield a materially different evaluation, as discussed in response to a comment below. An ENB sample study was selected because the ENB provides information on all positive declarations issued for projects reviewed under SEQR (for both Type I and Unlisted actions). It also provides data on all Type I actions that receive negative declarations (meaning no potentially significant impacts). This allowed for an analysis of projects that fall within the threshold limits (*i.e*. 200 units to 250 units) — to assess the number of additional projects that would be classified Type I by the revised thresholds.

Five hundred and forty-five projects were identified in the four-year ENB sample. Of these, 246 projects contained information on both the significance determination of the project (negative or positive declaration) and the number of residential units. The number of units ranged from 1 to 750. The remaining 299 projects did not provide sufficient information to be useful.

In populations of 150,000 persons or less, 22 projects were identified above the 250-unit threshold. Of these, 16 (73%) received positive declaration determinations and six projects received negative declarations. When the threshold was lowered to 200 units, an additional seven projects were identified between 250 and 200 units. Five of these (71%) projects received positive declarations and two received negative declarations. This suggests that lowering the thresholds will capture additional projects at about the same percentage of positive declaration (71% and 73%) to negative declaration (29% and 27%) for projects above the 250-unit threshold. Since the raw numbers are small, and the similarity of percentages may not be statistically significant, the relative percentages do provide a sense of consistency and the ENB data is the only data available to the Department.

For the second and third thresholds, the sample displayed no projects in the greater than 150,000 to one million population range for construction of units between 500 and 1000 in size, and only one project with 1000 or more units in the greater than one million population range (from New York City). In fact, several projects in populations over one million that appeared in the sample were for much smaller unit size developments and all received negative declarations. Therefore, the Department can reasonably conclude that the lower thresholds may result in some larger scale residential development projects being classified as Type I actions.

The Department also notes that there are other anticipated benefits to be derived from this revision. In terms of public access and participation, the Department expects that lowering the three thresholds will improve opportunities for the public to comment on large scale projects and provide greater public notice of such actions. Agencies must notice a negative or positive declaration for a Type I action in the Environmental Notice Bulletin. Under present circumstances, where there are no assurances or commitments to perform coordinated reviews for Unlisted actions, it is more likely that the public and reviewing agencies would suffer from a lack of shared knowledge. The coordinated review requirement for Type I actions serves to encourage sharing of information and ~~to~~ thereby discourage ~~prevent~~ "silo-ing" of reviews where agency reviewers do not communicate with other governmental agencies involved in a project review. Sponsors also risk undergoing multiple uncoordinated reviews when large projects are treated as Unlisted actions, only to re-start the process if a positive declaration is identified. Thus, the benefit is that coordinated review of these larger scale actions would be assured, resulting in a more cohesive, orchestrated review of the action.

The regulatory burden is procedural in that the project sponsors and lead agency would be required to complete the full EAF and coordinate review. They would also be subject to the presumption of significance for Type I actions.

Potential Impacts:

There are no ~~anticipated negative~~ potentially significant adverse environmental impacts associated with this Type I change in threshold for residential units ~~change~~. The proposed threshold adjustments would not substantively change individual reviews as the hard look standard is applicable to both Unlisted and Type I actions. Rather, the change would improve how the determination of significance is made for many projects that previously did not receive the treatment as a Type I action. Under the new thresholds, public input and coordination between agencies is expected to improve. ~~In addition, the risk is minimized for sponsored projects undergoing separate reviews as Unlisted actions to be re-reviewed (with time lost) when a positive declaration is identified. projects undergoing separate reviews as Unlisted actions to be re-reviewed (with time lost) when a positive declaration is identified.~~

Projects now identified with negative declarations that would be classified as Type I actions because of the lower thresholds ~~should not be impacted except the project sponsors~~ would only be required to complete the full EAF (instead of the short-EAF) and ~~the project would be subject to~~ conduct coordinated review. Overall, all three thresholds, despite the proposed change, are still quite high (in comparison to typical subdivision size) and can be expected to involve complex projects. Further, for projects in New York City, the City Environmental Quality Review Act (CEQR)[9] is specific to the needs of the city.

Alternatives:

No Action - The "no action" alternative would retain the current numbers that were established in 1978, which, as discussed above, fail to properly classify actions that should be classified in the Type I category.

Another alternative would be to further reduce the threshold for residential subdivisions to fewer lots (e.g., 75 and 150 construction units), which would result in the Type I classification for such subdivisions. However, municipalities that believe that the thresholds are still too high have the authority to lower them further by adopting a municipality specific Type I list under the authority contained in 6 NYCRR § 617.14.

Comment:

"Lowering the thresholds for Type I status for residential projects is a sound idea. Based on my experience, they should be even lower." Comment No. 21.

Response:

The proposed reductions are an improvement over the existing thresholds in terms of ensuring that an additional number of very large scale subdivisions undergo coordinated review and are subject to the more rigorous informational gathering requirements of the Full-EAF. Further, as pointed out above, cities, towns and villages can adopt their own Type I lists with even lower thresholds that would be specifically scaled to the size of the individual community and elevating an additional number of residential developments to Type I — which they could do in a more context sensitive way.

Comment:

"The residential development threshold should be lowered further by accounting for steep slopes, water course, ground water, wetlands disturbance or impacts upon impaired watersheds.

Suggested language:

(b) The following actions are Type I if they are to be directly undertaken,

funded or approved by an agency…

(5) construction of new residential units that meet or exceed the following

thresholds…

(vi) construction of new residential units located in an impaired watershed with a

Total Maximum Load Program (TMDL), an area of diminished well yields or areas including steep slopes, wetlands or watercourses." Comment No. 8.

Response:

This proposal is too specific for the Statewide Type I list. In past rulemakings, DEC has crafted the Statewide Type I and Type II lists in a generic fashion with the understanding that municipalities can adopt their own Type I lists that are more specific to their individual concerns. The local lists can be more contextual considering the scale of the individual community and its resources. Furthermore, under the existing and new rule proposed by the Department, the classification of a residential development under SEQR only requires a simple numerical calculation. The simple numerical calculation has worked well for agencies. With or without a local Type I list, the considerations proposed by the comment can be addressed through the hard look test, whether the action is Unlisted or Type I and through municipal land use regulation.

Comment:

“The amendments to the Type I action list at 6 NYCRR § 617.4 (b) (5) (iii) & (iv) and the justification seem to be at odds with reality. There are a handful of communities that meet the 150,000 to 1,000,000 population thresholds: Yonkers, Buffalo, Rochester, and places on Long Island. This category applies to a very small land area relative to the entire state. The 1,000,000-population threshold only applies to New York City. The justification for decreasing the housing unit threshold is weak at best:

The ENB dataset reviewed is in no way statistically significant, and is not recent, so it does not reflect the current shift away from single-family home development to apartments and multi-family units. Many more contemporary projects could be Type I due to this shift.

The assumption is that if a negative declaration is issued, the review may not have included coordination, and may not have been as rigorous as appropriate. This is an unsupported assumption. In many cases, applicants work diligently to provide the studies, reports and documentation that would otherwise be incorporated in an EIS. As a result, a negative declaration is issued since additional information that would be incorporated in an EIS is provided in the context of the review. In addition, the local site plan or subdivision process involves conducting a hearing to gain public input that ensures public participation. Moreover, when an Unlisted Action necessitates multiple agency approvals or funding, it is common to conduct Lead Agency circulation to Involved Agencies to avoid the need for the Applicant to conduct SEQR multiple times with multiple agencies. Practical experience does not appear to support the assertion that any significant number of Unlisted Actions that receive a negative declaration from a local agency subsequently receive a Pos Dec [positive declaration] from another Involved Agency. To the extent that a substantial database of such cases exists, it should be incorporated in the generic environmental impact statement. Experience indicates that many applicants preemptively prepare detailed studies and reports for submission with the initial EAF to avoid the interminable timeframes of a Pos Dec [positive declaration] and EIS.” Comment No. 93.

Response:

The changes only affect a small number of additional subdivisions. However, they apply to communities with 150,000 persons or less as well as communities with larger populations. The Department used the ENB dataset since it is the only statewide dataset available to evaluate the change. In response to the claim that the dataset is outdated, the Department conducted a more recent sampling for the years 2016 and 2017. While the recent sampling yielded approximately one third of the number of projects in comparison with the prior 4-year sample, it still shows a few more projects would change classification when the Type I threshold is lowered from 250 units to 200 units. The relative numbers of negative declarations to positive declarations issued for those projects also remains fairly consistent between the two sampling exercises. A summary of the two-year sample and a side by side comparison of the two multi-year samples follows:

One hundred and eight reported projects were found within the two years that were reviewed. A total of 93 projects were identified with the significance determination

of the project (negative or positive declaration) and the number of residential units associated with the proposed developments. The number of units ranged from one to 1,500. The remaining 15 sample projects did not provide sufficient information to be useful for this exercise.

In populations of less than 150,000 persons, six projects were identified in the two-year ENB sample above the 250-unit threshold, compared with 22 projects found in the four-year sampling exercise. Of these, 67% (or four) received positive declaration determinations compared with 73% (16) for the four-year sample, while two projects had negative declarations, compared with six for the four-year sampling. When the threshold was lowered to 200 units, an additional two projects were identified between 250 and 200 units compared with seven projects for the four-year sample. (We assume that there are more such projects (housing projects with less than 250 units) that were below the Type I threshold that were not identified because their review resulted in a negative declaration that was not required to be published in the ENB and therefore would not appear in the sample set.) One project had a positive declaration compared with five positive declarations in the four-year sampling exercise. The comparison between the two multi-year samples suggests that lowering thresholds captures a few additional projects that received positive declarations and at relatively the same percentage of positive declaration (67% and 50%) to negative declaration (33% and 50%) for projects above the 250-unit threshold. Since the raw numbers are small, and the similarity of percentages may not be statistically significant, the relative percentages do provide a sense of consistency.

<table>
<tr><td></td><td colspan="2">2016 & 2017</td><td colspan="2">2006, 2008, 2010 & 2012</td></tr>
<tr><td>Total Number of Relevant Projects Found in ENB</td><td colspan="2">108</td><td colspan="2">545</td></tr>
<tr><td>Number of Projects having sufficient comparison Information</td><td colspan="2">93</td><td colspan="2">246</td></tr>
<tr><td rowspan="2">Number of Projects
Population of 150,000 or less and greater than 250 Units</td><td rowspan="2">6</td><td>Pos Dec = 4 (67%)</td><td rowspan="2">22</td><td>Pos Dec = 16 (73%)</td></tr>
<tr><td>Neg Dec = 2</td><td>Neg Dec = 6</td></tr>
<tr><td rowspan="2">Number of Projects in the ENB
Population of 150,000 or less
Between 200 & 250 Units</td><td rowspan="2">2</td><td>Pos Dec = 1 (50%)</td><td rowspan="2">7</td><td>Pos Dec = 5 (71%)</td></tr>
<tr><td>Neg Dec = 1</td><td>Neg Dec = 2</td></tr>
</table>

For the second and third thresholds, the two-year sample displayed no projects in the greater than 150,000 to one million population range for construction of units between 500 and 1000 in size, or 1000 or more units in the greater than one million population range. In fact, several projects in populations over one million that appeared in the ENB for both multi-year samples were for much smaller unit size developments and all received negative declarations. As for the assertion that large scale subdivisions that are classified as Unlisted undergo coordinated review, there is no doubt that some larger scale residential developments (that are classified as Unlisted) undergo coordinated review. However, it does not logically follow that all such larger residential developments as proposed should not be subject to coordinated review. Finally, an applicant's preparation of detailed reports is not a substitute for the environmental impact statement process — which includes coordinated review and public participation as well as the requirement for findings.

2.2.3 Revise Type I Parking Space Thresholds Based on Community Size

Proposed Regulatory Language:

6 NYCRR § 617.4 (b) (6) (iii) - parking for 500 vehicles in a city, town or village having a population of 150,000 persons or less;

6 NYCRR § 617.4 (b) (6) (iv) - parking for 1000 vehicles in a city, town or village having a population of more than 150,000 persons;

Objectives, Rationale, and Benefits:

The Department proposes to add a threshold for parking spaces for communities of 150,000 persons or less. The number of parking spaces is a surrogate used in the SEQR process for establishing the level or potential for impact from development proposals. Large commercial or industrial development projects will generally require a substantial amount of associated parking spaces. Construction of surface parking lots can result in the loss of green space and generate a large volume of stormwater. Facilities that require large amounts of parking can also result in potential impacts on traffic and community character.

A common and often recommended measurement for determining the number of parking spaces that will be required for a project is based on the amount of gross floor area.[10] Using this measure, one parking space would be required for every 200 square feet of gross floor area of a building. For communities of less than 150,000 persons, the applicable Type I threshold for the construction of commercial or industrial facilities is 100,000 square feet of gross floor area. This equates to 500 parking spaces. By adding this new threshold for communities of 150,000 persons or less it will change the applicability of the existing parking threshold — parking for 1000 vehicles — so that it will apply only to communities with a population of more than 150,000 persons ~~or more~~.

Potential Impacts:

This proposed change will have no adverse environmental impact. It may result in more commercial and industrial activities being classified as Type I actions. This would result in more activities being required to use a full EAF rather than a short EAF. They would also be required to undergo coordinated review and additional notice and

distribution requirements. These projects may incur additional costs but many of these projects would likely have triggered the existing Type I threshold of 100,000 square feet of gross floor area. In addition, any proposed project that will require either 500 or 1000 parking spaces will likely result in several resource concerns that are better investigated through the process used for Type I actions. The possible loss of green space, potential storm water runoff, increases in traffic and the potential for a change in community character due to the possible need for changes to zoning are all impacts that would have to be assessed. All of these issues make these activities more likely to require an EIS and therefore meet the test for inclusion on the Type I list. The major benefit of this proposed change is that it will give to communities of 150,000 persons or less another tool or marker to use in determining when a project would be more likely to have a significant adverse environmental impact.

Alternatives:

The "no action" alternative would retain the current Type I threshold at 1000 vehicles for all municipalities without regard to size.

The second alternative would be to reduce the number of parking spaces for all communities to 500 or less vehicles. This alternative has the advantage of being simpler to understand. On the other hand, given the diversity of municipalities in New York State it would be difficult to arrive at one set of numbers that would fit every municipality from Montauk to Buffalo. Any municipality that feels that the numbers selected are still too high has the authority to lower them further by adopting a municipality-specific Type I list pursuant to 6 NYCRR § 617.14.

Comment:

"In the newly proposed subsections governing Type I thresholds for parking, there is an overlap in 6 NYCRR § 617.4 (b) (6) (iii) and (iv) that needs to be corrected. Section 617.4 (b) (6) (iii) applies to municipalities with populations of 150,000 persons or less, and § 617.4 (b) (6) (iv) applies to municipalities with populations of 150,000 persons or more. Municipalities with exactly 150,000 persons are covered by both (iii) and (iv)." Comment No. 151.

Response:

The Department has corrected this error and made the second threshold apply to cities, towns and villages with populations of more than 150,000 persons.

Comment:

"The reduction in the parking thresholds 6 NYCRR § 617.4 (b) (6) (iii) & (iv) is also at odds with reality: --This category of Type I seems to indicate that the construction of parking lots as standalone projects is common. While occasionally this is true in some urban settings (private or municipal parking structures/lots, commuter lots, etc.), it does not appear common in much of the State. Rather, the construction of such a large number of parking spaces is generally an element of another action (e.g. construction of a mall, destination-event venue, etc.). The scale of Actions demanding the thresholds of parking proposed are likely to trigger other Type I criteria. It is noted that the construction of a parking lot for 500 cars results in approximately 4-5 acres of land disturbance and resulting in permanent change in cover type. Similarly, the

construction of a parking lot for 1,000 cars covers between 7 and 10 acres. --However, parking structures generally cover smaller footprints, depending on the number of decks and configuration." Comment No. 93.

Response:

As explained above, the Department uses parking lot size as a measure of development size. Five hundred parking spaces equates to about 100,000 square feet of gross floor area. The Department agrees that a project involving five hundred or more parking spaces is likely to trigger another Type I threshold (*e.g*., ten or more acres of physical disturbance), but the parking spaces trigger nonetheless serves a valid purpose in identifying actions that should be classified as Type I.

Comment:

"Riverkeeper supports the proposed additions for parking lot construction into the Type I actions list, although the threshold could be lowered quite significantly for parking lot construction in municipal centers, or those cities such as Buffalo, which have eliminated minimum parking requirements for new construction city-wide." Comment No. 183.

Response:

Where appropriate, municipalities can adopt their own Type I list that lowers the threshold.

2.2.4 Add Threshold for Historic Resources Consistent with Other Resource Based Items on the Type I List[11]

Proposed Regulatory Language:

6 NYCRR § 617.4 (b) (9): any Unlisted action (unless the action is designed for the preservation of the facility or site), that exceeds 25 percent of any threshold established in this section, occurring wholly or partially within, or substantially contiguous to, any historic building, structure, facility, site or district or prehistoric site that is listed on the National Register of Historic Places (Volume 36 of the Code of Federal Regulations, parts 60 and 63, which is incorporated by reference pursuant to section 617.17 of this Part), or that [has been proposed by the New York State Board on Historic Preservation for a recommendation to the State Historic Preservation Officer for nomination for inclusion in the National Register, or that] is listed on the State Register of Historic Places or that has been determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places pursuant to sections 14.07 or 14.09 of the Parks, Recreation and Historic Preservation Law [(The National Register of Historic Places is established by 36 Code of Federal Regulations (CFR) Parts 60 and 63, 1994 (see section 617.17 of this Part)].

Objectives, Rationale, and Benefits:

The Department proposes to establish a revised threshold for designating Unlisted actions as Type I actions because of proximity to historic resources and to include properties that have been determined by the Commissioner of the Office of

Parks, Recreation and Historic Preservation eligible for listing on the State Register of Historic Places.

On the existing Type I list, under 6 NYCRR § 617.4 (b) (9) any Unlisted action, regardless of size, that occurs wholly or partially within or substantially contiguous to a historic resource is automatically elevated to a Type I action. This sometimes results in very minor actions being elevated to Type I and thereby requiring the use of the full EAF. Other resource based Type I items in SEQR, such as those addressing agriculture and parkland or open space, currently exist as Type I thresholds that are defined by exceeding 25% of other actions in the Type I category. This proposed revision will bring the treatment of actions proximal to historic resources in line with the other resource based Type I thresholds (i.e. agricultural districts and parkland).

The SEQR regulations at 6 NYCRR § 617.4 (a) state that Type I actions are those "... that are more likely to require the preparation of an EIS than Unlisted actions." This change is intended to place projects that are not as likely to require the preparation of an EIS in their rightful category as Unlisted actions.

Under this change, small projects will not escape review as they are still actions subject to SEQR. The revised short EAF now contains specific questions regarding the presence of historic resources. The substance of the issue would therefore not escape attention. In addition, this proposed revision does not change the substantive requirements of a SEQR review.

This proposed revision has also been expanded to include properties that have been determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation (OPRHP) as eligible for listing.

Resource eligibility has not previously been a criterion for this Type I listing and is now being included in this revision to the Type I list to more closely reflect the way that the New York State Office of Parks, Recreation and Historic Preservation treats resource eligibility decisions under State and Federal Historic Preservation Law, wherein listed and eligible properties are given equal treatment under the regulations.

In addition to listing historic properties on the State Register of Historic Places, under the State Historic Preservation Act (SHPA), the Commissioner of OPRHP determines which properties are eligible for listing, and adds them to the statewide Inventory. This long overdue amendment adds these historic properties that are eligible for listing on the State Register to the Type I list and brings thresholds in line with other items on the Type I list.

SHPA was modeled on the National Historic Preservation Act and SEQR was modeled on the NEPA.[12] Under these federal and state laws, the substantive methodologies for evaluating a project's impacts to historic properties do not distinguish between whether the affected historic property is listed on the National or State Registers of Historic Places or has been determined eligible for listing. Listing a property on the Registers, however, affords other protection and benefits, including the popular federal and state programs that provide tax credits to owners for rehabilitating historic properties.

This proposed amendment streamlines the SEQR process in the following ways. First, it alerts lead agencies and project sponsors to the potential for adverse impacts to all historic resources early on when the action is initially classified. Early recognition under SEQR of potential impacts to eligible properties together with the recent expansion of information required in the EAFs regarding impacts to historic properties will create a better substantive record for state agencies to use in their separate consultations with OPRHP under SHPA. It will also create a better record for OPRHP to review when lead agencies ask for technical comments during the SEQR process.

Second, the proposed change would provide better coordination of procedures under both SEQR and SHPA. This coordination is especially helpful to lead agencies when a state agency may not be initially involved in an action but later becomes involved as, for example, when state funding becomes available for the project later during the review. The inclusion of eligible properties, therefore, provides consistency with the consideration of historic resources in both NYS Parks Law (Section 14.09) and Section 106 of the National Historic Preservation Act.

Finally, similar proposals to add eligible properties to the Type I list were abandoned in the 1987 and 1995 SEQR amendments primarily because eligible historic properties were not readily identifiable. Today, OPRHP continually updates its Inventory. OPRHP's new Cultural Resources Information System is available through it's website to provide real time updates as soon as an historic property is determined eligible for listing.

Potential Impacts:

This proposed modification of the Type I lists (6 NYCRR § 617.4 [b] [9], in particular) is not expected to result in any significant impacts. As discussed above, the threshold for triggering a Type I action will be changed to 25% of any action on the Type I list when adjacent to or including a historic resource that is listed or has been determined eligible for inclusion on the State and National Registers of Historic Places. Projects falling under this threshold will retain their status as Unlisted actions, unless treated differently for some other reason, and reviews for these will be able to use the short EAF.

The revised short EAF (2013) contains specific language asking about the occurrence of historic resources, namely Part 1, Question 12 asks: Does the site contain a structure that is listed on either the State or National Register of Historic Places? And, is the proposed action located in an archeological sensitive area? Part 2, Question 8 asks "[w]ill the proposed action impair the character or quality of important historic, archaeological, architectural or aesthetic resources? Therefore, the consideration of historic resources would take place in the Short EAF. Although small projects will no longer be reviewed as Type I actions, they are still subject to the full review under SEQR as Unlisted actions. The amendment, therefore, does not change the substance of the review, only the requirement for coordination (which could occur voluntarily in any event). The Department has proposed revising the short and full EAF's with the regulatory change that includes properties eligible for listing.

Alternatives:

The “no action” alternative would retain the current Type I classification and the procedures in place, elevating every project occurring within or substantially contiguous to National Register properties, regardless of size, to the treatment of a Type I action. Many small projects would be subjected to the revised full EAF which is a very comprehensive and rigorous review document with in most cases little if any corresponding benefit.

Another alternative would be to remove the Type 1 action (proximity of any unlisted action to eligible and listed historic properties (6 NYCRR § 617.4 (b) (9))) totally from the Type I list and, instead, require that when a listed property may be impacted by a project, the determination of significance must include an evaluation of the potential for impact to the attributes that are the basis for the listing. This is like the treatment currently made available to Critical Environmental Areas.

Rather than have historic properties trigger a Type I, the regulation would be revised to say that any project that is adjacent to or contains a historic property must discuss, in the SEQR review, how that project may impact or affect the features that contribute to the significance and importance of the historic property. This alternative would ensure protection of important components of a historic property but relies on the data regarding resource importance being available to the public and on the lead agency being able to determine whether important contributing features may be impacted, likely in constant consultation with OPRHP staff. OPRHP has also recently made operational changes to how their staff assist the public which might need to be adjusted to accommodate a SEQR change such as this alternative proposes. The inclusion of this alternative, without proper evaluation, could put more burdens on lead agencies and OPRHP staff. Therefore, before taking any further action on this alternative, an analysis of possible impacts to OPRHP operations would likely be warranted. For these reasons, this alternative has not been further considered in comparison to the selected alternative.

Comment:

“The proposed amendments would make Unlisted Actions substantially contiguous to a property eligible for listing on the State Register of Historic Places a Type I action (6 NYCRR § 617.4 (b) (9)). Current regulations stipulate that Unlisted Actions substantially contiguous to listed properties be considered Type I actions. Many Municipal Centers contain older buildings, which may cause an increased number of projects to be considered Type I actions. While the procedural steps required for SEQRA compliance for a Type I action are modestly different from those of an Unlisted action, and while making SEQRA consistent with the State Historic Preservation Act (SHPA) in considering potential impacts to both listed and eligible resources would theoretically save time for larger actions for which SHPA compliance is required, it would also potentially snare a number of smaller projects that ordinarily would not require SHPA compliance into potentially extended consultation with SHPO or negotiation with the Lead Agency as the eligibility of resources is determined. Thus, the proposed amendments appear to be extending the scope and coverage of the SHPA unnecessarily. The State has already allowed this to happen when the NYSDEC and

OPRHP entered a Letter of Resolution (January 9, 2015) stipulating that all projects seeking coverage under the General Permit for Stormwater associated with Construction Activities must comply with the SHPA. …The language "has been determined by the Commissioner to be eligible" is concerning to the extent that projects can be delayed while someone argues that a determination should be made by the Commissioner. There should be some temporal element added, such as "at the time application is made it has been determined by the Commissioner to be eligible". OPRHP maintains a database of numerous potential historic resources the final determination on eligibility for which has not been made. Thus, the mere presence of such sites in the database may cause them to be considered eligible, thereby increasing the coverage of the SHPA even further." Comment No. 93.

Response:

The comment does not recognize that the State Historic Preservation Act (SHPA) applies to state agencies only and has separate substantive requirements from SEQR. Also, it does not recognize that SEQR review for the DEC Stormwater General Permit has been streamlined and now allows undertakings to proceed under SHPA for the General Permit that previously would have required individual SHPA reviews.

Additionally, while many municipal centers do contain older buildings, the fact that a building is old does not by itself make it eligible for listing on the State or National Registers of Historic Places under SHPA. See 9 NYCRR § 427.3. Under section 427.3, such buildings must exhibit one or more eligibility criteria such as association with events that have made a significant contribution to the broad patterns of our history; or with the lives of persons significant in our past; or that embody the distinctive characteristics of a type, period or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or yield, or may be likely to yield, information important in prehistory or history.

As to the concerns regarding delay in the SEQR process from making eligible historic resources Type I, the status of a building as listed or eligible is usually available at the time the action is classified, which is an initial step in the SEQR process. A property's eligibility can be quickly determined through the Office of Parks, Recreation and Historic Preservation's Cultural Resource Information Service (CRIS) system, which is available on line at https://cris.parks.ny.gov/Login.aspx?ReturnUrl=%2f. The DEC expects to connect its EAF Mapper to CRIS so the form could automatically populate the question on the EAF with regard to eligible properties as it currently does for listed ones.

SEQR does not contain a deadline for determining if a property is listed and, therefore, Type I. DEC is not aware of any problems with lead agencies delaying the SEQR review to change the classification of an action involving a historic resource. If the Commissioner of the Office of Parks, Recreation and Historic Preservation were to determine that a property is eligible before the lead agency makes a determination of significance then, yes, the classification of an action would be affected. Once the lead agency issues a negative or positive declaration, however, the classification should not be changed. This is because the way we determine the significance of an action's

impacts on historic properties under 6 NYCRR § 617.7 (c) (v) is the same regardless of whether an action is classified Unlisted or Type I or whether a property is listed on the State or National Registers or eligible for such listing.

Under the guidance that will be incorporated by the Department in the SEQR Handbook and workbooks, only buildings structures, districts, areas, sites or objects determined eligible by the Commissioner of the Office of Parks, Recreation and Historic Preservation and listed as such on the Cultural Resources Inventory Service (CRIS) prior to a lead agency making a determination of significance constitute eligible properties for purposes of SEQR. The fact that a property may be determined eligible by the Commissioner of the Office of Parks, Recreation and Historic Preservation is of no consequence for purposes of classifying the action.

Comment:

"We support this change to make the criteria for unlisted actions near an historic structure or site consistent with how other projects are handled which are near environmental resources such as parkland or agricultural districts. We often have projects that are very minor, that don't meet a type 2 threshold, but we must process the SEQR documentation as a Type 1 action simply because they are close to an historic resource. This amendment would still allow the option of using the full environmental assessment form and coordinated review but would provide for an unlisted action process for those minor projects which would not impact the historic resource." Comment No. 141.

Response:

The Department concurs with the comment. For Unlisted actions, where appropriate (Unlisted actions that come close to being Type I actions in scale), the lead agency could reasonably opt for utilizing the Type I procedures of requiring a full-EAF and coordinated review. The regulations provide the lead agency with such discretion in any event with the caveat that the Department promulgated a more detailed short EAF to encourage its use for most Unlisted actions.

Comment:

"We do not support the addition of the 25% threshold, however. The justification for the inclusion of a 25% threshold is that previously, very minor actions would be elevated to Type I, requiring the use of a Full EAF, and that the change is consistent with other resource-based Type I thresholds, i.e., agricultural districts and parkland. The DGEIS states that the intent is to "place projects that are not as likely to require the preparation of an EIS in their rightful category as Unlisted Actions." The assumption behind this change is that "small" projects that do not exceed the 25% threshold are less likely to result in potential adverse environmental impacts requiring review in an Environmental Impact Statement ("EIS"). In addition, the DGEIS states that "small projects will not escape review as they are still actions subject to SEQR," and rationalizes that the revised short EAF includes questions regarding the presence of historic resources.

The touchstone for eligibility and inclusion on the National and State Historic Registers is a resource's "integrity of location, design, setting, materials, workmanship,

feeling, and association." This is what determines the quality of its significance in American history, architecture, archeology, engineering, and culture. "Integrity" is the ability of a property to convey its significance.

Our concern is that the introduction of a 25% threshold may allow projects that materially impact the integrity of a historic site, i.e., the very characteristics that make it eligible for listing, and its value as a historic resource, to escape necessary initial review through completion of a Full EAF…. Even "small" actions can materially impact the character of a historic resource's surroundings, resulting in potentially significant adverse impacts to its integrity, and ultimately, its significance as a historic site. Therefore, they should be fully vetted in a Full EAF. This is consistent with review by federal agencies under Section 106 of the National Historic Preservation Act, which requires such review if a project may have an adverse effect on a historic site, i.e., it may "alter characteristics that qualify a specific property for inclusion in the National register in a manner that would diminish the integrity of the property." Comment No. 189.

Comment:

"We do not support the addition of "that exceeds 25 percent of any threshold established in this section" to 6 NYCRR § 617.4 (b) (9). This proposed change weakens protection of historic and archaeological sites and structures." Comment No. 2.

Comment:

"Through use of the "Type I" list - which creates a presumption that a proposed action "is likely to have a significant adverse impact on the environment" - the current version of the SEQR regulations provides some legal protection to historic resources impacted by a proposed project occurring within or substantially contiguous to a historic building, site or district listed (or, deemed eligible for listing) on the National Register of Historic Places. As currently written, the size or scale of the proposed project or activity does not matter. That would change substantially if the proposed amendment becomes law.

As proposed, only a project "that exceeds 25 percent of any threshold established" in the SEQR regulation's Type I list would be deemed a "Type I action" carrying with it a presumption that an Environmental Impact Statement may be required. See proposed 6 NYCRR § 617.4 (b) (9). For example, to be treated as a Type I action, the proposed action would have to involve: the rezoning of at least 6.25 acres; construction of 250 residential units in a municipality with a population greater than 150,000 but less than a million, or 625 units in a city with a population of one million or more; for a non-residential activities, physical alteration of at least 2.5 acres, or parking for 250 vehicles, or, in a municipality with more than 150,000 residents, construction of a facility exceeding 60,000 gross square feet. These thresholds will not adequately protect New York State's historic resources." Comment No. 68.

Comment:

"There are concerns however regarding the 25% threshold proposed in that the introduction of such threshold may allow projects that materially impact the integrity of a historic site, the characteristics that make it eligible for NHR listing, and provide its value

as a historic resource in the first place, to avoid initial review by not requiring completion of a Full EAF." Comment No. 110.

Comment:

"Even "small" actions can materially impact the character of a historic resource's surroundings, resulting in potentially significant adverse impacts to its integrity, and ultimately, its significance as a historic site. Therefore, they should be fully vetted in a Full EAF. This is consistent with review by federal agencies under Section 106 of the National Historic Preservation Act, which requires such review if a project may have an adverse effect on a historic site, i.e., it may "alter characteristics that qualify a specific property for inclusion in the National register in a manner that would diminish the integrity of the property." The questions included in the Short EAF may not correct for this oversight. Question 12.a in Part 1 of the model Short EAF, which is completed by the applicant, asks only if the site contains a structure that is listed on either the State or National Register of Historic Places. This question will miss projects that are contiguous to a historic site or district or other resource, as opposed to structures that are located directly within a project area, and ignores sites that are eligible for listing entirely. For example, under the proposed 25% threshold, a 12-unit subdivision with individual water and sewer systems located adjacent to a listed historic site would remain an Unlisted Action, and the impacts of the proposal on the historic resource would not be addressed in the Short EAF.

Question 12.b of the short EAF asks only whether the proposed action is "located in an archeological sensitive area," which does not address specific historic resources. And while Question 8 of Part 2, to be completed by the lead agency, asks whether the proposed action might "impair the character or quality of important historic, archaeological, architectural or aesthetic resources," based on the response to the Part 1 questions by the applicant, the lead agency may not have sufficient information to answer this question accurately without conducting its own investigation." Comment No. 189.

While the proposed amendment may "bring the treatment of actions proximal to historic resources in line with the other resource based Type I thresholds," in the absence of evidence that the 25% threshold is in fact sufficiently protective of agricultural districts and parkland, it should not be extended to important historic resources. And in balancing the slightly larger burden placed on applicants to complete a Full EAF rather than a short EAF against the potential impacts to recognized and important historic and prehistoric resources, we believe that the interest in preserving the integrity of such resources outweighs any administrative burden. Therefore, the 25% threshold should not be included in the proposed amendment." Comment No. 189.

Response:

The Department agrees that the characteristics that make historic properties deserving of special attention under SEQR are different than parks and agricultural districts as discussed in the comment. *See SEQR Short-EAF Workbook*, Part 2, Question 8, published on DEC's website at http://www.dec.ny.gov/permits/91429.html. The same significance indicator for historic properties applies to both Unlisted and Type I actions. Aside from which form an applicant may be required to complete, there are

two other distinguishing aspects of Type I actions from Unlisted actions. They are the requirement for coordinated review for Type I actions and that Type I actions are deemed more likely to be significant than Unlisted actions. Lead agencies may, however, still coordinate review for Unlisted actions and the hard look standard along with the low threshold for significance still applies to Unlisted actions.

While it is true that applicants completing the full-EAF before the Department revamped the short- and full-EAFs in 2013 (effective October 7, 2013) had a small additional burden in completing the full-EAF rather than the short-EAF, that changed in 2013. Both the short-and full-EAFs were substantially more comprehensive than the pre-October 2013 EAFs. In promulgating the much lengthier full-EAF, the Department was concerned that applicants for relatively small and sometimes inconsequential projects would be required to complete the new lengthy full-EAF because of the action was situated next to a property listed on the National Register of Historic Places even though much of the form would be irrelevant to the project or simply because use of the form would constitute regulatory overkill. This concern was the genesis of the proposed regulatory change to align all the place based projects on the Type I list using the 25% threshold. The Department believes that its rationale for the change is as valid now as it was in 2013. The Department has also modified question 12.a of the Short EAF to ask if the project site contains, or is it substantially contiguous to a building, archaeological site, or district that is listed or determined eligible for listing. Question 12.b has likewise been modified to ask if the project site, or any portion, is in or adjacent to an area designated as sensitive for archaeological sites. These changes will capture the information on the Short EAF so that it is available to the reviewing agency, as it is on the full EAF.

Comment:

“The Preservation League has long advocated for SEQRA to define actions including properties eligible for listing on the NYS and National Register of Historic Places as Type I. We applaud the change in Part 617.4 (b) (9) that adds NYS and National Register Eligible properties to the Type I list. This change brings SEQRA into alignment with the New York State Historic Preservation Act of 1980 and National Historic Preservation Act of 1966. As noted in DEC's Draft GEIS on the Proposed Amendments (pages 10 & 11), OPRHP's new Cultural Resources Information System makes it possible for local and state agencies to readily identify historic properties eligible for the National Register (NRE).” Comment No. 174.

Comment:

“6 NYCRR § 617.4 (b) (9) -The anomaly between review under SEQR and the SHPA of actions affecting sites that are listed on the National Register, and those that are eligible for the State or National Register, but are not yet listed, as well as those that are on the State Register, has long been a source of confusion. DEC is to be commended for clearing this up with the proposed amendment.” Comment No. 21.

Response:

The addition of “eligible” properties to the Type I lists was not, as a practical matter, possible until the internet made it feasible to more readily access the information

through the Office of Parks, Recreation and Historic Preservation's Cultural Resource Information System (CRIS). Until only recently, the Department was concerned that projects would be unduly delayed by adding eligible properties to the Type I list without the ability of applicants and the public to instantly identify the location of an eligible property. The classification of an action is an early step in the SEQR process that should be able to happen without delay. The Department will work towards integrating the CRIS information regarding eligible properties into the EAF Mapper so applicants and the public will have not to access separate on-line databases. DEC agrees with the second comment. The change also brings the Type I list into tighter harmony with the significance indicators in 6 NYCRR § 617.7 of the regulation, which requires the lead agency to take a hard look at the impact of the action on historic resources regardless of whether a property is listed on the National or State registers of historic places or determined by the Commissioner of OPRHP as eligible for listing.

Comment:

"To avoid potential confusion, the rule should include a reference to Parks, Recreation & Historic Preservation Law § 14.09, which requires a specific review process for any action undertaken, approved or funded by a state agency that may cause ANY change- beneficial or adverse- in the quality of any historic property that is listed or eligible for listing. In addition, revisions may be needed to the long and short Environmental Assessment Forms (EAFs), which do not currently require the identification of any properties or adjacent properties eligible for listing. (This "eligible for listing" language also appears in several proposed additions to the Type II list, such as the installation of cellular antennas or solar energy arrays.)" Comment No. 5.

Response:

Changes that are designed for preservation of the site or facility do not trigger the Type I category. The intent of the reference to section 14.09 is not to import all of section 14.09 into the SEQR regulations. The purpose of that reference is only to refer to the process by which the Commissioner of OPRHP determines that a property is eligible for listing of the State or National registers of historic places.

The Commissioner uses the same criteria to determine if a property is "eligible" for listing that is used to determine if a property should then be nominated to the National Register or listed in the State Register in consultation with the State Board for Historic Preservation. (9 NYCRR § 427.3).

When the Commissioner's staff provide technical advice on request to a municipality that is undertaking a SEQR review, the aspects of the historic preservation program under SHPA (PRHPL § 14.07) requiring assistance to municipalities and private entities comes into play. Often during the SEQRA process historic places and properties are inventoried and assessed for eligibility or for nomination to the National Register and for listing on the State Register. Both the Short EAF and Full EAF have been modified to comport with this revision.

Comment:

"The questions included in the Short EAF may not correct for this oversight. Question 12.a in Part 1 of the model Short EAF, which is completed by the applicant,

asks only if the site contains a structure that is listed on either the State or National Register of Historic Places. This question will miss projects that are contiguous to a historic site or district or other resource, as opposed to structures that are located directly within a project area, and ignores sites that are eligible for listing entirely. For example, under the proposed 25% threshold, a 12-unit subdivision with individual water and sewer systems located adjacent to a listed historic site would remain an Unlisted Action, and the impacts of the proposal on the historic resource would not be addressed in the Short EAF.

Question 12.b of the short EAF asks only whether the proposed action is “located in an archeological sensitive area,” which does not address specific historic resources. And while Question 8 of Part 2, to be completed by the lead agency, asks whether the proposed action might “impair the character or quality of important historic, archaeological, architectural or aesthetic resources,” based on the response to the Part 1 questions by the applicant, the lead agency may not have sufficient information to answer this question accurately without conducting its own investigation.” Comment No. 189.

Comment:

“Page 10 of DEC's Draft GEIS states that because the revised Short EAF required for Unlisted actions now contains specific questions regarding the presence of historic resources, the proposed revision to add the 25 percent threshold in 6 NYCRR § 617.4 (b) (9) "does not change the substantive requirements of a SEQR review." Part 1 Question 12 of the Short EAF, however, does not include State or National Register Eligible resources. The Preservation League believes this question should include sites eligible for listing on the State and/or National Registers. Indeed, DEC's Short EAF, Response to Public Comment (January 25, 2012) notes in response to General Comment 23 that the language in the Short EAF is intended to mirror that in § 617.4 (b) (9). Under this justification for excluding State and/or National Register Eligible resources from the Short EAF, we would like now to see the inclusion of State and/or National Register Eligible resources. Part 2, Question 8 of the Short EAF asks whether the proposed action would "impair the character or quality of important historic, archeological, architectural or aesthetic resources?" Without an objective definition of "important" we have seen many instances where a state or local agency disagrees with preservation professionals and local advocates on project impact and resource importance. We do not believe that this question substitutes for the proposed regulation change to Section 617.4 (b) (9).” Comment No. 189.

Response:

In the revised rulemaking, the Department has proposed to modify Part 1, Question 12 of the short-form to include actions that have been determined by the Commissioner of OPRHP as eligible for listing on the National or State registers of historic places. The Department expects to clarify the meaning of “important historic, archeological, architectural or aesthetic resources” in the EAF Workbook.

Comment:

"In 6 NYCRR § 617.4 (b) (9) and in many other locations in the regulations the language 'or that has been determined by the Commissioner of the State Office of Parks, Recreation and Historic Preservation (OPR) to be eligible for listing on the State Register' needs to be clarified. In presentations DEC staff stated that an agency beginning an environmental review would not have to wait for a determination from the Commissioner of OPR on whether a building over 50 years old would be considered eligible for listing; that the Commissioner of OPR had already made that definition and a specific list of eligible buildings already existed. Waiting for a response from the Commissioner of OPR to make such a determination adds significant time to the determination of whether an application is a Type I action or not, and the language within Part 617 needs to very clearly state that no new determination is needed for a building. This Board understands that because of the need to protect archeological sites, that the Commissioner of OPR will need to be consulted when sites are within proximity to a known archeological site, and such delay is unavoidable." Comment No. 161.

Response:

The use of "or" is to connote that an action may be Type I because of either being eligible to be listed on the National Register of Historic Places or having been listed. The list of eligible properties will be immediately available through the Office of Parks, Recreation and Historic Preservation's CRIS system (https://cris.parks.ny.gov/Login.aspx?ReturnUrl=%2f). There should be no delay in the ability of a lead agency to classify an action once it has received Part I of the EAF from the applicant. Thus, the lead agency need not have to wait for a determination from the Commissioner of the Office of Parks, Recreation and Historic Preservation.

2.3 TYPE II LIST (6 NYCRR § 617.5)

Section 8-0113 of the Environmental Conservation Law authorizes the Commissioner to adopt a list of "[a]ctions or classes of actions which have been determined not to have a significant effect on the environment and which do not require environmental impact statements…" This list of actions is set out in 6 NYCRR § 617.5, and is known as the Type II list of actions.

The Department proposes to broaden the Type II list ~~by expanding the list of Type II actions~~ to include additional categories of actions that ~~categorically do~~ would not have a significant adverse impact on the environment. Local government agencies and project sponsors will benefit from a reduced SEQR workload at no cost to the environment since the proposed list of actions — if undertaken — are ones that would not have a significant impact on the environment. Almost invariably, such actions ~~they~~ are the subject of a negative declaration *(i.e.*, the lead agency has determined that they would not ~~have~~ result in any ~~a potentially~~ significant adverse impact on the environment). By decreasing repetitive reviews (and attendant paperwork) of actions that are environmentally inconsequential, ~~it~~ the additions to the Type II list of actions ~~will~~ would allow agencies to focus their time and resources on those projects more likely to

have significant adverse impacts on the environment. The additions to the Type II list are based on the stakeholder discussions that DEC staff ~~have~~ conducted with representatives from state agencies, environmental organizations, business (see Appendix A) and the experience of staff in the Division of Environmental Permits. Some of the proposals have their genesis in the 1995 rule making. DEC staff also studied equivalent regulations from other states including equivalent regulations in California and Washington State.

An ancillary benefit of some of the proposed additions to the Type II list is that they bring SEQR into alignment with other environmental policy goals of the state by incentivizing environmentally compatible development while meeting the standard that they would not ~~have a potentially significant impact on the environment~~ result in any significant adverse environmental impacts. Any addition to the Type II list must first meet the standard prescribed in the law. ~~Thus, the same activity, which categorically would not have a significant impact on the environment, corresponds with activities that are regarded as sustainable. For example, some of the additions attempt to encourage development on previously disturbed sites in municipal centers with supporting infrastructure and encourage green infrastructure projects and solar energy development — which fulfills other policy goals of the state such as promoting smart growth and renewable energy~~.[13] ~~Other~~ One other proposed item~~s~~ will remove an obstacle~~s~~ encountered by municipalities when developing affordable housing (transfers of land for one, two and three family housing) ~~in cooperation with not-for-profit organizations~~. ~~The result is to provide a regulatory incentive for project sponsors to further the State's policy of sustainable development. Each proposed change will be discussed in more detail in the following sections.~~

The Department expects that expansion of the Type II list will mean increased regulatory certainty for applicants and municipalities considering such actions and increased attention to the remaining projects that are more environmentally significant.

Some commenters that the Department was conflating actions that support state policies with actions that have no significant impact and hence belong on the Type II list. The Department took a hard look at each and every one of its proposals for inclusion on the Type II list to make sure that they would not have a significant impact on the environment — in addition to making for good policy. The Department took this criticism seriously and as a result eliminated some proposals where it could not determine that they would not have a significant impact on the environment — even though they supported state policies. The detailed comments and responses are set out below.

General Comment:

"There is a problem underlying the entire Type II action list. It is not uncommon for actions to meet a Type II criterion, and to also meet a Type I criterion. The regulations do not address how such actions should be classified. This issue arose in *Association for the Protection of the Adirondacks v. Town Board of Town of Tupper Lake*, 64 A.D.3d 825 (3d Dept. 2009). This case involved a rezoning action that met one or more Type I criteria, but was also a Type II action because the underlying project would be subject to review by the Adirondack Park Agency. See current § 617.5 (c) (36). DEC filed an amicus curiae brief in the case, arguing that the action should not be

a Type II action. However, the court found that it was Type II, but only because the project would still undergo extensive environmental review by the Adirondack Park Agency. *Id*. …DEC should adopt an amendment clarifying this situation so that any Type I action that also meets one of the criteria for Type II status would be treated as a Type I action, except for those that have Type II status under current § 617.5 (c) (36), as well as current § 617.5 (c) (35) [certain actions subject to review under the Public Service Law].” Comment No. 21.

Response:

The commenter raises an interesting point, which was previously addressed in the 1995 GEIS. The answer to the commenter’s question is that the classification of an action as Type II would not change by reason of the action also meeting Type I criteria with the notable exception to this rule covered by 6 NYCRR § 617.5 (c) (2) (replacement, rehabilitation or reconstruction). That Type II contains qualifying language that says, “unless such action meets or exceeds any of the thresholds in section 617.4.” (Note that the Department proposed removing the qualifying language on this Type II but based on public comment and on its own reflection has rejected doing so). The Department has added the same qualifying language the Type II category for reuse of commercial or residential buildings (or mixed use ones) (see proposed 6 NYCRR § 617.5 [c] [18]).

General Comment:

“DEC must walk a fine line between streamlining the process while at the same time avoiding the dilution of SEQRA's mandate to incorporate environmental consideration into agencies' decision-making processes. DEC has managed to walk this line better in some instances than others in the proposed regulations. For example, certain of the newly-proposed Type II exemptions appear to have strayed too far into the realm of policy-making through SEQRA exemptions. While adding sustainable development or renewable energy projects to the Type II list would expedite their approval and implementation throughout the state, the proposed regulations cannot promote such projects as a policy goal absent specific legislative authority, or without a showing that all proposed Type II actions have been categorically determined not to have a significant effect on the environment.” Comment No. 151.

Response:

DEC has stated in this rule making that proposed Type II actions must meet the standard of ECL § 8-0113 that the action must be one that does not have a significant effect on the environment and which does not require environmental impact statements under this article, notwithstanding the policy goals that a particular action would promote (e.g., renewable energy, in-fill development and removing organics from the waste stream). The Department is discontinuing the proposed Type II for sustainable development, though not on the ground that it is engaged in policymaking. Sustainable development (variously known as “smart growth” or “in-fill development”) is a pattern of development supported by state policy that the Department did not invent through this rulemaking.

2.3.1 Upgrade of Structures to Meet Energy Codes (originally proposed[1] 6 NYCRR § 617.5 [c] [2])

Original Proposed Regulatory Language:

Replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site, including upgrading [buildings] structures or facilities to meet building, energy or fire codes [unless such action meets or exceeds any of the thresholds in section 617.4 of this Part].

Revised Proposed Regulatory Language:

Replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site, including upgrading buildings to meet building, energy, or fire codes unless such action meets or exceeds any of the thresholds in section 617.4 of this Part.

Objectives, Rationale, and Benefits:

The inclusion of upgrades of existing building to meet new energy codes is consistent with the current intent of the item and furthers National and state policies to promote energy conservation.

~~The change also simplifies the application of the item by eliminating reference of the thresholds in the Type I list. Eliminating the reference to the Type I thresholds will also remove a potential impediment to an activity that is consistent with sustainable development.~~

Potential Impacts:

The proposed amendment to include "energy codes" only clarifies that when one replaces, rehabilitates or reconstructs a structure consistent with the code provisions that are currently in effect, it qualifies as a Type II action. This is a reasonable and practicable change to the existing language that will have no significant adverse environmental impact — perhaps a positive effect on the environment. ~~The deletion of the Type I thresholds language will make this item easier to interpret and apply.~~ It will also serve to encourage the replacement and rehabilitation of structures which will further the state's policy efforts to maximize the reuse of already developed sites with existing infrastructure versus construction on green sites which frequently require the extension of water, sewer and other infrastructure resulting in additional sprawl. It will also further the states sustainable development goals.

Comment:

"We have concerns about removing these protections, and that the change goes too far since 'in kind' could be broadly construed to include a much larger project that could have significant impacts. We feel that it is important that the Type I thresholds remain and DEC state explicitly that if the action could be Type I, it should be classified as Type I." Comment No.155.

[1] The Type II actions and the numbering refer to the numbering of the Type II actions as "proposed." The Department anticipates changing the numbering in the final rule.

Response:

The DEC proposed removing the Type I language with the thought that requiring replacement “in kind” served as a sufficient limit to the types of projects that may be covered by the proposed Type II. Theoretically, if a replacement is “in kind” then there is really no change to the environment. However, an in-kind replacement, if large enough, could produce construction related impacts and perhaps other impacts related to a change of use that should at least be evaluated under SEQR. Construction related impacts are by their nature temporary but in some instances, they could be significant. An example of the same (Alfred E. Smith building example) is briefly discussed in the printable edition of the SEQR Handbook at p. 36. The existing Type I thresholds are large enough to allow most projects involving replacement in kind to proceed without being subject to SEQR and thereby promote in-fill development. The existing regulation (with the caveat for not triggering a Type I action) strikes a balance between those projects that are small scale and categorically would not have a significant impact on the environment and larger scale projects requiring an evaluation under SEQR. Hence, the Department chooses the no-action alternative with respect to eliminating the qualifying clause, namely “unless such action meets or exceeds any of the thresholds in section 617.4 of this Part.” The Department therefore chooses the no-action alternative.

Comment:

“The modification of the list of Type II actions (617.5 (c)(3)) to include specific provision for "green infrastructure" is well-intended, but should go further to modify 617.5 (c) (2) by replacing the words "in kind" with "without increasing the size of the building." Many agencies and building owners are seeking to replace outmoded electrical, plumbing, or heating equipment with newer (more energy conserving) equipment or relocating the essential equipment out of harm's way. By removing "in kind," the Department is signaling that it would welcome modernization of outmoded infrastructure by identifying such actions as Type II.”

Response:

The Department addressed this comment above by adding the word “energy” to 6 NYCRR § 617.5 (c) (2). Under this change, Type II actions would include upgrading buildings to meet the current energy code as well as the fire code. There is no need to eliminate the words “in kind.” Further, provided that such upgrades are subject to a discretionary approval by a government agency, owners have some latitude in performing upgrades to their buildings under 6 NYCRR § 617.5 (c) (2) without triggering SEQR. The Department has said in its SEQR Handbook that “[r]eplacement in kind refers to function, size and footprint. Stick for stick replacement is not needed to qualify as replacement in kind, especially where the changes are required by current engineering, fire and building codes…”

Comment:

“We propose revising this language to: replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site, including upgrading buildings, or facilities to meet currently accepted standards, building, energy, or fire

codes. This would clarify that the replacement/upgrade can include facilities that are not buildings and that it does not have to be an identical replacement." Comment No. 141.

Response:

The Department originally proposed changing the word "building" to "structures" and adding the word "facilities." These changes were meant clarify the intent of the Type II category to include not only buildings but other kinds of structures. After further consideration, the Department has determined to remove this proposed modification and favor the no action alternative as it was unnecessary to make this clarification. The express language of the existing regulation makes it clear that it applies to both structures and facilities.

2.3.2 Green Infrastructure (originally proposed 6 NYCRR § 617.5 [c] [3])

Original Proposed Regulatory Language:

Retrofit of a structure or facility to incorporate green infrastructure practices.

Revised Proposed Regulatory Language:

Retrofit of an existing structure and its appurtenant areas to incorporate green infrastructure.

Note: The Department originally proposed to amend 6 NYCRR § 617.2 (definitions) to add a new definition for the term "Green Infrastructure" that defined the term as "practices that manage storm water through infiltration, evapo-transpiration and reuse such as the use of permeable pavement; bio-retention; green roofs and green walls; tree pits; storm water planters; rain gardens; vegetated swales; urban forestry programs; downspout disconnection; and storm water harvesting and reuse." The proposed definition has been revised by the Department to change "urban forestry programs" to "urban forestry" and to make the list of stormwater related green infrastructure practices exclusive.

Objectives, Rationale, and Benefits:

The Department proposes to add green infrastructure practices (related to stormwater pollution prevention practices) used in retrofits of a structure to the Type II list of actions. The green infrastructure practices have been exclusively defined to include permeable pavement; bio-retention; green roofs and green walls; stormwater street trees and urban forestry; downspout disconnection; and stormwater harvesting and reuse in retrofit situations. A retrofit includes the ~~replacement of an existing facility or~~ altering of an existing structure, and its appurtenant areas (i.e., front, back and side yards, ~~facility~~ for the purpose of incorporating green infrastructure practices. Although these practices could be incorporated in new development and redevelopment projects, their classification as a Type II action is limited to their use in retrofit projects ~~as defined by the Department~~.

The current Type II item on replacement, rehabilitation or reconstruction is limited to “in kind” construction. This Type II category allows for some limited deviations from the existing structure to accommodate green infrastructure. The proposed Type II is meant to add some additional flexibility to the Type II action for in-kind replacement where the deviation is to add green infrastructure technology, as defined in the express terms, to an existing building. The definition of “green infrastructure” is ~~not~~ now intended to be exclusive as to the green infrastructure practices ~~that could come within this Type II definition as green infrastructure technology continues to evolve~~ enumerated in the definition, which have a proven track record and have been evaluated by the Department for the purposes of this EIS.

Potential Impacts:

This proposed change would result in the Type II classification of limited green infrastructure practices that retrofit a specific location, and would have no adverse environmental impact. Indeed, the change may have a significant beneficial impact on the environment since there is no significant environmental downside to the use of the enumerated green infrastructure practices when deployed to retrofit of existing structures and appurtenant areas. To the contrary, installation of green roofs or other green infrastructure techniques can substantially improve energy efficiency, reduce generation of runoff and result in the improvement of water quality on a site-specific basis. Since this proposed Type II action will only allow retrofits to an existing structure it will result in minimal or no additional site disturbance or construction impacts. This would also result in increased clarity and consistency with regard to classification of these types of projects under SEQR. This proposed change will provide a major benefit as it will promote the adoption of green infrastructure practices to improve existing environmental conditions.

Alternatives:

The “no action” alternative would retain the classification of these projects as Type I and Unlisted actions. This may result in unnecessary costs and time delays to implement these environmentally compatible projects. Green infrastructure components of the projects are not compelled by permit and straight replacement with existing non-green techniques would qualify as a Type II action as a “replacement in kind”. Therefore, the increased environmental review requirements may deter the implementation of these water quality and environmental improvements.

Comment:

“The proposal would exempt from SEQRA review any retrofit to an existing structure or facility to incorporate "green infrastructure" and would add a definition of this term in 6 NYCRR § 617.2. We certainly support expanded use of green practices to manage storm water runoff, but as worded this blanket exemption may allow actions that are environmentally harmful to proceed without any review. For example, a rain garden project fast-tracked by the City of Seattle to obtain Federal stimulus money resulted in standing ponds of muddy, stagnant water that created potential health hazards. The City ultimately had to evaluate its removal. In such cases using even a short EAF would help to evaluate any drainage impacts. Even a well-designed action might have a significant adverse impact --- for example, if it substantially affects an

adjacent wetland habitat. The definition seems disconnected from the retrofit implementation and is also not sufficiently narrow - it provides that green infrastructure "includes practices that manage storm water" and lists various methods, but by definition the exemption could be claimed for a variety of other retrofitting actions, not necessarily even limited to storm water management. While it is understandable that DEC does not want its regulations to be technology-limiting, a policy authorizing unrestricted use of any new and untested practice simply because someone calls it "green" is contrary to a Type II designation. It is a mistake to conflate good ideas with the absence of environmental impacts. It is also unclear whether some of the practices listed as "green infrastructure" would fall under the heading of retrofits. For example, urban forestry generally involves large areas and would not fit within this exemption unless DEC considers an entire city to be "an existing facility." Finally, we note that this provision should incorporate the same language as other proposed Type II actions (cellular antennas, small solar arrays) that only apply to structures or properties that are not listed or eligible for listing on the National or State Registers of Historic Places. It is easy to imagine how an action such as installation of a green roof or wall might impair the character of an important historic resource." Comment No. 5.

Response:

From the commenter's description, the problems cited about the rain garden in Seattle appears as though it was the result of inadequate engineering. It is questionable whether those problems would have been resolved ahead of time if the City of Seattle had completed an environmental assessment form. Certainly, there is little to no chance that a rain garden would (or should) be reasonably subject to an environmental impact statement. As stated in recent publication, "[m]any GI [green infrastructure] projects require no discretionary review and are not subject to SEQR. In the case where a GI project would require a discretionary review its lack of negative environmental impact would make it eligible for a negative declaration. If a GI project is performed for a project requiring discretionary review it might make a negative declaration more likely because it may serve to avoid impacts of projects to which they are attached." Justin Gundlach, *Putting Green Infrastructure on Private Property in New York City*, Environmental Law in New York, Vol. 28, No. 9, September 2017.

The Department agrees that the definition of green infrastructure should be more limited with regard to urban forestry programs, and has changed this phrasing to reflect the original intent of the proposal which is to limit the scope of the Type II to retrofitting existing structures and their appurtenances. The Department has changed the reference to "urban forestry programs" but retained urban forestry (since the planning of street trees is integral to green infrastructure). With regard to historic and cultural resources, simply because an action is listed as Type II does not mean that the action is free from Federal, State or local historic preservation laws, it simply means that the Department has determined the action will not have a significant adverse impact on the environment. In addition, DEC modified the proposed definition of green infrastructure practices as defined for the purposes of the SEQR regulations to limit the practices allowed under the Type II to those enumerated as follows:

> *"practices that manage stormwater through infiltration, evapotranspiration and reuse ~~such as~~ <u>including only the following:</u> the use of permeable*

pavement; bio-retention; green roofs and green walls; tree pits, stormwater planters, rain gardens, vegetated swales, urban forestry ~~programs~~; downspout disconnection; and stormwater harvesting and reuse."

Comment:

"A definition of 'retrofit' would be useful or include wording in guidance that states the term does not Include expansion of the footprint otherwise this item could be interpreted differently. Consideration could be given to combining 6 NYCRR § 617.5 (c) (2) and (c) (3) since retrofits are essentially covered under (c) (2) and § 617.4 thresholds could be applied in both instances: "the in-kind replacement, rehabilitation or reconstruction of a structure or facility, on the same site, including upgrading buildings to meet building, energy, or fire codes and any modification incorporating green infrastructure, unless such action meets or exceeds any of the thresholds in section 617.4 of this Part."" Comment No. 155.

Response:

The retrofit of an existing structure or its appurtenances with green infrastructure is beneficial to the environment and does not pose the risk of allowing significant new impacts to proceed without environmental assessment. Retrofit has an ordinary meaning that does not require additional legal definition, i.e., "to provide (something) with a component or feature not fitted during manufacture; to add (a component or feature) to something that did not have it when first constructed." There is no point to creating a special definition for the term "retrofit" in the regulations. The Department prefers to keep the green infrastructure Type II category separate from in-kind replacement which is a slightly different concept although it also includes upgrading buildings to meet modern codes.

Comment:

"Establishing "retrofit of an existing structure or facility to incorporate green infrastructure" as a Type II action requires further clarification. CCE strongly supports the implementation of green infrastructure, which provides numerous environmental, economic, and quality of life benefits; however, the categorical exemption of all green infrastructure projects is imprudent. The exemption provides no limit on the amount of area disturbed by the green infrastructure project, nor does it consider if the project impacts ecologically sensitive areas. Additionally, the definition of green infrastructure is very broad, meaning that there is virtually no limit to the amount of projects that could be considered "green infrastructure." While green infrastructure projects are generally seen as environmentally beneficial, we can't assume that all projects, regardless of size, type, or location, will not have an adverse impact. To assert that green infrastructure will have no significant impacts, DEC must, at least, consider project size and location, and provide a clear, limited definition of the term "green infrastructure."" Comment No. 27

Response:

DEC believes that by restricting this particular Type II to retrofits of an existing structure (and its appurtenant areas, i.e., the front, side and rear yards of a structure)

the size of any retrofit that could be classified as Type II is limited to currently developed areas. Thus, green infrastructure retrofits would expectedly not result in impacts outside the immediate vicinity of an existing structure. Further, the chance that a green infrastructure improvement to an existing structure would have a significant adverse impact on the environment (requiring the preparation of an environmental impact statement) are nearly non-existent because such retrofits are limited only to retrofit of an existing structure and its appurtenances and green infrastructure inherently provides environmental benefits, such as controlling stormwater pollution. Lastly, DEC has narrowed the definition to limit the types of practices that are included to those enumerated as discussed above.

Comment:

"This is an example of where "one size may not fit all" circumstances. Listing this as a Type II action without any knowledge of what type of green infrastructure might be proposed and how it would fit into the surrounding neighborhood is a serious problem. There is such a wide range of green infrastructure which is continually evolving so that SEQRA regulations cannot anticipate new designs and techniques, some of which may be more appropriate to an industrial/commercial setting rather than to a residential setting. The lead agency should make the type determination, not the State from afar." Comment No. 35.

Response:

DEC agrees that SEQR is contextual. However, by narrowing the list of green infrastructure practices to a specific list of practices that by their nature will not result in an adverse significant impact DEC believes it has addressed this concern.

Comment:

"Because green infrastructure is a decentralized strategy for urban stormwater management, installations must be dispersed throughout a sewer shed to be effective. However, this poses land access constraints on stormwater managers seeking to install green infrastructure in urban environments. Coincidentally, many cities in New York State suffer from an abundance of vacant residential properties, some of which are undevelopable due to their proximity to the floodplain. Alas, repurposing urban vacant lots as larger scale green infrastructure features is gaining popularity as a solution to two urban problems: stormwater runoff mitigation and urban blight. As such, we encourage green infrastructure actions exempt from review to be expanded beyond "retrofit of an existing structure or facility" so that green infrastructure on previously disturbed vacant lots are also considered Type II actions. Without additional clarification, the current proposal seems to exempt only actions replacing or altering an existing structure or facility. While we support including retrofits as Type II actions to encourage greater adoption of onsite storm water management, the definition should not be limited to retrofits. In contrast, green infrastructure installations in environmentally sensitive areas should not be a Type II action. By expanding (or clarifying) the definition to include green infrastructure on previously disturbed areas, NYSDEC will encourage the adoption of an environmentally beneficial strategy to vacant lot repurposing." Comment No. 7.

Response:

The Department agrees that repurposing vacant lots with green infrastructure is a good idea. However, broadening the Type II category beyond the limits set in the proposed category may be too broad to qualify as a Type II action under the statutory standard for creating such actions or classes of actions while acknowledging that repurposing such lots would likely qualify for a negative declaration in most such instances (as the above-cited article points out).

Comment:

"Green infrastructure is a welcome addition to this section, but it should be noted that the accompanying list of green infrastructure solutions is not comprehensive; the definition should not be limited to the listed methods, as they exclude major green and living infrastructure solutions such as living shorelines."

Response:

The definition is intended to only encompass the typical suite of stormwater-related green infrastructure practices that are normally associated with the retrofit of an existing structure. The Department agrees that living shorelines and other such projects are desirable, and would likely result in a negative declaration. However, broadening the Type II category beyond the limits set in the proposed category may be too broad to qualify as a Type II action under the statutory standard for creating such actions or classes of actions.

Comment:

"In the new definition of "Green infrastructure," 6 NYCRR § 617.2 (r), the following sentence should be added to the definition: "Infrastructure that allows or facilitates infiltration of saline runoff into local soil does not meet the definition of green infrastructure unless the project sponsor finds, based on credible site-specific evidence, that such infiltration will not result in salt accumulation in the soil and can provide documentation of such finding upon request." Reason for the added sentence: It is well-known and indisputable that salt will effectively "poison" soil in a manner that is not easily remediated. Since saline runoff will typically have this effect, it should not be allowed without site-specific assessment of whether it will result in salt accumulation in the soil." Comment No. 236.

Response:

Absent the use of green infrastructure practices, there is a greater probability of untreated saline runoff (from roadways) <u>filling</u> collection systems or receiving waterbodies untreated. The addition of the green infrastructure practices allows for onsite attenuation and treatment of the saline runoff prior to entering the collection system and/or receiving waterbody.

2.3.3 <u>Installation of telecommunications cables</u> ~~Expansion of Broadband Services~~ (originally proposed 6 NYCRR § 617.5 [c] [7])

Original Proposed Regulatory Language:

Installation of fiber-optic or other broadband cable technology in existing highway or utility rights of way.

Revised Proposed Regulatory Language:

Installation of telecommunication cables in existing highway or utility rights of way utilizing trenchless burial or aerial placement on existing poles.

Objectives, Rationale, and Benefits:

Telecommunications including high speed broadband service is increasingly seen as an essential component of a competitive business environment. ~~Better~~ Improved telecommunications ~~broadband~~ means greater opportunities for New Yorkers. Better ~~broadband~~ telecommunications will provide individuals with the opportunity to connect to educational and workforce development training resources; communities can foster more economic development; businesses can access new markets and create more jobs, and our schools, colleges and universities can conduct high-tech research and development and build an innovative and talented high-tech workforce. But, residents and businesses cannot fully participate in the digital economy without access to broadband. There are still many areas in New York that are underserved and unserved. This Type II item would clarify that the installation of ~~fiber-optic~~ telecommunication cable in existing highway or utility rights of way will not require environmental review under SEQR when installation involves aerial placement on existing poles or utilizing trenchless methods of buried cable.

Potential Impacts:

The Department has determined that the installation of fiber-optic and other telecommunications cables would not have a significant adverse impact on the environment given the relatively limited nature of the disturbance that will occur in existing rights of way provided installation involves utilizing trenchless burial or aerial placement on existing poles. Installing underground cable involves the excavation of existing soils, backfilling ~~the trench~~, compacting the soil and reseeding to restore the area to its previous state. Trenchless methods or technology, for the purposes of this Type II, means a type of subsurface construction work that requires few trenches (conventional open cut excavations) or no continuous trenches. Common trenchless methods include horizontal directional drilling (HDD), “jack and bores,” and “impact moling.” While not truly trenchless, the Department also includes plow line and directional boring methods of installation in this category of trenchless. Plow line and directional boring technologies do not require the traditional open cut digging but rather creates a minimal ‘trench’ as smaller diameter conduit or cable is pulled/dragged below the ground surface, with direct burial after, creating minimal disturbance or displacement of soil. The installation of aerial cables on existing poles will not involve any significant ground disturbance. Potential impacts common to this type of activity include: noise, fugitive dust, soil disturbance, erosion and stormwater runoff. Since this activity will occur in an existing highway or utility right of way, the area has already been

disturbed and is being maintained in an artificial, static habitat. Telecommunication cables do not present significant environmental risk once installed. These impacts are all temporary in nature, limited in scope, predictable, common to other types of maintenance and repair of existing utility systems within an existing right of way and easily managed by standard best management practices. In addition, there are multiple regulatory controls already in place to prevent impacts to sensitive environmental features. Project sponsors will still have to obtain wetland permits from state, local and federal agencies and if a project will disturb the bed or banks of a protected stream a stream protection permit would be required.

Alternatives:

The "no action" alternative would keep this item from the Type II list and continue to require a SEQR review, where some other kind of discretionary review is required (e.g. site plan review) prior to the installation of fiber-optic or other broadband cable technology. The no action alternative will result in confusion for local government officials and potentially cause delay in the expansion of broadband and other communication services to underserved or unserved areas of the state with no real environmental benefit.

Comment:

"Understandably, the swift installation of broadband and fiber optic cable, especially for rural areas is becoming an increasingly important public need. Because trenching for these cables presents moderate surface impacts and existing right of ways tend to represent pre-disturbed areas, one can assume that the environmental impact will be minimal. But in some cases it is not. Rights of ways, even if previously disturbed, still can serve as important habitat areas, migratory corridors and nesting areas. In some cases, a thoughtful Environmental Assessment Form can reveal conflicts with cable installation that would not stop a project, but could make the timing and scope of construction more sensitive to breeding seasons, wetlands protection, erosion risks or other areas that require thoughtful planning. Putting such actions on the Type II list would unnecessarily bar a potential lead agency from oversight that could lead to meaningful mitigation at minimal cost or effort." Comment No. 207.

Response:

DEC has a lot of experience with environmental reviews of underground cables; it has coordinated with the New York Broadband Program Office and telecommunication companies to provide screening of awarded project areas to determine DEC permit jurisdiction and other related concerns associated with installation of broadband cable. Project review areas have encompassed many hundreds of miles of installation in municipalities throughout New York State. Installation includes a combination of buried and aerial placement on existing poles, with each awarded project area covering many linear miles within a given municipality. In none of the reviews did a particular project warrant the preparation of an environmental impact statement. The potential impacts mentioned by the commenter are discoverable without SEQR since the projects are also subject to other regulatory reviews including DEC's permitting jurisdiction for such

things as freshwater wetlands, stream disturbance and threatened and endangered species. DEC does not believe it is necessary to create an historic properties exemption since the Type II involves existing rights-of-way with trenchless burial methods or aerial placement on existing poles. Impacts, if any, are not significant, temporary and limited to existing rights of way. DEC has further clarified that the Type II is limited to existing rights of way and required the use of existing poles or trenchless installation methods. DEC has also eliminated the words “broadband” and “fiber-optic” and replaced them with a simpler description of “telecommunication.”

Comment:

“The Type II designation covering the installation of fiber optic or broadband technology in highway rights-of-way is too broad and should except historic properties as in 617.5 (b) (14).” Comment No. 227.

Response:

The Department believes that the requirement for burial using minimally invasive trenchless methods in existing highway rights of way or placement on existing poles is sufficient to insure that there would not be a significant impact on historic properties.

Comment:

The growth-inducing aspects of broadband expansion throughout the state must be addressed. Comment No. 225.

Response:

There is no evidence that the adoption of the Type II would result in adverse growth-inducing impacts from extension of telecommunication services.

Comment:

“We urge the Department to amend its proposal to add a new (6 NYCRR § 617.5 (c) (7)) "Installation of fiber optic or other broadband cable technology in existing highway or utility rights of way," as we find it questionable to suggest that such activities will have no adverse impact on highways or utility rights of way that cross the Forest Preserve. We recognize that a local government as a lead agency could still treat such an activity as an unlisted action for its own review process, but the weight of this respective action merits a language amendment to better recognize the environmental significance of our "Forever Wild" lands. Furthermore, the public deserves to know if any new work is being conducted in utility rights of way that cross Forest Preserve lands. By amending 6 NYCRR § 617.5 (c) (7) to read, "Installation of fiber-optic or other broadband cable technology in existing highway or utility rights of way on lands that are not part of the Forest Preserve that exists within the Adirondack Park boundary ... " the option to conduct an environmental review would be left on the table. Most importantly, the public would still have the opportunity to be notified and provide comment on such actions, which would occur on lands belonging to all New Yorkers.” Comment No. 1.

Response:

The recent constitutional amendment passed by the voters in November 2017 and the implementing legislation (Chapter 61 of the Laws of 2017 and codified in ECL §9-2103) addresses the comment. It allows a county, village or town located in a forest preserve county, or a public utility company to collocate a public utility line (electric, telephone, broadband, water or sewer) within or buried beneath the width of an existing state, county or town highway. The implementing legislation requires a public hearing on each eligible project, and the opportunity for the public to be heard, and the application to the Department for a permit requires a resolution from the governing body of the project sponsor. There are also publication requirements in the State register, Environmental Notice Bulletin and the local newspaper. Chapter 61 of the Laws of 2017, thus, already provides for public notice regardless of whether there is a SEQR review or not.

Further, the constitutional amendment does not allow co-location or burial within existing utility rights-of-way outside of the highway right of way. It only allows co-location or burial within the width of an existing state, county or town highway.

Comment:

"We do not support the change …Such projects will be extensive, encompassing many miles of roadway per project, and will likely require excavation and stream crossings. New York State must not make a blanket determination that a project will not have a significant impact on the environment simply because it occurs in an existing right of way for a roadway. Much of this infrastructure will be installed in the Adirondack Forest Preserve, on areas adjacent to forest preserve, or on lands with conservation easements." Comment No. 2.

Response:

See the response to comment No. 1 regarding forest preserve lands. In terms of impacts, the proposed rule has been modified to restrict the Type II item to include a requirement for trenchless burial or placement on existing poles.

Comment:

"The Type II listing for the installation of cable technology should be clarified to say that it is limited to underground cables, or those placed on existing poles. This would be consistent with the analysis in the accompanying GEIS, which only assesses the impacts of such installations. It should be made clear that this does not apply to actions that involve the placement of new poles, which may have visual impacts and other adverse effects." Comment No. 21.

Response:

The rule has been clarified to require burial using trenchless methods or on existing poles.

Comment:

"The City supports the proposed creation of this Type II category, but notes that limiting this category to "fiber-optic or other broadband cable technology" may be overly prescriptive. As an alternative, the City recommends that DEC revise 6 NYCRR § 617.5 (c) (7) so that it applies to the installation of "telecommunications technology", which the City believes will allow greater flexibility to incorporate new technology while achieving the goals of this proposal." Comment No. 222.

Response:

The Type II language has been modified to refer broadly to "telecommunication cables."

2.3.4 Co-Location of Cellular Antennas and Repeaters (originally proposed 6 NYCRR § 617.5 [c] [14])

Original Proposed Regulatory Language:

Installation of cellular antennas or repeaters on an existing structure that is not listed on the National or State registers of historic places or located within a district listed in the National or State registers of historic places or that has not been determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places pursuant to sections 14.07 or 14.09 of the Parks, Recreation and Historic Preservation Law.

Upon consideration of comments received, the Department chooses to withdraw this element of the proposed rule and favor the no action alternative. The Department has grouped the comments together and provided a single response or rationale for choosing the no action alternative. The comments and response supersede the discussion of the objectives, rationale, benefits and potential impacts in the original draft GEIS.

~~Objectives, Rationale, and Benefits:~~

~~The current Type II item [617.5(c)(7)] that precludes the installation of radio communication and microwave transmission facilities as a Type II action has generated a substantial number of questions on the SEQR classification for installation of antennas and repeaters on existing structures. These antenna and repeaters can, in many locations, be installed on existing buildings and preclude the construction of a new tower. The placement of antennas and repeaters are meant to extend range and capacity for a system, so to a certain extent location is pre-determined. Existing structures that might serve as locations for antennas and repeaters include substations,~~

residential and commercial buildings, light poles, and power / energy / information distribution poles. It is fairly common practice in many communication projects to look for these types of facilities and appurtenances for co-location. This proposed change would create a better alignment of SEQR with Federal law on co-location. Congress, as part of the Middle Class Tax Relief and Job Creation Act of 2012, provided that a state or local government "may not deny, and shall approve" any request for collocation, removal, or replacement of transmission equipment on an existing wireless tower or base station, provided the action does not substantially change the physical dimensions of the tower or base station.[14] Such co-locations, therefore, would not be subject to discretionary review under SEQR though local governments retain their authority under the municipal enabling acts as curtailed by Federal law.

Potential Impacts:

The Department believes that the addition of an antenna on an existing tower or pole or other type of structure would not have a significant adverse impact on the environment given the relatively small size of antennas and repeaters. Where they are being co-located, the addition of an antenna or repeater would not be visually significant. Co-location of antennas and repeaters on existing facilities may even limit adverse impacts on the landscape by reducing the need for additional cell towers. Co-location minimizes most new visual impacts and new ground disturbances by utilizing previously disturbed areas containing existing structures. The presence of existing access roads to sites intended for antennas and repeaters further reduces the likelihood of adverse impacts from occurring as no new ground disturbance is needed for roads. Installation of antennas and repeaters on existing buildings nearby to historic resources, whether individual properties or districts, is not considered an adverse impact to these resources because, while perhaps introducing a new element to the general area, it is not a visually intrusive element, and unlikely to change the historic importance of nearby buildings and is considered reversible.

Alternatives:

The "no action" alternative would keep this item from the Type II list and continue to require a SEQR review, where some other kind of discretionary review is required (e.g. site plan review) prior to the installation of cellular antennas and repeaters on existing structures.

Another alternative would be to add the phrase "structure or district" to the proposed listing to prohibit the applicability of this item in a designated historic district, prohibit the installation of cellular antennas or repeaters within 500 feet of a designated historic structure or district and require that all cellular antennas and repeaters that are located within 500 feet of a historic structure or district be camouflaged to reduce visibility. As discussed above, since the installation of antennas or repeaters on non-historic buildings is not seen as an adverse impact to adjacent or nearby historic properties, there is little reason to further explore alternatives that put unnecessary restrictions on the proposed Type II action.

Comment:

“[W]e urge the department to add clarifying language that reads, ‘Installation of Cellular antennas or repeaters on lands that are not part of the Forest Preserve that exists within the Adirondack Park boundary, on an existing structure that is not listed on the National or State registers of historic places, [or] located within a district listed in the National or State registers of historic places. or that has not been determined … ‘This "belt and suspenders" approach is needed if this Type II addition is to be formally accepted….” Comment No. 1.

Comment:

“This change does not take into account other important cultural designations that can be affected by viewshed impacts, including New York State’s “National” Designated Scenic Byways, New York State Designated Scenic Byways, and additional legislated New York State Scenic Byways (NYS Highway Law, Article 12-C, Section 349-dd).15 This addition would undermine Scenic Byway Programs and Corridor Management Plans.” Comment No. 2.

Comment:

“Assembly comments on the 2012 draft scope included the concern that the provision on installation of cellular antennas and repeaters lacked a definition or any size or design standards. This remains a deficiency in the proposal and an ongoing cause of concern. We note that, although the DGEIS is correct that Federal law overrides state and local reviews of certain co-locations, the implementing FCC rules (47 CFR 1.40001) allow such reviews if a proposal would substantially change the physical dimensions of a facility, such as an increase of 10% or 10 feet, whichever is greater….” Comment No. 5.

Comment:

“These sections are drafted too broadly and with lack of precision to be clear what would be covered. Given that key terms like "technology," "cellular antennas," and "repeaters" are not defined it is not clear what the limitations of these proposed exemptions would be. There is also no direction regarding size of equipment, number of pieces of equipment, the size of a geographic area that would not receive Type II treatment.

Many local governments choose to exercise their authority to monitor, control or regulate activities in their right of way. Many have local laws that give them the tools to work with telecommunication companies to provide services to residents and accomplish that goal consistent with local land use, public safety and aesthetic policies. Most of this activity does not require SEQRA review and usually is handled outside of SEQRA or through a negative declaration. What needs to be addressed in a redrafting of these sections is protection for local governments to have SEQRA available that in cases where larger installation plans that may cover significant parts, or all of a community or new outsized equipment installations throughout portions of a community.

My suggestion is that the drafters withdraw these sections until more precise language can be drafted. Such language should also consider that technical

terminology in this field is always changing. A new SEQRA exemption should not be so broad as to deprive local governments of the tool when they need it." Comment No. 6.

Comment:

"5G small cells are not merely little devices going on utility poles. They come with cooling fans and other accoutrements which create noise (and run the risk of falling and/or leaking), and may require so-called soil sterilization, utilize hazardous batteries which can leak chemicals creating a hazmat situation, and are high enough to mar an historic or other scenic view or a neighborhood. 5G small cells bring industrial equipment closer into areas that people inhabit. Discretionary review of these structures should be maintained; this right certainly should not be taken away, and should in fact be mandated via Type 1 given the issues at play." Comment No. 116.

Comment:

"In 6 NYCRR § 617.5 (14) the co-location of cellular equipment on an existing structure should state as long as the co -location is in compliance with local zoning or at least the height limits in local zoning in order for such actions to be a Type II action. If a co-location involves a significant increase in height or a reinforcement of an existing tower or making an existing building nonconforming due to height, these could all turn out to be significant impacts that would need to be considered in an environmental review process." Comment No. 161.

Comment:

"This insertion is too broad. It makes no mention of the location of the existing structure or what is acceptable as an existing structure. In addition, there is no consideration of height allowances or location which could detrimentally affect a coastal viewshed. This regulation should comport with the protection of viewshed under NYS regulation including the 2016 Open Space Conservation Plan and the aesthetic resources considered through the use of a Full Environmental Assessment Form." Comment No. 183.

Comment:

"…We appreciate the interest in easing the regulatory burden on co-locating cellular antennas and repeaters on existing structures in the interest of precluding development of new towers in Greenfields, and agree that when historic structures and districts are impacted, the Type II exemption should not apply. However, by limiting the caveat to only listed historic structures or structures located within a district, it fails to protect those historic resources that may have a particular viewshed or other historic or cultural relationship that is vital to their historic integrity. As just one significant example, in the Hudson Valley, home of the Hudson River School of Painters, views from state and federal historic sites such as Frederic Edwin Church's Olana Estate could be impacted by the installation of additions to structures located in their view sheds. Therefore, the proposed new section should also specify that in order to be deemed a Type II action, the proposed installation must not be visible from any such structure.

We question the unsupported conclusion in the DGEIS that 'given the small size of antennas and repeaters … where they are being co-located, the addition of an antenna or repeater would not be visually significant.' Some of these facilities,

particularly parabolic microwave dishes, can be quite large and add to an existing tower's visibility. If located within a specifically designated scenic resource area, there could indeed be visual impacts from such additions. As recognized by the DEC"s own policy, "impacts to aesthetic resources of statewide concern may require more substantial mitigation strategies to achieve project approval." Therefore, the proposed amendment should also provide for the protection of visual and scenic resources, especially for Scenic Areas of Statewide Significance (SASSs) such as those established within the Hudson Valley region. These "designated SASS encompass unique, highly scenic landscapes which are accessible to the public and recognized for their scenic quality." Comment No. 189.

Comment:

"[T]he proposed amendments to the State Environmental Quality Review Act (SEQRA) cited above will hamper the Town's ability to plan for the least impactful way to site the coming 5G infrastructure. If we don't retain that right via Type II actions, the aesthetics and sightlines of our main thoroughfares may be significantly impacted. We strongly urge the NYS DEC to set aside the proposed amendments and allow municipalities such as Woodstock to retain their autonomy to invoke Type II actions for selecting the placement of cell antennas and repeaters. Should the Town fail to retain this right, its property values may suffer, and this in turn would reduce its property tax revenues." Comment No. 242.

Comment:

"We first note the general support for the provision on page 16, at paragraph (14), which is proposing to designate the "installation of cellular antennas or repeaters" on existing structures, that are not on historic sites, as Type II actions. We believe that this will streamline these types of applications submitted to municipalities, as several localities that we work with on a regular basis still require a Short, and in some cases even a Long Environmental Assessment Form, as a submission item for these types of applications. We hope that the new regulations will discourage municipalities from requiring such burdensome requirements in the future." Comment No. 3.

Comment:

The Department also received an extensive comment from the Wireless Infrastructure Association and CTIA, The Wireless Association (Comment No. 37) (Wireless Industry) supporting the proposed Type II, which is excerpted as follows: "Specifically, Section 617.5 (c) (7) of the SEQR Regulations expressly exempt a "nonresidential structure or facility involving less than 4,000 square feet of gross floor area." With reference to existing Section 617.5 (c) (7), DEC's SEQRA Handbook specifically states as guidance that" ... if a small dish antenna or repeater box is mounted on an existing structure such as a building, radio tower, or tall silo, the action would be Type II. Nevertheless, as noted by DEC in the DGEIS, many municipalities have misapplied the current Type II list by relying on the last part of Section 617.5 (c) (7) in the current SEQR Regulations to require submission of SEQR forms and conducting environmental reviews for wireless facility installations on existing structures…

The Communications Act of 1934, as amended by Section 704 of the Telecommunications Act of 1996, requires municipalities and other state and local agencies to review and decide land use, zoning, and other permit applications for wireless facilities in a reasonable period of time. Section 253 of the Communications Act also places limits on how ROWs are managed for telecommunications purposes. Numerous federal laws, regulations, and orders have been adopted in the past decade to further clarify and facilitate the rapid deployment of wireless infrastructure to serve the public… A common purpose behind federal laws, regulations, and orders that address communications and wireless infrastructure is to streamline state and local land use, environmental, and other discretionary permit processes where appropriate. Streamlined permitting for collocation and modifications of existing wireless infrastructure is part of an overall federal policy to advance wireless services to all Americans. DEC's proposed wireless/Broadband Type II List Additions are consistent with federal policy and laws that govern access to ROWs and streamline state and municipal permitting processes for deployment of various types of wireless communications infrastructure…. DEC's DGEIS determined that the installation of broadband infrastructure in existing utility corridors and public ROWs would create minimal, if any, visual or physical disturbances because these are developed areas with existing soil disturbances. …The FCC, in reviewing potential environmental impacts in the context of NEPA - the analogous federal environmental review statute - has determined that neither collocation of antennas on existing structures nor siting wireless infrastructure in existing ROWs have any potential for significant negative environmental impacts. The FCC, in its 2014 Infrastructure Order extended 'the categorical exclusion for collocations on towers and buildings to collocations on other existing man-made structures .... [D]eployments covered by this extension will not individually or cumulatively have a significant impact on the human environment.' In reaching this conclusion, the FCC relied on earlier FCC findings that additional use of an "existing building or tower 'has no significant aesthetic effect and is environmentally preferable to the construction of a new tower ... "' and 'that antennas mounted on towers and buildings are among those deployments that will normally have no significant impact on the environment.' The " ... same determination applies with regard to collocations on other structures such as utility poles and water towers ....” Comment No. 37.

Responses:

As shown above, the proposed Type II engendered a lot of debate in the comments and discussion at the public hearings. For the present, the Department chooses to withdraw the proposed rule in favor the no action alternative based on its consideration of the comments. In so doing, the Department has carefully reviewed the issues associated with creating an express Type II for co-location of cellular antennas.

As an initial matter, many commenters expressed concern over the radio frequency or RF emissions emanating from cellular sites. Federal law, however, preempts local decisions premised directly or indirectly on the environmental effects of RF emissions, assuming that the provider is in compliance with the Commission's RF rules. Thus, the Department focused on the comments related to the visual impacts of cellular antennas and repeaters. (Federal law also preempts or limits State and local discretion in other ways. Notably, as pointed out above, "…a State or local government

may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station." 42 USC § 1455. Thus, even where a co-location approval is discretionary and subject to SEQR, municipal discretion to deny a co-location is in some instances limited by federal law.

In theory, for environmental reasons, co-location of cellular antennas or repeaters on an existing structure should almost always be encouraged over construction of additional towers.

SEQR review is, however, contextual and commenters point out that even co-located antennas — depending on their placement and the technology that is utilized — may present a visual issue that could be significant depending on its context. The same activity could have little or no impact in one area but a significant impact in other areas.

Not surprisingly then the comments indicate that some antennas can be large and present a significant visual intrusion depending on where they are located (for example, in the viewshed of Statewide Areas of Scenic Significance or buildings or places listed on the New York State or National Register of Historic Places). Cellular antennas can be highly visible vertical structures whose size and visual impacts are variable and subject to technological change as indicated in Comment No. 116.

The proposed regulatory language contains an exception for historic places though as commenters have pointed out the proposed regulatory qualifiers do not protect the viewshed or visual impacts of the antennas from those historic places. One of the commenters provided general language to protect Statewide Areas of Scenic Significance in addition to places listed on the National Register of Historic Places. In attempting to preserve the Type II for co-location of cellular antennas and repeaters, the Department considered the addition of this language but its inclusion would make it difficult to classify the action in some cases and would run counter to the Department's historic practice of making classification a relatively objective judgment to make.

While it is possible to adopt a Type II for co-location, doing so would require caveats for visual impacts to protect against visual impacts that would be highly subjective to implement and thereby make it more difficult to classify the action.

Also, given the anticipated or reported changes in technology that are on the horizon, the Department finds it difficult to evaluate the potential impacts associated with the proposed Type II at this time. It is clear that both the technology and Federal regulatory environment are still evolving for wireless communications and it may be premature for the SEQR rules to be changed at this juncture.

Where the installation of a wireless antenna or repeater is in some cases a discretionary action subject to SEQR and needing a local government approval, it is a small enough matter for a wireless applicant to complete Part I of an EAF and the lead agency can evaluate the impact through the process of completing the rest of the EAF and assess the visual impact of the proposal. This analysis is not intended to impede co-location — which as stated above should be encouraged. It is only to intended to ensure that visual impact issues are considered in placement of the antennas.

While the co-location of cellular antennas would remain subject to SEQR where a municipality has discretionary review authority (e.g., site plan review) of such antennas and repeaters, municipalities are likely to use the Short EAF to review wireless antennas and repeaters unless the action is classified as a Type I action in which case the Full EAF must be used. The Department expects that almost all co-location applications should be Unlisted where a municipality has discretionary jurisdiction to review co-location of the antenna. The Department also expects that most discretionary decisions involving co-location of antennas on existing structures will lead to a negative declaration. Along these lines, under Federal Communications Commission regulations, many of these actions are considered Categorically Excluded (federal equivalent of Type II action) under the National Environmental Policy Act (NEPA). However, because the proposed Type II did not contain any siting requirements, the Department found it difficult to categorically determine that the co-location of cellular antennas and repeaters would result in a negative declaration for all potential proposed locations. At the same time, local governments that choose to regulate antennas and repeaters will have some ability under SEQR to address the visual impacts of a siting where it substantially changes the physical dimensions of the tower or base station subject to all other Federal limitations on the exercise of discretion, or adopt a local law making such actions Type II for their approval purposes.

2.3.5 Installation of Solar Energy Arrays (originally proposed 6 NYCRR § 617.5 [c] [15] & [16]; revised proposed 6 NYCRR § 617.5 [c] [14] & [15])

Original Proposed Regulatory Language:

Installation of five megawatts or less of solar energy arrays on a sanitary landfill, brownfield site that has received a brownfield site clean-up order certificate of completion (under 6 NYCRR § 375-3.9), waste-water treatment facilities, sites zoned for industrial use or installation of five megawatts or less of solar canopies at or above residential and commercial parking facilities (lots or parking garages).

Installation of five megawatts or less of solar energy arrays on an existing structure that is not listed on the National or State Register of Historic Places or located within a district listed in the National or State Register of Historic Places or on a structure or within a district that has not been determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places pursuant to sections 14.07 or 14.09 of the Parks, Recreation and Historic Preservation Law.

Revised Proposed Regulatory Language:

(14) Installation of solar energy arrays where such installation involves 25 acres or less of physical alteration on the following sites:

(i) closed sanitary landfills;

(ii) brownfield sites that have received a Brownfield Cleanup Program certificate of completion ("COC") pursuant to ECL § 27-1419 and 6 NYCRR § 375-3.9 or Environmental Restoration Project sites that have received a COC pursuant to 6 NYCRR § 375-4.9, where the COC under either program for a particular site has

an allowable use of commercial or industrial, provided that the change of use requirements in 6 NYCRR § 375-1.11(d) are complied with;
(iii) sites that have received an inactive hazardous waste disposal site full liability release or a COC pursuant to 6 NYCRR § 375-2.9, where the Department has determined an allowable use for a particular site is commercial or industrial, provided that the change of use requirements in 6 NYCRR § 375-1.11(d) are complied with;
(iv) publicly-owned wastewater treatment facilities;
(v) sites zoned for industrial use; and
(vi) parking lots or parking garages;

(15) installation of solar energy arrays on an existing structure provided the structure is not:

(i) listed on the National or State Register of Historic Places;
(ii) located within a district listed in the National or State Register of Historic Places;
(iii) been determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places pursuant to sections 14.07 or 14.09 of the Parks, Recreation and Historic Preservation Law; or
(iv) within a district that has been determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places pursuant to sections 14.07 or 14.09 of the Parks, Recreation and Historic Preservation Law;

Objectives, Rationale, and Benefits:

These new Type II actions recognize that utility scale and individual solar energy systems, when placed in specific locations, do not have a significant impact on the environment. ~~intended to encourage placement of solar panels and arrays in areas that have already been disturbed or on structures that already exist.~~ They would also further the goals of the initiative "Reforming the Energy Vision" or "REV" and in particular the NY-Sun initiative to grow the solar energy industry in New York,[15] which serves to reduce New York's dependence on fossil fuels.

The installation of solar energy arrays can substantially reduce energy costs and the generation of greenhouse gases. Increasing the amount of solar energy produced in New York State will reduce the generation of greenhouse gases and assist the state in attaining its goals for renewable energy production contained in the State Energy Plan[16] and PlaNYC.[17] Additionally, distributed generation (*e.g.*, locating many small renewable energy systems in communities rather than large central power plants) reduces strain on the electrical grid, demand for constructing additional large central power plants and associated transmission lines, and can improve air quality.

The rooftops of many commercial and industrial facilities are already home to a myriad of heating, ventilation and air conditioning equipment. Several corporations have embarked on the installation of solar energy arrays on roof tops as part of the move to a more sustainable operation. Corporations like Campbell's Soup, Costco, IKEA, Kohl's, Macy's, McGraw Hill, Johnson & Johnson, Staples, Walgreens and

Walmart all have programs to place solar arrays on the roofs of their stores. Solar energy projects can be located on structures in such a way that they are hidden from sight or barely visible. The benefits of solar energy arrays include the addition of more clean and renewable energy to New York's energy supply, creation of construction jobs, potential generation of property tax revenues for system lives of 10 to 20 years, no air emissions, no water is needed to generate power, system equipment operates very quietly, and the systems are self-sustaining.

When a landfill closes, the waste is sealed using a polyethylene cap, buried under compacted soil and seeded with grass. The landfill is then effectively useless~~, albeit somewhat pleasing to the eye~~. There are over 1,200 closed landfills is New York. A solar array or energy cover can provide sustainable energy to the facility and also minimizes the typical maintenance costs of grounds keeping and cover soil replacement. The installation of solar energy at a sanitary landfill site would return a currently under-utilized site to a productive use. A closed landfill can therefore continue to have use as a generator of revenue through renewable energy production. Since many sanitary landfills currently generate energy from the combustion of methane gas they already have the necessary infrastructure in place to connect to the electrical grid. There are currently three solar energy facilities located at sanitary landfills in New York State. In the Town of Clarkstown, Rockland County, a 2.3 MW solar energy facility was constructed at the Town's decommissioned and capped landfill. This facility was able to be constructed without affecting the transfer station that is still in operation at the site. Similar solar energy facilities have been constructed at sanitary landfills in the Town of Williamson, Wayne County (1.5 MW) and the Town of Patterson, Putnam County (1.0 MW). The Madison County Landfill has installed a solar array capable of generating 50 kW.[18] This facility has installed a thin film flexible solar membrane cover along with a free standing solar array. The City of New York has embarked on a program to develop solar energy at several closed sanitary landfills in the City.[19] Currently several adjoining states have programs to promote the construction of solar energy at sanitary landfills. Massachusetts, Connecticut and New Jersey have programs to transform landfill sites to sources of clean energy. These states have also found that solar arrays can be constructed at landfills with no effect on active or closed landfill cells. The USEPA encourages reuse of landfills and contaminated and formerly contaminated lands for renewable energy production through its "RE-Powering America's Lands" program.

The installation of a solar array at a brownfield, environmental restoration project, or inactive hazardous waste disposal site, herein collectively referred to as Environmental Remediation (ER) sites, whether solely on the land parcel(s) constituting the ~~brownfield~~ ER site, on existing or new buildings or structures or any combination of ground or pole mounted arrays and building or roof mounted arrays would add to the value of reusing the ~~brownfield~~ site.

"Brownfield site" is defined at ECL 27-1405.2 and ~~a term used to~~ describe certain properties ~~land~~ where a contaminant is present at levels exceeding the soil cleanup objectives or other health-based or environmental standards, criteria or guidance adopted by the Department that are applicable based on the reasonably anticipated use of the property, in accordance with applicable regulations. An "Environmental restoration project," defined at ECL 56-0502, is a remediation project associated with

certain contaminated properties owned by a municipality that has entered into an agreement with the Department to investigate or remediate the property. “Inactive hazardous waste disposal site,” defined at ELC 27-1301.2, is the regulatory term for properties known colloquially as “Superfund sites.”

Once ~~cleaned up~~ remediated, an ~~area~~ ER site may be reused or redeveloped to become a productive asset to the ~~local~~ community with a use compatible with site conditions. ~~Former brownfield~~ Remediated ER sites may become parks, or be used for residential, commercial, or industrial uses, as appropriate, but they must be redeveloped in a way that conforms to ~~local~~ zoning and ~~any the~~ a comprehensive ~~or master~~ plan, if any. A site owner must notify the Department of a change of use, defined at 6 NYCRR 375-1.11(d), before making the change.

~~Under New York’s Brownfield Cleanup Program (BCP),~~ The New York State Department of Environmental Conservation (NYSDEC) encourages the cleanup and redevelopment of ~~brownfield~~ ER sites. More recently, under its Green Remediation policy (DER-31), the Department has been encouraging more sustainable remediation and reuse of brownfield and other contaminated sites, including the use of renewable energy in both the cleanup and contemplated future use of the site.

To be eligible as a Type II action, the Department must have granted to the owner of a particular site a Certificate of Completion (COC) (or a full liability release for older inactive hazardous waste disposal sites). Issuance of a COC is the culmination of a rigorous and comprehensive environmental investigation of the site and implementation of a Department-selected remedy for remediation that is protective of public health and the environment. Citizen participation is an essential element of the remedial process.

Many industrially zoned sites in communities are underutilized. There may be more land zoned for industrial use than can presently be used based on past use patterns. Also, uses not compatible with an industrial activity may have been located in close proximity to what was once an isolated site, making it less desirable for future industrial use. Encouraging the use or reuse of these sites for the installation of solar arrays will return these areas to a productive use. Installing solar canopies on parking lots and parking garages presents a beneficial activity without significant adverse environmental impacts. It turns a large single-use asphalt lot ~~at a commercial or residential facility~~ into a power plant while also providing shaded parking for patrons and lowering the state’s and nation’s dependence on more polluting fuels. In response to comment, the Department has removed the commercial and residential requirement, as the environmental impacts do not relate to the parking lot category of use.

Potential Impacts:

The installation of solar arrays can be viewed as a visual intrusion and they can be very land intensive. Solar arrays can also have an impact on the visual character of designated historic structures or districts. However, since these Type II actions will utilize only existing non-historic structures, previously or currently disturbed sites, or sites zoned for industrial use, they will greatly minimize new ground disturbance or construction and would not result in a significant adverse environmental impact. When arrays are placed on the ground, such as at landfills or industrial areas, visual impacts

will not be significant and landscaping can be utilized, as necessary, to reduce any residual impact. Landfill and Municipal wastewater treatment sites also tend to be relatively isolated or have substantial buffer areas. This will further reduce the possibility that these arrays will result in any significant adverse aesthetic/visual impacts to surrounding land uses. Because solar arrays would not result in operational changes to a municipal waste water treatment facility potential impacts typically associated with industrial use sites, *i.e*. odors, traffic, etc., will not occur. Solar arrays can be successfully built on landfills without compromising the integrity of the existing final cap. Foundations can be designed to minimize any impact on the integrity of the cap or existing methane collection systems. Industry has developed new flexible photovoltaic film panels that can be integrated into the cap.[20] Experience in New York and other states demonstrates that solar arrays can be successfully constructed on both the flat and side slopes of a landfill with no adverse impact to site integrity.

Solar arrays can be accommodated at ~~brownfield~~ ER sites. When the arrays are constructed on brownfield sites they must be designed and installed in such a way as to not interfere with any planned, ongoing, or completed cleanup or operation /maintenance of any remedy that may be needed at the brownfield site.

Frequently, remedies at ER sites include cover systems (*e.g*., soil or asphalt) intended to eliminate direct contact with contaminated soil or active remediation systems which utilize wells and piping to extract or inject various media and also typically have monitoring wells which require ongoing access. Development of a solar array on an ER site can be coordinated with the remediation and redevelopment of the site such that the remedy can be operated and integrity of the remedy maintained.

~~Any~~ If a solar development ~~planned~~ is proposed for an ER site ~~(contemplated future use of the site) would be considered during the development of the site remedy as part of the Department's oversight of the cleanup to~~ at the time a remedy is proposed, the Department can ensure compatibility of the remedy with the solar installation.

Construction of solar canopies at existing parking facilities will not result in a significant adverse environmental impact. These sites are already disturbed and covered with impermeable pavement so it will not result in any additional ground disturbance. These canopies are low in profile so offsite visual impact will be negligible or non-existent and if properly designed, solar canopies can also help to manage surface runoff and reduce pollutant loading typically associated with run-off from parking areas. The environmental impacts from solar canopies should all be positive.

For roof-top installations this provision would not allow placement of solar arrays on designated historic resources so impacts to these resources will not be significant. When solar is installed on roof tops, the visual impacts are greatly reduced due to the lack of visibility to a roof (except perhaps from adjacent roof tops and high rises).

Alternatives:

The "no action" alternative would mean that ~~these activities~~ solar installations as described above would continue to require a SEQR review. ~~Leaving these activities off the Type II list would miss the opportunity for creating a regulatory incentive for the installation of solar arrays at sites that would require SEQR review for these solar energy installations that have no significant adverse impacts associated with the installation and operation of solar power.~~ No action would ~~also~~ miss the opportunity to align SEQR with the State Energy Plan and the PlaNYC which seek to expand the development of solar resources in the state.

The second alternative is to remove the restriction for designated historic properties. This alternative risk impacting the characteristics of a building that make it historically important. The Department considers it to be prudent to leave decisions regarding the placement of solar arrays on historic properties as decisions reviewed under SEQR on a case-by-case basis. At the same time, however, it needs to be recognized that the placement of solar systems on historic properties is not always an adverse impact or intrusion. As mentioned in connection with green infrastructure, simply because an action is listed as Type II does not mean that the action is free from Federal, State or local historic preservation laws, it simply means that DEC has determined the action will not have a significant adverse impact on the environment. The federal Advisory Council on Historic Places (ACHP) has acknowledged that some solar placements can be sensitively done on historic properties without damage to the integrity or importance of the structure. Stated in Sustainability and Historic Federal Buildings, an ACHP publication dated May 2, 2011, "[s]olar panels tend to have the least visual impact on historic buildings with flat roofs and parapets, when compared to other on-site renewable energy applications. The angle at which a panel is installed is important, and the more horizontal the orientation, the less visible and conspicuous it becomes. There are also other products such as solar "laminates" on the market that lay flat on a roof top and are less visually intrusive." In addition, Jean Carroon, member of the National Trust for Historic Preservation Sustainable Preservation Coalition reported to a US Senate panel that green and historic can be compatible, stating "Historic buildings with metal and slate roofs can often accept solar panels without damaging the existing fabric. Placement can be discreet and the installations can be reversible."[21]

The third alternative would be to place a different limit on the size of the installation. However, no matter the size, there is an ability and technology to hide or screen solar arrays on roofs to not create impacts. For example, the largest roof top solar array in New England is being installed in West Davisville, RI, on two privately owned buildings located in the Quonset Business Park. The solar array has been described as about 8,000 panels, largely unnoticed to passersby because it is set back 10 feet from the edge of the roof and the panels are only about 2 to 3 feet off the roof. Palmer Moore, a developer with Nexamp, a Mass.-based solar energy company installing the system, has been quoted as saying ""The nice thing about it is that, despite its scale, you would never know it's there because it's on a rooftop."[22] As for closed landfills, these properties are already relatively secluded or are usually a somewhat concealed site location. Solar at landfills and brownfields that have been

remediated is actually just a re-use, for good reason, of already disturbed and recovered land.

Comment:

"While it is laudable to encourage the development of renewable energy, commercial-scale solar installations result in substantial changes in land use, the effects of which include changes in community character and visual impacts at a minimum, thus seem appropriate for review under SEQRA.

For reference:

--Typical land area for 1 MW is 4 acres of level land.

--Typical land area for 5 MW is 25 acres of level land.

Documentary support that such large scale changes in land use will not have a negative impact on the environment as a rule is required in the GEIS to support this proposed amendment." Comment No. 93.

Comment:

"We are also concerned with certain aspects of 617.5 (c) (15) and (16), which involve the installation of solar energy arrays of five megawatts or less. A five megawatt solar array can create a physical footprint of 25 acres or more. This must not be considered a Type II Action. Although creating greater capacity in clean, green, renewable energy is desirable, developing this capacity still impacts the environment and must be considered a Type I Action." Comment No. 2.

Comment:

"We have concerns about conferring Type II status on projects to install five megawatts or less of solar energy arrays on sanitary landfills or on brownfield sites that have received a brownfield site clean-up order certificate of completion (under 6 NYCRR 375-.3.9), if in some cases, such sites might be considered suitable for agricultural uses; in addition, we suggest that a metric other than total megawatts (such as acreage) may be more appropriate for determining that impacts are sufficiently minimal as to warrant Type II status." Comment No. 26.

Comment:

"The addition of solar project siting, while conceptually a positive addition to the Type II list, should not include urban brownfield sites in the Brownfield Cleanup Program. Part of the goal of the BCP is to promote urban infill. Solar installations may not be appropriate in all areas, may be counter to urban redevelopment goals, and may have potential impacts on' neighborhood character. We also recommend placing a limit on the acreage of solar installations that can be exempted as Type II actions, rather than relying strictly on a five-megawatt limit. Solar energy projects involving the physical alteration of 10 acres or more should not be exempted from review. The 10-acre threshold is consistent with the Type I threshold set forth at 6 NYCRR § 617.4(b)(6)(i)." Comment No. 151.

Comment:

“While we think changes may be well-intentioned, we have serious concerns that by cutting the environmental review, the department may lead to developers and review boards to overlook serious impacts to the environment and surrounding communities. For example, a well-intentioned solar project on the Rapp Road landfill might cause increased run-off or reflections that could impact the surrounding Albany Pine Bush Preserve. On paper, we like the idea of solar cells on the landfill, but without a full environmental review we won't know if it’s an appropriate proposal. Renewable energy and sustainable housing developments are important in our carbon contained future, but they can’t come at a cost to our state’s endangered Albany Pine Bush.” Comment No. 188.

Comment:

“Solar arrays producing up to five megawatts can be spatially extensive. A five-megawatt array utilizing the common 40% efficient panels could cover up to twenty-five acres. Much of the waterfront in the Buffalo Niagara region is industrially zoned property, and vast installations of solar panels can be detrimental to critical habitat. In addition, there is no consideration in these provisions to the type of solar panel or how it is to be anchored into the substrate. Solar arrays anchored into the substrate on a capped landfill or brownfield site, for example, need to carefully ensure the cap is not breached because penetration of these surfaces can be extremely detrimental to the environment.” Comment No. 183.

Response:

The 5 MW threshold originally proposed was chosen to provide consistency with the maximum eligibility threshold allowed by NYS Standardized Interconnection Requirements (SIR) for Distributed Generation (DG) projects, which includes solar (photo voltaic). As commenters note, a 5MW capacity project requires a typical land area of 25 acres. The amount of land area is variable, however, because it depends on the technology and ancillary equipment being used for a specific installation that would still meet the SIR 5 MW threshold. As such, and as also recommended by commenters, the Department has chosen to use an acre threshold which is a more appropriate and definitive metric for determining eligibility under the Type II. The threshold which the Department has chosen is for actions that involve a physical alteration of 25 acres or less to remain consistent with the typical land area a 5MW project would require as provided for in the original proposal. The Department does not debate that a physical alteration of 25 acres in some instances could be considered a moderate change in land use, prompting a look at associated potential impacts. Commenters primarily identified impacts potentially affecting aesthetics and community character. However, the potential for solar arrays to result in a significant adverse environmental impact is greatly minimized by the eligible locations –closed sanitary landfills, publicly owned waste water treatment plants, sites that support or are zoned for an industrial use, and parking lots or parking garages. These siting requirements make it unlikely that an adverse impact will occur, as each of these sites has either already been significantly altered by human actions, or previously designated by the local government for industrial activity. In addition, solar arrays can take advantage of low profile design

technology that has less of a visual impact than vertical structures such as cellular antennas. Further discussion relative to each of the eligible locations is provided in more detail below.

Sanitary landfills

Commenters indicated that installation of solar arrays may result in substantial changes in land use and at a minimum could affect community character and have visual impacts. The Department agrees that in some instances, primarily where landfilling results in features that are raised from the surrounding landscape, the raised area may have already created a visual impact. In addition, as most communities have historically located landfills in areas that are isolated and screened from other land uses, the potential for adverse impacts to important or designated scenic resources is extremely small. Potential contextual based impacts, such as to aesthetics, are further minimized since the site was or is dedicated to landfilling, and the installation of solar arrays in such a context will not present an adverse impact. Where communities have previously designated a landfill site as an allowable use, the community has arguably predetermined that associated activities, structures, and the typical aesthetic components inherent therein, are consistent with the goals and desires of the community.

Other potential impacts include concerns with the landfill cap, soils and or slope integrity and stormwater runoff onto adjacent sites/parcels. These impacts are subject to review and controlled by the Department through its on-going regulatory control over closed landfills. For example, prior to the placement of solar arrays on landfills, the facility will need to obtain approval from the NYSDEC Division of Materials Management (DMM) in accordance with 6 NYCRR Part 360 requirements. Areas of concern evaluated by the DMM as part of that review include: protection and maintenance of the final cover, protection of the landfill gas system, and drainage. A facility must also demonstrate compliance with the provision that disturbances will not increase the potential threat to human health or the environment. See 6 NYCRR § 360-2.15 (k) (9). While Part 360 is not a substitute for SEQR analysis, the identified impacts are small rather than substantial and controllable.

Industrial Areas

These potential impacts are primarily the same as those for placement on landfills. While industrial sites have been established in many different community settings statewide, these uses and associated impacts are already predetermined by such zoning and, arguably, consistent with the goals and plans of the community. Should an instance arise where there could be a nearby ‘sensitive’ resource or land use, where an impact could occur, these can be easily identifiable during an agency’s site plan or special use permit review and can be readily controlled by that process. Further, solar arrays do not carry with them the types of impacts, such as changes in traffic, emission of pollutants (air, water), or tall structures that are often more typical of an industrial use and that have greater potential to be significant. The Department has determined that associated impacts are minimal and do not result in significant adverse impacts that require preparation of an EIS.

~~Brownfield~~ ER Sites

Comment:

“The proposed exemption of the installation of solar energy arrays on brownfield sites would apply to a "site that has received a brownfield site clean-up order certificate of completion (under 6 NYCRR §375-3.9)." The inclusion of the words "clean-up order" adds confusion, since as worded these installations are limited to sites where all remediation has been completed and not to a clean-up order. The DGEIS clearly indicates that there is a potential for significant adverse environmental impacts if the installation of solar energy arrays interferes with the operation or integrity of remedies at a brownfield site, which would not comply with the Type II eligibility criteria. Although this action may still constitute a change of use requiring notification to DEC pursuant to ECL §27-1425, the SEQRA exemption would preclude any public notice or involvement in reviewing potential impacts. This is particularly concerning since many brownfield sites are in environmental justice areas.” Comment No. 5.

Response:

The Department removed the reference to “clean-up order,” but retains the requirement that a “certificate of completion” (COC) has been issued to be eligible for this Type II. Issuance of a COC contemplates the possibility that a certificate holder will redevelop a site, subject to appropriate restrictions. Installation of solar arrays must meet the requirements of the COC and any restrictions placed on the site, as would be the case for any other development. As mentioned in the question, development is subject to the Department’s change of use requirements. Therefore, the potential for the action to cause interference with the operation or integrity of the remedy, as mentioned by the commenter, is unlikely given the degree to which the Department closely regulates ER sites. The installation of solar arrays at an ER site has the potential to result in similar environmental impacts as those identified and discussed above for sites zoned for industrial use and landfills. These sites have been previously disturbed, may have supported a historic commercial or industrial-type use, and, as such, surrounding land uses likely have co-existed with those uses or developed around them, or both. As stated in the responses above, established zoning associated with these types of site uses has been predetermined to be consistent with the goals of the communities that established them. The Department has not identified significant adverse environmental impacts that would require preparation of an EIS to identify and evaluate those impacts. The Department has decided, however, to classify as Type II only ER sites with a COC allowable use of commercial or industrial based on the assumption that residents in the vicinity of unrestricted use sites or those with a COC allowable use of residential or restricted residential may want the additional environmental review afforded by SEQR.

Wastewater Treatment Plants

In evaluating comments, the Department has modified this section to add the qualification that the wastewater treatment facility be a publicly owned facility. While the character of ownership is usually not indicative of impact, this clarification is important as operating wastewater treatment facilities could include privately owned/operated facilities, such as those serving a subdivision and located within a residential area. The location of these privately-owned facilities could vary greatly, and while many smaller

scale solar projects can be more frequently found installed on individual residences, a larger scale installation may have adverse impacts in a residential setting. Existing municipal waste-water treatment facilities, however, are generally located in low lying areas. These types of facilities are already dedicated to an industrial activity, with industrial tanks, piping and equipment on-site. Installation of solar arrays would not result in a significant change to those existing conditions or site activities and daily operations

Comment:

"Construction on brownfields and landfill sites as identified in section 15 activates additional permitting requirements to accommodate remediation, capping or related site-specific protection measures. Those requirements serve as a disincentive to development on sites that have otherwise been identified as preferred locations for solar energy facilities by communities throughout the state. A type II designation for desirable sites is a step towards removing barriers and aligning price signals with state priorities. However, to ensure favorable economics we encourage NYSDEC to consider raising the proposed 5MWac cap to maximize development at preferred sites. The 5MWac cap stems from the compensation structure in New York and is not tied to environmental impacts. There is no reason to restrict large scale development at the identified locations as research indicates net environmental benefits from solar development and no significant adverse impacts in the form of stormwater runoff or other environmental impacts… Reducing costs and enabling rooftop solar on existing structures makes sense and is in keeping with state energy development objectives. We support a Type II designation for projects installed on existing structures." Comment No. 153.

Response:

The Department agrees that placement of solar arrays on brownfields and landfill sites will usually be a net benefit for the environment with no adverse impacts. The Department has removed the five-megawatt threshold.

Comment:

"§ 617.5(c) (14) to (16) - The Type II listings for certain small solar installations should also make an exception for locations that are substantially contiguous to the types of historic sites and districts that are already excepted therein, and to public parklands. Such solar installations, no matter how small, may have adverse visual impacts on nearby historic sites and parkland." Comment 21.

Response:

The Department does not find there would be any significant impacts because a site is substantially contiguous to a historic site/district or public parkland. Historic sites and districts are not always so designated because of an associated aesthetic value or quality. Placement on rooftops are generally low profile, fitting with existing rooftop structures in many instances. Additionally, the rooftops of many facilities already house heating, ventilation and air conditioning equipment. Further, potential visual impacts are greatly reduced due to the lack of visibility when installed on a rooftop. Likewise, installation at existing parking facilities or canopies are low in profile so offsite visual impacts will be negligible or non-existent. Properly designed solar canopies can also

help to manage surface runoff and reduce pollutant loading typically associated with run-off from parking areas.

Comment:

"The development of new solar energy resources needed to achieve the goals of the NY Clean Energy Standard the state's NY-Sun program is severely challenged on many fronts. Among those challenges is the municipal approvals process. Municipalities typically are without sufficient expertise or resources needed to perform a competent, consistent, and objective SEQR process for larger scale projects. All 5MW solar installations that meet certain low-impact, best practice criteria should be added to the list of Type II actions. A list of criteria should be developed to include such practices as minimizing grading, leaving existing topsoil, providing vegetative screening and 50-100 foot setbacks from adjacent properties, retaining or improving existing site hydrology, providing wildlife corridors at certain intervals, using sheep or co-located agricultural practices for vegetation control, etc." Comment No. 36.

Response:

The Department agrees that large scale solar may present unique or new issues for which municipalities need to evaluate when compared with the typical suite of actions they more routinely review. That, however, does not mean that the impacts are so unique that a municipality lacks expertise or resources to review under SEQR. Municipalities have the ability to obtain the assistance of consultants to undertake an adequate environmental review. The commenter provides some examples of mitigating measures and best management practices that can be incorporated into project design as necessary to avoid and minimize potential environmental impacts. Classifying the action, however, should be an easy process without the need to know a lot about specific design details. Adding a list of qualifying conditions as suggested would overly complicate that determination. Still, the Department finds that there are no significant impacts from this category of Type II action such that adding mitigating conditions to the eligibility requirement are needed.

Comment:

We strongly support state policies to reduce greenhouse gas emissions and to create incentives with respect to the development of renewable energy. These additions to the Type II list promote activities that are regarded as sustainable. We recognize that these new Type II actions encourage placement of solar panels and arrays in areas that have already been disturbed or on structures that already exist and would also further the goals of the Reforming the Energy Vision initiative ("REV") and the NY -Sun initiative seeking to expand the solar energy industry in New York. A discussion of how the 5MW threshold was determined should be stated while consistency with locally adopted planning, including but not limited to, a comprehensive plan or Local Waterfront Revitalization Plan (LWRP) or a Brownfield Opportunity Area (BOA) should be included in this regard." Comment No. 110.

Response:

The Department agrees that these actions should be encouraged to promote green/renewable energy, and can be designed and installed to result in no significant adverse environmental impacts. The Department has eliminated the reference to five megawatts inasmuch as it was only used as an indirect measure of size.

Comment:

“In §617.5(16) the addition of up to 5 megawatts of solar arrays on an existing structure should state as long as the construction is in compliance with local zoning. For example, constructing an array on an existing building that created a height variance may have a significant impact needing consideration in an environmental review process.”

Response:

Adding a condition that the action be consistent with local planning or other regulatory land-use criterion as suggested is not warranted or necessary since local laws will apply notwithstanding the Type II classification. The Department has placed limiting conditions for those actions identified as eligible in creation of this express Type II and determined they will not result in significant adverse environmental impacts as discussed in responses above.

Comment:

“As noted in the introduction, the proposed SEQRA regulations cannot promote particular uses (i.e. sustainable development or renewable energy) without a showing that those uses have been categorically determined not to have a significant effect on the environment. No matter how well intentioned, DEC is overreaching and usurping the role of the legislature in seeking to establish a policy that so-called "sustainable" development is favored. Such a policy can only be established by the legislature… DEC cannot make such a finding for many if not all of these "sustainable" favorites. 10 or 25 acres of disturbance for a solar field would have environmental impacts just as a 10 or 25-acre disturbance for billboards or windfarms or anything else. These items would also contradict the existing Type II regulation that says that an agency may adopt its own Type II list but that none of its Type II actions can be Type I actions under the list at 6 NYCRR § 617.4.” Comment No. 151.

Response:

The Department has addressed the policy making issue under the general comments to the Type II list above. Impacts are discussed throughout this and other sections.

Comment:

“The City urges DEC to expand the Type II threshold for solar energy arrays from five megawatts to ten megawatts. The City believes this would further incentivize installing solar panels on sites with multiple large rooftops, such as office and industrial campuses. Roof-mounted solar arrays, as compared to ground-mounted arrays that create new footprints, have relatively minor environmental impacts. The City believes these types of projects will help the City achieve its greenhouse gas emissions

reduction goals and activate otherwise unused rooftops. And in fact, the City is currently exploring solar-related projects for the rooftops of City-owned buildings that would exceed five megawatts. In addition, the City recommends that DEC expand § 617.5 (c) (15) to include the installation of solar canopies at or above park, community facility, and municipal parking lots and garages. As noted in the Draft Generic Environmental Impact Statement ("DGEIS"), "installing solar canopies on parking lots and garages presents a beneficial activity without significant adverse environmental impacts" and "solar energy projects can be located on structures in such a way that they are hidden from sight or barely visible." This logic also applies for all non-historic structures and the Type II category should not be limited to residential or commercial parking facilities." Comment No. 222.

Response:

The Department agrees and has eliminated the qualification that placement of solar arrays be limited to only residential and commercial parking structures. The Department's determination of no significant adverse environmental impacts remains the same regardless of the type of facility where the installation occurs. The Department has eliminated the reference to five megawatts inasmuch as it was only used as an indirect measure of size. The 25-acre threshold applies to all eligible locations except for placement on existing structures. These installations are self-limiting by the size of the existing structures themselves, for which the Department determined installation of solar arrays poses no significant adverse environmental impact as discussed in responses above.

Comment:

"Building retrofits, PV projects on marginal sites, and anaerobic digesters are all examples of efforts that ultimately reduce New Yorkers' demand for grid-supplied energy, and thereby confer permanent environmental benefits for the State. In NYSERDA's view, these projects do not pose any significant negative environmental impact and it is therefore appropriate to designate them as Type II. NYS DEC's proposed inclusion of these types of projects in its Type II list will remove an unnecessary regulatory barrier for such projects, thus inviting private-sector investment and amplifying the positive effects of NYSERDA's portfolio of clean energy efforts." Comment No. 153.

Comment:

I support the proposed addition of Secs. 617.5 (c) (15), (16). These provide Type II status to certain solar installations. A major increase in solar energy generating capacity is an important part of New York's effort to achieve an 80% reduction in greenhouse gas emissions by 2050, and these additions will help facilitate this effort. Comment No. 33.

Response:

The Department agrees with the comment.

2.3.6 Expand Provisions for Area Variances (originally proposed 6 NYCRR § 617.5 [c] [17]; revised proposed 6 NYCRR § 617.5 [c] [16] & [17] replacing existing paragraphs [12] and [13])

Original Proposed Regulatory Language:

Granting of area variances not involving a change in allowable density [individual setback] and lot-line [variances] adjustments;

[Granting of an area variance[s] for a single-family, two-family or three-family residence;]

Revised Proposed Regulatory Language:

Granting of individual setback and lot line variances and adjustments;

Granting of an area variance[s] for a single-family, two-family or three-family residence;

Upon consideration of comments received, the Department chooses to withdraw most elements of the proposed rule and favor the no action alternative, with the exception of the clarification that lot-line adjustments are always Type II actions.

Objectives, Rationale, and Benefits:

This ~~proposed~~ revision renumbers but retains the existing language in 6 NYCRR § 617.5 (c) (12) and (13) and adds "lot line adjustments" to existing § 617.5 (c) (12). ~~would expand the applicability of the existing Type II exemption for area variances for one, two and three family residences to include lot line adjustments but not involving a change in allowable density of dwelling units. Area variances are subject to the review and approval of zoning boards. Such boards which are required under state law to consider environmental factors in their decision to either issue or deny the requested relief (see, for example, Town Law §267-b). Under the state enabling law criteria for granting area variances, the zoning board must consider whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district and impose conditions for the purpose of minimizing any adverse impact such variance may have on the neighborhood or community. This existence of such criteria is not a substitute for the SEQR process; however, the area variances covered by the existing Type II or as modified are categorically not by themselves environmentally significant. If an area variance is a component of another action that is subject to SEQR (*e.g.*, a development that requires a special use permit or site plan approval) then the lead agency would be required to include consideration of the environmental impacts of the variance as a component of the whole action.~~ Lot line adjustments was included in the original proposal, incorporated into a new section 617.5 (c) (16). "A lot line adjustment or alteration is a means by which a boundary line dividing two lots is adjusted or moved. Such a move is typically made by agreement between the owners of the parcels. A change in the location of the boundary line effectively creates two lots with new dimensions. Some municipalities define "subdivision" to

include lot line adjustments."[23] The change would clarify that lot line adjustments, whether defined as a subdivision or as a standalone approval, are Type II actions.

Potential Impacts:

The Department does not believe there are any potentially significant adverse impacts from this ~~expansion of the Type II category for area variances and lot-line adjustments~~ change. ~~Stand-alone area variances, not involving a change in allowable density,~~ Lot line adjustments should never result in a significant adverse environmental impact as they only involve a change in the lot line between two lots and are less significant than the Type II items covered by existing sections 617.5 (c) (12) and (13) (changes to setbacks and variances for one, two or three-family residences). ~~As discussed above, zoning boards may only grant such variances where it finds that the variance will not have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district. State law requires that zoning boards grant the minimum variance necessary and impose conditions to minimize adverse impacts. Under whole action theory, area variances that are a component of another action that is subject to SEQR would be considered in evaluating the overall impact of the action~~.

Alternative:

The "no action" alternative would remove this item from the Type II list and continue the current situation which would restrict area variances to only one-, two- and three- family residences and lot-line variances.

Comment:

"It is not clear whether the phrase "lot-line adjustments" is intended (a) as a second type of grant (together with "area variances not involving a change in allowable density") that is meant to be covered by the subsection, which would therefore be a Type II Action or (b) another limitation on the types of "area variances" that would be Type II actions. Based on the text of the current subsection ("granting of individual setback and lot line adjustments"), it is clear that the more appropriate reading is the former, which would result in subsection 17 covering two types of "grant" (i.e., "area variances" and "lot-line adjustments"). In order to clarify the meaning of this phrase, I propose adding the phrase "allowing only lot-line adjustments or other area adjustments" immediately before the phrase "not involving a change in allowable density", and removing the term "area" from the phrase "area variances" and the term "lot-line adjustments" from the end of the subsection.2. It is not clear whether the term "density" refers to (a) dwelling unit density (i.e., the maximum number of dwelling units permitted on a zoning lot) or (b) an increase in the allowable floor area, and it is also possible that the term could be interpreted as referring to the concept of zoning lot coverage (i.e., portion of the total area of the zoning lot on which a building stands). In our view, the use of the term "density" indicates an intent to refer to the linked concepts of both (a) and (b); and zoning lot coverage is a distinct concept from both (a) and (b) as it does not involve increases in demand for services or infrastructure…" Comment No. 117.

Response:

The Department chooses to withdraw most elements of the proposed rule in favor the no action alternative, with the exception that lot-line adjustments should be included as Type II actions. Lot line adjustments are sometimes treated as subdivisions. The change is intended to clarify that such adjustments are Type II actions whether they are treated as subdivision reviews or some other type of approval. The simple addition of adjustment (which was proposed in the initial rule), avoids the semantical problems created by the initially proposed new rule.

Comment:

“In the New York City Zoning Resolution (the "NYC ZR"), "density" refers to dwelling units (see density regulations at NYC ZR § 23-20). For this reason, the City is concerned about the impacts that proposed § 617.5 (c) (17) would have on maximum floor area variance applications submitted to the New York City Board of Standards and Appeals ("BSA"). The majority of bulk variance applications submitted to BSA do not involve a "density" increase pursuant to NYC ZR § 23-22 (maximum number of dwelling units). Instead, these applications typically seek approval to exceed maximum floor area requirements. Therefore, under proposed § 617.5 (c) (17), these applications would not involve a change in allowable density and would be exempt from environmental review. In other words, proposed § 617.5 (c) (17) would allow BSA applicants to classify their proposals as Type II actions if the number of dwelling units is not increased above as-of-right allowances, even if the proposed floor area is above the permitted floor area limits. Similarly, BSA applicants seeking approvals for exceeding non-residential floor area limits could also classify their proposals as Type II actions under the proposed amendment. Under these scenarios, projects that would ordinarily need evaluation for their potential environmental impacts on, among other things, transportation, architectural and archaeological resources, shadows, open space, construction, and hazardous materials could avoid this oftentimes necessary review. In consideration of the above, the City urges DEC to revise proposed § 617.5 (c) (17) to include language excluding cities with populations of one million persons or more and instead to retain the current § 617.5 (c) (12) and (c) (13), which classify individual set back and lot line variances and area variances for single-family, two-family or three-family residences as Type II actions, but to limit those Type II categories to cities with populations of one million persons or more.” Comment No. 222.

Response:

See Response to Comment No. 117.

Comment:

“As someone who regularly appears before local zoning boards of appeal, I think that the proposed revision to the Type II listing for area variances will be an improvement. The types of variances that allow for greater density are the ones that are most likely to have an adverse impact. However, it should be made clear that all other aspects of a project are not Type II actions merely because the variance is.” Comment No. 21.

Response:

The Department agrees but in light of the semantical problems of designing the Type II language has decided to retain the existing language with the addition of lot-line adjustments.

Comment:

“The proposed language arguably contravenes the legislative intent underlying the several statutes that govern local land use regulation and the procedures of the zoning board of appeals (ZBA). For example, General City Law Section 81-b(4)(b)(iv) directs a ZBA to consider "whether a proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district" when making a determination on an area variance. The provisions of General Municipal Law §239-m also strongly suggest that an area variance requires a determination of significance under SEQRA. Upon establishment of a county or regional comprehensive plan, any of a number of proposed actions near a mapped boundary must be referred to the county or regional planning council - one such action is "granting of use or area variances." The referral must include the "full statement of such proposed action" - specifically including a completed EAF and all other materials required by such referring body to make its determination of significance pursuant to ... [SEQRA] and its implementing regulations." It is also illogical to argue (as the DGEIS does) that "area variances are categorically not by themselves environmentally significant…Stand-alone area variances, not involving a change in allowable density, should never result in a significant adverse environmental impact." It is difficult to believe that no area variance - even one that increases the maximum allowable height by 40 or 50 feet -- could ever have an adverse environmental impact. This provision is ultra vires and should not be adopted.” Comment No. 5.

Response:

See Response to Comment 117.

2.3.7 Minor Subdivisions (originally proposed 6 NYCRR § 617.5 [c] [18])

Original Proposed Regulatory Language:

Subdivisions defined as minor under a municipality’s adopted subdivision regulations, or subdivision of four or fewer lots, whichever is less, that involve ten acres or less, and provided the subdivision was not part of a larger tract subdivided within the previous five years and is not within or substantially contiguous to a critical environmental area that has been designated pursuant to section 617.14 of this Part.

Upon consideration of comments received, the Department chooses to withdraw this element of the proposed rule and favor the no action alternative. The Department has grouped the comments together and provided a single response or rationale for choosing the no action alternative. The comments and response supersede the discussion of the objectives, rationale, benefits and potential impacts in the original draft GEIS.

~~Objectives, Rationale, and Benefits:~~

Under the municipal enabling laws for subdivision plat review (e.g., Town Law §276) towns, villages and cities may define subdivisions as major or minor with the review procedures and criteria for each set forth in the local regulation. Minor subdivisions have a speedier and less complicated process associated with them since they involve the creation of fewer lots.[24] Along these lines, municipalities often define minor subdivisions as four or fewer lots or two lots. Minor subdivisions present the opposite case from large-scale subdivisions (which the Department believes should have a lower Type I threshold), which often have potentially significant impacts associated with them. On the other hand, the impacts of minor subdivisions are very predictable and controllable, as set forth below, through modern design techniques which for any parcel of land more than one acre in size would include compliance with the Department's stormwater general or individual permit. Since most minor subdivisions would be classified as Unlisted actions (unless located next to a property listed on the National Register, agricultural district or parkland), notice of negative declarations for such projects would not appear in the Environmental Notice Bulletin and thus there is no reliable way to track the number of negative declarations that have been issued for such projects. For the years 2006, 2008, 2010 and 2/3 of 2012, the number of the positive declarations for subdivisions with four lots or less (classified as Type I because of location) was 5. This equates to 11% of the total number of subdivisions (45) with four or fewer lots that were Type I actions on account of location and therefore listed in the Environmental Notice Bulletin. This percentage would greatly shrink if all subdivisions were added to the total number. Lead agencies have likely issued negative declarations for the vast majority of minor subdivisions.

By placing certain minor subdivisions on the list of actions that do not require environmental review under SEQR, the proposed amendment would reduce unnecessary administrative burdens on agencies and landowners with no loss of environmental protection. In the case of these minor subdivisions, agencies could focus their attention on fulfilling the requirements of the municipal enabling laws for subdivision plat review (*see, for example*, Town Law §§276, 277; see also, New York State Department of State, James A. Coon Technical Series, *Subdivision Review in New York*, available at http://www.dos.ny.gov/lg/publications.html) and the requirements of the State Pollution Discharge Elimination System (SPDES) to control stormwater (which apply to any disturbance of an acre or more).[25] Both sets of laws include environmental considerations that are especially relevant to subdivisions.

Potential Impacts:

The impacts of such subdivisions are predictable and the municipal enabling laws provide an ample grant of authority to municipalities to consider the typical and expected environmental impacts of minor subdivisions.[26] Municipalities with zoning can also regulate density and require clustering to reduce impacts. Under such circumstances coupled with the additional caveats for numbers of acres, location within or next to a critical environmental area, provides assurance that such actions would not have a significant effect on the environment.

The typical impacts associated with minor subdivisions are those associated with the development that follows the division of land into lots, which are clearing, grading and filling of the site, noise, dust and runoff. In the case of minor subdivisions, these

~~impacts are minor in nature and easily controlled by modern construction techniques including those required through the Department's stormwater individual and general permits.~~

~~Additional impacts from occupancy of the structure to be located in the subdivisions are use of pesticides and herbicides for lawn and garden care and the construction and operation of water supply wells and onsite sanitary systems. Since the impacts from the construction or expansion and subsequent occupancy are well known and predictable the preparation of an EIS for these projects offers little value to an agency. In addition, there are multiple regulatory controls already in place to prevent impact to sensitive environmental features (e.g., Federal and State wetlands permitting).~~

~~Finally, the expressed concern with this proposed Type II is that applicants for subdivision approval will choose to evade environmental analysis by submitting multiple minor subdivision applications for the same parcel of property rather than one application that would be comprehensively reviewed under SEQR. This impact is addressed through the restriction that the subdivision was not part of a larger parcel that was subdivided in the past five years and the limitation on the number of subdivided acres that could fall into the Type II category.~~

Alternatives:

The "no action" alternative would remove this item from the proposed Type II list and continue to require a SEQR review for minor subdivisions. To the extent that a minor subdivision did not qualify as a Type I action, local governments would retain the ability to, through adoption of their own lists of Type II actions, classify such subdivisions as Type II actions.

~~The second alternative would be to limit the Type II exemption to two-lot subdivisions, which would correspond to how minor subdivisions are defined in some or many municipalities. It does not, however, appear as if potential impacts (if any) would be materially mitigated or avoided by this alternative.~~

~~A third alternative would be to limit the Type II exemption to areas with existing sewer and water systems or communities with adopted zoning laws. This alternative would arguably mitigate impacts since communities with zoning have conferred upon themselves greater powers to avoid impacts (if any) from growth associated with subdivisions. Communities without zoning, however, tend to be rural towns where the impacts of a very small subdivision would not be significant.~~

~~A fourth alternative would be to limit the Type II action to areas outside of agricultural districts established pursuant to Article 25-AA of the Agriculture and Markets Law — whose purpose is to encourage the continued use of farmland for agricultural production. There may be some concern that the proposed Type II would help to incentivize the conversion of agricultural lands to residential lots. The Department does not believe this is a significant issue given the other restrictions placed on the proposed Type II action. However, the addition of this further restriction on the proposed Type II action would insure that residential subdivisions in agricultural districts continue to receive consideration under SEQR.~~

~~A fifth alternative would be to remove the restriction on acres. Arguably, the lot size restriction does not avoid or mitigate environmental impact; it only limits the tracts of land that the Type II classification would be applicable to. On the other hand, the restriction on acreage serves to indirectly favor use of the Type II classification in more already developed areas that have a higher level of infrastructure already in place — thereby indirectly avoiding additional residential sprawl to areas that do not contain residential infrastructure.~~

Comment:

"The statute includes a similar provision for approval of final plats when no preliminary plat is submitted. Notably, there are no exceptions, even for developments identified in municipal regulation as minor subdivisions (*see also Matter of Tehan v. Scrivani,* 468 N.Y.S.2d 402). DEC has no statutory authority to adopt regulations implementing the Town Law or other statutes governing local government procedures, and in any event the rule exempting minor subdivisions from SEQRA review is in direct conflict with statutory provisions and ignores judicial findings that such actions can and do have significant adverse environmental impacts. This exemption should be withdrawn. (Failing this, we note that the DGEIS indicates that one alternative that was considered was to preclude using this exemption in an agricultural district, since the proposal could incentivize conversions of farmland to residential lots. This alternative was rejected for undisclosed reasons. Having identified the potential benefits of this alternative, it could be argued that it is incumbent on DEC to include it in the rules to implement the policy for state agencies enunciated in Ag. & Mkts. Law § 305 (3).)"

Comment:

"We recognize the interest in reducing administrative burdens on agencies and landowners in the case of minor subdivisions that can be expected to result in de minims impacts. We believe that there should be additional restrictions on this Type II action, however, in order to ensure that proposals which might impact scenic, historic and agricultural resources are subject to a review and a determination of significance.

The DGEIS rejects an alternative that would limit this new Type II action to areas outside of agricultural districts in the interest of not incentivizing conversion of agricultural lands to residential lots because 'the Department does not believe this is a significant issue given the other restrictions placed on the proposed Type II action.' The conversion of ten acres of farmland to a four-lot subdivision can result in significant impacts, however, as the value of the land for benefits such as crop production, wildlife habitat, and climate resilience may be compromised. In certain sensitive areas, such as SASSs and near historic sites, such a development can also have negative visual impacts and impact the integrity of a historic resource, as discussed above.

The cumulative impact of even a few minor subdivisions on sensitive visual resources or coastal areas could result in a significant erosion of aesthetic and environmental quality. Especially given that scenic and coastal areas are often subject to increased development pressure, these important qualities could be put at risk by what otherwise might be considered just another inconsequential subdivision. The combined impacts of many small residential projects have degraded forested stretches of the shore of the Hudson River and converted many acres of cropland. The historic

and community character of small hamlets and villages could also be dramatically impacted by a “minor subdivision.”

State policies behind the Type II exemptions and meant to streamline the SEQRA review process should not come to cross purposes with those meant to encourage the continued use of farmland for agricultural production and to protect scenic and historic resources. Therefore, this proposed Type II action should also contain caveats that the exemption will not apply if the proposed subdivision is located within an agricultural district established pursuant to Article 25-AA of the Agriculture and Markets Law, if it is located within a designated SASS, or occurs wholly or partially within, or substantially contiguous to any historic building, structure, facility, site or district or prehistoric site that is listed on the National Register of Historic Places or that is listed on the State Register of Historic Places, or that has been determined by the Commissioner of Parks, recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places.” Comment No. 189.

Comment:

“A subdivision may meet any of the characteristics described in section (18), and yet may still have one or more potentially significant environmental impacts. In rural Columbia County, several towns place fewer and less stringent requirements on minor subdivisions. Less information is requested of an applicant, and fewer standards are required to be met. Yet, in some of these rural communities, most new subdivisions are minor subdivisions. Further, in all of Columbia County, only one critical environmental area (CEA) exists. The CEA provision of state law is underutilized, and thus this part of the proposed regulation would have almost no effect in the entire County. As written, DEC’s language in (18) could have the result that almost none of the new subdivisions in the county would ever receive the scoping or scrutiny of an EIS regardless of the local context. We encourage DEC to refrain from adding (18) to the Type II list, and to leave the determination to the municipalities, so they may evaluate in the local context.” Comment No. 32.

Comment:

“While reducing administrative burdens on agencies and landowners in the case of minor subdivisions that can be expected to result in minimal impacts may be a practical concern deserving support in principle, additional restrictions on this Type II action may be necessary to ensure that proposals which might impact scenic, historic and agricultural resources or significant natural habitats are subject to a review and a determination of significance and that this provision does not result in sprawl.” Comment No. 110.

Comment:

“6 NYCRR § 617.5 (18) should state minor subdivisions only for residential development in compliance with local zoning and subdivision regulations. In presentations, DEC staff stated they intended only residential subdivisions to be considered Type II, and this Board supports subdivisions for any other use (such as commercial retail, offices, and industrial) may involve significant impacts that merit consideration through an environmental review.” Comment No. 161.

Comment:

“Exempting even minor subdivisions from environmental review is not warranted and potentially leaves sensitive ecological areas at risk. There are a few items to consider in this section including the use of critical environmental areas, the lack of a size determination and applicability of the term “substantially contiguous.” First, this section presupposes that any lands to be protected are already designated or proximate to an area that is designated, a “Critical Environmental Area” (CEA). Many vital ecological areas or important habitat areas are not designated as a CEA but maintain an extremely important ecosystem function. According to the NYSDEC website, there are currently only five CEAs in Erie County and the most recent designation was recorded in 1992. Specifically, important ecological areas, such as mature headwater and riparian forests and wetlands, may not be officially designated as a CEA in a small town or village because the CEA designation can be cumbersome for small jurisdictions with limited resources to obtain. Limiting the applicability of this section to only those lands with an official CEA designation leaves important ecological areas as risk.

Furthermore, the ten-acre size determination in this section should be lowered as it could be interpreted as exempting from environmental review development activities impacting valuable wetlands. Currently, oversight of wetlands smaller than 12.4 acres is ceded to the federal government and not subject to oversight under New York law. However, two companion bills to address this issue were recently introduced in both the State Assembly and Senate. These bills strive to protect wetlands by placing wetlands as small as one acre under state jurisdiction. While the Legislature progresses on wetland protection in one area, the State agencies should not put wetlands at risk by changing the terms of this law.” Comment No. 183.

Comment:

“As the City stated in its August 10, 2012 public comments on DEC's draft scope of work for the DGEIS, the City remains concerned about proposed § 617.5 (c) (18), which would create a Type II category for subdivisions defined as minor under a municipality's regulations, or a subdivision of four or fewer lots, that involve ten acres or less. The impacts of nominally minor subdivisions can vary to a large extent and may include impacts to sensitive features such as watercourses, wetlands, and steep slopes. In the City's experience, particularly in the New York City Watershed, the layouts of proposed subdivisions are altered as a consequence of State-regulated wetlands, limiting distances to watercourses, and depending on soil conditions, limited areas within which to serve proposed single-family residential structures with on-site treatment of domestic wastewater (e.g. subsurface septic treatment systems). The City recommends that DEC eliminate this proposed Type II category, or limit its applicability to subdivisions outside of the New York City Watershed.” Comment No. 222.

Comment:

“I am against the addition of “minor” subdivision or “subdivision of four or fewer lots” to the Type II list. The fact that a project is considered "minor" does not mean there will be no associated potentially significant impacts. One or two houses in an area of environmental significance, such as steep slopes or proximity to waterbodies, could have more impact than a large housing project in another area. Also, the size of the house(s) would also be a factor. The disturbance and impacts from four very large houses could be more than the disturbance and impacts from six modestly sized houses. Discretion should be left to municipal agencies.” Comment No. 225.

Comment:

“SEQRA is often the mechanism whereby the impacts of inappropriate minor subdivisions, such as those that cumulatively impact Brookhaven’s drinking water and surface water supplies, are detailed. These SEQRA reviews are an important component of Planning Board and Zoning Board decisions for denial. To exempt minor subdivisions from SEQRA will reduce the ability of Planning Boards and Zoning Boards to review the impacts of minor subdivisions, and may cause more legal judgments to go against municipalities because the information typically contained within a SEQRA review is not part of the official record.” Comment No. 228.

Comment:

“In general, I support the proposed changes to SEQRA as they will facilitate a more efficient review process. However, I offer the following recommended edit:

(18) subdivisions defined as minor under a municipality’s adopted subdivision regulations, or subdivision of four or fewer lots, whichever is less, that involve ten acres or less than one acre of disturbance, and provided the subdivision was not part of a larger tract subdivided within the previous five years from the date of the application for plat approval and is not within or substantially contiguous to a critical environmental area that has been designated pursuant to section 617.14 of this Part;

The above edit is recommended for the following reasons:

1. The area of physical disturbance is a better indicator of a potential environmental impact than the amount of acreage involved in the total subdivision application.

2. In rural communities it is very common for large tracts of land (well in excess of 10 acres) to be subdivided for estate planning purposes with no physical improvements or changes to land use proposed. These types of subdivisions should be considered Type II Actions as well.

3. Many communities process lot line mergers and lot line adjustments (where no new lots are created) as subdivision applications. These types of applications also typically involve no new development or disturbance, but can involve greater than 10 acres of land and should be considered Type II Actions.

4. In suburban communities, particularly those with no sewer or water infrastructure, a minor subdivision application involving less than 10 acres of land can easily involve more than 1 acre of disturbance thus requiring NYS permits for

stormwater discharges from construction activities. These applications may also involve clearing of habitat known to be sensitive for threatened and endangered species (particularly in light of the northern long-eared bat), but not necessarily within a designated critical environmental area. As such, minor subdivisions involving less than 10 acres of land but greater than 1 acre of disturbance may have greater potential for environmental impacts than a subdivision involving more than 10 acres of land and no disturbance. Therefore, these applications should not be considered Type II Actions, as this classification would diminish a board's ability to require the reorientation or reduction of lots to avoid impacts." Comment No. 231.

Response:

Upon consideration of comments received, the Department favors the no-action alternative. While few minor subdivisions have potentially significant environmental impacts associated with them, the Department cannot categorically make this conclusion without the addition of conditions such that the exceptions to the Type II category would overcome the rule. The Department is also persuaded not to adopt the proposed Type II provision for minor subdivisions, namely, for the reason that some or many municipalities have difficulty tracking subdivision chronology. The concern is that an applicant or landowner could escape major subdivision review and SEQR by applying for successive minor subdivisions for the same lands. Many local laws contain a "look back" provision to guard against this possibility. However, one commenter pointed out that many municipalities have a difficult time administering the look back provision on account of limitations in record keeping. This particular proposal may still be meritorious but better adopted at the municipal level by local governments that believe they have the capacity to administer the Type II.

2.3.8 Sustainable Development (originally proposed 6 NYCRR § 617.5 [c] [19], [20], [21] and [22])

Original Proposed Regulatory Language:

(19) On a previously disturbed site in the municipal center of a city, town or village having a population of 20,000 persons or less, with an adopted zoning law or ordinance, construction of a residential or commercial structure or facility involving less than 8,000 square feet of gross floor area, not requiring a change in zoning or a use variance or the construction of new roads, where the project is subject to site plan review, and will be connected (at the commencement of habitation) to existing community owned or public water and sewerage systems including sewage treatment works that have the capacity to provide service;

(20) On a previously disturbed site in the municipal center of a city, town or village having a population of more than 20,000 persons but less than 50,000 persons, with an adopted zoning law or ordinance, construction of a residential or commercial structure or facility involving less than 10,000 square feet of gross floor area, not requiring a change in zoning or a use variance or construction of new roads, where the project is subject to site plan review, and will be connected (at the commencement of habitation) to existing community owned or public water and sewerage systems including sewage treatment works that have the capacity to provide service;

(21) On a previously disturbed site in the municipal center of a city, town or village having a population more than 50,000 persons but less than 250,000 person , with an adopted zoning law or ordinance, construction of a residential or commercial structure or facility involving less than 20,000 square feet of gross floor area, not requiring a change in zoning or a use variance or construction of new roads, where the project is subject to site plan review, and will be connected (at the commencement of habitation) to existing community owned or public water and sewerage systems including sewage treatment works that have the capacity to provide service;

(22) On a previously disturbed site, within one quarter of a mile of a commuter railroad station, in a municipal center of a city, town or village having a population of 250,000 persons or more, with an adopted zoning law or ordinance and within a transit oriented zoning district or transit oriented overlay zoning district, construction of a residential or commercial structure or facility involving less than 40,000 square feet of gross floor area, not requiring a change in zoning or a use variance or construction of new roads, where the project is subject to site plan review, and will be connected (at the commencement of habitation) to existing community owned or public water and sewerage systems including sewage treatment works that have the capacity to provide service;

In connection with these proposed new Type II actions, the Department also proposed to add the following definitions to section 617.2 as follows:

"'Municipal center' means areas of concentrated and mixed land uses that serve as central business districts, main streets, and downtown areas;" and

"'Previously disturbed' means a parcel of land in a municipal center that was occupied by a principal building used for residential or commercial purposes where the building has been abandoned or demolished."

Upon consideration of comments received, the Department chooses to withdraw this element of the proposed rule and favor the no action alternative. The Department has grouped the comments together and provided a single response or rationale for choosing the no action alternative. The comments and response supersede the discussion of the objectives, rationale, benefits and potential impacts in the original draft GEIS.

~~Objectives, Rationale, and Benefits:~~

~~The four proposed Type II actions described above — which allow for a sliding scale of re-development activity depending on population levels — are actions that would not have a significant impact on the environment. Development of sites that have been previously disturbed and that have existing infrastructure categorically result in significantly less environmental impact than developing undisturbed sites (that are not located in downtown or main street areas). The proposed Type II actions would in effect create a regulatory incentive for redevelopment of existing sites in downtown and main~~

street areas already served by public infrastructure, which has clear environmental benefits over "greenfield" sites that have not been already developed. The Department has set out in Appendix F a list of supportive research for the proposition that locating development on such areas has less impact on the environment than development on previously undisturbed sites without existing infrastructure and that is automobile dependent.[27] Further, State policy favors development of existing sites in municipal centers.[28]

The Department has conditioned the proposed Type II categories for sustainable development on conformance with zoning and site plan review, which insures that the classification may only be applied in those local jurisdictions that have exercised the tools given to them by the State Legislature to appropriately manage land use. The Legislature has given cities, towns and villages authority to manage land use and many of its impacts. These powers are constitutionally enshrined in Article IX of the State Constitution and implemented through the Statute of Local Governments, the Municipal Home Rule Law, city charters (e.g., the New York City Charter) and the other municipal enabling acts (e.g., Article 16 of the Town Law and Article VII of the Village Law).As a consequence, small scale impacts of a project (that do not rise to the level of significant under SEQR) can be addressed through the municipal land use review process (i.e., comprehensive planning, zoning and special use permits or site plan review, or both).

The Department has proposed definitions for municipal center and previously disturbed to identify the types of properties that were intended to benefit from the Type II, namely downtown, previously built on locations already served by existing infrastructure. The Department considered many other formulations to convey this meaning as downtown areas are usually defined through municipal comprehensive plans and then implemented through zoning. They cannot be precisely defined in a state-wide rule making for hundreds of municipalities across the state.

Potential Impacts:

Potential adverse impacts are avoided because of the many limitations built into the proposal. To qualify, among other requirements, the building must be on a site that is occupied or previously occupied by a principal building, small in scale (based on a relative scale according to population). It has to be connected to existing sewer and water, located in a downtown or mixed use location, and subject to site plan review (which enables municipalities to review a project based on a wide list of community and environmental considerations).

Directing growth to previously disturbed areas has clear environmental benefits: improved air and water quality, reduction of greenhouse gas emissions, greater habitat and open space protection, farmland preservation, clean-up and re-use of Brownfield sites, elimination of blight, and fish and wildlife protection. Development within "municipal centers" is largely characterized by "smart growth" land use patterns – i.e., higher density; mixed land uses; increased transit accessible and viability; greater roadway connectivity and accessibility; and varied mobility options, such as walking and biking. Taken together, these land use characteristics have been shown to reduce vehicle miles travelled (VMT) and the number of car trips necessary for daily travel by creating "location-efficiency" – i.e., greater proximity, accessibility and connectivity

among land use destinations. This result in turn reduces automobile air pollution and greenhouse gas emissions.

Compact, higher-density development, for example, reduces travel distance between buildings and land uses. Mixed-use zoning places a variety of life's daily destinations – home, work, recreation, retail shopping, civic – within close and accessible proximity to residences and one another, thus further reducing the miles we travel and the number of car trips necessary to access these amenities. And roadway connectivity offers more travel route options, quicker and easier access to our daily destinations, and generally less traffic congestion. Density, mixed land uses and transportation connectivity also combine to yield a built environment that is conducive to walking, biking, mass transit and trip-bundling (i.e., minimizing the number of trips by accessing several destinations in one condensed trip), which also reduces adverse environmental impacts.

Conversely, sprawling development patterns – dispersed, low-density, single-use, disconnected development on the metropolitan fringe – tend to increase travel distances among daily destinations, which increases automobile dependence, VMT and greenhouse gas emissions. Researchers estimate that 50 – 60% of increases in VMT since 1950 are attributable to sprawling development patterns. Streamlining development projects in "municipal centers" offers a powerful antidote to sprawl, and its concomitant auto reliance and adverse environmental impacts.

Location does matter, and in the context of vehicle emissions, location matters a great deal. Indeed, without land use changes, particularly regarding the location of development, the State and nation simply cannot meet meaningful greenhouse gas emission reduction goals.

The Department believes that the proposed sustainable development Type II action for the largest category of building size and communities, involving buildings with less than 40,000 square feet in communities of 250,000 persons or more, should only apply to areas within one half mile of a passenger train station. This is to account for the fact some of the communities where this largest category could potentially apply (e.g., in Nassau and Suffolk counties) contain some very large and dispersed communities (in terms of population) with no readily definable downtown areas. Because of the way many of these Long Island communities were developed in the post-World War II era, the proposed Type II category might end up applying to areas where the proposed Type II category could potentially contribute to sprawl rather than provide an incentive for sustainable development. This limitation would help to insure that the Type II category is not inappropriately applied in areas that would not constitute municipal centers. The larger category also corresponds to communities that have transit and opportunities for transit oriented development including the City of Buffalo as well as many Long Island communities.[29] The proposed Type II action could help to incentivize the efforts of those communities in promoting transit oriented development.[30] In particular, Buffalo has many areas in need of downtown revitalization. The city, however, has an important asset, namely a light rail system that serves the municipal center of the city. The Type II could assist the City in making areas near the light rail stations more attractive to developers and therefore nodes of development activity in the city center.

Alternatives:

The “no action” alternative would remove this item from the proposed Type II list and continue to require a SEQR review for such development. To the extent that such actions do not qualify as a Type I action, local governments would retain the ability to, through adoption of their own lists of Type II actions, classify such actions as Type II actions.

Comment:

“Proposed new definitions of the terms “municipal center” and “previously disturbed” limits the exemption to project sites located in areas of concentrated and mixed land uses that serve as central business districts, main streets and downtown areas, and parcels where the principal building has been abandoned or demolished. Thus, the new Type II actions are meant to promote development of previously disturbed sites with existing infrastructure, and which can be categorically assumed to have less impact than similar development on green fields. Scenic Hudson supports policies meant to revitalize central business districts, main streets and downtown areas, and agrees that such development, so long as it is in compliance with existing zoning requirements and subject to site plan review, should be incentivized. We have the following additional specific comments:

The lowest population threshold of up to 20,000 persons allowing for construction of up to 8,000 sf of gross floor area will capture many municipalities in the Hudson Valley with populations much smaller than this amount. For example, the Village of Millbrook has a population of only about 1,450 people and an area of only 1.9 square miles. And the Village of Tivoli, a 1.64 square mile community on the shore of the Hudson River, has a population of approximately 1,100 people. These small municipalities are well below the 20,000 population threshold. DEC should include an analysis in the FGEIS of whether 8,000 sf of gross floor area is an appropriate size for new construction to be exempted from SEQRA review in the case of such smaller municipalities and their corresponding municipal centers, and provide a smaller threshold if appropriate. For instance, for municipalities of 10,000 persons or less, a gross square foot limit of 3,000 or 5,000 might be more appropriate.

In addition, the proposed new Type II actions should include a provision that makes it clear that such development will remain subject to any local law or ordinance requiring architectural review and consistency with historic district requirements. Finally, similar to our comments above regarding other proposed Type II actions, in the event such proposed construction occurs wholly or partially within, or substantially contiguous to any historic building, structure, facility, site or district or prehistoric site that is listed on the National Register of Historic Places or that is listed on the State Register of Historic Places, or that has been determined by the Commissioner of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places, it should not be deemed a Type II action exempt from SEQRA review.” Comment No. 189.

Comment:

“The definition of municipal center is flawed. The language “areas of concentrated and mixed use” is vague. In a rural or suburban context, this vagueness may well lead to application in areas not intended by DEC, such as primarily commercial strips in suburban and rural communities. Such areas could be considered to “serve as” a central business district in municipalities that otherwise lack such districts. These areas are not concentrated in the same way as a more densely developed urban center, but in the context of a rural or suburban community, such areas could be deemed “concentrated.” Residential use is often close by to commercial strips in suburban and rural areas, meeting the “mixed use” part of this definition. Adding this definition, and using it to add some actions to the Type II list is problematic. CLC disagrees with the premise behind this, that actions in municipal centers are less likely to have significant environmental impacts. We believe these amendments would undercut the state’s longstanding policies supporting smart growth, as well as the intent of SEQR.

“(af) “Previously disturbed” means a parcel of land in a municipal center that was occupied by a principal building used for residential or commercial purposes where the building has been abandoned or demolished.”

The definition of previously disturbed, tied as it is to the premise that certain actions on sites previously occupied by residential or commercial buildings, ignores context. Community context is important to the consideration of potential environmental impacts, their avoidance, minimization, and mitigation, as intended under the state environmental quality review act (SEQRA). CLC urges NYS DEC to refrain from adding this definition and the related amendments to the list of Type II actions.”

Comment:

“§ 617.5(c) (~9) to (22) -The various thresholds in these sections appear to have been chosen at random. There is no support for them in the GEIS. Unless and until there is factual support for these numbers, these proposed new sections should be withdrawn.” Comment No. 21.

Comment:

“An exemption would be added for construction of a residential or commercial structure or facility on a "previously disturbed site" in the "municipal center" of municipalities of various sizes. However, there is no specified timeframe for when the disturbance has taken place, it could have been 100 years ago or 100 days ago. Also, the DGEIS acknowledges that it is difficult to precisely define a "municipal center." As a result, it is not entirely clear how some areas in mid-sized communities will be determined to be municipal centers - in a city with multiple commercial areas, would a remote block or corner with 5 or 6 commercial establishments count? The absence of environmental history of these proposals calls into question the Type II designation criteria stating such projects can have no significant impact on the environment. How is it known that such a project meets these criteria when the municipal center can't be clearly defined so as to identify similar projects? In the case of the exemption related to a "transit oriented overlay zoning district," although we are pleased to see that the

distance was decreased to one quarter mile, the language is so specific as to appear to exclude only one area/project, undermining the concept of the Type II designation and potentially raising questions about why such project must be excluded from SEQRA review. It should also be noted that although the proposal addresses municipalities "with a population of more than 20,000 persons but less than 50,000 persons" and a population "more than 50,000 persons but less than 250,000 person [sic)", it fails to account for a municipality with a population of exactly 50,000 persons." Comment No. 5.

Comment:

"§ 617.2(z) 1. The proposed definition of "municipal center" is extremely vague. If the term is not better defined, there will be repeated l litigation over whether or not a specific project site fits this definition. Also, it is not clear if this designation will be applied on an ad hoc basis, at the whim of lead agencies. To avoid these problems, the definition should be limited to sites previously designated in local SEQR regulations under § 617. 14, or in a local comprehensive plan or zoning code.

§ 617. 2(af) -Why is the definition of "previously disturbed" limited to only residential and commercial uses?

§ 617. 2(af) - The definition of "previously disturbed" should be limited to those parts of a site that were actually occupied by a building and other improvements. It should not apply to any parts of the site that are still in a relatively natural state." Comment No. 21.

Comment:

Although Buffalo is specifically mentioned by the NYSDEC as benefiting from this proposed addition (citing the light rail line), the language could be clarified in the proposed rule change to include "Metrorail Station" or light rail. • Consider including proposed redevelopment projects up to 20,000 square feet (consistent with the language for municipalities under 250,000) outside of the transit corridor be classified as Type II Actions as long as they adhere to the established requirements defined under "municipal center" (areas of concentrated and mixed land uses that serve as central business districts, main streets, and downtown areas) and "previously disturbed". • Additional clarification should be provided in regards to what defines a "main street" under the "municipal center" definition." Comment No. 30.

Comment:

"Town centers and main streets are of great importance to communities, environmentally, socially and economically. Sites of abandoned or demolished buildings are often sites that municipalities seek to re-use. New development may be very different from previous development, and there may well be potential environmental impacts even though a site was developed previously. A blanket approach is not appropriate." Comment No. 32.

Comment:

"The provisions regarding previously disturbed sites in municipal centers (proposed paragraphs 617.5 (c) (19) through (22)) may be interpreted too broadly under the proposed definitions of "municipal center" (§ 617.2 (z)) and "previously disturbed"

(§ 617.2 (af)). Although the goal of encouraging development in already-developed areas rather than encouraging sprawl is a good one, how far out on a "main street" would the "municipal center" extend? And is a parcel "previously disturbed" if it was occupied by a small house that was demolished years ago and has since become habitat for an endangered species? These can be very community-specific decisions and might better be left within the existing authority of local agencies to adopt their own Type II lists under subdivision 617.5(b).” Comment No. 49.

Comment:

“We support the adoption of Type II exemptions for infill development/sustainable development in cities, towns, and villages of various sizes at set forth in proposed 6 NYCRR §§ 617.5(c) (19) - (22). We would further recommend the revision of proposed §617.5(c) (22) to cover cities, towns, and villages of 250,000 to 1,000,000 persons only, and would add a fifth exemption for municipalities of greater than 1,000,000 persons. For the largest category, which would cover New York City, DEC should increase the maximum size for infill developments to 60,000 square feet and clarify that a subway station is a "commuter rail station" for the purposes of qualifying for the exemption. As proposed, the provision would have virtually no impact in New York City, which is in as much need of infill rehabilitation as the rest of the state …The language of the proposed new Type II category speaks of sites ‘within one quarter mile of a commuter railroad station," but the corresponding analysis in the DGEIS states that this category would be appropriate for sites "within one half mile of a passenger train station.’ The proposed language should be consistent as between the DGEIS and the proposed language of the regulation.” Comment No. 151.

Comment:

“Page 7 (af) Previously Disturbed- Current proposed definition is narrowly drawn and specific to municipal locations. Also, it is not broad enough to address other types of previous disturbance to a site and may lead to confusion in assessing impacts to archeological resources (e.g. SHPO has specific requirements for documenting "previous disturbance" under Section 14.09 of NYS PRHPL or Section 106 (NHPA- 54 U.S.C. § 306108)). Consider using the following definition in ·addition to or in lieu of the one proposed. It is taken from FEMA guidelines and is consistent with the general understanding of archeological prior ground disturbance: "Previously disturbed ground" means that some type of ground disturbing activity has taken place in an area that may have affected the Integrity-or intactness-of archeological resources present at a site.” Comment No. 155.

Comment:

“Remove the phrase 'in a municipal center' from the definition of 'previously disturbed' in 6 NYCRR § 617.2 (af). In presentations DEC has explained the intent of some of the changes to Part 617 is to help simplify the environmental review of infill development. Since every place within the revised Part 617 where the phrase 'previously disturbed' is found, it is accompanied by the phrase 'in a municipal center,' thus making inclusion within the definition redundant. Further, the inclusion of this phrase within the definition of 'previously disturbed' would limit extending an exemption

to infill development on a site previously disturbed that is not in a municipal center." Comment No. 161.

Comment:

"6 NYCRR § 617.5 (19) needs to clarify what counts toward the 8,000 limit for residential and commercial projects. It seems most likely that the limit is intended for the footprint of the proposed building, but the existing proposed section has no guidance on whether it is limited to the size of the proposed disturbance, floor area, or footprint of the proposed building. This section should also specify that the proposed projects are in compliance with local zoning. Finally, an 8,000 square foot single family residence on a small lot may be completely out of character with surrounding residences, for example on a lakefront with small cottages; thus DEC should consider lowering the limit for residential development to 3,000 or 4,000 square feet." Comment No. 161.

Comment:

"The definition or intent of "Municipal center" is vague. It is unclear whether areas adjoining or abutting downtown areas could be construed to be included in a "municipal center." On its face, this definition appears clear and logical but the potential application leaves room for interpretation regarding the geographical bounds of a municipal center. How far does it extend and what does it include? The blanket provisions in this section should not apply to Coastal Areas or special review districts. This definition becomes increasingly important as Type II actions are triggered." Comment No. 183.

Comment:

"First there are two clarity difficulties regarding the definitions of, "municipal center" and "previously disturbed." Concerns regarding the definition of municipal center are addressed above in 6 NYCRR § 617.2 (z). In addition to this, the definition of "previously disturbed" lacks clarity on the meaning of the term "principal building." This definition does not specify how abandoned lots that once had a building are to be considered…These sections also appear to apply predominately to new construction, whether infill or not. Although these sections are predicated on compliance with the zoning code and the requirement that no variance be needed, among other factors, that does not adequately account for the protected rights which could be explored in an environmental review such as the effects of the height of a newly constructed structure on the viewshed of the surrounding area or traffic implications due to an increase in people and change in use. For example, some development on parcels on the Outer Harbor in the City of Buffalo could be considered a Type II action under these new criteria even though it may abut critical coastal habitat. It is Riverkeeper's opinion that waterfront development without a full environmental review is irresponsible." Comment No. 183.

Comment:

"First, the City supports DEC efforts to incentivize redevelopment of previously disturbed sites in municipal centers that are served by public transportation infrastructure. However, based on the current proposal, it is unclear what DEC considers to be a "commuter railroad station". The City recommends that DEC broaden the applicability of 6 NYCRR § 617.5 (c) (22) by making it clear that this Type II category

applies to previously disturbed sites in a municipal center that is within a quarter mile of a commuter railroad or subway station or that are otherwise transit oriented, which may include a location within a transit oriented zoning district or transit oriented overlay zoning district. Second, the City recommends that DEC revise 6 NYCRR § 617.5 (c) (22) by increasing the floor area threshold for residential buildings, or predominantly residential buildings containing commercial and/or community facility space, from less than 40,000 square feet of gross floor area to less than 50,000 square feet of gross floor area. This change would help ensure that this Type II category would apply to the majority of affordable housing projects funded through the New York City Department of Housing Preservation and Development's ("HPD") Neighborhood Construction Program ("NCP"), which is available to certain development projects with 45 affordable dwelling units or less. These NCP-funded projects will oftentimes include ground floor commercial or community facility space if it is permitted by zoning. HPD anticipates an increase in NCP projects, and streamlining the environmental review for NCP-funded projects that would otherwise meet the requirements of this section would result in lower costs to affordable housing developers and would ultimately be beneficial to the City's overall affordable housing goals without additional significant adverse impacts on the environment. In light of the above, the City requests that DEC revise§ 617.5(c) (22) as follows:

Section 617.5 (c) (22) on a previously disturbed site, within one quarter of a mile of a commuter railroad or subway station or that is otherwise transit oriented, which may include a location within a transit oriented zoning district or transit oriented overlay zoning district, in a municipal center of a city, town or village having a population of 250,000 persons or more, with an adopted zoning law or ordinance {and within a transit oriented zoning district or transit oriented overlay zoning district], construction of a residential structure or [facility, or a predominantly residential structure or facility containing commercial and/or community facility space, involving less than 50,000 square feet of gross floor area or commercial structure or facility involving less than 40,000 square feet of gross floor area, not requiring a change in zoning or a use variance or construction of new roads, where the project is subject to site plan review, and will be connected (at the commencement of habitation) to existing community owned or public water and sewerage systems including sewage treatment works that have the capacity to provide service…" Comment No. 222.

Comment:

"Municipal Center:" This definition needs to be clarified as it is too specific to be used in all conditions found in the various types of communities. A Municipal Center as proposed is difficult to apply in a suburban setting, for example. The definition should be revised to recognize these differences or to permit Municipal Centers to be specifically defined by the municipality. 3. 617.2 (af) Definitions- "Previously Disturbed:" If a parcel of land was previously disturbed in a municipal center, it was not necessarily a commercial or residential use. The uses in a municipal center may also include structures operated by governments, utilities, religious uses and others. The definition, therefore, should be expanded accordingly." Comment No. 227.

Response:

The Department chooses to withdraw the sustainable development Type II in favor of the no action alternative. Before setting out the specific reasons for the Department's choices, the Department observes that in-fill development or smart growth is, in general, environmentally preferable to what has become colloquially known as "sprawl." DEC notes that the comments mostly agreed with the goal of supporting in-fill development. The existing Type II for replacement in-kind supports the concept of reuse as does the proposed Type II for reuse of existing buildings. Thus, in choosing the no-action alternative, the Department has not abandoned support of in-fill development. While some commenters expressed their belief that the Department was engaging in policymaking, State policy already favors smart growth.

The Department prefers the no-action alternative here as it cannot adequately define the phrase "municipal center" with sufficient precision, as many of the commenters have pointed out. One commenter stated, "a blanket approach is not appropriate." The State is too diverse. Even the use of transit oriented districts to define the geography of the proposed Type II suffers from the problem that they are not specifically recognized in the state municipal zoning enabling acts. Inasmuch as the Department cannot know with a reasonable degree of certainty the areas of the State that would be designated for in-fill and Type II classifications, despite its best and exhaustive efforts to define municipal center, it cannot categorically say that the Type II action would not have a significant impact on the environment. Individual municipalities are in a much stronger position to identify in-fill locations and possibly to adopt their own Type II actions based on specific mapping and characteristics of a location. The cities of Buffalo and New York, based on their comments, are certainly in a position to develop a Type II category around their transit oriented locations or districts. Thus, the Department continues to support the concept behind the Type II but chooses to defer to municipalities to the extent they wish to use the authority granted to them under SEQR to develop their own Type II lists to encourage in-fill development.

2.3.9 Reuse of an Existing Residential or Commercial Structure (originally proposed 6 NYCRR § 617.5 [c] [23]; revised proposed 6 NYCRR § 617.5 [c] [18])

Original Proposed Regulatory Language:

<u>In a city, town or village with an adopted zoning law or ordinance, reuse of a commercial or residential structure, where the activity is consistent with the current zoning law or ordinance;</u>

Revised Proposed Regulatory Language:

<u>Reuse of a residential or commercial structure, or of a structure containing mixed residential and commercial uses, where the residential or commercial use is a permitted use under the applicable zoning law or ordinance, including by special use permit, and the action does not meet or exceeds any of the thresholds in section 617.4 of this Part.</u>

Objectives, Rationale, and Benefits:

The built environment of New York State contains many structures that are currently vacant or abandoned. For example, in 2013, the City of Albany ~~has recently~~ determined that there were ~~are~~ 809 vacant buildings in the city.[31] That estimate may have increased to over 1000 such buildings since 2013, See City of Albany, Department of Buildings and Regulatory Compliance, Vacant Building Report, January 20, 2017, published on the City of Albany's website at http://www.albanyny.gov/Libraries/Buildings_Regulatory_Compliance_Docs/Vacant_Building_Report_Jan_20_2017.sflb.ashx, last visited on March 5, 2018. These vacant structures, if not properly maintained, contribute to urban blight and suburban flight and are an under-used resource. Many of these structures could be reused for housing or commercial development rather than developing a previously undeveloped site. Returning a vacant residential or commercial structure to a productive use can reduce blight, improve the vitality and live-ability of a neighborhood and return structures to municipal tax rolls.

Potential Impacts:

Since these properties generally have existing infrastructure, the suite of potential environmental issues is very limited, easy to predict, and routinely handled under municipal land use regulations. The reuse of a residential structure will: generate traffic, have air emissions from heating and cooling, use water and generate wastewater, solid waste and noise. All of these impacts are limited in nature, will in many cases be using existing infrastructure, and are routinely handled through the existing local land use approval process and code reviews. The reuse of a commercial structure will also: generate traffic, have air emissions from heating and cooling, use water and generate wastewater, solid waste and noise but on a slightly greater level.

The requirement that the ~~activity must be consistent with current zoning~~ use must be permitted by zoning including by special use permit will limit the applicability of the Type II to those projects that have been pre-determined by the local municipality to be an allowable use. This Type II is akin to the Type II for replacement in kind, and the revised language contains the same additional limiting conditional, namely, that the action must not trigger any of the Type I thresholds. Industrial uses are not included in this Type II category.

Rehabilitation of an existing building avoids the "embodied energy" required for new construction – *i.e*., the energy (and concomitant pollution and environmental degradation) required to extract, produce and transport new construction materials, and the actual construction of the building. (A common phrase among green building advocates is "the greenest building is the one that isn't built.") [32] An existing structure already possesses its embodied energy, with the exception of maintenance and rehabilitation. And unlike new construction, rehabilitation involves largely labor (usually local), and less materials. Rehabilitation also avoids the disposal of building materials in a landfill that would result from the ultimate demolition of an existing building that is not maintained or restored.[33] Since one-quarter of the material in solid waste facilities is comprised of construction debris (much of which is from building demolition), the

minimization or avoidance of building demolition through rehabilitation reduces solid waste.

The rehabilitation of existing structures in municipal centers also reaps environmental benefits through Brownfield clean-up and re-development. According to the Preservation League of New York State, 27% of the historic rehabilitation projects in Rhode Island's historic rehabilitation tax credit program (2002 – 2006) were located in Brownfield areas; one would expect similar – or greater – correlations in New York State.

Alternatives:

The "no action" alternative would remove this item from the proposed Type II list and continue to require a SEQR review prior to the proposed reuse of a vacant or abandoned structure to the extent there is a discretionary review involved in the reuse. This may serve as a deterrent to the redevelopment of existing structures and result in development of a previously undisturbed site with all of the impacts associated with the development of a green field site.

Another alternative would be to expand this provision to apply to all structures including governmental and industrial uses. In the case of industrial uses, they frequently involve processes that use or store hazardous chemicals, require permits for air and water emissions, result in fugitive emissions of non-regulated compounds and may require new infrastructure to store or treat water and air emissions. Also, industrial uses have a greater range of potential impact issues that are more difficult to predict when compared to residential and commercial activities and generally they fall outside of the traditional land use authority.

Comment:

"The phrase "consistent with the current zoning law or ordinance" is very vague and will lead to a high volume of litigation, unless it is clarified. It should be limited to uses permitted as of right without site plan review or a special use permit, so as to clarify its meaning." Comment No. 21.

Response:

The phrase has been changed to permitted by zoning, which could mean permitted "as of right" or permitted but subject to a special use permit. If an action is permitted as of right and involve no discretionary approvals, then it would not be subject to SEQR in any event. If the change of use requires a special use permit, then the suite of impacts normally associated with a change of use (i.e., construction and traffic) can be addressed through special use permit review.

Comment:

"We support the inclusion of a Type II category for the reuse of existing structures (where consistent with zoning), but note that the term "commercial" is not defined (unlike the term "residential" which is defined). This category could also be expanded to include the reuse of municipally-owned structures and community facilities as they are defined in local zoning. It is not clear whether "reuse" limits the structure to

its existing size or would also allow expansion of the structure as long as the expansion was consistent with the current zoning." Comment No. 151.

Response:

The qualifying phrase has been changed to a use permitted by zoning as mentioned above. Changes involving new construction would be subject to SEQR unless they were covered by 6 NYCRR § 617.5 (c) (2). Thus, this Type II provision is only intended to cover reuse of the inside of the building. Inasmuch as this Type II is akin to the Type II for replacement in kind, DEC has also added the same limiting language as that Type II contains, namely that the action not trigger any of the Type I thresholds.

DEC prefers not to separately define the term "commercial" since it has a well understood common meaning or is defined in zoning laws. It should also be made clear that the change of use referred to in this Type II only refers to commercial and residential uses and not to changes to industrial activities. Industrial uses are not covered by this Type II category.

The Department did not add "governmental uses" since this Type II is focused solely on residential and commercial reuses though the Department would consider such an addition. This Type II for reuse does not include provision for expansion of the use but reuse only. The primary environmental impacts associated with reuse of an existing building are usually construction-related or ones associated with a change of use. The Type II category has therefore been qualified to disqualify reuses that involve a change of use. Based on the comments, DEC has added language that the reuse must be either residential or commercial or mixed use.

Finally, the Department evaluated the ENB to determine whether reuse actions typically receive a negative or positive declaration. DEC's ENB search of projects (where a sufficient description of the action was provided) identified 14 actions in 2016 and nine actions in 2017. All such actions received negative declarations.

2.3.10 County Planning Board referrals under Section 239-m or 239-n of the General Municipal Law (originally proposed 6 NYCRR § 617.5 [c] [24]; revised proposed 6 NYCRR § 617.5 [c] [19])

Original Proposed Regulatory Language:

The recommendations of a county or regional planning board or agency pursuant to General Municipal Law sections 239-m or 239-n.

Objectives, Rationale, and Benefits:

A frequently asked question by town and county planners is whether the county or regional planning board recommendation is subject to SEQR. County planning board recommendations are advisory opinions (*Headriver, LLC v Town Bd. of Town of Riverhead*, 2 N.Y.3d 766 (2004)) and not subject to SEQR. An explanation of this interpretation by the courts is already included in the SEQR Handbook (DEC SEQR Handbook, p. 179, 2010 PDF Version, available on DEC's website at http://www.dec.ny.gov/permits/6188.html). This proposal would codify the status of such recommendations thereby bringing greater certainty to the law.

Potential Impacts:

This potential amendment will not have a significant adverse impact on the environment of the State of New York. These advisory activities presently do not trigger a SEQR review.

Alternative:

The “no action” alternative would remove this item from the Type II list. An explanation of this interpretation by the courts is already included in the SEQR Handbook so deleting this regulatory change would result in no real change in practice but it would miss an opportunity to provide municipalities and county planning agencies with clear direction on the applicability of SEQR to the 239-m & n process.

Comment:

“The proposal exempts the recommendations of a county or regional planning council pursuant to General Municipal Law §§ 239-m or 239-n. We note that § 239-m requires delivery of a full statement of the proposed action, which must include a completed EAF. Since the actions subject to reviews under this section includes area variances, this exemption would only be acceptable lf the earlier Type II list additions for area variances and smaller subdivisions are deleted. If all three are adopted, some land use decisions could escape any form of environmental review, contrary to statutory provisions and legislative intent.”

Response:

The Type II for minor subdivisions has been removed and the only addition to the Type II categories covering setbacks and areas variances is the addition of lot line adjustments. If a lot line adjustment is referred to a county planning board or agency an EAF would not be a required element of the full statement. The county planning agency however, can use the online EAF forms to evaluate the action.

2.3.11 Dedication of Parkland (originally proposed 6 NYCRR § 617.5 [c] [44]; revised proposed 6 NYCRR § 617.5 [c] [39])

Original Proposed Regulatory Language:

Dedication of parkland.

This Type II classification has been merged with acquisition of parkland. See Section 2.3.12, below.

Objectives, Rationale, Benefits:

SEQR requires a close look at development projects that will be located in or next to parklands. In general, parkland is accorded special protection in the law. (Over eighty years ago in *Williams v. Gallatin*, 229 N.Y. 248, 253, the Court of Appeals explained "[a] park is a pleasure ground set aside for the recreation of the public, to promote its health and enjoyment.”] Parkland protection is given special prominence in SEQR. The SEQR regulations accomplish the hard look requirement for parklands by including in the Type I list (actions more likely to require an EIS) any unlisted action “occurring wholly or partially within or substantially contiguous to any publicly owned or

operated parkland, recreation area or designated open space," if such use exceeds 25 percent of any of the Type I thresholds.

On the other hand, the Department does not believe that the dedication of parkland, whereby the State or a municipal government devotes land for parkland purposes, has under any circumstances a significant, adverse impact on the environment. Therefore, the Department believes that the act of dedicating land as parkland should be added to the Type II list. This Type II addition was mentioned by participants at one or more of the stakeholder meetings. This proposed Type II action applies only to the dedication of land as parkland and would not exempt park management or developments plans or actions that would otherwise be subject to SEQR as Unlisted or Type I actions.

Alternative:

The "no action" alternative would not add dedication of parkland to the Type II list. The Department also considered an alternative that would restrict the number of acres above which parkland dedication would no longer qualify as a Type II action.

Comment:

"The dedication of parkland is an appropriate addition to the list of Type II actions. There are no conceivable adverse impacts from such actions." Comment 21.

Response:

DEC agrees with the comment.

Comment:

"Not each instance of dedication of parkland may be environmentally appropriate. While rare, a proposed dedication of parkland could result in community-character conflicts or undue fiscal impact. Perhaps this should only be Type II where it has been identified as a high priority for park land in a statewide, regional or municipal master plan or open space plan." Comment No. 93.

Response:

DEC does not agree that the act of dedicating parkland could have a significant adverse impact on community character in terms of community character. *See Williams v. Gallatin*, cited above. Fiscal impacts are not by themselves an environmental impact in determining the significance of an action.

Comment:

"The dedication of parkland being classified as a Type II action in proposed § 617.5 (23) should be amended to require it to be 10 acres or less in size, in compliance with the municipality's comprehensive plan, be done as part of the review and approval process for a subdivision or site plan for residential development, and in a size and manner prescribed in the municipality's subdivision regulations, zoning, and/or site plan regulations. Further, the DEC should consider making dedication of 10 acres or less of parkland to a municipality where it is not part of a proposed residential development in a location and scope that conforms with a municipality's comprehensive plan or recreation plan to be a Type II action. Dedication of more than 10 acres of

parkland or dedication of any parkland for a recreational purpose not discussed and duly deliberated on by the public through a municipality's comprehensive plan development and review process may have significant impacts that need to be determined through an environmental review process…DEC should also consider the dedication to a municipality of 10 acres or less of land intended to be forever wild and covered by a conservation easement to be a Type II action." Comment No. 161.

Responses:

The Department has modified this Type II category to combine it with acquisition of parkland inasmuch as the intent of the Type II classification is to refer to public acquisitions of land for parkland by either State or municipal governments where the lands are then dedicated to such use. Acreage is discussed below.

2.3.12 Acquisition of less than one hundred acres of land to be Dedicated as Parkland (originally proposed 6 NYCRR § 617.5 [c] [45]; revised proposed 6 NYCRR § 617.5 [c] [39])

Original Proposed Regulatory Language:

Acquisition of less than one hundred acres of land for parkland.

Revised Proposed Regulatory Language:

An agency's acquisition and dedication of 25 acres or less of land for parkland, or dedication of land for parkland that was previously acquired, or acquisition of a conservation easement;

This Type II classification has been merged with dedication of parkland. See Section 2.3.11, above.

Objectives, Rationale, and Benefits:

Adding the action of acquiring land as parkland to the Type II list was requested by participants at stakeholder meetings. This proposed Type II item applies only to acquisition and dedication of land as parkland as well as acquisition of conservation easements and does not exempt from SEQR any accompanying management or development plans or construction projects intended for the parkland.

This change would substantially streamline the regulatory process for what are relatively simple actions of acquiring parkland by state and local agencies. Parkland helps mitigate the local effects of storm and extreme heat events, particularly in urban areas, making communities more resilient to the effects of climate change, especially in the urban environment by helping to lower concentrations of greenhouse gases in the atmosphere, and depending on the location, building resiliency allowing communities to better adapt to the effects of climate change including major storm events.

This Type II would apply to 1) an agency's acquisition and dedication of 25 acres or less of parkland, 2) dedication of parkland previously acquired, and 3) acquisition of conservation easements. There are no acreage limits on dedication of lands previously acquired or for conservation easements.

Potential Impacts:

Just as dedication of parkland would have no adverse impact on the environment, acquisition of smaller parcels of land for parkland have no significant adverse impact on the environment given their intended use. The acquisition of larger parcels of property ~~— one hundred acres or more —~~ may present other considerations or possible impacts were they to be developed with larger scale, active recreational uses. Such plans, if they exist, should be evaluated under SEQR as part of the initial decision to acquire larger parcels of parkland. The acts of dedicating parkland and acquiring conservation easements have no significant adverse impacts on the environment.

Alternatives:

The no action alternative would retain the existing language of the regulation by which even small acquisitions for parkland had to be evaluated under SEQR.

Other alternatives would be to limit the number of acres of land under the proposed Type II category to smaller purchases or to increase the number of acres within the Type II category. Doing so, however, might require an amendment of 6 NYCRR § 617.4 (b) (4), the Type I item for acquisitions of 100 acres or more. One or more commentators proposed amending the Type I regulations to exclude acquisitions for parkland entirely. The Department also considered restricting the Type II category to parkland acquisitions for passive recreational uses, or to require that the acquisition and intended use has been identified and assessed in, for example, an adopted recreational or comprehensive plan (which would encourage planning).

Comment:

"We propose changing this to read: acquisition by an agency of less than one hundred acres of land for parkland. We support adding the acquisition of parkland to the Type II list. The proposed language seems too general. We are concerned that this could be misinterpreted that a private entity could propose acquiring land with minimal improvements for a significant commercial development such as a recreational park and it could qualify under the proposed language. We believe that restricting this action to agencies as defined in SEQR will clarify this language." Comment No. 141.

Response:

A private owner's acquisition of land would not be subject to SEQR. However, the term "agency" has been added to make clear that the Type II only applies to public acquisitions.

Comment:

"All acquisitions of parkland should be Type II actions. There are no conceivable adverse impacts from such actions. Much parkland is acquired merely to preserve it, with no development of park facilities intended. As with the dedication of parkland, future development of such land, if any ever occurs: can be addressed when the plans are proposed. 6 NYCRR § 617.5 (c) (45) -The acquisition of a conservation easement should also be added to the Type II list. Again, there are no conceivable adverse impacts from such actions." Comment No. 21.

Response:

The Department agrees with the comment about the impact of acquisition of parkland, and agrees that the acquisition of conservation easements have no adverse environmental impact. Conservation easements have been added to this proposed Type II category. The same for dedication of parkland for lands previously acquired.

Comment:

"We are also very concerned with the proposed changes to Section 617.5(c) (45) which would classify as a Type II Action an "acquisition of less than one hundred acres of land for parkland." We do not support this change, which could very likely lead to the segmentation of an action. It would also undermine the need to consider environmental impacts early in the decision-making process. Additionally, 100 acres is not an insignificant amount of land, especially in an urban area. There is a broad range of activities, such as large crowd gatherings or festivals, which are likely to occur in parkland that could impact adjacent ecologically sensitive areas. These impacts require an informed assessment before acquisition. SEQR review must not be eliminated at the acquisition stage, which would impact the public's ability to have a meaningful role in the decision-making process." Comment No. 2.

Response:

Some commenters have argued that the actions of acquiring and dedicating parkland have no significant adverse impact on the environment. Indeed, the Department could consider entirely removing parkland acquisition from the Type I category. All such acquisitions, as one commenter has urged, may be better classified as a Type II action. The commenter above mentions "crowd gathering" and "festivals as an example of where the acquisition and dedication of parkland could have a significant effect on the environment;" however, a municipal action to permit such gathering would be Type II actions under 6 NYCRR § 617.5 (c) (15) (minor temporary uses of land). Thus, arguably, no amount of parkland acquisition would have a significant impact on the environment However, acquisitions of one hundred acres or more are Type I actions.

In response to this comment, the Department has modified the proposed language to limit the Type II to acquisition and dedication of twenty-five or less acres of parkland. In so doing, the Department notes that the acquisition of one hundred or more contiguous acres of land is a Type I action.

Comment:

"The acquisition of 100 acres of parkland being classified as a Type II action in proposed §617.5(44) should be limited to acquisitions that are in compliance with a municipality's comprehensive plan or recreation plan as to location, size, and types of recreational uses proposed. The acquisition of large acreage of parkland for recreational purposes that have not been publically vetted, such as through the public hearings involved with a municipality's adoption of a comprehensive plan or recreation plan, could have significant impacts that need to be addressed in an environmental review." Comment No. 161.

Response:

The Department has instead chosen to limit the proposed Type II action to acquisition of twenty-five or less acres of land, dedication of previously acquired lands, and acquisition of conservation easements.

Comment:

"Riverkeeper commends the state for making the transfer and dedication of parkland easier. We would suggest, however, including a definition for parkland in § 617.2 as it is in unclear whether parkland is intended to mean open space or actively used area or a mix of both categorizations. Parkland is not defined in implementing regulations to SEQR either. If parkland is not clearly defined and is not intended to include open space, then we encourage to DEC to apply this same ease of transfer to dedicated open space." Comment No. 183.

Response:

Parkland can be for open space purposes. The Department is not making a distinction between parks that are solely for open space and parks that have recreational improvements (which also serve park purposes), and relies on the common law definitions of a park that has been well established in New York law (arising in the context of attempts to alienate parkland). In *Williams v Gallatin*, 229 NY 248, 253–54 [1920], the New York Court of Appeals defined parks as follows:

> A park is a pleasure ground set apart for recreation of the public, to promote its health and enjoyment. [Citations omitted.] It need not, and should not, be a mere field or open space, but no objects, however worthy, such as courthouses and schoolhouses, which have no connection with park purposes, should be permitted to encroach upon it without legislative authority plainly conferred, even when the dedication to park purposes is made by the public itself and the strict construction of a private grant is not insisted upon. [Citations omitted.] …Monuments and buildings of architectural pretension which attract the eye and divert the mind of the visitor, floral and horticultural displays, zoological gardens, playing grounds, and even restaurants and rest houses, and many other common incidents of a pleasure ground, contribute to the use and enjoyment of the park. The end of all such embellishments and conveniences is substantially the same public good. They facilitate free public means of pleasure, recreation, and amusement, and thus provide for the welfare of the community. The environment must be suitable and slightly or the pleasure is abated. Art may aid or supplement nature in completing the attractions offered…

This Type II category would mostly benefit municipalities as the State acquires property through its Open Space Plan/GEIS and the State does not have a dedication process as do municipalities.

Comment:

"We agree with the objectives stated that parkland helps mitigate the local effects of storm and extreme heat events, particularly in urban areas, making communities more resilient to the effects of climate change, especially in the urban environment by helping to lower concentrations of greenhouse gases and in building resiliency allowing

communities to better adapt climate change and major storm events and understand the reason for the 100 acre threshold for SEQRA review especially with active recreational uses. The text could more clearly differentiate between passive and active recreational uses insofar as it appears that the intent is for passive activities under 100 acres are intended to be Type II actions while active recreational uses or recreational developments under 100 acres and any recreational acquisition over 100 acres are not to be considered Type II." Comment No. 110.

Response:

The Department did not intend to make a distinction between active and passive parks or parks that contain both kinds of uses. Again, development of parkland is subject to SEQR so if an agency were to propose active recreational uses involving structures or buildings those improvements would be subject to SEQR.

Comment:

"While the typical acquisition of parkland would not have the potential for significant adverse environmental impacts, the proposed Type II exemption is overbroad as written and would allow the acquisition of environmentally-contaminated parcels for use as parkland, without further SEQRA review. The DGEIS notes that the proposed exemption "does not exempt from SEQR any accompanying management or development plans or construction projects intended for the parkland," but it is not clear how this exemption would protect against the acquisition and use of contaminated parcels. We recommend that DEC amend the proposed exemption to include an exception for the acquisition of environmentally-contaminated parcels. Environmental contamination could be evaluated using brownfield cleanup standards (for example) in order to determine whether the proposed Type II exemption applies to the acquisition of a particular parcel." Comment No. 151.

Response:

This Type II category is exclusively for acquisition and dedication. To reiterate, it does not exempt development or improvement activities or plans from SEQR. Brownfields are used for parkland but they have to be cleaned up for that purpose. The absence of SEQR for smaller acquisitions would not restrict the municipality from performing a due diligence investigation to determine whether the land had a history of contamination and would be suitable for parkland. The Department does not believe it is necessary to create a caveat for this possibility. The acquisition and dedication of parkland rarely, if ever, raises direct environmental impact issues.

In selecting a 25-acre threshold the Department is guided by past practice. To adopt too low of a threshold would make the Type Category largely useless and to adopt too large a threshold would avoid the hard look SEQR that may be required for larger acquisitions. In considering this question, the Department reviewed the Type II action for parkland in the City of New York. The City of New York has adopted a Type II category for "park mapping, site selection or acquisition of less than ten acres of existing open space or natural areas." RCNY §5.05 (c) (7). Context matters in SEQR and a ten-acre park in New York City may seem larger than a ten-acre park in upstate New York or Long Island. The Department's records list 1,139 municipal parks in New

York ranging from .39 acres to 2,339 acres. Of the 1139 park approximately 585 parks are 25 acres in size or less with the median park size being 23.8 acres. Selecting 25-acres for the Type II would capture the median park size in New York. As stated above, the Department does not believe there any adverse environmental impacts associated with the acquisition and dedication of such lands.

2.3.13 Certain Transfers of Land ~~to Provide Affordable Housing~~ (originally proposed 6 NYCRR § 617.5 [c] [46]; revised proposed 6 NYCRR § 617.5 [c] [9])

Proposed Regulatory Language:

Transfer or conveyance of five acres or less by a municipality or a public corporation to a not-for-profit corporation for the construction or rehabilitation of one, two or three family housing.

In lieu of this Type II, the Department has chosen to modify existing 6 NYCRR § 617.5 (c) (9) to include "transfers of land" to construct one, two and three family housing. Construction of one, two and three family housing was made a Type II action in the 1995 regulatory amendments and the incidental transfer of title associated with those activities similarly does not significantly adversely impact the environment.

~~Objectives, Rationale, and Benefits:~~

One of the basic concepts of SEQR is the "whole action". Having the land transaction of a proposed activity subject to review under SEQR, when the activity itself is listed as a Type II action, is not consistent with this concept. If the overall action has been classified as Type II then the individual components of that action should also be Type II. Although the original proposal was tied to specific transfers, upon further consideration the Department determined that all conveyances of land associated with the construction or expansion one, two and three family homes (see 6 NYCRR §617.5 [c] [9]) should be covered under the revised proposal. The Department determined that this objective would be more clearly accomplished by amending 6 NYCRR § 617.5 (c) (9) as opposed to creating a new Type II action. ~~This quirk~~ Lack of this Type II has ~~also~~ resulted in affordable housing projects, such as l those sponsored by not-for-profit agencies, being required to undergo SEQR review for the transfer of land from a municipality to a not-for-profit organization, when the activity involving the construction of a one, two or three family residence is a Type II action. Adding this item to the Type II list will therefore rationalize the process by which municipalities acquire or transfer land to not-for-profit organizations, or others such as Habitat for Humanity and Neighborhood and Rural Preservation companies that are organized for, among other purposes, to build or develop affordable housing. The proposed Type II action could have a positive impact on the provision of affordable housing that previously required the preparation of an EAF and a determination of significance due to the underlying land transaction.

Potential Impacts:

Since part of the underlying action — construction or expansion of a single-family, a two-family or a three-family residence — is already classified as a Type II action, the addition of this provision is not expected to have a significant adverse impact on the environment.

The revised proposed Type II action would contribute to the state's policy of sustainable development by encouraging the reuse of distressed or abandoned properties in urban areas and increasing the stock of housing, including affordable housing in such areas. When development occurs in existing communities it can reduce vehicle miles traveled, decrease greenhouse gas emissions, leaves more and larger areas for the natural process of absorption and filtering stormwater and leaves ecosystems intact to support diverse plant and wildlife populations.

Alternative:

The "no action" alternative would remove this item from the proposed Type II list. Not adding this activity to the Type II list would continue the current practice of subjecting these very desirable and sustainable activities to undergo a SEQR review because of the land transfer with no environmental benefit.

~~Additional alternatives would be to reduce the acreage that could be transferred under this Type II action or to eliminate the requirement that such transfers be made to not-for-profits groups like Habitat for Humanity since, according to the Division of Housing and Community Renewal, for-profit actors are also involved in the development of affordable housing and the impact would not change based on the character of the transferee. The Department determined that five acres was sufficiently large to cover most in-fill projects given their location in more urban environments.~~

Comment:

"The proposed exemption for transfers of land for affordable housing should be revised to eliminate the requirement that the land be transferred to a not-for-profit corporation. The status of a corporation as not-for-profit is irrelevant to the appropriate SEQRA analysis, which reviews potential environmental impacts. The DGEIS itself suggests that an alternative would be to eliminate the not-for-profit requirement "since, according to the Division of Housing and Community Renewal, for-profit actors are also involved in the development of affordable housing and the impact would not change based on the character of the transferee." The DGEIS itself thus provides the justification for eliminating the not-for-profit requirement and provides no basis for the inclusion of such a requirement." Comment No. 151.

"The proposal exempts the transfer or conveyance of up to five acres by a municipality or public corporation to a not-for-profit corporation for the construction or rehabilitation of 1, 2 or 3-family housing. The justification offered is that since the ultimate construction of each such housing unit is already a Type II action, such transfers should similarly be exempt as part of the "whole action." This justification, however, is flawed with regard to the proposal. The DGEIS discusses the exemption in terms of building affordable housing as in-fill projects in urban environments, but the proposal contains no language which would limit its use to such beneficial actions. There are no restrictions on the characteristics of the land to be conveyed-it may be used for public recreation, or in an agricultural district or critical environmental area.

Nothing limits the applicability of the exemption to urban areas - the transfer could be in an undeveloped area where five acres of new housing would have significant adverse impacts. No language even requires that the housing must be

affordable, which is even more troubling since the DGEIS indicates that DEC considered the alternative of allowing such transfers to for-profit actors. The inclusion of "rehabilitation" is also troubling since this would suggest that residential housing is currently located on municipal property. This provision should either be withdrawn or substantially limited." Comment No. 5.

"According to the GEIS, the rationale behind this new listing is that it would make the land transfer consistent with the exemption of a one, two or three family residence under current § 617.5 (c) (9). However, that listing is limited to a single structure on a single lot. The proposed § 617.5 (c) (46) does not contain this limitation. A five-acre parcel could be used to build dozens of units. This new section could be revised to limit it to transfers for a single structure. Even better, it could be combined with current§ 617.5(c) (9), to put the entire single-structure exemption in one section." Comment No. 21.

Response:

The Department has chosen the no action alternative and instead proposes modification of the existing 6 NYCRR § 617.5 (c) (9) to include "transfers of land" to construct one, two and three family housing. Construction of one, two and three family housing was made a Type II action in the 1995 regulatory amendments and the incidental transfer of title associated with those activities similarly does not significantly adversely impact the environment.

Comment:

"The proposed exemption for transfers of land for affordable housing should be revised to eliminate the requirement that the land be transferred to a not-for-profit corporation. The status of a corporation as not-for-profit is irrelevant to the appropriate SEQRA analysis, which reviews potential environmental impacts. The DGEIS itself suggests that an alternative would be to eliminate the not-for-profit requirement "since, according to the Division of Housing and Community Renewal, for-profit actors are also involved in the development of affordable housing and the impact would not change based on the character of the transferee." The DGEIS itself thus provides the justification for eliminating the not-for-profit requirement and provides no basis for the inclusion of such a requirement." Comment No. 151.

Response:

The Department agrees with the comment. The "not-for-profit" language has been withdrawn. In addition, see response to Comment No. 21 above.

Comment:

"This section is too broad and it needs to be clarified because it lacks protections for land and natural resources on that land. For example, what type of land is being transferred? The suggested language does not clarify whether the land to be transferred is old-growth forested land, open space or wetland. Specifically, because this section applies to new construction it could apply to any land type and carry great risk to ecological assets because it eliminates the vital check provided by environmental review. Unlike previous sections, which included at least minor protections to the land, and the character of the structure to be built and surrounding neighborhood, by

including the inability to transfer the land if a variance or change in zoning code was necessary. This section, however, lacks those protections. Comment No. 183.

Response:

The underlying idea of the original proposal was to synchronize land transfers from municipalities with the Type II for the construction of one, two and three family housing on a single lot. The Department believes that such transfers are incidental to the underlying Type II activity and likewise have no significant impact on the environment. The Department agrees that the identity of the transferee is irrelevant to SEQR and that the five-acre limit is arbitrary. Accordingly, the Department, has gone back to its original concept, namely to synchronize the paper transfer of land with the underlying Type II action. The newly proposed language is as follows:

> (9) construction or expansion of a single-family, a two-family or a three-family residence on an approved lot including provision of necessary utility connections as provided in paragraph (11) of this subdivision and the installation, maintenance [and/]or upgrade of a drinking water well [and] or a septic system, or both, and the conveyance of land in connection therewith;

2.3.14 Sale and Conveyance of Real Property by Public Auction Pursuant to Article 11 of the Real Property Tax Law (originally proposed 6 NYCRR § 617.5 [c] [47]; revised proposed 6 NYCRR § 617.5 [c] [40])

Proposed Regulatory Language:

Sale and conveyance of real property by public auction pursuant to Article 11 of the Real Property Tax Law.

Objectives, Rationale, and Benefits:

A municipality or a state agency may acquire land through foreclosure or other means where the land reverts to the agency due to a failure of the owner to remain current on property taxes. State law requires that the municipality or agency dispose of this land through a public action to the highest qualified bidder. The municipality or agency has no discretion but to abide by the results of the auction. Currently, agencies are ostensibly required to perform a SEQR review since the sale, lease or other transfer of greater than 100 acres is a Type I action and transfers of parcels of land that are under 100 acres are classified as Unlisted actions. Arguably, such transactions would fall under the existing Type II exemption for actions that are ministerial (6 NYCRR § 617.5 (c) (19)). This proposed revision would clarify that such actions should be classified as Type II actions.

In any event, the environmental assessments for this activity are meaningless since the agency, at the time of the auction, has no idea regarding the ultimate use of the property by the new owner (in addition to having no real discretion regarding the ultimate disposition of the property except to award it to the highest bidder). Any subsequent development proposal for the property will generally result in an environmental review if the proposed action requires a discretionary permit or approval from a state or local agency and the activity is not a Type II action.

Potential Impacts:

The Department has not identified any significant adverse environmental impacts should this activity become codified as a Type II action. SEQR requires that an agency conduct an environmental review at the earliest possible time. But there are situations where that leads to an environmental review that is essentially meaningless because the details needed to conduct a review are not yet available and as arguably in this case the agency has no discretion to change what it is doing. This is one of those situations. The agency disposing of the property has no control over the future use of the property; it has no discretion but to sell the property to the highest bidder. This addition to the Type II list would merely codify an action as Type II that is arguably ministerial and not subject to SEQR in any event.

Alternatives:

The “no action” alternative would remove this item from the Type II list and continue to cause confusion regarding the appropriate classification of the action.

Another alternative would be to limit the item by including the phrase “unless such action meets or exceeds the criteria found in 617.4(b)(4) of this Part.” - Since there are no identified significant adverse impacts it is not necessary to impose additional limitations on this item.

A third alternative would be to expand this proposed listing to allow for disposition of land by any means - Expanding the proposed Type II action to allow for all land dispositions to be covered would raise several issues. Dispositions involving more than 100 acres would conflict with the existing Type I action threshold. If the agency disposing of the property has discretion as to the ultimate new owner it is more likely that details regarding the subsequent reuse of the property will be known at the time of the disposition meaning that a proper environmental review could be completed at the time of the disposition.

Comment:

“We strongly support this addition to the list of Type II Actions. This language clarifies that the sale of tax foreclosure property where the agency is simply taking title and then selling the property is Type II. There is no physical alteration to the property and any subsequent development would be subject to a separate environmental review.” Comment No. 141.

Response:

The Department agrees with the comment.

2.3.15 Brownfield Clean-up (originally proposed 6 NYCRR § 617.5 [c] [48])

Proposed Regulatory Language**:**

Brownfield site clean-up agreements under Title 14 of Article 27 of the Environmental Conservation Law, provided that design and implementation of the remedy do not commit the Department or any other agency to specific future uses or actions or prevent an evaluation of a reasonable range of alternative future uses of or actions on the remedial site.

Upon consideration of comments received, the Department chooses to withdraw this element of the proposed rule and favor the no action alternative. The Department has grouped the comments together and provided a single response or rationale for choosing the no action alternative. The comments and response supersede the discussion of the objectives, rationale, benefits and potential impacts in the original draft GEIS.

~~Objectives, Rationale, and Benefits:~~

~~The Department's Brownfield Clean-up regulations (6 NYCRR 375-3.11 [b]) exempt from SEQR remedy selection and implementation of remedial actions under Department-approved work plans pursuant to ECL article 27, Title 14 provided that design and implementation of the remedy do not commit the Department or any other agency to specific future uses or actions; and prevent evaluation of a reasonable range of alternative future uses of or actions on the remedial site. This exemption contained in the Brownfield cleanup regulations was noted in Judge Read's concurring opinion in *Matter of Bronx Committee for Toxic Free Schools v. New York City School Construction Authority* (20 N.Y.3d 148). In that case, the Court held that the New York City Schools Construction Authority was required to prepare a supplemental EIS for its long term maintenance and monitoring plan. In her concurring opinion, Judge Read suggested that DEC should reconcile SEQR with the Brownfield exemption. The exemption, which appears in the Brownfield cleanup regulations, does not currently exist in the SEQR regulations. This item would clarify that the development and implementation of a Brownfield clean-up agreement, including plans for long term maintenance and monitoring of the site, is a Type II action with the same caveats as that currently exist in 6 NYCRR §375-311(b) namely that future development plans and alternatives for the Brownfield would be fully subject to SEQR. The cleanup itself and plans to clean-up the site would be a Type II action.~~

~~Potential Impacts:~~

~~There are no potential adverse impacts associated with the inclusion of this activity as a Type II action. The process of investigating and the subsequent clean-up of a Brownfield site are tightly controlled by existing state and federal regulation. The current Brownfield clean-up process requires an environmental review that is comparable and in many areas exceeds the requirements for an environmental review under SEQR due to the highly technical nature of the site assessments. In addition, each step of the process includes a rigorous and proscriptive citizen participation plan.~~

Alternative:

The no-action alternative would mean that this proposed Type II action would not be added to the Type II list.

Comments and response:

The Department received a several comments on this proposed Type II action but has chosen to withdraw this proposal inasmuch it is expecting to be undertaking a rulemaking that will modify 6 NYCRR § 375-3.11 (b) and the SEQR Type II classification set out in that regulation. The exception from SEQR for brownfield clean-up agreements belongs under the regulations that implement that program since only the Department and the City of New York, by delegation of authority, are affected by the rule. Comments that were received in connection with 6 NYCRR § 375-3.11 (b) will be considered within the brownfield remediation rule making.

2.3.16 Anaerobic Digesters (originally proposed 6 NYCRR § 617.5 [c] [49]; revised proposed 6 NYCRR § 617.5 [c] [41])

Original Proposed Regulatory Language**:**

Construction and operation of an anaerobic digester, at a publically-owned wastewater treatment facility or a municipal solid waste landfill, provided the digester has a feedstock capacity of less than 150 tons per day, and only produces Class A digestate (as defined in 6 NYCRR § 361-3.7) that is beneficially used or biogas to generate electricity or to make vehicle fuel, or both.

Revised Proposed Regulatory Language:

Construction and operation of an anaerobic digester, within currently disturbed areas at an operating municipal solid waste landfill, provided the digester has a feedstock capacity of less than 150 wet tons per day, and only produces Class A digestate that can be ~~is~~ beneficially used or biogas to generate electricity or to make vehicle fuel, or both.

Objectives, Rationale, and Benefits:

This ~~new~~ Type II action is intended to encourage placement of anaerobic digesters at ~~existing publically-owned wastewater treatment facilities or~~ operating municipal solid waste (MSW) landfills.

Anaerobic Digestion is a naturally occurring process where microorganisms continuously breakdown organic material in an oxygen deprived area to produce biogas and a fertilizer product. Food waste is the second largest category of municipal solid waste in the United States, accounting for approximately 18% of the waste stream (“Organic: Co-Digestion,” 2014). Rather than allowing this material to go into a landfill,

the food waste can be diverted to anaerobic digesters. ~~Digesters can be located at wastewater treatment plants. They can also manage the biosolids produced at the plant.~~ This process could help to diminish the amount of municipal solid waste being sent to landfills while creating a renewable source of energy and other useful by-products.

In 2012, the United States produced about 251 million tons of trash, with 18% of that amount consisting of food waste. Municipal solid waste (MSW) recovery was almost 87 million tons but food waste recovery was only 2% ("Municipal Solid Waste," 2014). Although food waste was 36.4 million tons of MSW, only 1.7 million tons were recovered. In 2008, New York alone produced 36 million tons of waste, with about 23% of this being organic. Using the process of anaerobic digestion and taking the second largest contributor from the municipal waste stream could help to decrease MSW disposal, increase renewable energy generation, and increase the production of organic soil amendments.

Biogas

Anaerobic digesters produce biogas. Biogas results from the breakdown of organic matter into mostly methane and carbon dioxide. Captured biogas is transported from the digester using a pipe either directly to a gas use device or to a gas treatment system where hydrogen sulfide can be removed to prevent corrosion of the combustion device ("Biogas Handling," 2014). The biogas is then used to start an engine-generator set where it produces electricity that is often more than enough for the facility itself to run on as well as have excess electricity sold to a utility or the biogas can be burned off using a flare. This engine generator set also produces a lot of waste heat that can be collected and used to maintain the temperature of the digester or heat the surrounding buildings, or both. Processed biogas, also known as biomethane or renewable natural gas, can ~~be~~ also be used to produce vehicle fuel.

~~An anaerobic digestion facility at a wastewater treatment plant that manages biosolids from the plants can significantly increase the quantity of biogas produced by adding food scraps, food processing waste, and other high energy wastes. Therefore, regulators and operators of such plants have shown an increased interest in the addition of these organics to digesters at treatment plants.~~

Digestate

Digestate or effluent is product that was once influent and has been processed through the digester. Effluent can either be solids or liquids or a mix of both depending on whether the system has a solid-liquid separator. This effluent is low in odor and rich in nutrients. If a liquid solid separator is used, then the liquid can be used as a fertilizer and the solids can be used for <u>items such as</u> livestock bedding or soil amendments (fertilizer) ~~on the farm with excess being sold~~.

An anaerobic digester can be operated at various temperatures and detention times. DEC specifies two levels of treatment that digesters can operate under – termed

Class A and Class B. Class A treatment occurs at a higher temperature than Class B. The temperature and detention time for Class A insures that any disease-causing organisms (pathogens) are reduced to below detectable levels. Since the Class A material does not contain pathogens, there are few restrictions on the use of the digestate, assuming the other applicable standards (heavy metal content, etc.) are also met. Class B treatment reduces the pathogen content but does not insure complete destruction. Therefore, the Department requires a permit for each site where Class B digestate is applied and imposes several requirements (types of crops that can be grown, success restrictions, etc.) that must be followed. The anaerobic digester itself, whether operated as Class A or Class B, will be essentially the same.

~~*Wastewater Treatment Facilities and*~~ *Landfills*

~~Wastewater treatment facilities have been utilizing anaerobic digestion since the 1920's. Anaerobic digestion systems at municipal wastewater treatment plants help to not only breakdown biosolids (sewage sludge) but also eliminate pathogens in wastewater. The end result of this process is an improvement in water quality. Anaerobic digesters at wastewater treatment facilities are becoming more prominent around the world. In the United Kingdom, over 66% of that nation's sewage sludge is treated using an anaerobic digestion system. In the state of California, there are almost 140 wastewater treatment facilities that use anaerobic digesters ("Organics: Co-Digestion," 2014).~~

~~Wastewater treatment facilities are an ideal location for anaerobic digestion systems for a number of reasons. The biggest factor is that they already have the existing infrastructure. Some of these facilities have excess capacity since they were built to handle the waste load of large corporations that have since left the state. With this excess room, wastewater facilities can also accept outside food waste and other organics. Since anaerobic digestion already produces renewable energy, by adding food waste it could help to increase their energy yield. This can have an even greater impact on the wastewater treatment facility by making them self-sufficient and perhaps generating excess electricity to be sold back to the local utility. In doing so, they are increasing their revenue through tipping fees, improving their biogas generation, decreasing their environmental impact, and diverting food waste from landfills.~~

Municipal solid waste landfills can divert loads of food scraps that would otherwise be placed into the landfill to an anaerobic digester located on-site. The digester would reduce the amount of organics placed in the landfill and extend the life of the landfill. Anaerobic digestion should not increase the amount of vehicular traffic at the landfill since the same material that would be brought to the landfill for disposal will be diverted to the anaerobic digestion. In addition to conserving landfill capacity, the biogas generated by the anaerobic digestion can be used in existing landfill gas collection and electric-producing equipment. The majority of the municipal solid waste landfills in the State already have engines to convert biogas to electricity so the addition of an anaerobic digestion system will fit well with the existing infrastructure at the landfill, with little visual or other environmental impacts.

Food Waste

Even though the digestion of sewage sludge produces biogas, food waste is known to produce even more biogas when sewage sludge and food waste are combined. A study by East Bay Municipal Utility District in Oakland, California showed that food waste has three times as much energy potential as biosolids alone. Even with such high amounts of energy potential, co-digestion only occurs in about 22% of currently operating systems in the U.S.

- Cattle Manure = $25m^3$ gas/ton
- Biosolids = $120m^3$ gas/ton
- Food waste = $376m^3$ gas/ton

By anaerobically digesting 100 tons of food waste per day for five days a week, enough power would be produced for 1,000 homes. If 50% of the food waste generated in the U.S. each year was anaerobically digested, enough electricity would be generated to power over 2.5 million homes for a year.

Potential Impacts:

In theory, the construction of anaerobic digesters may cause a visual intrusion and an increase in truck traffic. However, since this Type II action is restricted to anaerobic digestion facilities at ~~existing publicly-owned wastewater treatment plants and~~ operating municipal solid waste landfills, sites already devoted to an industrial type use, it would not result in significant adverse environmental impacts. ~~The wastewater treatment plants already have numerous tanks, buildings, and other structures in place~~. With regard to aesthetics changes, a digester would not be substantively different from the structures or operations already on-site.~~-~~These facilities already have storage structures and other structures ~~on-site~~ similar in character to a digester. Also, truck traffic already exists for the various operations at ~~the treatment plants and~~ landfills and additional traffic for delivery of food scraps or other organics would likely be limited compared to the existing traffic to the facility. ~~For a municipal landfill there will be no additional truck traffic since this material is already being brought to the landfill for disposal~~. If supplemental organic (food waste) material is trucked in separately or in addition to the existing waste stream already received for disposal, the tanker trucks used ~~to deliver organic material to a sewage treatment facility~~ will likely range from 5,500 to 11,600 gallons in size. One gallon of water weighs 8.34 pounds, so a load of material will weigh between 45,870 pounds (22.93 tons) to 96,744 pounds (48.37 tons). This means that a 150 ton/day facility will require from 3 to 7 trucks/day for delivery of organic material. This assumes that all of the material will be trucked to the site. The addition of 3 to 7 truck trips/day to an ~~existing waste water treatment plant~~ operational landfill would not in any event result in a significant addition to traffic entering or leaving the facility. Since the bulk of the organic material ~~will be generated onsite~~ is already being trucked in for disposal as part of the current waste stream, this estimate of additional truck traffic is very conservative. ~~and~~ The actual number of trucks at most sites will probably be closer to the lower estimate.

~~Publically-owned wastewater treatment facilities and m~~ Environmental justice communities may, in some instances, be located near municipal solid waste landfills. ~~Municipal solid waste landfills may, in some instances, be located in environmental justice communities~~. A review of existing MSW landfill facilities (in active operation) in New York State reveals that 4 out of 27 (approximately 15%) ~~of these facilities~~ are located within two miles of a potential environmental justice area. The environmental impacts of an operating municipal solid waste landfill with an anaerobic digester is virtually indistinguishable from the environmental impacts of an operating municipal solid waste landfill without an anaerobic digester. No significant environmental impacts to environmental Justice communities would result from the inclusion of the is Type II item. ~~For the same reasons that the placement of anaerobic digesters in MSW landfill facilities would not cause a significant impact in non-environmental justice communities they would not do so even if situated near environmental justice communities.~~ Further, the construction of an anaerobic digester would still require a permit under the Department solid waste regulations (6 NYCRR Part 360). Those permits include, as part of the permit review process, a specific screen for the presence of potential environmental justice areas. If a potential environmental justice area was found, the Department would apply ~~application of~~ Commissioner's Policy – 29 ~~would be required~~.

As discussed above, the diversion of food waste and other high energy organic wastes from landfills to anaerobic digesters would reduce the amount of organics placed in the landfill, extend the life of the landfill, increase renewable energy generation and increase the production of organic soil amendments

Alternatives:

The "no action" alternative would mean that these activities would continue to require review under ~~the~~ SEQR. On the other hand, adding these activities to the Type II list would create a regulatory incentive for the construction of anaerobic digesters at sites where anaerobic digestion of waste would be a highly compatible activity. Selecting the No Action alternative would also mean that organic wastes will continue to be landfilled taking up valuable landfill space, decreasing site life and requiring expansion of existing facilities into present green field areas — without the possible incentive created by the regulatory incentive to reduce this wasteful practice.

The second alternative would be to place a lower ~~different~~ limit on the size of the anaerobic digester. The size chosen (150 tons per day) represents a digester that can easily blend into the visual and operational aspects of a wastewater treatment plant or landfill that would be interested in a digester. A smaller size would not be large enough to generate the amount of biogas needed to justify the investment and produce sufficient amounts of electricity. This alternative was not selected since the reduction in the identified impacts from constructing a facility smaller than 150 tons/day does not justify the reduction in the utility of the item and it would continue the current practice of landfilling with its attendant impacts.

A third alternative would limit this Type II item to only one of the two facility types. This alternative could be selected if it was determined that the impacts from the construction and operation of an anaerobic digester at one of the facility types would result in impacts that were different in scale or potentially significant~~. Since both~~

~~publically-owned wastewater treatment facilities and municipal solid waste landfills would involve construction at an existing site that is already dedicated to an industrial activity the addition of an anaerobic digester would not introduce a new or different type or scale of use to the site. Both facility types already possess similar structures and are the source of truck traffic. The Department does not expect that the impacts will be dissimilar in scale or type so this alternative was not selected~~.[34] The Department has chosen to limit this proposed Type II category from what was originally proposed to one facility type, namely municipal solid waste landfills.

Comment:

"With regard to the Type II list, it is questionable whether anaerobic digesters, particularly at publicly-owned wastewater treatment facilities, should be Type II as would happen if proposed 6 NYCRR § 617.5 (c) (49) is added. While diverting food waste to biogas production is a useful goal, the impacts of a specific project should still be reviewed as an unlisted action. Some useful processes can cause problems if they are poorly planned or poorly executed." Comment No. 49.

Comment:

"The proposed inclusion of anaerobic digesters at wastewater treatment facilities, or municipal landfills is curious. While anaerobic digesters are not intrinsically bad, and the reduction of sludge products and production of methane gases for energy use can supplement harmful fossil fuel burning, the inclusion of these as a Type II action undermines the purpose of environmental review, especially as many WWTPs in New York are in coastal areas, and may affect sensitive ecological systems…" Comment No. 183.

Response:

The Department has re-evaluated this item and chosen the third alternative discussed in the DGEIS –the placement and operation of anaerobic digesters at only one facility type should the other have potential for adverse environmental impacts. Specifically, the Department has chosen to create an express Type II for placement and operation of a digester only at operating municipal solid waste landfill facilities and not at municipal waste water treatment facilities.

Placement and operation of an anaerobic digester at a Waste Water Treatment Facility (WWTF) - As most comments on this item agree, operation of a digester at a WWTF is environmentally beneficial. However, the Department cannot categorically determine there would not be potential for significant adverse environmental impacts with placement at a municipal WWTF. The primary reason for this determination being the change in land use and potential resultant impacts to community character and aesthetics associated with operation of a digester. Construction/operation of a 150 wet-ton per day facility, with associated tanks, piping, and other appurtenances, could require a land area of up to two acres. While many municipal wastewater treatment facilities are typically well screened and their daily operations are relatively unobtrusive, this may not be the case for all facilities, particularly those located within a dense urban setting. Given that review under SEQR is contextual, two acres of land use and associated digester operations (odor, trucking)

in such an urban setting may pose a significant change with potential significant adverse environmental impacts. While in practice most potential impacts could be mitigated by project design to non-significance, the Department determined the contextual evaluation of potential impacts associated with operation of a digester at a municipal WWTF should continue.

Placement and operation of an anaerobic digester at a Municipal Solid Waste (MSW) Landfill - In contrast to WWTFs, the addition of anaerobic digesters to the Type II list for placement and operation at MSW landfills contains several important limiters intended to address potential environmental impacts and justify the regulatory revision. These include the following: The digester must be located at an existing operational municipal landfill. Operational landfills have operations occurring on a daily basis and process equipment is similar to what is required for operation of a digester. The addition of a digester poses minimal operational changes. Landfills already have the infrastructure to handle waste deliveries and methane gas systems to manage the methane generated by the landfill. Placement is limited to only currently disturbed areas of the facility. This condition serves to avoid the development of greenfield areas and the removal of existing buffers where construction and operation of a digester may otherwise result in encroachment or potential impacts to a sensitive resource, e.g., along costal or riparian areas. For the purpose of this Type II item, currently disturbed areas are those areas located within the existing facility property line boundaries that are structures/buildings or areas that are maintained or used as part of on-going site operations. These areas include existing buildings/structures, parking lots, grassed areas that are maintained as lawn, or other maintained areas, *e.g*., gravel or concrete pad storage or work areas. Further, by limiting placement to only currently disturbed areas, the action would not result in any additional site clearing that could otherwise open the view shed to the surrounding land uses and effectively avoids potential aesthetic impacts. The size of the digester allowed under this provision is much smaller than the waste quantity already handled by these types of facilities. Limiting the digestate produced to Class A biosolids reduces below the threshold of significance the potential impacts from pathogens or odors.

Comment:

"…Moreover, anaerobic digesters inherently produce biosolids. These are increasingly being proposed for land application in New York State, while the science surrounding the potential environmental impacts from such land application remains underdeveloped. Until such time as the potential impacts of land application are fully understood, State regulation should not exempt from environmental review a production process that generates a by-product that could threaten water quality and other environmental resources." Comment No. 183.

Response:

~~Land spreading is not covered under this proposed Type II category~~. Digesters allowed under this Type II must only produce Class A digestate (biosolids) that can be beneficially reused. As the Department identifies in the discussion above, since the Class A material does not contain pathogens, few restrictions need to be imposed on the use of the digestate. If the biosolids from the anaerobic digester are proposed to be

land spread (i.e. used as a soil amendment (fertilizer), ~~it~~ that activity requires compliance with DEC Land Application and Storage facility permit requirements (6 NYCRR Part 361). The NYSDEC review and approval under Part 361 contains comprehensive standards to ensure that the application has no significant impacts. ~~In addition,~~

Comment:

"Adding the construction of anaerobic digesters at 6 NYCRR § 617.5 (b) (49) to the Type II list is inappropriate. These facilities carry significant explosion and fire risk. In addition, the feed stock capacity should be clarified in the regulations. The GEIS discusses the measure (wet tons vs. dry tons); however, in implementation, practitioners and applicants will not refer to the GEIS. The difference is substantial as the proposed measure in dry tons is 800,000 gallons per day and in wet tons is 40,000 gallons per day. Moreover, the terms used in the proposed regulation should be consistent with other biosolids regulations. Documentation that the presence of an anaerobic digester will not have a substantial potential for negative environmental impacts as a rule must be incorporated in the GEIS to support the proposed amendment." Comment No. 93.

Response:

Anaerobic digesters operated in the United States are non-pressurized liquid systems, consisting primarily of water. Therefore, the risk of fire and explosion during digestion itself is minimal. Anaerobic digestion does produce methane gas that is usually combusted to produce energy in an on-site engine. This gas is explosive in nature but is fully contained in the gas management system at the digestion facility. There are currently more than 100 anaerobic digesters operating in New York State, and many that have been in existence for decades without incidence of explosion or fire.

The proposed regulation has been revised to clarify that the capacity limit refers to wet tons. In practice, tons typically refer to wet tons, but the additional clarity is warranted. Wet tons are used because the waste accepted could vary and the tons-unit is most universally used. If the waste was only biosolids, the use of dry tons would be appropriate but it is likely the digester will accept other wastes such as food scraps, food processing waste, and vegetable oils, which are not commonly measured in dry tons.

Comment:

"While we support the use of anaerobic digesters as a more sustainable means to deal with food and organic waste, we believe these projects should still go through environmental review. Exempting these projects could result in significant impacts in environmental justice communities. Because a number of wastewater treatment facilities are sited in already overburdened environmental justice communities, even minor increases in truck traffic and other impacts could harm the community. The fact that they are a more sustainable means to dispose of organic waste does not mean there should be a lower standard applied to these projects when it comes to

environmental review, and this exception should be withdrawn from the Type II list." Comment No. 148.

Response:

As discussed in responses above, location of WWTFs within or near dense urban communities is one of the main reasons for the Department's determination not to include this facility type under this Type II item. While some existing landfills are located within or near a potential environmental justice community, the Department did not identify any significant adverse environmental impacts associated with placement and operation of a digester at these facilities located near or in EJ communities. Municipal solid waste landfills are sites already dedicated to an industrial activity. The addition of an anaerobic digester to existing site operations would not introduce a new use or result in a significant increase or change to site operations than currently exist or that would adversely affect an EJ area. Operation of a digester at a landfill would not in any event result in a significant addition to traffic entering or leaving the facility, as discussed in response to comment above. Further, the construction of an anaerobic digester would still require a permit under the Department's solid waste regulations (6 NYCRR Part 360). The Department's review process includes a specific screen for the presence of potential environmental justice areas. If a potential environmental justice area was found, application of Commissioner's Policy – 29 would be required.

Comment:

"Proposed §617.5(49) would classify anaerobic digesters at municipal waste water treatment plants and landfills as a Type II action. This paragraph needs to be coordinated with the revisions proposed to 6NYCRR Part 360-369 concerning landfills, wherein the DEC may choose to include any facility proposed at a landfill to be part of the landfill operating permit and thus subject to an extensive environmental review process." Comment No. 161

Response:

The construction of an anaerobic digester would still require a permit, or modification of an existing permit, under the Department's solid waste regulations (6 NYCRR Part 360) as stated in the response above.

Comment:

"The proposed regulatory language as proposed section 617.5 (c) (49) relating to the new Type II action for anaerobic digesters should also apply to residential and business use with a proposed amendment (underlined) as follows: "Construction and operation of an anaerobic digester, at a publicly-owned wastewater treatment facility or a municipal solid waste landfill, residences and businesses. provided the digester has a feedstock capacity of less than 150 tons per day, and only produces Class A digestate that is beneficially used or biogas to generate electricity or to make vehicle fuel, or both." Individual homeowners and businesses should be allowed to produce their own biogas for residential and business use from their own on-site waste so as to reduce carbon emissions through seepage and transportation as in large scale energy production. The New York State Energy Plan of 2015 calls for a 40% reduction of

greenhouse gas emissions from 1990 levels by 2050 and an increase to 50% of electricity generation from renewable energy sources, up from the current 11 %. Small scale residential/business biogas production through anaerobic digesters produce a safer and local source of energy which avoids the loss of energy and pollution associated with long distance pipeline gas transmission and seepage as occurs with large scale methane gas production such as hydro fracking. Allowing residential and businesses to produce their own biogas through on site anaerobic digesters prevents transmission and seepage of gas, even from larger scale municipal anaerobic digesters, and thereby reduces emissions of greenhouse gases so as to prevent further climate change. Encouraging individual homeowners and business owners to use their own waste for small scale on-site biogas production/anaerobic digesters also prevents the needless transportation of household waste to municipal wastewater treatment facilities or landfills. Reducing the amount of household/business waste for municipal treatment also reduces carbon emissions associating with the transportation. Keeping waste immediately local at one's home or business for anaerobic digestion and localized biogas production thereby aligns with the New York State Energy Plan to prevent further climate change. The DEC should therefore amend the proposed regulatory language for the new Type II action of anaerobic digesters to also apply to residential and business use." Comment No. 187

Response:

The inclusion of all commercial or residential areas under this Type II list is overly broad and could result in adverse impacts depending on location and setting that is best evaluated under SEQR. The Department chose placement at operating landfill facilities as they have similar existing infrastructure and similar operational impacts such that operation of a digester at these existing industrial sites would not result in significant impacts.

2.4 MANDATORY SCOPING (6 NYCRR § 617.8)

The changes to section 617.8 (scoping regulations) would make scoping mandatory, and provide a better link between the content of the environmental assessment process, the final written scope, and the draft environmental impact statement. At least one stakeholder made this point, i.e., that the Department should create a better link between the determination of significance, scoping and the draft EIS. In connection with these proposed changes, the Department has proposed some clarifying modifications to the definition of "scoping" in section 617.2. The proposed changes strengthen the regulatory language to encourage the preparation of concise EISs targeted only at studying, avoiding or reducing potentially significant impacts identified through the determination of significance and the scoping process. Based on public comment, the Department has decided that scoping should remain optional for supplemental EISs.

Scoping was included in the SEQR regulations adopted in 1987 as "…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 draft EIS … [see 6 NYCRR § 617.2 (af)]" (to be renumbered in new regulations). As such, scoping was not mandatory, public participation was not required, a written scope of issues was to be completed within 30 days of the filing of the positive declaration, the lead agency was required to provide a written justification for the inclusion of new information following the issuance of the written scope and a "Scoping Checklist" was provided to serve as a guide for scoping.

Changes to the scoping process were made through in the 1995 amendments of the SEQR regulations (which became effective on January 1, 1996). The scoping provisions were revised to address problems brought to the Department's attention since scoping was formally recognized in the 1987 SEQR regulations. The problems included: (i) lack of specific guidance on the scoping process; (ii) lack of a requirement for public participation; (iii) reluctance of project sponsors to participate in scoping due to the perception that it had no definitive end point; and (iv) inappropriate use of the scoping checklist which, instead of being used to focus the draft EIS, was used by agencies as a one size fits all outline for every draft EIS.

Under the 1995 amendments scoping was still optional but strongly encouraged. If scoping was conducted, a draft scope and public review was required, and the timeframe for the production of a final written scope was extended to 60 days (to allow time for public participation). Also, the project sponsor was authorized to revise the final written scope and include information provided following the release of the final written scope in the draft EIS, or to treat the late information as a comment on the draft EIS which would be addressed in the final EIS. In addition to the changes in the regulatory provisions, the scoping checklist, which had been Appendix D, was removed from Part 617. [35]

DEC strongly considered making scoping mandatory in 1995 but decided that leaving scoping optional would allow agencies, project sponsors and the public to gain experience with the new provisions and the opportunities afforded by the changes in the regulations. There was also concern that certain projects may not require scoping due to the limited nature of the associated impacts or limited interest or concern about the project. A full discussion on the changes made to the scoping process can be found in the 1995 generic EIS (http://www.dec.ny.gov/docs/permits_ej_operations_pdf/finalgeis.pdf).

Overall, scoping provides a large benefit to the EIS process. A consensus has emerged that EISs too often become defensive with inordinate stress on discussion of impacts that are trivial or not significant —making it more difficult to focus on those impacts that are truly significant. An EIS should focus on the central issues, but unfortunately, EISs sometimes contain too much minutiae that unreasonably prolongs the process and deflects from the true issues concerning a project.

For more EISs to be consistently focused on significant impacts, scoping must be made mandatory. Scoping is a critical step in identifying issues that must be discussed in the EIS and eliminating less significant issues from further discussion. Additionally, scoping should build on the environmental assessment process by which an agency determines that an EIS is warranted. A draft EIS should focus on each of those issues that Part 3 of the EAF identifies as requiring additional assessment with the addition of issues of environmental significance that have been identified in the scoping process. By the same token, issues determined during the environmental assessment as not having a significant adverse environmental impact should not be re-evaluated in the draft EIS.

The need for more predictability, consistency and finality in the determination of the adequacy of the draft EIS is provided by adding language to clarify the limits of the lead agency's authority to reject a draft EIS as not adequate.

Revised Proposed Regulatory Language:

6 NYCRR § 617.8 (a) - 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 [non-significant] not significant. ~~Scoping should result in EISs that are focused on relevant, potentially significant adverse impacts.~~ Scoping is [not] required for all EISs (except for supplements to EISs). [. Scoping] and may be initiated by the lead agency or the project sponsor.

(b) [If scoping is conducted,] T[t]he project sponsor must submit a draft scope that contains the items identified in paragraphs (e) [(f)] (1) through (5) of this section to the lead agency. The lead agency must provide a copy of the draft scope to all involved agencies, and make it available to any individual or interested agency that has expressed an interest in writing to the lead agency.

[(c) If scoping is not conducted, the project sponsor may prepare a draft EIS for submission to the lead agency.]

(c) [(d)] Involved agencies should provide written comments reflecting their concerns, jurisdictions and [information] needs for environmental analysis sufficient to ensure that the EIS will be adequate to support their SEQR findings. The lead agency shall include such informational needs in the final scope, ~~unless they are unreasonable in scope or irrelevant to the involved agency's jurisdiction~~. Failure of an involved agency to participate in the scoping process will not delay completion of the final written scope.

(d)[(e)] Scoping must include an opportunity for public participation. The lead agency may either provide a period of time for the public to review and provide written comments on a draft scope or provide for public input through the use of meetings, exchanges of written material, or other means.

(e) [(f)] The lead agency must provide a final written scope to the project sponsor, all involved agencies and any individual that has expressed an interest in writing to the lead agency within 60 days of its receipt of a draft scope. The final written scope should include:

(1) a brief description of the proposed action;

(2) the potentially significant adverse impacts identified both in Part 3 of the environmental assessment form [the positive declaration] and as a result of consultation with the other involved agencies and the public, including an identification of those particular aspect(s) of the environmental setting that may be impacted;

(3) the extent and quality of information needed for the preparer to adequately address each impact, including an identification of relevant existing information, and required new information, including the required methodology(ies) for obtaining new information;

(4) an initial identification of mitigation measures;

(5) the reasonable alternatives to be considered;

(6) an identification of the information [/] or data that should be included in an appendix rather than the body of the draft EIS; and

(7) a brief description of the [those] prominent issues that were considered in the review of the environmental assessment form or raised during scoping, or both, and determined to be [not] neither relevant nor [not] environmentally significant or that have been adequately addressed in a prior environmental review [.] and the reasons why those issues were not included in the final scope.

(f) [(g)] All relevant issues should be raised before the issuance of a final written scope. Any agency or person raising issues after that time must provide to the lead agency and project sponsor a written statement that identifies:

(1) the nature of the information;

(2) the importance and relevance of the information to a potential significant impact;

(3) the reason(s) why the information was not identified during scoping and why it should be included at this stage of the review.

(g) [(h)] The project sponsor ~~may~~ must incorporate information submitted consistent with subdivision (f)[(g)] of this section into the draft EIS ~~at its discretion~~ or attach such comments into an appendix of the draft EIS. ~~Any substantive information not~~

~~incorporated into the~~ body of the ~~draft EIS must be considered as public comment on the draft EIS.~~

Objectives, Rationale, and Benefits:

The Department's proposal is to place more emphasis on identifying issues earlier on in the SEQR process through the EAF and scoping and to draw a tighter connection between the two ~~using the EAF as the first step in scoping~~. The revised EAFs are much more comprehensive than previous versions and updated to cover the range of issues lead agencies typically encounter in the environmental assessment process. This should allow a lead agency to assess, in a thorough fashion, all of the potential impacts and to establish a basis for distinguishing between issues that need additional scrutiny in an EIS and issues that do not require any further analysis and can be excluded from the EIS scope. Scoping can then be used to determine the depth and type of assessment that will be required in a draft EIS.

The Department's proposal also provides clearer language on the ability to target an EIS. As explained above, a consensus has emerged among stakeholders that EISs are commonly filled with information that does not factor into the decision or that is not significant. This is driven by the defensive approach agencies and project sponsors take in developing an EIS record. In pursuit of a "bullet proof EIS", the tendency is to include information even though the environmental assessment has already concluded that an issue is not substantive or significant. When EISs are bloated with information that will not factor into the final decision they become difficult to read, distracting the reviewer from issues that are truly consequential to decision making. Reducing clutter in an EIS will also allow lead agencies and project sponsors to increase the depth of analysis of impacts that are significant in the decision-making process.

Further, the Department's proposal will provide better guidance on the basis for accepting or rejecting a draft EIS for adequacy. The current regulations make the project sponsor responsible for accepting or deferring issues that arise following the preparation of the final written scope. This change was made in the 1995 amendments to give definite closure to the scoping process. However, a lead agency can undermine the decision of a project sponsor by simply rejecting a draft EIS as inadequate for failure to include issues that were deferred by the project sponsor. This is a form of double jeopardy and it can lead to a protracted debate as to the adequacy of a draft EIS. A lead agency should not be able to reject a draft EIS as inadequate when the project sponsor has decided to defer an issue and treat it as a public comment about a draft EIS, consistent with 617.8 (h). The proposed language will clarify that such a decision by a project sponsor cannot serve as the basis for rejecting a draft EIS as inadequate to start the public review process. The draft EIS was never intended to be a perfect document. That is why the draft EIS is made available for public review and followed by the final EIS.

The Department received many comments that the proposed changes to scoping combined with the new acceptance procedures for draft EISs will foreclose public comment on issues that may arise after the completion of the final scope. In response to this comment, DEC has amended the proposed revisions to section 617.8 (h) to require that the project sponsor either incorporate an assessment of the issues into the draft

EIS or the raw comments into an appendix of the draft EIS, provided the commenters meet the threshold requirements for late comments in section 617.8 (h) (that have been in place since 1996). The last sentence of existing section 617.8 (h) has been stricken since the late received issues, if they meet the threshold requirements under existing section 617.8 (g), must be incorporated into the draft EIS. Most project sponsors have chosen to address comments in the body of the draft EIS — even late received ones — so this new provision will serve to confirm existing practice while providing public assurance that even late raised issues provided they are important and relevant will be addressed early on. Significant issues, whether addressed in the text of the draft EIS or raised within comment letters appended to the DEIS, must still be responded to in the Final EIS.

Potential Impacts:

The Department believes that making scoping a required step for the preparation of all EISs would have a positive environmental impact inasmuch as it will lead to earlier identification of issues and EISs that are more targeted to significant concerns. This will result in channeling all EISs through a public process to affirmatively determine which impacts, identified during the environmental assessment process, require additional study in the EIS and which impacts do not require additional study.

The proposed revision to section 617.8 (g) (formerly "h") prescribes that issues raised post scope but before the draft EIS is submitted should either be incorporated into the draft EIS or attached in an appendix of the draft EIS. This assumes that the comments raise significant issues and the information in the late filed letter is relevant and important to the issue. The revision is not intended to encourage opposition groups to sandbag project sponsors with very late filed repetitive comments. ~~clarifies that a lead agency cannot reject a draft EIS as inadequate on a project sponsor's decision to treat late information as comment to be addressed in the final EIS~~. In any event, if the issue is substantive and relevant then it is in the project sponsor's best interest to include it in the draft EIS as the Supreme Court noted in *West Village Committee v. Zagata* (challenge to the 1995 SEQR amendments).[36] If the project sponsor chooses not to include this material or if it is submitted so late as to make it difficult to include at that point, then the potential risk of the need for a supplement to the draft or final EIS is a risk that the project sponsor must assume. This proposed change will reinforce the importance of identifying all pertinent issues during the scoping process or even immediately thereafter if the commenter shows cause for having not submitted comments during the scoping period and the commenter raises issues that are relevant and important.

Alternatives:

The "no action" alternative would retain scoping as an optional procedure and continue the current situation where a lead agency can undermine the intent of the current regulations to provide closure to the process of issue identification. Both of the proposed changes should help to ensure that issues are identified as early in the process as possible and that the process can move forward on the basis of the issues that have been identified as being significant.

An alternative would be to provide the lead agencies with the authority to include “late items” after the preparation of the final scope. Lead agencies had this authority until the provision found at section 617.8 (g) was added in 1995. Lead agencies at the local and state level can be very susceptible to the claim that additional information is needed. This is part of the defensive nature of SEQR review. In most cases it serves only to bloat the draft EIS with information that has already been assessed and dismissed — adding significant time and expense to the preparation of a draft EIS.

Another alternative would be to require that scoping must include a public meeting. As discussed in the 1996 generic EIS, the Department considered this alternative but dismissed it in order to provide lead agencies with more flexibility in conducting a scoping process and also in recognition that a scoping meeting is not necessarily the most efficient way to solicit public input. The circulation of a draft scope and the submission of written comments is a much more effective way to involve the public in the scoping process — especially in the age of mass communication through e-mail. However, lead agencies are allowed the option of using any or all such methods, including public meetings, in the conduct of scoping.

A last alternative would be to allow more time for scoping. However, any time frame selected can be modified under section 617.3(i) of the regulations and it should not take more than the already provided time to settle on a scope for almost any action.

Comment:

“The OLC firmly supports the DEC's decision to make scoping mandatory for all Environmental Impact Statements (EIS). Through our collective experience, however, it has been found that significant environmental issues have been identified subsequent to acceptance of the scoping document. This should, in no way, limit the lead agency from finding inadequacies in the draft EIS. We strongly urge you to remove the proposed revision to SEQRA that states that "issues raised after the completion of the final written scope cannot be the basis for the rejections of the draft EIS as inadequate."” Comment No. 158.

Response:

The substance of the language has been in place since January 1, 1996. Here is a side by side of the language from 1996 and the presently proposed language:

1996 to the present	Newly Proposed language as modified in response to public comment
(g) All relevant issues should be raised before the issuance of a final written scope. Any agency or person raising issues after that time must provide to the lead agency and project sponsor a written statement that identifies: (1) the nature of the information; (2) the importance and relevance of the information to a potential significant impact;	The Department proposed making scoping mandatory except for supplemental EISs and requiring that issues that are not advanced in the scoping process but before the draft EIS is submitted must be incorporated into the body of the draft EIS or in an appendix if there is cause for not having submitted them during the scoping process and they are relevant and important. The language

(3) the reason(s) why the information was not identified during scoping and why it should be included at this stage of the review.

(h) The project sponsor may incorporate information submitted consistent with subdivision (f)[(g)] of this section into the draft EIS at its discretion. Any substantive information not incorporated into the draft EIS must be considered as public comment on the draft EIS.

in section 617.9 on acceptance of the draft EIS is intended to mirror these provisions and impose a minimal guide to a lead agency's discretion as to when it can reject a draft EIS.

The new proposed rules are simply a tweak to the rules that have existed since January 1, 1996, which is to create a definitive end to the scoping process and then to allow issues that arise after scoping to be addressed in the EIS itself. Except the emphasis in the new rules, informed by public comment, is to insure that issues appear in the draft rather than are deferred to responses to public comment in the final EIS. Though the Department has received many comments on the regulatory changes, the reality is there was no known problems with the existing language since January 1, 1996 (as the Court in the West Village case predicted) and project sponsor have generally been incentivized to address comments and issues as early as possible in the process. The new rules further facilitate what the Court in West Village said would be the case.

Comment:

"One of the most important proposed changes, making scoping mandatory, is a reform that NFIB/NY has long supported. As the law is currently written, the process restricts investment as project sponsors have difficulty predicting what new issues will be introduced that require further studies and information. Mandatory scoping will improve predictability at the outset to help project sponsors use their time, resources and money strategically." Comment No. 145.

Response:

The Department agrees that mandatory scoping can be expected to bring about more predictability in the EIS process.

Comment:

"We support the proposed revision to make EIS scoping a mandatory requirement. The text of the proposed regulation in section 617.8(a) should be changed to strike the comma after "potentially significant" in the penultimate sentence so that it is clear that what is being included in the scope of the EIS are "potentially significant adverse environmental impacts." The sentence should be changed to read "Scoping should result in EISs that are focused on relevant, potentially significant adverse environmental impacts." Comment No. 151.

Response:

The Department has decided that the sentence is redundant, and has removed it for that reason.

Comment:

“While scoping is a valuable tool for starting the EIS analysis it can be cumbersome, particularly because it does not recognize the difference between approval actions involving applicants and direct agency actions with only one lead agency. Scoping should not be required for actions such as agency comprehensive or natural resources plans (e.g. State Park Master Plans). Suggested language: Scoping is required for all EIS's, "except where an action is directly undertaken by a state agency and there are no applicants or other involved agencies." “Comment No. 154.

Response:

The Department believes that scoping is as valuable a tool to inform agencies undertaking direct actions as it is for agencies undertaking indirect actions (approvals or permits). There is no basis to distinguish the two types of actions in terms of the value that scoping adds to the process.

Comment:

“The requirement that the lead agency include the requests of involved agencies in the final scope will help to resolve a longstanding problem. All too often, local lead agencies ignore the needs of involved agencies, which are often state agencies. However, the last phrase of the proposed new language should be removed. The proposed language gives the lead agency the power to eliminate from the final scope (and thus from the SEQR process), information that involved agencies need to carry out their statutory mandates. However, in many cases, the lead agency ·will not have the expertise necessary to properly evaluate whether or not an involved agency's requests are unreasonable or irrelevant in light of the statutes and regulations that the involved agencies must administer. This is particularly likely to occur in the typical scenario where a local agency is the lead agency, but State agencies such as DEC are involved agencies. This would put the involved agency in the position of being unable to fulfill its duties under 6 NYCRR § 617~11. In lieu of removing this language, it could be made subject to the involved agency in question agreeing to a modification of its request.” Comment No. 21.

Comment:

“DEC's attempt to streamline the scoping process is laudable and we agree that "scoping should result in EISs that are focused on relevant, potentially significant, adverse environmental impacts." However, significant battles could occur if (as noted at 617.8(d)) a lead agency determines that an involved agency's information needs are "unreasonable in scope or irrelevant to the involved agency's jurisdiction." The unwillingness of lead agencies to limit involved agencies and the public has made scoping an inclusive process rather than one that narrows issues.” Comment No. 146.

“The City notes that the language in proposed §617.8(c) suggests that a lead agency has the discretion to disregard or exclude requests for informational needs

made by an involved agency if the lead agency deems them irrelevant to the involved agency's jurisdiction, even if the request is supported by a demonstrated need for the environmental analysis. The City is concerned that such a result would be unduly restrictive on involved agencies, particularly when there are no clear guidelines on how to determine the reasonableness of the involved agency's request or the relevance to the involved agency's jurisdiction." Comment No. 206.

Response:

The Department partially agrees with the City's comment. It has modified the proposed language of the requirement but retained the ability of the lead agency to filter such requests for reasonableness. Lead agencies should have the ability to filter scoping requests for reasonableness. This is in keeping with the lead agency's coordination role and the goal of encouraging focus on issues that have true environmental significance.

Comment:

"While mandatory scoping could inform communities of the environmental impacts of a project at an earlier stage, without strong public participation requirements and a mechanism to modify the draft EIS based on information received after scoping, the public 's role is constrained and SEQRA's purpose is frustrated. At the early scoping stage, the full-range of the project's impacts may not be known. The public may not even be aware of the project proposal Yet, DEC's proposed regulations hinder the public and agencies' ability to raise impacts that are discovered after the completion of the final scope for inclusion in the EIS. The public notice and review provisions for scoping must be strengthened and the public and agencies must be able to address additional impacts that were not raised in the final scope in the EIS." Comment No. 148.

Comment:

"While I support the DEC's decision to make scoping mandatory for all EIS's, that information-gathering process should not be used to constrain the investigation of important issues later in the environmental review. Scoping plays a critical role, not only in identifying issues pertinent to an environmental review, but also in enlisting public participation early in the process. Issues of local significance aren't always raised during scoping because the public is still learning about the proposal. It may be months after scoping is finalized that the public becomes aware of negative ramifications from a project. By placing limitations on the introduction of additional information after finalization of the scope document, the DEC is hamstringing the review process itself." Comment No. 175.

Response:

DEC disagrees that it has hindered the ability of the public to raise impacts that are discovered after completion of the final scope for inclusion in the EIS. Under section 617.8 (f) of the SEQR regulations, the public has and continues to be able to raise issues even after a scope is completed. DEC has strengthened the public notice procedures by requiring public notice of the draft and final scopes. It has also clarified the proposal to require that late comments not addressed in the body of the draft EIS should be included in an appendix to the draft EIS rather than first addressed as

response to comment. It is noteworthy that the same public awareness concerns were raised in 1995 concerning the then new scoping provisions as are being raised by this commenter and others. The comments and responses from that time bear repeating:

> Comment: Limiting the ability of the public to raise additional issues after the final scope is intolerable. Gathering information and making decisions about what needs to be studied takes time. Citizens groups should not have to meet the same test as agencies in the submission of late material.
>
> Response: The Department is not prohibiting the public from submitting additional issues after the preparation of the final written scope. But, it is requiring that the agency/organization/individual that submits the late material provide a statement that identifies: the nature of the information; the importance and relevance of the information to a potential significant impact; and the reason(s) why the information should be included at this stage of the review. These requirements are being added to the regulation to address a problem that has been brought to the Department's attention regarding the lack of a definitive end to scoping. The required test should not be a burden for any party. If the information is truly relevant and significant to the project review, the test should be easy to meet. Legitimate issues not picked up in scoping can be added to the draft EIS by the project sponsor or must be addressed as comments on the draft EIS.

Final Generic Environmental Impact Statement on the Proposed Amendments to the State Environmental Quality Review Act at pp. 63-64, September 6, 1995, reprinted on the Department's website at http://www.dec.ny.gov/permits/357.html.

Comment:

"We also support the Long Island Builders Institute's (LIBI) recommendation that no material should be allowed into the record for SEQRA review after the record has been closed and/or submittal dates have passed and the regulations should specifically prohibit such material requirements. We also believe that their recommendations that applicants must have some recourse to the courts at appropriate times and that scoping determinations be made a "final determination" and thus appealable to the appropriate court, are sound proposals." Comment No. 152.

Response:

The 1995 scoping provisions established a definitive end to the scoping process with two caveats:

Under 6 NYCRR §617.8 (f) (formerly "g"), the late commenter has the burden of furnishing a written statement describing the importance and relevance of the information to a potential significant impact and why the information was not provided during scoping as well as why it should be included.

Second, comments submitted after the close of scoping must be addressed in the draft EIS or added as an appendix to the draft EIS so the public will have an early opportunity to view and respond to any late raised issues.

The EIS process in particular is an iterative one. As many commenters, have stated, the public may not become aware of a particular action until a later point in the process. The rules strike a balance between the goal of insuring maximum public participation with the goal of moving the process along.

Generally, SEQR decisions are not appealable until an agency has rendered a final decision. DEC cannot change that rule as it is a judicial one. As a matter of economy, courts do not want to examine controversies until the matter reaches a final decision. Issues raised in the SEQR process are sometimes already addressed by the organic permitting process, which serves to support the ripeness rule that courts use in determining when the proper time is to bring litigation to challenge an agency action.

Comment:

"To ensure communities are able to meaningfully participate in the review process as SEQRA intends, the regulations must increase the time that the draft scope is available for review and commenting. The current 60-day turnaround from when a lead agency receives a draft scope and must issue a final scope is not nearly enough time for the public to comment meaningfully, the agency to consider those comments, the agency to do further investigation as necessary, and for the lead agency to produce the final scope. This timeline should be expanded so that the public has time to be notified of the draft scope; review, discuss, and investigate the draft scope; and submit comments and/or testimony on the draft scope and for this input to be thoughtfully considered and responded to." Comment No. 148.

Response:

The time frames are already flexible. Under 6 NYCRR § 617.3 (i), the lead agency and the applicant can agree to extend the time frames in scoping. Under § 617.14. (b), agencies may modify the time frames in Part 617 the time periods established in Part 617 for the preparation and review of SEQR documents, and for the conduct of public hearings, in order to coordinate the SEQR environmental review process with other procedures relating to the review and approval of actions. This authorization is subject to several caveats. They include that such time changes must not impose unreasonable delay or be less protective of public participation. The current time frames do not seem to have caused any undue problems for lead agencies.

Comment:

"DEC should withdraw and reject proposed section 617.8 (h), which would allow an environmental impact statement ("EIS") to move forward within 60 days of receipt of the draft scope. As pointed out, project sponsors and applicants are in a position of superior knowledge, and local governments, state agencies and the public constantly are playing catch up. This puts agencies and the public at an unfair disadvantage. It will readily provide opportunities for project sponsors and permit applicants to "game the calendar" by timing their submissions to jam agencies and to coincide with times when the public is least able to pay attention. The proposed changes would put a premium on these tactics." Comment No. 150.

Response:

The Department disagrees. The same time frames have been in place since 1996, and lead agencies, applicants and the public have managed to conduct their reviews within the existing rules.

Comment:

"Elimination of Environmental Assessment for Projects in which Sponsor and Lead Agency Agree an EIS Will Be Required with the addition of mandatory scoping, consideration should be given to eliminating the need for an Environmental Assessment Form (called an Environmental Assessment Statement in New York City) in situations where it is clear that an EIS will be required. In such cases, the applicant should be permitted to provide a draft scoping memorandum with its application for the underlying approval or funding, upon which a Positive Declaration can be properly based. This would eliminate an unnecessary interim step that does not add anything of substance to the analysis of the potential environmental impacts of a proposed action. Where it is obvious that an EIS will be required, there is no need to delay starting the process for the preparation, filing and administrative review of a form that is in almost all instances superseded by a published EIS scope and a DEIS." Comment No. 151.

Response:

Even where the applicant agrees to prepare a draft EIS, the environmental assessment form serves a useful purpose in providing basic information on a project (Part I). It also focuses the lead agency on a list of significant issues upon which it can evaluate a draft scope. DEC's practice is to prepare an EAF and issue a determination of significance notwithstanding whether the project sponsor has submitted a draft EIS. DEC treats the draft EIS as Part I of the EAF form but expanded and then completes Parts 2 and 3 and issues a determination of significance. DEC follows this procedure since the lead agency must still make a determination of significance and parts 2 and 3 logically lead to the determination of significance. DEC agrees with at least one commenter that the provision allowing for a draft EIS to be submitted in lieu of an EAF should be eliminated with mandatory scoping as it only leads project sponsors to prematurely perform work that should await the scope. As such, DEC has revised the proposed language to include this suggestion.

Comment:

"Scoping of a Supplemental Environmental Impact Statement (SEIS) should be optional and any public comment on the scope limited to the topic or topics identified as for inclusion in the SEIS. While this Board agrees with making scoping mandatory when a positive declaration is issued and with other changes DEC has proposed to clearly define the required contents of an EIS and the ability of the lead agency to require new topics be added to an EIS, requiring scoping for an SEIS adds several weeks to the environmental review process unnecessarily. The proposed changes to Part 617 clearly attempt to narrowly construe where an agency can require preparation of a SEIS, and thus an SEIS can only address the single or limited topics that the lead agency has identified. While the public may have valuable input in how a topic is described in the scope of a SEIS and thus evaluated in the SEIS, it is a waste of time to open up public comment on an entire project (the public had that opportunity when discussing scope of the EIS and at the public hearing on the draft EIS). The lead agency should be allowed to determine if the issue or issues to be discussed and evaluated in the proposed SEIS are clear enough that nothing is to be gained by a scoping process." Comment No. 161.

Response:

The Department agrees with the comment and has further revised the proposed express terms to favor the no-action alternative for supplemental EISs. As pointed out in the comment, the existing regulation (6 NYCRR § 617.9 (a) (7)) already sets out a form of scope for the supplemental EIS that is narrower than the underlying EIS inasmuch as it states that "[t]he lead agency may require a supplemental EIS, limited to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS…" The regulations (6 NYCRR § 617.10 (d) (4)) also refer to supplements in the section that concerns generic environmental impact statements. It states, "(a) supplement to the final generic EIS must be prepared if the subsequent proposed action was not addressed or was not adequately addressed in the generic EIS and the subsequent action may have one or more significant adverse environmental impacts." DEC's SEQR Handbook states that "[a] supplemental EIS provides an analysis of one or more significant adverse environment impacts which were not addressed, or inadequately addressed, in a draft or final EIS. A supplemental EIS may also be required to analyze the site-specific effects of an action previously discussed in a generic EIS." Thus, supplements are by definition narrower than the EISs that they supplement. With respect to scoping, the Handbook gives that as an option. Further, the Department sometimes looks to the National Environmental Policy Act of 1967 (NEPA; 42 USC 4321, *et seq.*), SEQR's parent statute, for guidance on implementing SEQR. Under NEPA's primary implementing regulations, scoping for supplements is optional. 40 CFR § 1502.9 (c) (4). The Department's views this as further support for keeping scoping optional for supplemental EISs.

On the other hand, a scope is more than a listing of subjects; it is intended to address the content and level of detail of the analysis, the range of alternatives, and the mitigation measures that might be needed. In many cases, public input would add value to the outline of these subjects in an appropriate case.

On balance, the Department believes the wisest course of action here is to leave scoping for a supplement to the discretion of the lead agency depending on the specific circumstances of the action.

Comment:

"In practice, mandatory scoping for all actions that receive a positive declaration of significance would render the submission of a draft EIS rather than a Full EAF at the start of review an unnecessary - and likely costly - approach. Therefore, DEC should consider eliminating 6 NYCRR § 617.6 (a) (iv) (4), which authorizes an agency to waive the requirement for an EAF if a draft EIS is prepared or submitted, and treat the DEIS as an EAF for the purpose of determining significance. The option to submit a DEIS should be removed." Comment No. 189.

Response:

DEC agrees with this comment (eliminating 6 NYCRR §617.6 [a] [iv] [4]) since the scope will determine the contents of the draft EIS. With mandatory scoping it is premature to submit a draft EIS until scoping has occurred. Additionally, the provision that allows the submission of a draft EIS rather than an EAF has been a source of confusion. Agencies need to first set out the issues they believe are significant and that is best done through completion of an EAF (especially now that the forms are electronic and contain the mapper function). Further, since DEC almost always requires scoping when it is lead agency, DEC's practice has not been to waive the EAF process but to treat a draft EIS submitted in lieu of an EAF as an expanded EAF (which is what the regulation contemplates will be done). As such, DEC has revised the proposed language to include this suggestion.

Comment:

"In the revised definition of "Scoping," § 617.2 (ai), the proposed new wording ("which starts with the analysis of potentially significant issues identified in the EAF") should be revised slightly. Such revision should clarify that the scope of issues to be considered in an EIS starts with but is not restricted to "potentially significant issues identified in the EAF." It's difficult to foresee whether the proposed new wording could actually be interpreted to mean that the EIS scope is limited to the potentially significant issues that have been identified in the EAF – but the potential ambiguity could be easily eliminated. The wording of § 617.8 (d) [(e)] says that "Scoping must include an opportunity for public participation…." but does not entirely eliminate the ambiguity because it's not entirely clear whether the allowable "written comments on the draft scope" include written suggestions on expanding the scope beyond the potentially significant issues identified in the EAF. Granted, § 617.8 (d/e) has long been understood to mean that new scoping issues and topics can be added to the draft scope based on public comment – but such interpretation might be called into question by the proposed new § 617.2 (ai) wording about "potentially significant issues" that have been identified in the EAF, and whether this new phrase is meant to be restrictive or limiting. All very arcane, I recognize, but please consider rewording the latter part of § 617.2 (ai) with something like this: Scoping starts with the analysis of potentially significant issues identified in the EAF. As the process continues, scoping provides a project sponsor with a written outline of topics that must be considered and provides an opportunity for early

participation by involved agencies and the public in the review of the proposal. or, alternatively: Scoping, which starts with but is not restricted to the analysis of potentially significant issues identified in the EAF, provides a project sponsor with a written outline of topics that must be considered and provides an opportunity for early participation by involved agencies and the public in the review of the proposal." Comment No. 236.

Response:

The current proposed language states that scoping "starts" with the analysis of potentially significant issues identified in the EAF. The Department agrees that the scoping process is intended to add and modify the list that is identified in the EAF. The Department also agrees that this is an important and sometimes confusing subject, and has revised the proposed language in the definition of scoping for better clarity (and will do so in the SEQR Handbook, too) based on the comment.

Comment:

"While we are encouraged by your mandatory scoping proposal, we are concerned that your proposed regulations will place new limitations on the scoping process. We think a maximum of 60 days for the scoping period is too short. Some proposals are complicated and need a longer time for the public to review. We also are very concerned about the proposed prohibition on the introduction of new information after the completion of the final written scope. Constraining topics to cover in an EIS to only those topics identified in scoping will encourage developers to withhold concerning information about a project until after the final scoping document is complete. A developer could withhold information related to a known endangered species on a property such as Karner Blue butterfly or a hognose snake, or a seasonal wetland. Facts that come to light afterward will have a difficult time being included in the draft EIS, creating an undue burden for lead agencies and an uphill battle for citizen enforcement of SEQRA in the courts. We strongly urge you drop this proposed change from the proposed SEQRA revisions." Comment No. 188.

Response:

The commenter misconstrues the proposed changes. DEC has not changed the scoping period, which can now be changed by agreement of the project sponsor and the lead agency or by an agency adopting its own local procedures as provided for under the SEQR regulations. The proposed provisions for determining that a draft EIS is adequate mirror the existing provisions in 617.8 and then provide a definition for when a draft EIS is adequate that builds upon the scoping language such that all steps in the process are linked (as one stakeholder asked to be better articulated).

Much of the resource information comes from DEC's GIS layers, which are then incorporated into the electronic EAFs. There is less and less opportunity or benefit for project sponsors to withhold information. At the same time, the lead agency and the public have some duty to come forward as early as possible in the process with information and concerns that might be relevant to the review of the project. DEC has strengthened the public notice provisions by requiring ENB notice of scopes and a summary of after-received public comment on the scope. The ENB is a free electronic

newsletter. DEC also expects that projects will be increasingly noticed on social media platforms (which DEC has been experimenting with).

2.5 PREPARATION AND CONTENT OF ENVIRONMENTAL IMPACT STATEMENTS (6 NYCRR § 617.9)

The proposed changes to 6 NYCRR § 617.9, among other changes, define what it means for a draft EIS to be "adequate" for purposes of public review ~~as follows: "A draft EIS is adequate with respect to scope and content for the purpose of commencing public review if it meets the requirements of the final scope, section 617.9(b) of this Part, and provides the public and involved agencies with the information necessary to evaluate project impacts, alternatives, and mitigation measures."~~ On a resubmitted draft EIS, that was determined to be inadequate, the proposed new regulatory language states: "The determination of adequacy of a resubmitted draft EIS must be based solely on the written list of deficiencies provided by the lead agency following the previous review. ~~The proposed regulations include two other provisions that would serve to streamline the EIS process, namely 1) that "[i]information submitted following the completion of the final scope and not included by the project sponsor in the draft EIS cannot be the basis for the rejection of a draft EIS as inadequate but such information may require a response to comment in the final EIS or the preparation of a supplemental EIS in accordance with section 617.9 (a) (9), and 2). As is the case under the current regulations, if such information relates to a significant impact or identifies one not included in the final scope then the project sponsor may include the information in the draft EIS.~~

The last proposed changes to section 617.9 relate to ensuring that actions that are subject to an EIS, account for projections of sea level rise, ~~and~~ changes in the frequency and character of storm events, <u>and other effects</u> as a result of climate change. DEC proposes to add "measures to avoid or reduce both an action's environmental impacts and vulnerability from the effects of climate change including sea level rise and flooding" to the topics that should be covered in an EIS for development projects where flooding may be a significant ~~issue~~ <u>concern</u>. Secondly, DEC also proposes to add "impacts on the use of renewable energy" to the list of impacts that may be considered in an EIS identified in 617.9(b) (5) (iii) (e).

2.5.1 Determining the Adequacy of a Draft EIS

Revised Proposed Regulatory Language**:**

§ 617.9 Preparation and content of environmental impact statements

(a) Environmental impact statement procedures. (1) The project sponsor or the lead agency, at the project sponsor's option, will prepare the draft EIS. If the project sponsor does not exercise the option to prepare the draft EIS, the lead agency will prepare it, cause it to be prepared or terminate its review of the action. A fee may be charged by the lead agency for preparation or review of an EIS pursuant to section 617.13 of this Part. [When the project sponsor prepares the draft EIS, the document must be submitted to the lead agency.]

(2) The lead agency will use the final written scope~~, if any~~, and the standards contained in this section 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 in accordance with the standards in this section within 45 days of receipt of the draft EIS. A draft EIS is adequate with respect to scope and content for the purpose of commencing public review if it meets the requirements of the final written scope, ~~scope including any required additions under~~ sections 617.8 (g) and 617.9(b) of this Part, and provides the public and involved agencies with the necessary information to evaluate project impacts, alternatives, and mitigation measures.

(i) If the draft EIS is determined to be inadequate, the lead agency must identify in writing the deficiencies and provide this information to the project sponsor. ~~Information submitted following the completion of the final scope and not included by the project sponsor in the body of the draft EIS cannot be the basis for the rejection of a draft EIS as inadequate but the lead agency may require the incorporation of such information as i) an appendix to the draft EIS, ii) a response to comment in the final EIS or iii) the preparation of a supplemental EIS in accordance with section 617.9 (a) (7).~~

(ii) The lead agency must determine whether to accept the resubmitted draft EIS within 30 days of its receipt. The determination of adequacy of a resubmitted draft EIS must be based solely on the written list of deficiencies provided by the lead agency following the previous review.

Objectives, Rationale, and Benefits:

Determining the adequacy of a draft EIS, which is the responsibility of the lead agency, is a challenging step in the EIS process. If scoping becomes a mandatory requirement as proposed above, it is important to use that final written scope as the roadmap for the draft EIS. If the project sponsor produces a draft EIS that is consistent with the final written scope it should be presumed that the document is adequate to commence the public review process. This is to allow the EIS process to continue to move forward to the public comment phase, and to strongly discourage lead agencies from moving the rhetorical goal post such that an applicant who is acting in good faith to fulfill the requirements of the scope cannot get to a complete or adequate draft EIS. In so doing, the Department is balancing the competing goals of expediting all SEQR proceedings in the interest of prompt review while insuring that all relevant, significant issues are examined in the draft EIS.

If the project sponsor fails to adhere to the final written scope, then the document should be rejected as not adequate and the lead agency must provide a written list of the identified deficiencies that the project sponsor needs to correct. When the document is re-submitted, the second review must be based on the list of deficiencies that were identified in the first round of review unless a late filer can make the showing required by section 617.8 (g) (proposed to be renumbered as section 617.8 (f)). Information accepted into a scope through section 617.8 (g) should be the rare exception rather than the rule. This is an issue of fairness and will lead to a more efficient process.[37]

When there is a dispute over a conclusion reached about an impact, the lead agency must take into consideration that the draft EIS is only a draft. As the Department has previously stated in the SEQR Handbook, the goal of adequacy is not

to resolve all issues to the full satisfaction of the lead agency. If there are legitimate differences in the assessment of an impact between the lead agency and the project sponsor both positions can be presented in the draft EIS. The goal is to provide a document that is adequate to start the public review. Lead agencies should keep in mind that the draft EIS is called a "draft" because it is expected to be changed in response to public comment and agency review. Lead and involved agencies can and should continue the review of the draft EIS during the public review period.

Potential Impacts:

~~This proposed change will not result in a significant adverse environmental impact.~~ It is less likely that a major issue will be missed in the development of the draft EIS if scoping is required. If a major issue was identified by the lead agency following the issuance of the final written scope, then it is generally in the project sponsor's best interest to include it in the draft EIS as pointed out by the Court in *West Village Committee v. Zagata*, "… it would appear that if the issues are significant, it would be in the project sponsor's best interests to include them in the draft EIS rather than being subjected to delay caused by the requirement of a supplemental EIS or litigation challenging the failure to include it in the draft EIS or the adequacy of review during the comment period."[38] If the project sponsor chooses not to include this material or if it is submitted so late as to make it difficult to include it at that point, then there is a risk that a supplement to the draft or final EIS will be required. The proposed regulatory changes also underscore the fact that significant issues arising after the final scope must be addressed in the draft EIS or by including the comments in an appendix to the draft EIS. This will help to insure that important issues, even if they arise after the final scope, are raised to the attention of the review process as early as possible This proposed change will reinforce the importance of identifying all pertinent issues during scoping and the initial review for adequacy of the draft EIS.

Alternatives:

The "no action" alternative is not desired because it would not address the problems with the current language that sometimes result in an unreasonably protracted review of a draft EIS for adequacy.

Another alternative would be to require that the submitted draft EIS be determined complete if it contains all items listed in the final scope. This alternative would require the default acceptance of the submitted draft EIS if it contained all of the elements identified in the final written scope. Although this may sound desirable on its face it is not practical for numerous reasons: Such a mechanical rule of acceptance could result in the default acceptance of an EIS that was sufficient on its face in terms of topics but inadequate in terms of its substance. It would also conflict with the statute, which makes clear that determining the adequacy of a submitted draft EIS is the responsibility of the lead agency.

Comment:

"Unfortunately, in its zeal to ensure that potential environmental impacts are identified early, DEC has proposed that lead agency should not be permitted to reject a

Draft EIS or require revision based on adverse environmental impacts identified after the scoping is complete.

Instead, agencies are limited to addressing such impacts in the response to comments in the Final EIS or in a Supplemental EIS. This proposal is unnecessary and does not comport with the goals of SEQRA. In many cases, the full range of adverse impacts is not immediately apparent and requires careful assessment of project design and setting or research into the operation of similar projects in other areas. This assessment may not be possible during the limited time frame allowed for scoping. The duty imposed by SEQRA to assess and avoid or mitigate adverse environmental impacts of a proposed action is not limited to obvious adverse environmental impacts or those discovered within a limited time frame. DEC cannot rewrite the law to allow government entities to simply ignore or limit review of subsequently discovered impacts."

The affected public would also be penalized by the proposed limits to review. Communities who discover the process or potential harms after the scoping ends will be out of luck. Communities of color and low-income communities, which may have a particularly difficult time accessing information or finding needed expert assistance, and first-time commenters just learning to navigate SEQRA are especially likely to be excluded from this process. Even where the lead agency recognizes that additional time for public comment is required, the draft regulations eliminate the discretion to provide that time. Further, the proposed fixes – that is, including issues in the response to comments in the Final EIS or issuing a supplemental EIS, will not protect the public's right to have input on the environmental assessment. The public has no opportunity to review or critique the final EIS and the lead agency is allowed, but not required, to issue a supplemental EIS when new issues are raised. The time limits for scoping proposed by the revised SEQRA regulations also seriously disadvantage public commenters. Under the proposed regulations, if the lead agency doesn't respond to a draft scoping document within 60 days, the draft essentially becomes the final scoping document. Proposed 6 NYCRR §§ 617.8(e), (h). To avoid this drastic result, public notice and comment and agency consideration of those comments would have to happen within that limited time frame. At best, agencies might provide 30 or 45 days for public comment. Such limited time frames may be adequate for relatively simple projects in communities that learn of the project early and are already well-versed in the environmental issues raised. They would not provide nearly enough time for communities where extensive outreach is required or where language is an obstacle, for particularly complex issues, or for project that are not well-developed at the time of scoping. At minimum, if the issues to be studied in an EIS are limited by the issues raised during scoping, that process must be flexible enough to allow for meaningful public participation and review in all circumstances…. At minimum, if environmental review is limited to issues raised during scoping, DEC must provide a much longer time period for developing a final scope and must mandate extensive public outreach and engagement as part of the scoping process." Comment No. 159.

Response:

The Department has not proposed changing the time frames for scoping. In this regard, see responses to comments #s 148 and 150 under the proposed regulatory

changes to section 617.8. For complex projects, where an agency needs more time to complete the scope then the agency can seek the agreement of the applicant (as provided for under the general rules of SEQR. Based on the Department's experience (which is considerable) and to its knowledge, time frames for scoping have not been a problem. Also, the new provisions regarding scoping are only intended to mirror the existing language in section 617.8 (set out above), which was intended to set a clear demarcation between the scoping process and the development of the DEIS. With respect to that existing language, it was recently interpreted by the Chief Administrative Law Judge for the Department, who stated:

> 617.8(g) reveals that the section was added by the Department to provide a definitive end to the scoping process prior to the development of a DEIS [citations omitted]. Nothing in the regulatory history indicates an intent to prevent an agency from considering substantive and relevant issues raised after the completion of the DEIS, whether by treating the issues raised as comments on a DEIS (see Part 617 FGEIS at 67), by allowing supplementation of the SEQRA record to address deficiencies in a DEIS, or by subjecting the issues to adjudication under Part 624."

In the Matter of the Application for an Underground Storage of Gas Permit Pursuant to Environmental Conservation Law Article 23, Title 13, by Finger Lakes LPG Storage, LLC, OHMS Case No. 201166576, Ruling of the Chief Administrative Law Judge on Issues and Party Status, September 7, 2017, p. 47, available on the Department's website at http://www.dec.ny.gov/hearings/2477.html.

Further, the intent of new proposed regulatory language is not to prevent the process of considering significant issues raised after the scope is finalized. Existing and proposed sections 617.8 and 617.9 merely require some showing that the issues are significant, could not have been raised during scoping and then require the project sponsor address the issue in the body of the draft EIS or add the comments to the appendix of the draft EIS. If all else fails, the lead agency has the power to require a supplement under certain circumstances.

Practically speaking, a project sponsor has nothing to gain by refusing to address a significant issue whether it arises during the scoping process or afterwards as the Court in *West Village Committee v. Zagata* recognized. The new language is intended to address the real concerns of some project sponsors that some lead agencies, when confronted with public opposition to a project, move the regulatory goal post such that an applicant cannot move past scoping or the draft EIS stage to the public comment period notwithstanding their earnest attempts to address significant issues. <u>This was a major issue raised by stakeholders, and which the Department has attempted to address.</u>

At the same time, SEQR is an iterative process. The evaluation of impacts through the EAF process is built upon in the scope and then in the EIS. Each step in the process is intended to build upon the understanding of a project, alternatives and mitigation. It is not expected that all of the impacts associated with a project can or will be known at the EAF or scoping stages.

As to the comment about mandating a more muscular outreach process, under the existing regulations, a positive declaration must state whether (proposed to be modified to "how and when") scoping will be conducted. 6 NYCRR § 617.12 (a) (2) (ii). On top of this requirement, the Department has added the requirement that the draft and final scopes be posted on a publicly accessible website.

Comment:

"The City is concerned about the practical implications of requiring that the adequacy of a resubmitted draft EIS be based solely on the submitted written list of deficiencies. Important issues are often discovered later in the process, particularly in technical analyses needing multiple rounds of review and iterations. Requiring that the determination of adequacy of a resubmitted draft EIS be based solely on previous written comments would prohibit the lead agency from requiring that new, previously unforeseen (before the revision) potential impacts from being addressed before the EIS is published for public review. While it is important to structure the review process to avoid never-ending rounds of comments, this restriction could result in an inadequate EIS that does not fulfill the goals of SEQRA. The City urges DEC to amend this section to limit adequacy determinations to those items in the first set of written comments or issues where the lead agency can show that a significant deficiency remains." Comment No. 222.

Response:

After-raised, previously unforeseen impacts can be addressed by the project sponsor in the draft EIS or by adding the comments to an appendix of the draft EIS. The public will now be aware of the after-raised comment since the comments themselves, if relevant and significant in the view of the lead agency, will have to be incorporated into an appendix of the draft EIS if they are not evaluated in the draft EIS itself. In either event, they will have to be responded to in the final EIS.

Comment:

"We recommend that the proposed language be revised to be more consistent with these existing provisions and SEQRA terminology as follows:

A draft EIS is adequate with respect to scope and content for the purpose of commencing public review if it meets the requirements of the final scope, section 617.9(b) of this Part, and provides the public and involved agencies with the information necessary to systematically consider a proposed action's significant adverse environmental impacts, alternatives and mitigation measures.

A second proposed amendment would add a sentence to § 617.9(a)(2)(i) as follows: "Information submitted following the completion of the final scope and not included by the project sponsor in the draft EIS cannot be the basis for the rejection of a draft EIS as inadequate but such information may require a response to comment in the final EIS or the preparation of a supplemental EIS in accordance with section 617.9(a)(7)." According to the DGEIS, this proposed amendment "clarifies that a lead agency cannot reject a draft EIS as inadequate on a project sponsor's decision to treat late information as a comment to be addressed in the Final EIS," rather than revise and resubmit a new DEIS. This is ostensibly in the interest of addressing a "need for more

predictability, consistency, and finality in the determination of the adequacy of the draft EIS."" Comment No. 189.

Response:

The cited language has been eliminated since it is confusing. Instead, the Department has revised the proposed language in section 617.9 (a) (2) with respect to the elements of a complete draft EIS as constituting compliance with the requirements of the scope and any additional materials required by reason of section 617.8 (g) and section 617.9 (b) of this Part, and provides the public and involved agencies with the necessary information to evaluate project impacts, alternatives, and mitigation measures. This language will serve as an elemental checklist for what constitutes a complete draft EIS.

Comment:

"The proposal that issues emerging after scoping has concluded cannot be grounds to reject a project defies prudence and common sense. The significance and weight of an issue should determine its relevance, not an arbitrary cut-off early in the process. Citizens who may be adversely affected, with their health as well as property values at risk, often learn about proposed projects well into the EIS process, and often need time to identify environmental threats." Comment No. 190.

Response:

The existing regulations at 6 NYCRR §617.8 (g) state that the importance and relevance of the information is a factor in evaluating whether the lead agency should consider issues that are proposed after the scope has been finalized.

Comment:

"I cannot support, however, changes which will have the effect of limiting scoping (See proposed changes to § 617.9 paragraph (2) subsection (i)). Limiting the introduction of new information after the initial written scoping will reduce the thoroughness of SEQR's and encourage sponsor/developers to keep back information. That incentive already exists and should not be exacerbated. Facts that come to light afterward will have a difficult time getting included in the draft EIS. Suggesting that withheld information could be later captured in a Supplemental EIS is simply not practical and creates an undue burden for lead agencies and an uphill battle for citizen enforcement of SEQRA in the courts." Comment No. 245.

Response:

The Department does not agree that the proposed revisions will impair the fact finding process in SEQR. The comment also overlooks the fact that geographic information has over the past ten years becoming increasingly available on electronic media including DEC's natural resources information that auto completes the EAF forms.

2.5.2 Mitigation Measures: Vulnerability to Storm-related Impacts

Original Proposed Regulatory Language:

6 NYCRR § 617.9 (b) (5) (iv) a description of the mitigation measures, including measures to avoid or reduce both an action's environmental impacts and vulnerability from the effects of climate change such as sea level rise and flooding;

Revised Proposed Regulatory Language:

6 NYCRR § 617.9 (b) (5) (iii) (i): measures to avoid or reduce both an action's environmental impacts and vulnerability from the effects of climate change such as sea level rise and flooding.

Note, the revised proposal has relocated this revision, without substantive amendment, to a more appropriate subparagraph so that it appears under 6 NYCRR § 617.9 (b) (5) (iii) as a new clause "(i)" (among the items that the lead agency should identify and discuss only where applicable and significant).

Objectives, Rationale, and Benefits:

Mitigating the effects of a changing climate represents one of the most pressing environmental challenges for the State, the nation and the world. The major scientific agencies of the United States — including the National Aeronautics and Space Administration (NASA) and the National Oceanic and Atmospheric Administration (NOAA) — agree that climate change is occurring and that human activity is a principal cause~~are contributing to it~~. The impacts of climate change are already being felt in the State, including observed temperature increases and sea level rise. Predictions for future climate change impacts in the State further demonstrate the need to take action now to reduce greenhouse gas emissions.

The Department believes that it is critical to ensure that projects built in potentially vulnerable locations are able to withstand and adapt to the effects of climate change. Major storm events in the last few years, such as Hurricane Sandy, Tropical Storm Lee and Hurricane Irene, have resulted in significant impacts on the environment of the state. The storms have had devastating impacts on coastal and in-land areas. Scientists are predicting that the frequency of severe storms will increase due to the effects of climate change from greenhouse gas emissions. In the aftermath of Hurricane Sandy, Governor Cuomo convened the 2100 Commission to examine and evaluate key vulnerabilities in the State's critical infrastructure systems, and to recommend actions that should be taken to strengthen and improve its resilience to storm damage. The Commission recommended that the State require lead agencies under SEQR to assess climate change adaptation and resilience measures, as well as actions to mitigate climate change, as part of their SEQR environmental impact review. To accomplish this, the report recommended that the Department amend its SEQR Handbook and environmental assessment form workbooks to make clear that adaptation and resilience

to climate change should be properly considered when determining the significance of an action under SEQRA.[39]

The added language will help to implement this recommendation of the NYS2100 Commission. Because of the effects of climate change, a proposed project may have additional significant adverse environmental impacts that must be considered and mitigated in an EIS. Moreover, a proposed project may be vulnerable due to the effects of climate change, and mitigation of such vulnerability must be part of an EIS. The new language will, for example, require lead agencies, when preparing EISs for development projects to consider adaptive measures that will lessen the impacts that the project will have on the environment as a result of the effects of climate change, and to reduce vulnerability of the project to the effects of climate change.

Potential Impacts:

There are no adverse environmental impacts expected from the proposed, additional regulatory language as consideration of flooding and storm events is a common sense preventative measure against future environmental harm. The proposed regulatory language will confirm that the discussion of mitigation measures in an EIS will need to include consideration of a project's impacts and vulnerability due to the effect of climate change. For example, an EIS will need to discuss adaptation and resilience measures for projects that would be especially vulnerable to the impacts of climate change, including storm damage. Some project sponsors may face the additional cost of conducting such assessments.

Alternative:

The "no action" alternative would result in no change to the existing language of the SEQR regulations though project sponsors may still be reasonably required to discuss issues of adaptation and resilience. The proposed language merely codifies what is implicit in SEQR. Finally, the "no action" alternative may result in lead agencies not performing the necessary review regarding climate change issues or implementing appropriate mitigation measures regarding climate change effects.

Another alternative would be to retain the existing language on mitigation but to amend the definition of "mitigation" in section 617.2 to include the proposed new regulatory language. The purpose of this alternative is to underscore the notion that all projects, whether they are subject to an EIS or not, should account for the impacts that climate change is having on the state's coastal areas and in-land places susceptible to storm damage.

Comment:

"We support the amendment to section 617.9 (b) (5) (iv) to include climate change vulnerabilities such as flooding and sea level rise in the description of mitigation measures, particularly as this will work well with DEC's recently promulgated Part 490, 'Projected Sea Level Rise'.: Comment No. 33.

Response:

The Department agrees with this and other comments that express support for the amendment to 6 NYCRR § 617.9 (b) (5) (iv) (revised to §617.9 [b] [5] [iii] [i]), as well

as support for additional Departmental guidance on how to consider climate change under SEQR. As described in the GEIS, this new provision in Part 617 clarifies the content of an EIS. Where relevant and significant in relation to an action, the EIS must discuss climate change related impacts and vulnerabilities, and, if appropriate, include mitigation measures to avoid or reduce those impacts and any vulnerabilities.

When considering climate change under SEQRA, it is important to recognize the distinction between two categories of "mitigation": (1) mitigation of greenhouse gas emissions, including measures to reduce greenhouse gas emissions that result from a project, since such emissions contribute to climate change; and (2) mitigation of climate vulnerabilities, which include vulnerabilities of a project that may be caused or exacerbated by climate change. SEQR encompasses both types of mitigation, as well as consideration of both types of related impacts of climate change. That is, SEQR mandates consideration of greenhouse gas emissions that contribute to climate change (category 1 above), as well as consideration of how climate change may alter a project's environmental impacts during the lifetime of that project (category 2). An example of category 2 is a project that may increase the public's exposure to flooding during the project's lifetime. In all cases, environmental review under SEQR should in a proper case consider both a project's greenhouse gas emissions and its climate vulnerabilities, as well as mitigation of both types of impacts when relevant.

Finally, the Community Risk and Resiliency Act (CRRA) directed the Department to promulgate official sea level rise projections, which the Department recently adopted in 6 NYCRR Part 490 (Part 490). CRRA also requires applicants for certain specified permitting and funding programs to consider "flooding, storm surge, and sea level rise." There will be substantial overlap between projects that will undergo scoping under SEQR and those that will require permits covered under CRRA. As a result, the Department agrees that this new provision in Part 617 will work well with the recently-adopted Part 490. Any project proposed to be located in an area affected by sea level rise will be able to utilize the projections in Part 490.

Comment:

Climate change vulnerabilities such as flooding should be considered in the Environmental Assessment Form, in addition to scoping. Comment No. 26.

Response:

The EAFs already address flooding. Flooding is addressed in questions 16 of Part I of the Short-form and Question 10 of Part 2 of the Short-form and Part 2 of the Full EAF, question 5 (which references questions in Part 1). The Commenter is also directed to the associated portions of the SEQR workbooks.

Comment:

Consideration of "vulnerability from the effects of climate change" should be struck from the proposed rule because it is overly bulky and costly, there are no quantifiable measurements, this does not add substantive information, there is no "promulgated climate regulation", and this presupposes project impacts before the project has been evaluated. Comment No. 146.

Response:

As modified, the proposed rule change has been moved to the list of items requiring evaluation where relevant (or applicable) and significant. It is far costlier to ignore the evaluation than to perform it as recent flooding events have shown. As to whether the environmental impacts that stem from a project's vulnerability to climate change are substantive or proportional, this should be evaluated on a project-by-project basis following the existing procedures of SEQR. The rule change does not pre-suppose impacts. The regulatory provision at issue addresses the required contents of an environmental impact statement. As far as official guidance and rules are concerned, the Department recently promulgated 6 NYCRR Part 490, Projected Sea-level Rise, which provides official sea level rise projections. Part 490 is one example of a promulgated climate change regulation, which includes quantification of a measurement of the State's vulnerability to the climate change hazard of sea-level rise. Additional climate change vulnerabilities are quantified, for example, in the New York State ClimAID report, which is the primary source for the Part 490 projections. The Department's Division of Environmental Permits has had climate change guidance where an EIS is required since 2009.

Comment:

This regulation appears to formalize DEC's (2010) Commissioner's Policy 49 and require the range of analyses mentioned in that Policy be included in an EIS, regardless of the specifics of the project. This will delay small projects without having a meaningful impact on greenhouse gas emissions. Furthermore, the GEIS Regulatory Impact Statement states that mitigation measures "may include" a consideration of climate change vulnerabilities, but the proposed amendment would make this a requirement. Comment No. 93.

Comment:

Consideration of "vulnerability from the effects of climate change" is contrary to existing flexibility in scoping, particularly with respect to smaller projects and municipalities. Comment No. 93.

Responses:

Commissioner's Policy 49 (CP-49) memorializes the Department's commitment to considering climate change in all aspects of its activities. That is, CP-49 is a high-level, internal agency directive to Departmental staff. There is no specific reference to SEQRA in CP-49, nor is there any specific reference to CP-49 in the Part 617 regulation, including in the new provision added in 6 NYCRR § 617.9 (b) (5).

The regulatory language has been moved into the list of topics that are evaluated in an EIS where applicable and significant, which was the intent of the change. For example, the impact of climate change and flooding may have more applicability to actions occurring in the coastal area than projects occurring further inland. If the climate change discussion is not both applicable and significant then SEQR would not require it be included in the EIS.

As for comment regarding delay of small projects, EISs are rarely required of small projects and climate change analysis is only required where applicable and

significant. The requirement has also memorialized the climate change analysis that has become part of SEQR and NEPA.

Comment:

The scope of SEQRA should be expanded to include greenhouse gases and DEC should provide additional guidance for considering greenhouse gas emissions, including lifecycle emissions upstream and downstream of projects. Comment nos. 27 and 28.

Responses:

SEQR already encompasses impacts of greenhouse gas emissions, including impacts of greenhouse gas emissions on climate change as well as mitigation of climate vulnerabilities. That is, SEQR includes where relevant and significant consideration of greenhouse gas emissions that contribute to climate change, as well as consideration of how climate change may alter a project's environmental impacts during the lifetime of that project. As for how such impacts should be assessed including lifecycle emissions upstream and downstream projects, the comment is noted.

Comment:

SEQRA should require a mandatory and standardized review of climate change, for example by requiring all lead agencies to adopt DEC's (2009) Policy for Assessing Energy Use and Greenhouse Gas Emissions in an Environmental Review', (2010) Commissioner's Policy 49, and the New York State Energy Plan. Comment No. 58.

Response:

Comment noted. The Department also notes that lead agencies sometimes use DEC policies without any mandate to do so. The policies are internal directives to Departmental staff, and do not themselves alter existing statutory authority or regulatory requirements. Other lead agencies may choose to adopt these or similar policies. Furthermore, the additional and updated SEQR and CRRA guidance that the Department is developing will, if adopted by additional lead agencies, further improve consistency.

Finally, the Department agrees that the New York State Energy Plan is an excellent resource for lead agencies and project sponsors to review in the course of the SEQR process. Local government climate change goals and plans are similarly useful resources.

2.6 GENERIC ENVIRONMENTAL IMPACT STATEMENTS (6 NYCRR § 617.10)

Proposed Regulatory Language

The Department is also proposing an amendment to 6 NYCRR section 617.10 (Generic EISs) that would clarify the ability of a lead agency to deny an action for which it has prepared a generic EIS as follows:

6 NYCRR § 617.10 …

(d) When a final generic EIS has been filed under this part:

(1) No further SEQR compliance is required in the following circumstances: a) if a subsequent proposed action will be carried out in conformance with the conditions and thresholds established for such actions in the generic EIS or its findings statement; or b) the lead agency determines not to approve, undertake or fund the action;

Objectives, Rationale, and Benefits

This additional language would simply make express something that is implicit, namely that an agency that has undertaken to prepare a programmatic generic environmental impact statement can abandon the program or complete the EIS and make negative findings. Under the existing regulations, no final EIS need be filed if an action is withdrawn under 6 NYCRR § 617.9 (a) (5) (i).

Potential Impacts

None.

Alternatives

The “no action” alternative would result in no change to the existing language of the SEQR regulations. However, the ability of a lead agency to prepare negative findings based on a GEIS is already implicit in the SEQR regulations.

Comments:

The Department did not receive any comments on this regulatory change.

2.7 DOCUMENT PREPARATION, FILING, PUBLICATION AND DISTRIBUTION (6 NYCRR § 617.12)

Revised Proposed Regulatory Language

6 NYCRR § 617.12 (c) (1): Publication of notices: (1) Notice of a Type I negative declaration, conditioned negative declaration, positive declaration, draft and final scopes and completion of an EIS must be published in the Environmental Notice Bulletin (ENB) in a manner prescribed by the department. Notices must be submitted [provided] by the lead agency [directly] to the Environmental Notice Bulletin [, Room 538,.] by e-mail to the address listed on the ENB’s webpage or to the following address: Environmental Notice Bulletin, 625 Broadway, Albany, NY 12233-1750. The ENB is accessible on the department's [internet] web site at 'http://www.dec.state.ny.us'.

6 NYCRR § 617.12 (c) (5): The lead agency shall publish or cause to be published on a publicly available website (that is free of charge) the draft and then final EIS scopes and, ~~to the extent practicable,~~ the draft and final EISs. The website posting of such scopes and statements may be discontinued one year after all necessary permits have been issued by the federal, state and local governments or after the action

is funded or undertaken, whichever is later. Printed filings and public notices shall clearly indicate the address of the website at which such filings are posted.

DEC is also proposing some non-substantial modifications and conforming edits to 6 NYCRR § 617.12, as set out in the express terms.

Objectives, Rationale, and Benefits

The objective is to compliment the new mandatory scoping rule by providing for notice of publication of both the draft and final scopes in the Environmental Notice Bulletin. At the same time, the rule also memorializes the necessity of posting the scopes and EIS on the web.

Potential Impacts

None.

Alternatives

The only alternative is the no-action alternative.

Comment:

“We support the requirement that the lead agency publish its draft and final EIS scopes and draft and final EISs on a publicly-available website, but would clarify the phrase "to the extent practicable." In 2017, the cost and technological requirements of posting even large documents such as draft and final EISs, is "practicable" for all lead agencies. We recognize that the text of ECL § 8-01 09 (4) and (6) contains the phrase "unless impracticable," but DEC should clarify its interpretation of that phrase in order to strictly limit the ability of lead agencies to claim that it is not practicable to publicly post EISs on the basis of cost or availability of website space. The revisions to this section should also allow for a lead agency to discontinue the website posting of scopes and EISs upon the withdrawal of a proposed action in addition to the current trigger for discontinuance of website publication ("may be discontinued one year after all necessary permits have been issued by the federal, state and local governments").” Comment No. 151.

Response:

The Department agrees with the changes proposed by this comment and has amended the revised proposed regulatory language accordingly. What might have been considered “practical” when SEQR was amended to encourage website posting has drastically changed in favor of electronic publication of documents.

Comment:

“It is already the case that current SEQR provisions require no meaningful notice to potentially interested stakeholders. Publication in the Environmental Notice Bulletin (ENB) and a legal notice in the community's newspaper of record are presently deemed legally sufficient. However, the present notice provisions are highly unlikely to inform most interested persons. Almost no one reads the ENB. The circulation of print newspapers has dropped dramatically and these notices are rarely found in their on-line editions. SEQR does set forth several other forms of notification, but they are only utilized by applicants when required to do so by the Department. The lack of required

broad-based notification is a major source of deficiency in the regulations and must be addressed by the Department." Comment No. 226.

Response:

The Department does not agree with the comment that "almost no one reads the ENB" judging by the public response that the Department's often receives to notices in the ENB. At the same time, the Department agrees with the sentiment of the comment that agencies should strive to improve public notice of projects whether though use of new technologies such as social media or traditional tools where appropriate. The comment is otherwise noted.

Comment:

"The City recommends that DEC revise § 617.12(c)(5) to address those actions that do not require any federal, State or local permits, for example, [zoning amendments, local legislation, and certain municipally funded as-of-right developments]. Under the currently proposed amendment, a lead agency could seemingly be required to leave the environmental review documents online for an indefinite period. The City recommends that DEC revise proposed § 617.12 (c) (5) as follows:

'Section 617.12(c)(5) The lead agency shall publish or cause to be published on a publicly available website (that is free of charge) the draft and then final EIS scopes and, to the extent practicable, the draft and final EISs. The website posting of such copies and statements may be discontinued one year after all necessary permits have been issued by the federal, state and local governments or when the action is final, i.e., the action does not require permitting. Printed filings and public notices shall clearly indicate the address of the website at which such filings are posted.'" Comment No. 222.

Response:

The Department agrees with the comment and has incorporated these changed into the revised proposed regulatory language to address the substance of the comment.

2.8 SEQR FEES (6 NYCRR § 617.13)

Proposed Regulatory Language:

6 NYCRR § 617.13 (e) [Where an applicant chooses not to prepare a draft EIS,] T[t]he lead agency will provide the applicant, upon request, with an estimate of the costs for preparing or reviewing the draft EIS calculated on the total value of the project for which funding or approval is sought. The applicant is also entitled to, upon request, copies of invoices or statements for work prepared by a consultant that are submitted to the lead agency in connection with any services rendered in preparing or reviewing an EIS.

Objective, Rationale, and Benefits:

The Department proposes to clarify the fee assessment authority in the regulations by amending the existing language to provide project sponsors with the ability to request an estimate of the costs for reviewing the EIS and a copy of any invoices or statement of work done by any consultant for the lead agency. This is primarily an issue of fairness and disclosure. A project sponsor should have the right to receive an estimate of the lead agency's costs for the review of the EIS along with written documentation to support such fees. Currently, the lead agency must provide an estimate to the project sponsor when they take on the responsibility for the preparation of the EIS.

Potential Impacts:

This is merely an accounting issue and it will not result in any adverse impacts.

Alternatives:

The no action alternative would remove this item from the Fees section. This is primarily a fairness issue. All project sponsors deserve an estimate and an accounting of how the money was used. The current situation would not be tolerated by any customer of a service.

A second alternative would be to require that a fee be collected for all EISs and that all EISs are prepared by a third party hired by the lead agency. Currently, the lead agency or the project sponsor at its option may prepare the draft EIS. This is a recurrent issue. It has been discussed since the initial adoption of the SEQR Act in 1975. The statute specifically contemplates the possibility that the applicant will prepare the draft EIS. Subdivision 3 of section 8-0109 states:

> An agency may require an applicant to submit an environmental report to assist the agency in carrying out its responsibilities, including the initial determination and, (where the applicant does not prepare the environmental impact statement), the preparation of an environmental impact statement under this article. The agency may request such other information from an applicant necessary for the review of environmental impacts. Notwithstanding any use of outside resources or work, agencies shall make their own independent judgment of the scope, contents and adequacy of an environmental impact statement.

However, the alternative would track the requirements of NEPA.[40] The argument for the NEPA approach is that project applicants have an inherent interest in proceeding with a project as proposed and are not interested in considering alternatives or ways to mitigate or avoid environmental impacts.

While there is truth to this argument such an alternative is not workable under SEQR. Unlike NEPA EISs which apply to major actions of federal agencies, SEQR applies to actions undertaken by any state or local agency including school and fire districts. Setting up a process for a third-party system for preparation of all EISs would increase the cost and time taken to prepare an EIS as well as being subject to various procurement laws and regulations. Given that many municipalities in New York State do not have full time planning agencies this would be a significant burden. It also may not

substantially improve the EIS product. Project sponsor may not be willing to share the details of the project with the selected contractor which could lead to EISs short on substantive analysis due to a lack of understanding of the project. The required public review for all EISs and the requirement that all agencies make their own independent review of the EIS record serves to reduce the inherent bias of a project sponsor being allowed to evaluate its own project.

Comments:

The Department did not receive comments on this change.

2.9 COASTAL CONSISTENCY

Under section 617.9 (b) (5) (iv) of the existing SEQR regulations, the GEIS must consider consistency of the proposed rules with applicable coastal policies contained in 19 NYCRR section 600.5. As described above, the rule making includes changes to the Type I list, the Type II list, and the procedures governing scoping and preparation of environmental impact statements. Many of the proposed Type II actions, rules for scoping and acceptance of the draft EIS and completion of the final EIS have no bearing on the State's coastal policies. The proposed amendments that might have some effect on the State's coastal policies are set out and discussed in the table that follows:

Coastal Policy	**Proposed Rules**	**Analysis**
Section 600.5(a)(5): "Encourage the location of development in areas where public services and facilities essential to such development are adequate, except when such development has special functional requirements or other characteristics which necessitate its location in other coastal areas."	Proposed 617.5(c) (2), (3) (upgrades of existing structures to meet energy codes and with green infrastructure); ~~671.5 (c) (18), (19), (20), and (21) (sustainable development Type II actions);~~ 617.5(c) (22) (reuse of existing structures); ~~and 617.5(c) (47) (Brownfield site clean-up agreements).~~	The proposed Type II actions set out in the middle column would further the coastal policy to encourage the location of development in areas with public services inasmuch as they would provide a regulatory incentive for the reuse of, upgrading or modernizing of existing structures ~~previously disturbed sites with existing infrastructure as discussed above~~. ~~The proposed Type II actions remove some regulatory barriers to development in pre-disturbed or previously developed areas that contain public services and existing infrastructure.~~
Section 600.5(c): "Agricultural lands policy. To conserve and protect agricultural lands in the State's coastal area, an action shall not result in a loss nor impair the productivity of important agriculture lands as identified on the coastal area map, if that loss or impairment would	~~Proposed section 617.5(c) (17) (Type II action for minor subdivisions).~~	~~Subdivision and conversion of agricultural lands into residential lots is a matter of environmental concern since such subdivisions can impact open space, wildlife, and impair the future capacity of the land for food production. The classification of minor subdivisions as Type II actions would, however, have very limited application to agricultural~~

adversely affect the viability of agriculture in an agricultural district, if there is no agricultural district, in the area surrounding such lands.”	Proposed section 617.5(c) (48) (Anaerobic Digesters).	~~lands since the Type II action is limited to lots of ten acres or less and subdivisions of 4 lots or less within a five-year period. Subdivisions of concern would tend to involve much larger parcels and more lots. As such, the proposed Type II would not create an incentive for the conversion of agricultural lands and is therefore not inconsistent with the coastal policy. To the extent that public comment may reveal a conflict between the proposed Type II action and the State's policy to protect and preserve agricultural lands, the proposal identifies an alternative to limit the Type II action to lands outside of agricultural districts. Finally, the proposed Type II actions for sustainable development provide a regulatory incentive to direct development away from agricultural fields and into areas of existing development.~~ The proposed Type II action for anaerobic digesters would have no effect on the loss or impairment or viability of agricultural lands.
Section 600.5(f)(3): Protect, enhance and restore structures, districts, areas or sites that are of significance in the history, architecture, archeology or culture of the State, its communities or the nation.	Amended section 617.4 (b) (9) (Type I action for actions that are within or substantially contiguous to certain historic resources).	While smaller scale development projects, which are below the Type I thresholds, would no longer be classified as Type I actions and subject to the full EAF and coordinated review, they would still be subject to SEQR and the substantive considerations regarding impacts to historic resources that currently applies in SEQR. Therefore, no conflict exists with

		the coastal policy. The proposal would also require impact analysis of properties that have been determined to be eligible for listing on the State Register of Historic Places by the Commissioner of Parks, Recreation and Historic Preservation — which would advance the coastal policy to protect historic resources.
Section 600.5(g)(4): Activities or development in the coastal area will be undertaken so as to minimize damage to natural resources and property from flooding and erosion by protecting natural protective features, including beaches, dunes, barrier islands and bluffs. Primary dunes will be protected from all encroachments that could impair their natural protective capacity.	Proposed 617.9(b)(5)(~~iv~~) (iii) (i) (consideration of measures to avoid or reduce both an action's environmental impacts and vulnerability from the effects of climate change such as sea level rise and flooding).	This proposed amendment to the text of section 617.9 would clearly advance the coastal policy to minimize damage to natural resources from flooding and erosion since such considerations would be explicitly included in mitigation, where relevant, when an EIS is prepared.

REVISED REGULATORY IMPACT STATEMENT (SAPA § 202-A)

1. Statutory Authority

The Department's statutory authority to amend Part 617 is in Environmental Conservation Law (ECL) § 8-0113, which authorizes the Department, through the Commissioner, to adopt rules and regulations to implement the State Environmental Quality Review Act (SEQR).

2. Legislative Objectives

The purpose of the proposed amendments to Part 617 is to update and improve the efficiency of the SEQR process without sacrificing meaningful environmental review. The proposed changes build on regulatory changes from past SEQR rulemakings, namely the 1995 amendments (effective January 1, 1996) to the SEQR regulations (which supplemented the Type II list and established a more detailed scoping process for environmental impact statements, among other changes) and on the rulemaking that established the new electronic environmental assessment forms that became effective October 7, 2013.

3. Needs and Benefits

The last major amendments to the SEQR regulations occurred more than two decades ago. This rule making is intended to update the SEQR regulations with additional Type II actions, *i.e*., adding more actions to the list of actions not subject to further review under SEQR, and with other changes more fully described in the express terms and accompanying environmental impact statement. Many of the concepts and ideas underlying the proposed changes had their genesis in 2011 when the Department convened a series of round table meetings among stakeholders in the SEQR process on ways to streamline the SEQR process without sacrificing meaningful environmental review.

Beginning in 2011 and continuing through 2013, stakeholder meetings were held throughout the state with individuals representing governmental agencies, business, and environmental groups (see, draft generic environmental impact statement or draft GEIS, Appendix A, which has been published on the Department's website at http://www.dec.ny.gov/permits/83389.html). In those meetings, the Department asked stakeholders to react to a skeletal outline of proposed changes and to also add their ideas to the list that was prepared by the Department's staff. Stakeholders gave support to tightening the environmental impact statement process (requiring mandatory scoping and enacting more exact requirements on when a draft environmental impact statement can be rejected as inadequate). With some exception, stakeholders also gave support to a proposed list of additions to the Type II list of actions (*i.e.,* actions that would not be subject to further review under SEQR). The express terms are, for the most part, the products of those meetings. Some ideas were first proposed in the 1995 rule making process.

The Department is also proposing a provision to ~~clarify that the discussion of mitigation measures~~ recognize that ~~in~~ an environmental impact statement may include,

where relevant, an analysis of a project's vulnerability to the effects of climate change such as sea level rise and flooding. (Energy use and greenhouse gas emissions are already among the topics addressed by SEQR. *See* ECL §8-0109 [2] [h] as implemented by 6 NYCRR 617.9 [b] [5] [iii] [e] and Policy on Assessing Energy Use and Greenhouse Gas Emissions in Environmental Impact Statements, dated July 15, 2009.) As discussed in the accompanying draft GEIS associated with this rulemaking, this change implements a recommendation of the Governor's 2100 Commission[41]and ensures that where appropriate mitigation measures will be considered in mitigating the impacts of a project. The recent occurrence of extreme weather events underscores the need for SEQR reviews to address the effects of climate change, including preparation for the risks from climate change, as well as human activities that drive climate change.

4. Benefits

The accompanying draft environmental impact statement contains a specific discussion of objectives and benefits for each proposed change to the SEQR regulations.

5. Costs

a. To the regulated parties:

Because SEQR is a law that requires compliance by government agencies, any effect on the regulated public is indirect. Further, in most cases, the proposals, if adopted, would arguably reduce costs through the creation of additional Type II actions and further streamlining of the EIS process. This is the agency's overall best estimate; however, the economic impact of the amendments to SEQR is impossible to quantify.

Except for the small change to the Type I rule ~~(which lowers the thresholds~~ for ~~when a~~ residential ~~subdivision~~ housing units ~~would have~~ be ~~classified as a Type I action)~~ and the proposed change to section 617.9 (regarding sea level rise and storm-impact analysis), the changes streamline the regulations, which reduces costs to regulated parties. For example, the additional Type II actions would no longer be subject to review under SEQR. Mandatory scoping will help insure that environmental issues are considered early on rather than at the end of the process after a project sponsor has already spent large sums of money on moving an application forward. On the other hand, reducing the thresholds for Type I actions ~~and subdivisions~~ involving residential developments may arguably raise costs for ~~subdivision~~ applicants, though there is no way to measure the effect since some of the ~~subdivisions~~ developments effected by the new proposed rule would be Type I on account of other thresholds and the Type I requirement for coordinated review results in more efficiency of review (which arguably has the effect of reducing costs). The proposed rules in section 617.9 related to sea level rise and flooding may arguably increase costs for some project sponsors of developments that are located in coastal and other flood prone areas where the project requires preparation of an environmental impact statement. The additional costs would be to assess, avoid or mitigate the impacts that may come about from sea level rise or flooding — which as recent storm events show would be a cost-saver in the life cycle of the project and to governmental responders should a major storm event impact the project.

Based on public comment, the Department has made other changes to the proposal that add minimal cost. These are as follows:

1. In section 617.6, the Department removed the provision that provided for submission of draft EISs in lieu of EAFs. This was in response to a comment from commenter John Caffry that pointed out that the provision is an anachronism with the requirement for mandatory scoping. Inasmuch as scoping determines the contents of a draft EIS, an applicant would be putting the cart before the horse to be submitting a draft EIS before scoping. Project sponsors are still free to do so but the practice is illogical and a waste of time and effort. Removal of this provision may be a cost saver for the regulated community. In a few instances, the project sponsors have submitted DEISs to the Department and then have had to resubmit another version following scoping.
2. In section 617.9, the Department has modified the requirement that post scoping, raised issues, that are properly raised (with the required justifications for late submission), be evaluated in the draft EIS or, if not, that the comments are appended to the draft EIS. This change replaces a provision that allows applicants to address such late raised comments as responses in the FEIS if they are not addressed in the draft EIS. The change in requirement only, potentially, adds the reproduction costs of the raw comments.
3. Other changes include the requirement for publication in the Environmental Notice Bulletin (a free internet publication) of notice of the availability of the draft and final scopes for an EIS (6 NYCRR § 617.12). This is to insure public notification of the draft and final scopes for an EIS. This requirement only entails completing a form and e-mailing it to the Environmental Notice Bulletin for publication. Also, in section 617.12, at the suggestion of the New York State Bar Association, Environmental Law Section, the Department has eliminated the qualifier “to the extent practicable” from the requirement for website posting of EISs. The Bar Association pointed out that it is always practical to public EISs on the web, whereas that may not have been the case when the ECL was amended to provide for website posting of EISs in 2005.

b. To state and local governments;

State and local agencies may decrease their costs (as would project sponsors) where the action involves one of the proposed Type II actions (actions not subject to review under SEQR). State and local governments may incur additional costs on account of mandatory scoping. This cost is difficult to measure, however, since scoping can decrease costs later in the process by insuring that environmental issues are articulated at an early stage in project review. The concept of scoping is not new as it was first introduced into the SEQR regulations in 1987 and then detailed in the 1995 amendments to the SEQR regulations (effective January 1, 1996). Some manner of scoping currently occurs for all draft EISs. The regulation now specifies how scoping should be done when the scoping option is chosen. Agency staff time spent participating in scoping should be more than offset by a reduction in staff time currently spent determining adequacy of a submitted draft EIS and requesting more information from applicants. Scoping also makes the process more predictable for applicants. Agencies have the authority to assess a fee for preparation or review of a draft or final EIS. This fee includes the cost of scoping. The Department, therefore, believes that, as

a whole, state and local governments will see a reduction in costs associated with implementation of SEQR due to the reduction in the number of projects that will be subject to SEQR and the changes that encourage timely and more efficient reviews of actions.

Costs to the Department mainly involve staff time and resources to promulgate these regulations and then to conduct training on them. The Department already conducts scoping on most EISs where it is lead agency. As with most regulatory amendments there will be some cost in retraining people in the SEQR process as a result of this rulemaking. The cost here is short term and minimal. The Department has maintained a training and assistance program for those interested in receiving training and those who have specific questions relating to implementation of the law. The Department also cooperates with the Department of State and statewide organizations such as the Association of Towns, the Conference of Mayors and the New York Planning Federation in the conduct of training. This amendment would require that some additional staff time be devoted to training but it would be a relatively small change from currently existing efforts.

The second and third group of changes may be applicable to local governments where they serve as project sponsor.

5. Local Government Mandates

There are no additional programs, services, duties or responsibilities imposed by the rule upon any county, city, town, village, school district, fire district or other special district except to require mandatory scoping of all environmental impact statements (where it is now optional). Statistically, there are very few environmental impact statements compared to actions that receive a negative declaration. The proposed regulations otherwise reduce mandates by adding to the number of Type II actions (which are not subject to further review under SEQR). The expansion of the Type II provision for ~~area variances~~ lot line adjustments ~~would most likely~~ may reduce the regulatory workload of zoning or planning boards since ~~area variances~~ lot line adjustments ~~(which are within the jurisdiction of zoning boards of appeals)~~ would only be subject to SEQR if a project required other approvals or permits that were subject to SEQR (*e.g.*, site plan review, legislative zoning changes, use variances and special use permits). The requirement to look at sea level rise and flooding in a proper case is, at best, a minor mandate compared to the consequences of not doing so.

6. Paperwork

With the addition of items to the list of Type II actions there will be a reduction in the need for applicants and lead agencies to complete environmental review forms. (It should be noted, however, that in 2013 the forms became electronic with links to GIS and are now quicker and easier to complete than before). The amendments may, however, result in lead agencies having to prepare more scoping documents because scoping would be mandatory under the proposed new rules. Nonetheless, scoping is only applicable where an environmental impact statement is required and only in a small percentage of actions is an environmental impact statement required. Scoping is, however, a long term time saver in that it allows for early identification of issues. There are no new or additional recordkeeping requirements of a regulated party. An additional

requirement is imposed for internet posting of draft scopes. Additional paperwork includes publication of notices of draft and final scope and in rare cases the addition of appendix to the draft EIS containing late submitted scoping comments. The Department views these additional requirements as minimal.

7. Duplication

There is no duplication of other state or federal requirements. With some of the Type II additions, the regulations are intended to reduce duplication of SEQR review requirements with those carried out under State land use enabling laws (*e.g*., the sustainable development Type II actions in section 617.5[c]).

8. Alternatives

A list and discussion of the regulatory alternatives is contained in the draft GEIS.

9. Federal Standards

There are no applicable Federal standards inasmuch as SEQR is not a Federal delegated program.

10. Compliance Schedule

The time necessary to comply with these regulatory amendments is not substantial. Some training time may be necessary for those unfamiliar with SEQR but for those familiar with the current regulations the amendments should be easily understood and implemented. Any particular questions will be answered by the Department in its assistance role to state and local agencies and to the regulated public. The Department does anticipate conducting general training on these amendments for those who may want to participate, which would include in person and the preparation of web-based training materials. Compliance is technically required on the effective date of the regulation. The Department proposes that the amendments should take effect ~~three~~ six months or more from the date their adoption is noticed in the New York State Register. This delay in implementation would allow for explanatory materials to be produced and training to occur before the effective date of the new rules. ~~The express terms provide for an effective date of January 1, 2017~~9, ~~which was added as a placeholder since it is difficult to precisely determine when the proposed rules would be adopted (assuming they are adopted). The Department could change this date in the notice of adoption so the amendments become effective three months from the date of their adoption.~~ In addition to physical outreach, the Department would utilize its electronic and web-based resources to train other agencies, local governments, and the public on the new regulations.

REVISED REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES AND LOCAL GOVERNMENTS (SAPA § 202-B)

1. Effect of Rule

Presently, any proposal, whether made by a business or local government, that involves a discretionary decision by a government agency and that may affect the environment, is subject to an assessment under the State Environmental Quality Review Act (SEQR) — to determine whether it may have a significant impact on the environment, and, if so, the lead agency must prepare an environmental impact statement. An exception lies where that action or project has been categorically determined not to be subject to environmental review (6 NYCRR 617.5[c]). The rulemaking effects all local governments (as they are required to comply with SEQR when approving or undertaking an action), and many small businesses, to the extent they may seek approvals or governmental funding for actions that may affect the environment. The actual effect on small businesses and local governments is very contextual depending on the action that is under consideration. Therefore, the proposed rules potentially affect all local governments and some small businesses but mostly in a way that is beneficial to them.

2. Compliance Requirements

The Department expects that the proposed rules, overall or state-wide, to reduce the cost of complying with SEQR because of the addition of a number of Type II actions (actions that do not require the preparation of an environmental impact statement) and proposed changes to the environmental impact statement process that would streamline the regulatory decision making process that is subject to SEQR. While a small number of large scale ~~subdivisions~~ residential development projects may change classifications (due to changes proposed to the Type I list of actions contained in 6 NYCRR 617.4), from Unlisted to Type I, that change is procedural. Applicants for large scale subdivisions elevated to the Type I list would be required to complete the full EAF instead of the short EAF and the review of such ~~subdivisions~~ residential units would require coordinated review. Type I actions are also deemed more likely to require the preparation of an EIS. However, only about 200 EISs are prepared on a yearly basis ~~for~~ as compared to the tens of thousands of actions that are presumably the subject of a negative declaration. The imposition of mandatory scoping for EISs will mean more early work in the EIS process but statewide relatively few EISs are prepared. Finally, ~~language~~ provision has been added to the list of topics that an EIS may cover to insure consideration is given to the vulnerability of development projects to flooding and sea level rise on account of climate change. Particularly in coastal areas, this may require additional analysis by local governments when they serve as lead agencies, and by small businesses when they are project sponsors. It would be speculative to predict the number of times a project sponsor and lead agency must perform these analyses. Substantive assessment of these topics has long-term benefits, as the nation discovered following the recent spate of hurricanes that have devastated coastal areas, *e.g.*, “Superstorm” Sandy, and, in 2017, Puerto Rico and Houston Texas. Planning for major storm events is common sense.

3. Professional Services

The Department expects that there would be little change, if any, in the professional services that a small business or local government would likely employ to comply with this rule. Currently, the professional services that may be needed to prepare SEQR documents include a wide range of technical expertise. Because of the proposed new Type II actions, there may be a decrease in professional services since those actions would no longer require further compliance with SEQR. However, such an effect is difficult to measure. Though not part of this rule making, the rulemaking to update the EAF forms made environmental analysis more accessible to non-professional who often serve on planning and zoning boards. The present rule making is part and parcel a follow up to the previous rulemaking to update the EAF forms.

4. Compliance Costs

The additions to the list of Type II actions may result in the elimination of time and expense for local governments and small business project sponsors.

The proposed changes would also bring greater efficiency to the environmental impact statement process by mandating scoping, creating greater linkages between the determination of significance and the scope of the EIS. The new requirements serve to encourage lead agencies to build on their prior analyses. The proposed regulations would also tighten the rules on whether the lead agency can reject a draft EIS as inadequate. While relatively few actions subject to SEQR (usually larger scale ones) require the preparation of EISs, the business community may realize some benefit in compliance costs from the proposed new procedures that would bring greater certainty to the EIS process. Compliance costs will otherwise remain the same except as discussed above with respect to whether additional professional services may be needed in some cases to timely complete final environmental impact statements.

5. Economic and Technological Feasibility

There are no economic or technological feasibility issues.

6. Minimizing Adverse Impact

There are no adverse economic or regulatory impacts expected from adoption of these rules.

7. Small Business and Local Government Participation.

In preparing the proposed regulatory changes, the Department held numerous stakeholder meetings (that were co-sponsored by the Empire State Development Corporation) where individuals representing business and local governments (including Hudson Valley Patterns for Progress, which the Department partnered with prior to this rulemaking in evaluating ways to improve the implementation of SEQR) were asked to identify changes that could be made the regulations. Overall, these meetings were very well attended and the exchange of ideas and proposals was extensive and exhaustive. The list of individuals is attached as Appendix A to the revised draft environmental impact statement. The Department also issued a draft scope to this draft generic environmental impact statement, which was noticed in the Environmental Notice Bulletin. Through that media, persons from all parts of the state, including businesses

and local government officials, were asked to comment on the proposed changes described in the scooping statement. Scenic Hudson and the Environmental Law Section of the New York State Bar Association, in their comments, favorably remarked upon the extent to the Department's outreach to the stakeholder community.

REVISED RURAL AREA FLEXIBILITY ANALYSIS (SAPA § 202-BB)

1. Types and estimated numbers of rural areas

The regulations are statewide and thus the rules would apply to all rural areas.

2. Reporting, recordkeeping and other compliance requirements

There is no change from the existing rules except that a relatively small number of additional larger-scale subdivisions that would not otherwise be classified as Type I actions would now be classified at Type I and be subject to the full environmental assessment form rather than the short form coordinate review. Lead agencies will be required to conduct scoping in instances where an environmental impact statements is required ~~will be completed~~.

3. Costs

The Department does not expect any additional costs to comply with the new rules except as described in the Regulatory Flexibility Analysis for Small Businesses and Local Governments.

4. Minimizing Adverse Impact

The proposed rules would not have an adverse impact on rural areas since they the Type II changes have the ~~overall~~ effect of decreasing the regulatory burden and the new scoping rules and EIS acceptance practices are expected to make ~~ing~~ the SEQR process more efficient. ~~Rural boards are likely to welcome some of the newly proposed Type II actions.~~

6. Rural area Participation

The Department held stakeholder meetings and public hearings and informational sessions throughout the state. A roster of individuals who attended the stakeholder meetings is contained in attachment A to the revised draft generic environmental impact statement accompanying the proposed rules. As indicated by the roster, meetings were held in upstate locations including Albany and Buffalo. The roster of persons attending the round table discussions included ~~quite a~~ few persons located in rural areas of the State or who regularly work with rural communities. The Department also issued a draft scope to this draft generic environmental impact statement, which was noticed in the Environmental Notice Bulletin. Through that media, the Department solicited comments from all parts of the state including rural areas.

REVISED STATEMENT IN LIEU OF JOB IMPACT STATEMENT (SAPA § 202-A [2] [A])

The proposed amendments to the State Environmental Quality Review Act (SEQR) regulations at 6 NYCRR Part 617 should have no impact on existing or future jobs and employment opportunities as these are procedural revisions to existing rules. The proposal to add categories of Type II actions would constitute a reduction in regulatory burden. The Type I changes are minor and will not affect development or employment. The changes to the environmental impact statement process can be expected to bring greater efficiency to the EIS process. The remaining changes are minor, and would have no effect on jobs.

A Job Impact Statement is not submitted with this rulemaking proposal because the proposal will not have a "substantial adverse impact on jobs or employment opportunities," which is defined in the State Administrative Procedure Act Section 201-a to mean "a decrease of more than one hundred full-time annual jobs and employment opportunities, including opportunities for self-employment, in the state, or the equivalent in part-time or seasonal employment, which would be otherwise available to the residents of the state in the two-year period commencing on the date the rule takes effect." The proposed changes to Part 617, which again are generally procedural in nature, are not expected to have any such effect and most likely will not affect or impact jobs or employment opportunities.

.

APPENDIX A
HUDSON VALLEY SEQR DIALOGUE PARTICIPANTS

Meeting Date	Attendee	Organization (if known)
2/17/2010	David Eberle	
	Jeff Anzevino	Scenic Hudson
	Dave Church	
	Suzanne Kinder	
	Kathy Nolan	
	Sandra Kissam	Stewart Park and Reserve Coalition
	Justin Dates	Maser Consulting
	Jennifer Cocozza	DC Planning
	Tom Baldino	Beacon CAD
	Jim Bacon	
	Frank Cullyer	
	Kenneth J. Vogel	
	Connie Coker	Rockland Co. Legislator
	Doreen Tignanelli	
	John Penny	Poughkeepsie Journal
	George Collins	
	James Davis	
	Doreen Wekerce	
	Larry Knapp	Darlin Construction
	Heather Jockson	
	Linda Geary	
	Albert Annunziata	
	George Potanovic Jr.	
	David Porter	
	Joanne Steele	Sierra Club
	Mary McNamara	

DEPARTMENT OF ENVIRONMENTAL CONSERVATION
STAKEHOLDER OUTREACH MEETINGS

7/27/2011	Nan Stolzenburg	Community Planning & Environmental Associates/AICP
	John Caffry	Law Offices
	Sara Potter	
	Richards	Dormitory Authority
	Robert S. Derico	Dormitory Authority
	Kenneth Pokalsky	Business Council
	Darren Suarez	Business Council
	Kenneth Finger, Esq.	BRI
8/11/2011	Richard Hyman	BRI
	Nina Peek	VHB/Saccadi & Schult
	Beatrice Havranek	County of Ulster
	Charlie Murphy	Pattern for Progress
	Jonathan Drapkin	Pattern for Progress
	Larry Wolinsky	Pattern for Progress
	Marissa Brett	WCA
	Frank Mccullough	WCA/McCullough, Goldbergers, Staudt
	John Nolan	Pace Law School
	Rachel Shatz	ESD
	Soo Kang	ESD
8/31/2011	Rachel Shatz	ESD
	Soo Kang	ESD
	Simon Wynn	ESD
	Philip E, Karmel	
	Kevin Healy	
	Gordon Johnson	
	Wesley O'Brien	MTA
	Robert Kulikowski	NYC Mayor's Office of Environmental Coordination
	Graham Trelstad	SVP/AKRF
	Peter Liebowitz	AKRF
	Chris Vitolano	Langan Engineering & Env. Services
	Thomas Devaney	Langan Engineering & Env. Services
	Hayley Mauskapf	Scenic Hudson
	Joseph Tazewell	ESD
	Jeffrey Anzevino	Director of Land Use Advocacy, Scenic Hudson, Inc.
	Mark Chertok	Sive Paget & Riesel
	Edward Applebome	President & CEO/AKRF
	Jen McCormick	Deputy Commissioner/ESD
	Andrea Kretchmer	Founder & Managing Member of The Kretchmer Companies
	Michael Gerrard	Columbia University
	David Paget	Sive, Paget & Riesel
	Linh Do	SVP/AKRF
	Steve Eisner	Mayor's Office of Env. Remediation

	Mark McIntyre	Mayor's Office of Env. Remediation
	Roger Evans	DEC - Region 1
	Jeffrey Anzevino	Scenic Hudson, Inc.
	David Paget	Sive, Paget & Riesel
9/1/2011	Roger Evans	DEC - Region 1
	Jennifer Hartnagel	Environmental Advocate
	Rachel Shatz	ESD
	Simon Wynn	ESD
	Andrea Lohneiss	ESD
	Desmond Ryan	Executive Director of Association of a Better LI
	Philip E, Karmel	
	Kevin Healy	
	Jen McCormick	Deputy Commissioner/ESD
	Christina Orsi	Regional Director of Western NY, ESD
	Terri Elkowitz	VHB
	Robert M. Eschbacher	VHB Office in Hauppaugh
	Mitchell Pally	CEO of LI Builders Institute
	Robert Deluca	Group for the East End
	Kevin McDonald	The Nature Conservancy
	Carrie Meek Gallagher	Dir. Of Sustainability Suffolk Co. Water Authority
	Richard Leland	Fried, Frank, Harris Shriver & Jacobson LLP (#1)
	Joe Gergela	Executive Director-LI Farm Bureau
10/21/2011	Paul Tronolone	ESD
	Steve Gawlik	Vice President Capital Projects, ESD
	Kenneth Swanekamp	Director-Erie County
	Matthew N. Davidson	Director of Communications & Government Relations, Buffalo & Fort Erie Public Bridge Authority
	Brendan Mehaffy	Executive Director City of Buffalo
	David Mingoia	Deputy Director-Amherst IDA
	Sundra Ryce	President & CEO SLR Contracting & Services, Inc.
	Vincent Ricotta	Business Dev. Mgr.-SLR Contracting & Services Inc.
	Craig Slater	Harter, Secrest & Emery Law Offices
	Laura St. Pierre Smith	Vice President, Buffalo Niagara Partnership
	Michael Alspaugh	Senior Planner - Erie County
	Jim Allen	Executive Director Amherst IDA
	Stewart Haney	Chief Operating Office - WENDEL
	Michael Garland, P.E.	Director of Env. Services County of Monroe
	Samuel Ferrao	Niagara County IDA-Niagara County
	Al Culliton	COO-Erie County IDA
	Sam Magavern	Co-Director-Partnership For the Public Good
	Adam Walters	The Land, Env. & Energy PracticeGroup Leader
2/20/2012	Jonathan Tingley	Tuczinski, Cavalier, Gilchrist & Collura PC
	Sharon D. Kroeger	Wassauc Hist., Ag. Crossroads, Inc.

	Frank Fish	BFJ Planning
	Bryant Cocks	BC Planning LLC
	John A. Ward	Planning Board Member
	Dominic Cordisco	Drake Loeb
	Chris Ramsdill	Zoning Board Member
	Mary Ellenfinger	Planning Board
	Cathy Magarelli	Town Bd – Woodstock
	Clif Schneider	Town of Cape Vincent-Councilman
	Michael Baden	Town of Rochester-Planning Board Chair
	Sherry Menninger	Town of Sullivan Planning
	Wayen Kennedy	Town of Efrain Planning Board
	Don Markell	Campbell Planning Board
	Tammy M. Ayers	Town of Otisco-Town Clerk
	Bruce Clark	Town of Hague
	Charlotte Mayhew	Town of Plattsburgh
	Diane Drollette	Town of Plattsburgh
	Catherine Clark	Town of Hague
	Joan McDeid	Zoning/Cato
	Cindy Stephenson	Planning/Cato
	Bob Wicihowski	Zoning Board
	Tony Tozzi	Malta Building/Planning Director
	Kris Dimmick	Bernier Carr
	Sam Biondolillo	Town of LeRay - Town Board
	Debbie Biondolillo	Town of LeRay - Town Board
	Herb Engman	Town Supervisor-Town of Ithaca
	Andrew Gilchrist	Tuczinski, Cavalier, Gilchrist & Collura PC
4/24/2012	Walter Pacholczak	AGC NYS, LLC-Vice President
	Tom Goodwin	Monroe County Dept. of Planning & Dev., Planning Mgr.
	Jessica L. Ottney	The Nature Conservancy
	Sean Mahar	Audubon New York
	Laura Haight	NYPIRG
	Kevin Ryan	Ryan Law Group
	Daniel Ruzow	Whiteman, Osterman & Hanna LLP
	Robert Feller	Bond, Schoeneck & King
	Cheryl Roberts, Esq.	Rapport Meyers, LLP
	Lael Locke	NY Planning Federation
5/10/2012	Mike Elmendorf	AGC NYS, LLC
	Tom Goodwin	Monroe County Dept. of Planning & Dev., Planning Mgr.
	Sean Mahar	Audubon New York
	Brendan Manning	AGC NYS, LLC
	Laura Haight	NYPIRG
	Andrew Reilly	Wendel Companies
	Kevin Ryan	Ryan Law Group
	Daniel Ruzow	Whiteman, Osterman & Hanna LLP
	Robert Feller	Bond, Schoeneck & King
	Cheryl Roberts, Esq.	Rapport Meyers, LLP
3/26 & 4/19/13		
	Barbara Warren	Citizens Environmental Coalition

Kathleen	Curtis	Clean & Healthy New York
Judith	Anderson	Environmental Justice Action Group of Western NY
Saima	Anjam	Environmental Advocates of New York
Robert	DeLuca	Group for the East End
Richard	Amper	Long Island Pine Barrens Society
Eddie	Bautista	New York Environmental Justice Alliance
Christine	Giorgio	New York Lawyers for the Public Interest
Gavin	Kearney	New York Lawyers for the Public Interest
Laura	Haight	New York Public Interest Research Group
Misti	Duvall	Riverkeeper
Dan	Mackay	Preservation League of NYS
Holly	Carlock	Scenic Hudson
Andrienne	Esposito	Citizens Campaign for the Environment
Paul	Beyer	Department of State
Roger	Downs	Sierra Club
Mannajo	Greene	Clearwater
Katherine	Hudson	Riverkeeper

APPENDIX B

POSITIVE DECLARATION AND NOTICE OF SCOPING

Notice of Intent to Prepare

Regulatory Impact Statement
Draft Generic Environmental Impact Statement
Regulatory Flexibility Analysis
(RIS/DGEIS/RFA)
For
Amendment of Title 6
New York Code of Rules and Regulations
Part 617
Regulations Governing Implementation of the
State Environmental Quality Review Act
July 11, 2012

This notice is issued pursuant to Part 617 of the implementing regulations pertaining to Article 8 (State Environmental Quality Review Act) of the Environmental Conservation Law.

The New York State Department of Environmental Conservation (DEC), 625 Broadway, Albany, New York 12233-1750, is the lead agency for this rulemaking proposal.

Description of the Action
The New York State Department of Environmental Conservation proposes to amend the existing statewide State Environmental Quality Review Act (SEQRA) regulations (6NYCRR Part 617) to streamline the regulatory process without sacrificing meaningful environmental review.

The proposed amendments constitute an unlisted action and include:

A. Improve the scoping process;
    1. Require public scoping of Environmental Impact Statements (EIS);
    2. Provide greater continuity between the environmental assessment process, the scope and the draft EIS with respect to content; and
    3. Strengthen the regulatory language to encourage targeted EISs.

B. Clarify and reduce review requirements:
   1. Reduce the numeric thresholds in the Type I list for residential subdivisions and parking;
   2. Bring the threshold reduction for historic resources in line with other resource based items on the Type I list; and
   3. Expand the number of actions not requiring review under SEQRA (Type II list) to encourage development in urban areas vs. development in greenfields and to allow green infrastructure projects.

C. Improve timeliness of decision making:
   1. Provide more guidance regarding the proper means for determining the adequacy of a draft EIS; and
   2. Establish a more meaningful timeframe for the completion of a final EIS.

The Department has not identified any significant adverse environmental impacts from the proposed amendments. However, DEC has chosen to use a generic environmental impact statement (GEIS) as the means to discuss the objectives and the rationale for the proposed amendments, present alternative measures which are under consideration and provide the maximum opportunity for public participation.

Scoping
In an effort to provide early public review of the proposed amendments, the Department of Environmental Conservation is conducting a public scoping of issues to be addressed in the draft GEIS. A draft scope has been prepared to facilitate the scoping discussion. A copy of the draft scope is posted on the DEC website at:
http://www.dec.ny.gov/permits/6061.html

Comments and additional information
Comments related to potential significant adverse environmental impacts and additional alternatives to be addressed in the DGEIS should be sent to: depprmt@gw.dec.state.ny.us . Please include the phrase “Comments on 617 Scope” in the subject line of the e-mail. Comments may also be submitted in writing to:

Division of Environmental Permits & Pollution Prevention
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233-1750

Additional information regarding the proposed amendments can be obtained by contacting the Division of Environmental Permits & Pollution Prevention at: depprmt@gw.dec.state.ny.us or by calling 518-402-9167.

Comments on the draft scope
Will be accepted through
August 10, 2012

APPENDIX C

DRAFT SCOPE

DRAFT SCOPE
for the
Generic Environmental Impact Statement (GEIS)
on the
Proposed Amendments
to the
State Environmental Quality Review Act (SEQRA)

6 NYCRR - Part 617

PREPARED BY THE NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
DIVISION OF ENVIRONMENTAL PERMITS & POLLUTION PREVENTION
July 11, 2012

Description of the Action

The New York State Department of Environmental Conservation (DEC) proposes to amend the regulations that implement the State Environmental Quality Review Act ("SEQR", Title 6, New York Code of Rules and Regulations (6 NYCRR), Part 617). The principal purpose of the amendments is to streamline the SEQR process without sacrificing meaningful environmental review.

The Department has not identified any significant adverse environmental impacts from the proposed amendments. However, DEC has chosen to use a generic environmental impact statement (GEIS) as the means to discuss the objectives and the rationale for the proposed amendments, present alternative measures which are under consideration and provide the maximum opportunity for public participation.

DEC is conducting this public scoping of the issues to be addressed in the GE IS to allow maximum, early public participation. Comments and suggestions related to the scoping of potential significant adverse environmental impacts and additional alternatives to be considered by DEC should be submitted in writing to the office listed below.

Comments on the draft scope will be accepted through **August 10, 2012.**

Summary of Proposed Amendments to 6NYCRR Part 617

617.2 DEFINITIONS

- Add definition of “Green Infrastructure”
- Add definition of Minor Subdivision”
- Add definition of “Municipal Center”
- Revise definitions of:
  - “Negative Declaration”
  - “Positive Declaration”

617.4 TYPE I ACTIONS

- Reduce number of residential units in items 617.4(b)(5)(iii), (iv) & (v);
- Reduce number of parking slots for municipalities with a population under 150,000; and
- Bring the threshold reduction for historic resources [617.4(b)(9)] in line with other resource based items on the Type I list.

617.5 TYPE II ACTIONS

- Add new Type II actions to encourage development in urban areas vs. development in green fields and to encourage green infrastructure projects;
- Add new Type II actions to encourage the installation of solar energy arrays;
- Add new Type II action that allows for the sale, lease or transfer of property for a Type II action;
- Add new Type II action to make minor subdivisions Type II;
- Add a new Type II actions to make the disposition of land by auction a Type II action; and
- Add a new Type II action to encourage the renovation and reuse of existing structures.

617.8 SCOPING

- Make scoping mandatory;
- Provide greater continuity between the environmental assessment process, the final written scope and the draft Environmental Impact Statement (EIS) with respect to content;
- Strengthen the regulatory language to encourage targeted EISs;
- Clarify that issues raised after the completion of the final written scope cannot be the basis for the rejection of the draft EIS as inadequate.

617.9 PREPARATION AND CONTENT OF ENVIRONMENTAL IMPACT STATEMENTS

- Add language to require that adequacy review of a resubmitted draft must be based on the written list of deficiencies; and
- Revise the timeline for the completion of the FEIS.

617.12 DOCUMENT PREPARATION, FILING, PUBLICATION AND DISTRIBUTION

- Add language to allow for the electronic filing of EIS's with DEC.

617.13 FEES AND COSTS

- Add language to require that a lead agency provide the project sponsor with an estimate of review cost, if requested; and
- Add language to require that a lead agency provide the project sponsor with a copy of invoices or statements for work done by a consultant, if requested.

The following discussion provides the objectives and rationale for the major proposed changes. It also includes pre-draft language. The pre-draft text amendments show proposed language deletions as bracketed ([XXXX]) and new language as underlined (XXXX). This language is being provided to stimulate discussion and comment on the preliminary changes

TYPE I LIST

Objectives and Rationale: The Department proposes to:

(1) Reduce some of the thresholds for residential subdivisions. Experience has shown that the thresholds for some of the Type I items for residential construction are rarely triggered because they were set too high in 1978. This change will bring the review of large subdivision into conformance with current practice. Large subdivisions are frequently the subject of an EIS.

(2) Add a threshold for parking spaces for communities of less than 150,000 persons. A common and often recommended measurement is 1 parking space per 200 square feet of gross floor area of a building. If you are a community of less than 150,000 persons the applicable Type I threshold for the construction of commercial or industrial facilities is 100,000 square feet of gross floor area. This equates to 500 parking spaces.

(3) Bring the threshold reduction for historic resources in line with other resource based items on the Type I list. On the existing Type I list any Unlisted action, regardless of size, that occurs wholly or partially within or substantially contiguous to a historic resource is automatically elevated to a Type I action. This results in many very minor actions being elevated to Type I. Other resource based Type I items such as those addressing agriculture and parkland/open space result in a reduction in the Type I thresholds by 75%. Given the fact that the new Full EAF now requires much more information it would be very onerous and potentially expensive for a project sponsor to have to complete a Full EAF for a relatively minor activity. Also, the new Short EAF now contains a question regarding the presence of historic resources so the substance of the issue will not escape attention.

Regulatory Text Amendment:

- 617.4(b)(5)(iii) in a city, town or village having a population of [less than]150,000 persons or less, [250]200 units to be connected (at the commencement of habitation) to existing community or public water and sewage systems including

sewage treatment works;

- 617.4(b)(5)(iv) in a city, town or village having a population of greater than 150,000 persons but less than 1,000,000, [1,000]500 units to be connected (at the commencement of habitation) to existing community or public water and sewage systems including sewage treatment works;
- 617.4(b)(5)(iv) in a city, town or village having a population of greater than 1,000,000, [2,500]1000 units to be connected (at the commencement of habitation) to existing community or public water and sewage systems including sewage treatment works;
- 617.4(b)(6)(iii) in a city, town or village having a population of 150,000 persons or less, parking for 500 vehicles;
- 617.4(b)(6)(iv) in a city, town or village having a population of 150,000 persons or more, parking for 1000 vehicles;
- 617.4(b)(9) any Unlisted action that exceeds 25 percent of any threshold in this section [(unless the action is designed for the preservation of the facility or site)] occurring wholly or partially within, or substantially contiguous to, any historic building, structure, facility, site or district or prehistoric site that is listed on the National Register of Historic Places, or that has been proposed by the New York State Board on Historic Preservation for a recommendation to the State Historic Preservation Officer for nomination for inclusion in the National Register, or that is listed on the State Register of Historic Places (The National Register of Historic Places is established by 36 Code of Federal Regulation (CFR) Parts 60 and 63, 1994 (see section 617.17 of this Part));

TYPE II LIST

Objective and Rationale: The Department proposes to broaden the list of actions that will not require review under SEQRA. This will allow agencies to focus their time and resources on those projects likely to have significant adverse impacts on the environment. The additions to the Type II list are based on discussions that DEC has conducted with representatives from state agencies, environmental organizations, business and the 30+ years of experience of staff in the Division of Environmental Permits.

A second and more important reason for many of the proposed additions to the Type II list is to try and encourage environmentally compatible development. Many of the additions attempt to encourage development in urban areas vs. development in greenfields and encourage green infrastructure projects and solar energy development. Others proposed items will remove obstacles encountered by municipalities when developing affordable housing in cooperation with not-for-profit organizations. The overall goal is to provide a regulatory incentive for project sponsors to further the State's policy of sustainable development.

Proposed Text Amendment:

- The acquisition, sale, lease, annexation or transfer of any ownership of land to undertake any activity on this list.
- Disposition of land, by auction, where there is no discretion on the part of the

disposing agency on the outcome.

- Re-use of a non-residential structure not requiring a change in zoning or a use variance unless such action meets or exceeds any of the thresholds in section 617.4(b)(6),(8),(9),(10) and (11) of this Part.
- Lot line adjustments and area variances not involving a change in allowable density [replacing existing items 12 and 13 in 6 NYCRR 617.5(c)].
- In municipalities with adopted subdivision regulations, subdivisions involving 10 acres or less and defined as minor under a town, village or city's adopted subdivision regulations or subdivision of four or fewer lots, whichever is less.
- The recommendation of a county or regional planning entity made following referral of an action pursuant to General Municipal Law, sections 239-m or 239-n.
- In the municipal center of a city, town or village having a population of less than 20,000, with adopted zoning regulations, construction or expansion of a residential or commercial structure or facility involving less than 8,000 square feet of gross floor area or construction or expansion of a residential structure of 10 units or less where the project is subject to site plan review, and will be connected (at the commencement of habitation) to existing community owned or public water and sewerage systems including sewage treatment works which have the capacity to provide service and does not involve the construction of new public roads.
- In the municipal center of a city, town or village having a population of greater than 20,000 but less than 50,000, with adopted zoning regulations, construction or expansion of a commercial or residential structure or facility involving less than 10,000 square feet of gross floor area or construction or expansion of a residential structure of 20 units or less where the project is subject to site plan review, and will be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works which have the capacity to provide service and does not involve the construction of new public roads;
- In the municipal center of a city, town or village having a population of greater than 50,000 but less than 150,000, with adopted zoning regulations, construction or expansion of a commercial or residential structure or facility involving less than 20,000 square feet of gross floor area or construction or expansion of a residential structure of 40 units or less where the project is subject to review under local land use regulation, and will be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works which have the capacity to provide service and does not involve the construction of new roads.
- In the municipal center of a city, town or village having a population of greater than 150,000, with adopted zoning regulations, construction or expansion of a commercial or residential structure or facility involving less than 40,000 square feet of gross floor area or construction or expansion of a residential structure of 50 units or less where the project is subject to review under local land use regulation, and will be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works which have the capacity to provide service and does not involve the

construction of new roads.

- Replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site, including upgrading of buildings to meet building, energy, or fire codes, unless such action meets or exceeds any of the thresholds in section 617.4(b)(6),(8),(9),(10) and (11) of this Part.
- Replacement, rehabilitation or reconstruction of a structure or facility, using green infrastructure techniques, unless such action meets or exceeds any of the thresholds in section 617.4(b)(6),(8),(9),(10) and (11) of this Part.
- Installation of rooftop solar energy arrays on an existing structure that is not listed on the National or State Register of Historic Places or installation of less than 25 megawatts of solar energy arrays on closed sanitary landfills.
- Installation of cellular antennas or repeaters on an existing structure that is not listed on the National or State Register of Historic Places.
- Brownfield site clean-up agreements under Title 14 of ECL Article 27.

SCOPING

Objectives and Rationale: The Department proposes to:

(1) Require public scoping for all EIS's. Currently scoping is not mandatory but all parties have come to accept the importance of public scoping as a tool to focus an EIS on the truly substantive and significant issues. Seeking public input early in the EIS process helps to ensure that all of the substantive issues are identified prior to the preparation of the draft EIS.

(2) Place more emphasis on using the EAF as the first step in scoping. The revised EAF's are much more comprehensive than the previous versions. This should allow the lead agency to assess, in a thorough fashion, all of the potential impacts and to establish a basis for determining those issues that need additional scrutiny in an EIS and issues that do not require any further analysis and can be excluded from the EIS scope. Scoping can then be used to determine the depth and type of assessment that will be required in the draft EIS.

(3) Provide clearer language on the ability to target an EIS. All parties agree that many EIS's are currently filled with information that does not factor into the decision. This is driven by the defensive approach agencies and project sponsors take in developing the EIS record. In pursuit of the "bullet proof EIS" the tendency is to include the information even though the environmental assessment has already concluded that the issue is not substantive or significant.

(4) Provide better guidance on the basis for accepting/rejecting a draft EIS for adequacy. The current regulations give to the project sponsor the responsibility for accepting or deferring issues following the preparation of the final written scope. A lead agency cannot reject a draft EIS as inadequate if the project sponsor has decided to defer an issue and treat it as a comment on the draft EIS. Language would be added to clarify that the decision of the project sponsor cannot serve as the basis for the rejection of a draft EIS as not adequate to start the public review process.

Proposed Text Amendment:

- 617.8(a) - 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 [non] not significant. Scoping should result in EISs that are only focused on relevant, significant, adverse impacts. Scoping is [not] required for all EISs [. Scoping] and may be initiated by the lead agency or the project sponsor.
- 617.8(f)(2) - the potentially significant adverse impacts identified both in Part III of the environmental assessment form [positive declaration] and as a result of consultation with the other involved agencies and the public, including an identification of those particular aspect(s) of the environmental setting that may be impacted;
- 617.8(f)(7) - A brief description of the prominent issues that were raised during scoping and determined to be not relevant or not environmentally significant or that have been adequately addressed in a prior environmental review [.] and the reason(s) why those issues were not included in the final written scope.
- 617.8(h) - The project sponsor may incorporate information submitted consistent with subdivision 617.8(g) of this section into the draft EIS at its discretion. Any substantive information not incorporated into the draft EIS must be considered as public comment on the draft EIS. Information submitted following the completion of the final scope and not included by the project sponsor in the draft EIS cannot be the basis for the rejection of a draft EIS as inadequate.

PREPARATION AND CONTENT OF ENVIRONMENTAL IMPACT STATEMENTS

Objectives and Rationale: The Department proposes to add language to require that the adequacy review of a resubmitted draft must be based on the written list of deficiencies and revise the timeline for the completion of the FEIS.

Determining the adequacy of a draft EIS is a challenging step of the EIS process. If the document has been rejected as not adequate, the lead agency must provide a written list of the identified deficiencies that the project sponsor needs to correct. When the document is re-submitted the second review must be based on the list of deficiencies that were identified in the first round of review. This is an issue of fairness and will lead to a more efficient process. A draft EIS does not have to be perfect. The goal is to provide a document that is adequate to start the public review.

The current language regarding the timeframe for the preparation of the final EIS is unrealistic. It requires that the final EIS be prepared within 45 days after the close of any hearing or within 60 days of the filing of the draft EIS. Rarely, if ever, are these timeframes met. The Department proposes to extend this timeframe and provide certainty for when the EIS process will end.

Proposed Text Amendment:

- 617.9(a)(2) The lead agency will use the final written scope[,if any,] and the standards contained in this section 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 [in accordance with the standards in this section] within 45 days of receipt of the draft EIS. Adequacy means a draft

EIS that meets the requirements of the final written scope and section 617.9(b) of this Part.

(i) If the draft EIS is determined to be inadequate, the lead agency must identify in writing the deficiencies and provide this information to the project sponsor.
(ii) The lead agency must determine whether to accept the resubmitted draft EIS within 30 days of its receipt. The determination of adequacy of a resubmitted draft EIS must be based solely on the written list of deficiencies provided by the lead agency following the previous review.

- 617.9(a)(5) - Except as provided in subparagraph (iii) of this paragraph, the lead agency must prepare or cause to be prepared and must file a final EIS, within [45 calendar days after the close of any hearing or within 60] 180 calendar days after the lead agency's acceptance of the draft EIS [, whichever occurs later].

[(i) No final EIS need be prepared if:
(a) the proposed action has been withdrawn or;
(b) on the basis of the draft EIS, and comments made thereon, the lead agency has determined that the action will not have a significant adverse impact on the environment. A negative declaration must then be prepared, filed and published in accordance with section 617.12 of this Part.]
(i) If the Final EIS is not prepared and filed within the 180-day period, the EIS shall be deemed complete on the basis of the draft EIS, public comment and the response to comments prepared and submitted by the project sponsor to the lead agency. The response to comments must be submitted to the lead agency a minimum of 60 days prior to the required filing date of the final EIS.
(ii) The lead and all involved agencies must make their findings and can issue a decision based on that record together with any other application documents that are before the agency.
[(a) if it is determined that additional time is necessary to prepare the statement adequately; or
(b) if problems with the proposed action requiring material reconsideration or modification have been identified.]
(iii) No final EIS need be prepared if:
(a) the proposed action has been withdrawn or;
(b) on the basis of the draft EIS, and comments made thereon, the lead agency has determined that the action will not have a significant adverse impact on the environment. A negative declaration must then be prepared, filed and published in accordance section 617.12 of this Part.

SEQR FEES

Objective and rationale: The Department proposes to clarify existing fee assessment authority by amending language to provide project sponsors with the ability to request

an estimate of the costs for reviewing the EIS and a copy of any invoices or statement of work done by any consultant for the lead agency. This is primarily an issue of fairness and disclosure. A project sponsor should have the right to receive an estimate of the lead agency's costs for the review of the EIS along with written documentation to support such fees. Currently, the lead agency must provide an estimate to the project sponsor when they take on the responsibility for the preparation of the EIS.

Proposed Text Amendment:
617.13(e) [Where an applicant chooses not to prepare a draft EIS, t] The lead agency shall provide the applicant, upon request, with an estimate of the costs for preparing or reviewing the draft EIS calculated on the total value of the project for which funding or approval is sought. The applicant shall also be entitled, upon request to, copies of invoices or statements for work prepared by a consultant.

COMMENT PROCEDURES

Comments on this draft scope will be accepted in writing or by email through **August 10, 2012**. Comments via e-mail should be submitted to: depprmt@gw.dec.state.ny.us . Please insert the phrase "Comments on Part 617 Draft Scope" in the subject line. Alternatively, comments submitted in writing should be sent to:

New York State Department of Environmental Conservation
Division of Environmental Permits & Pollution Prevention
625 Broadway
Albany, New York 12233-1750

APPENDIX D

INDIVIDUALS/GROUPS THAT COMMENTED ON DRAFT SCOPE

PART 617 COMMENTS - 2012

Name	Organization
Blow, Steven	DPS
Bonafide, John	Div. of Historic Preservation
Boncke, Bruce	BME Associates
Brant, Sandy	Town of Evans
Brett, Marissa	Westchester County Association
Colan, Maggie	Town of Marbletown Planning Board
Cordisco, Dominic - (Joint ltrs. from)	Hudson Valley Pattern for Progress, Orange Co. Partnership, Builders Assoc. of Hudson Valley & Orange Co Chamber of Commerce
Carlock, Haley	Scenic Hudson, Inc
Carlson, Eric	Empire State Forest Products Association
Derico, Robert	Dormitory Authority of State of New York
Dubuque, Lewis	NYS Builders Association
Haight, Laura	- cmts. Submitted by 17 health, environment & environmental justice orgs
Hall, Joe	Town of Riverhead Planning Department
Kulikowski, Robert	NY Mayors Office of Environmental Coordination
Lithco, George	Jacobowitz and Gubits, LLP
Lyman, Laura	Alliance for Clean Energy New York
Lynch, John	Edward Weinstein Architecture & Planning
Mackay, Daniel	Preservation League of NYS
Meci, Betty Lee	AVC Hearing Aid Center Inc
Merriman, Michael	Ecological Analysis, LLC
Mule, Michael	Suffolk Co. Division of Planning & Environment
Murphy, Richard	Assemblmembers Sweeney & Lavine
Pierson, Ben	RS&RE, BWSP, NYS DOH
Pixley, Caitlin	Sierra Club, Atlantic Chapter
Porter, David	New Paltz

Rendleman, Laurie	Orange Co. Industrial Development Agency
Resnick, Michele Klugman	Sullivan County Partnership
Rivard, Berneda	BME Associates
Scott, Allan	Sullivan County Partnership
Shapiro, Susan	Attorneys at Law
Stach, Maximilian	Turner Miller Group
Stolzenburg, Nan	Community Planning & Environmental Associates
Terry, Mark	Town of Southold Planning Department
Tsamardinos, Jane	NYS Conferences of Mayors & Municipal Offices
Turner, Stuart	Turner Miller Group
Warth, Thomas	Hiscock & Barclay, LLP
Feller, Bob -	Bond, Schoeneck & King

EAF QUESTIONS - 2012

Geneslaw, Robert -	Robert Geneslaw Co.
Johnson, Gordon -	MTA Headquarters
Harris, Robert -	WM Schutt Associates
Meder, Joanne -	Frederick P. Clark Associates, Inc.
Nakkeid, Marius -	Question from Norway
Strauss, Valerie -	Alliance for Clean Energy New York, Inc.
Turner, Stuart -	Turner Miller Group
Wigell, Barbara -	NYS Homes and Community Renewal

APPENDIX E

FINAL SCOPE

FINAL SCOPE
for the
Generic Environmental Impact Statement (GEIS)
on the
Proposed Amendments
to the
State Environmental Quality Review Act (SEQRA)

6 NYCRR - Part 617

PREPARED BY THE NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
DIVISION OF ENVIRONMENTAL PERMITS & POLLUTION PREVENTION
November 28, 2012

1.0 Description of the Action & Environmental Setting

The New York State Department of Environmental Conservation (DEC) proposes to amend the regulations that implement the State Environmental Quality Review Act ("SEQR", Part 617 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York. The principal purpose of the amendments is to improve and streamline the SEQR process without sacrificing meaningful environmental review. The changes being proposed are modest in nature, not intended to change the basic structure of an environmental review, build on the changes made to the environmental assessment forms and are within the authority of the DEC to implement without seeking additional legislative action. SEQR applies to all state and local agencies in New York State when they are making a discretionary decision to undertake, fund or approve an action.

DEC has proposed changes to the SEQR regulations, which it does not expect to have a significant impact on the environment. However, given the importance of the SEQR regulations in general in all areas of environmental impact review, DEC has chosen to use a generic environmental impact statement (GEIS) as the means to discuss the objectives and the rationale for the proposed amendments, present alternative measures which are under consideration and provide the maximum opportunity for public participation.

2.0 Summary of Proposed Amendments to 6 NYCRR Part 617

617.2 DEFINITIONS

- Add definition of “Green Infrastructure”
- Add definition of Minor Subdivision”
- Add definition of “Municipal Center”
- Add Definition of “Replacement in Kind”
- Add definition of “Substantially Contiguous”

- Revise definitions of:
  - “Negative Declaration”
  - “Positive Declaration”

617.4 TYPE I ACTIONS

- Reduce number of residential units in items 617.4(b)(5)(iii), (iv) & (v);
- Reduce number of parking slots for municipalities with a population under 150,000; and
- Reduce the threshold reduction for historic resources [617.4(b)(9)] in line with other resource based items on the Type I list and add eligible resources.

617.5 TYPE II ACTIONS

- Add new Type II actions to encourage development on previously disturbed sites in municipal centers and to encourage green infrastructure projects;
- Add new Type II actions to encourage the installation of solar energy arrays;
- Add new Type II action that allows for the sale, lease or transfer of property for a Type II action;
- Add new Type II action for minor or small scale subdivisions;
- Add a new Type II actions to make the disposition of land by auction a Type II action; and
- Add a new Type II action to encourage the renovation and reuse of existing structures.

617.8 SCOPING

- Make scoping mandatory;
- Provide greater continuity between the environmental assessment process, the final written scope and the draft environmental impact statement (EIS) with respect to content;
- Strengthen the regulatory language to encourage targeted EISs;
- Clarify that issues raised after the completion of the final written scope cannot be the basis for the rejection of the draft EIS as inadequate.

617.9 PREPARATION AND CONTENT OF ENVIRONMENTAL IMPACT STATEMENTS

- ! Add language to require that adequacy review of a resubmitted draft must be based on the written list of deficiencies; and
- ! Revise the timeline for the completion of the FEIS.

617.12 DOCUMENT PREPARATION, FILING, PUBLICATION AND DISTRIBUTION

- ! Add language to encourage the electronic filing of EISs with DEC.

617.13 FEES AND COSTS

- ! Add language to require that a lead agency provide the project sponsor with an estimate of review cost, if requested; and
- ! Add language to require that a lead agency provide the project sponsor with a copy of invoices or statements for work done by a consultant, if requested.

3.0 Discussion of Proposed Changes and Alternatives

The following discussion provides the objectives and rationale for the major proposed changes and the alternatives under consideration. It also includes preliminary express terms. The pre-draft text amendments show proposed language deletions as bracketed ([XXXX]) and new language as underlined (XXXX). This language is being provided to stimulate consideration and comment on the preliminary changes

3.1 Type I List

3.1.1 Regulatory Text Amendment:

- 617.4(b)(5)(iii) in a city, town or village having a population of [less than] 150,000 persons or less, [250] 200 units to be connected (at the commencement of habitation) to existing community or public water and sewage systems including sewage treatment works;
- 617.4(b)(5)(iv) in a city, town or village having a population of greater than 150,000 persons but less than 1,000,000, [1,000]500 units to be connected (at the commencement of habitation) to existing community or public water and sewage systems including sewage treatment works;
- 617.4(b)(5)(iv) in a city, town or village having a population of greater than 1,000,000, [2,500] 1000 units to be connected (at the commencement of habitation) to existing community or public water and sewage systems including sewage treatment works;

Objectives and Rationale: The Department proposes to reduce some of the thresholds for residential subdivisions. Experience has shown that the thresholds for some of the Type I items for residential construction are rarely triggered because they were set too high in 1978. There is scant information in the 1978 draft and final EIS that demonstrates any basis for the selection of the thresholds other than the numbers in a rural and urban area should be different. The proposed change will bring the review of

large subdivision into conformance with current practice. Large subdivisions are frequently the subject of an EIS and by nature when proposed on new sites often have one or more potentially significant impacts on the environment due to the need for the expansion of infrastructure such as water, sewer and roads needed to serve the new development.

Alternatives: The "no action" alternative would retain the current numbers which were established in 1978. There is no substantive record supporting the numbers that were selected in 1978. Other suggested alternatives include reducing the number or threshold to a lower number of lots that would trigger Type I classification.

3.1.2 Regulatory Text Amendment:

- 617.4(b)(6)(iii) in a city, town or village having a population of 150,000 persons or less, parking for 500 vehicles;
- 617.4(b)(6)(iv) in a city, town or village having a population of 150,000 persons or more, parking for 1000 vehicles;

Objectives and Rationale: The Department proposes to add a threshold for parking spaces for communities of less than 150,000 persons. A common and often recommended measurement is one parking space per 200 square feet of gross floor area of a building. For communities of less than 150,000 persons the applicable Type I threshold for the construction of commercial or industrial facilities is 100,000 square feet of gross floor area. This equates to 500 parking spaces.

Alternatives: The "no action" alternative would retain the current Type I threshold at 1000 vehicles for all municipalities without regard to size. Other suggested alternatives include reducing the number of parking spaces for all communities to 500 or less vehicles.

3.1.3 Preliminary Text Amendment:

- 617.4(b)(9) any Unlisted action that exceeds 25 percent of any threshold in this section [(unless the action is designed for the preservation of the facility or site)] occurring wholly or partially within, or substantially contiguous to, any historic building, structure, facility, site or district or prehistoric site that is listed on the National or State Register of Historic Places, or that has been [proposed by the New York State Board on Historic Preservation for a recommendation to the State Historic Preservation Officer for nomination for inclusion in the National Register, or that is] determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places (The National Register of Historic Places is established by 36 Code of Federal Regulation (CFR) Parts 60 and 63, 1994 (see section 617.17 of this Part));

Objectives and Rationale: The Department proposes to bring the threshold reduction for historic resources in line with other resource based items on the Type I list. On the

existing Type I list any Unlisted action, regardless of size, that occurs wholly or partially within or substantially contiguous to a historic resource is automatically elevated to a Type I action. This results in very minor actions being elevated to Type I. Other resource based Type I items such as those addressing agriculture and parkland or open space result in a reduction in the Type I thresholds by 75%. Given the fact that the new Full EAF, which will be effective on April 1, 2013, requires much more information on historic resources it would be unduly onerous for a project sponsor to have to complete a Full EAF for a relatively minor activity. Also, the new Short EAF now contains a question regarding the presence of historic resources so the substance of the issue will not escape attention. This change does not change the substantive requirements of a SEQR review. This listing has been expanded to include properties that have been determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation eligible for listing. This change would make SEQR consistent with both State and Federal Historic Preservation legislation.

Alternatives: The "no action" alternative would retain the current Type I item. Other suggested alternatives include the following: exclude projects that are subject to review under Section 106 of the National Historic Preservation Act of 1966 or 1409 of the State Historic Preservation Act and delete the entire listing but require that when a listed property may be impacted by a project that the determination of significance must include an evaluation of the potential for impact to the attributes that are the basis for the listing.

3.2 Type II List

The Department proposes to broaden the list of actions that will not require review under SEQR. This will make SEQR more meaningful by allowing agencies to focus their time and resources on those projects likely to have significant adverse impacts on the environment. The additions to the Type II list are based on discussions that DEC has conducted with representatives from state agencies, environmental organizations, business (see Appendix A) and the experience of staff in the Division of Environmental Permits.

A ancillary reason for many of the proposed additions to the Type II list is encourage environmentally compatible development. Many of the additions attempt to encourage development on previously disturbed sites in municipal centers with supporting infrastructure and encourage green infrastructure projects and solar energy development. Others proposed items will remove obstacles encountered by municipalities when developing affordable housing in cooperation with not-for-profit organizations. The overall goal is to provide a regulatory incentive for project sponsors to further the State's policy of sustainable development.

3.2.1 Regulatory Text Amendment:

3.2.2 Preliminary Text Amendment:

- Disposition of land, by auction, where there is no discretion on the part of the disposing agency on the outcome.

Objectives and Rationale: A municipality or a state agency may acquire land through foreclosure or other means where the land reverts to the agency due to a failure of the owner to remain current on property taxes. State law requires that the municipality or agency dispose of this land through a public action to the highest qualified bidder. The municipality or agency has no discretion but to abide by the results of the auction. Currently, agencies are required to perform a SEQR review since the sale, lease or other transfer of greater than 100 acres is a Type I action and amounts under 100 acres are classified as Unlisted actions. The environmental assessments under these circumstances are fairly meaningless since the agency has no idea of what the ultimate use of the property will be by the new owner at the time of the auction. The only guide the agency can use is zoning or the lack of zoning. In addition, the subsequent development of the property will generally result in an environmental review if the proposed action requires a discretionary permit or approval from a state or local agency

Alternatives: The "no action" alternative would remove this item from the Type II list and continue to require a SEQR review prior to the disposition of land by auction. Other suggested alternatives: expand this proposed listing to allow for disposition of land by any means as a Type II action, limit the item by including the phrase "unless such action meets or exceeds the criteria found in 617.4(b)(4) of this Part."

3.2.3 Regulatory Text Amendment:

- In a city, town or village with an adopted zoning law or ordinance, reuse of a commercial or residential structure not requiring a change in zoning or use variance unless such action meets or exceeds any of the thresholds in section 617.4(b)(6),(8), (9), (10), and (11) of this Part.

Objectives and Rationale: The built environment of New York State contains many structures that are currently vacant. For example, the City of Albany has recently determined that there are 809 vacant buildings in the city. These vacant structures, if not properly maintained, contribute to urban blight and are an under used resource. Many of these structures could be reused for housing or commercial development rather than developing a greenfield site. Since these properties generally have existing infrastructure the suite of potential environmental issues is very limited and are routinely handled under the existing local land use reviews. Returning a vacant residential or commercial structure to a productive use can reduce blight, improve the vitality and live-ability of a neighborhood and return structures to the tax role.

Alternatives: The "no action" alternative would remove this item from the Type II list and continue to require a SEQR review prior to the proposed reuse of a vacant or

abandoned structure. Other suggested alternatives: Expand this provision to apply to all structures including industrial uses.

3.2.4 Regulatory Text Amendment:

- Lot line adjustments and area variances not involving a change in allowable density [replacing existing items 12 and 13 in 6 NYCRR 617.5(c)].

Objectives and Rationale: Individual setback and lot line variances and area variances for single, two- or three- family homes are currently Type II actions. This proposed revision would expand the applicability to all types of structures so long as the proposed lot line adjustment or area variance does not change the allowable density. These types of variances are subject to the review and approval of zoning boards which are required under state law to consider environmental factors in their decision to either issue or deny the requested relief.

Alternatives: The "no action" alternative would remove this item from the Type II list and continue the current situation which would restrict area variance to only one-, two- and three- family residences.

3.2.5 Regulatory Text Amendment:

- In cities, towns and villages with adopted subdivision regulations, subdivisions defined as minor under the municipality's adopted subdivision regulations, or subdivision of four or fewer lots, whichever is less, involves ten acres or less, and provided the subdivision does not involve the construction of new roads, water or sewer infrastructure, and was not part of a larger tract subdivided within the previous 12 months.

Objectives and Rationale: The municipal enabling laws for subdivision plat review (e.g., Town Law §276) authorize municipalities to define subdivisions as major or minor. Minor subdivisions, as defined in many municipal subdivision regulations, usually consist of four or fewer lots or two lots. The municipal enabling laws provide a sufficient grant of authority to municipalities to consider the typical and expected environmental impacts of minor subdivisions. Under such circumstances and the ability of municipalities to condition or deny approvals along with the additional caveats for numbers of acres, connection to utilities, and no construction of new roads, provides assures that such actions would not have a significant effect on the environment.

Alternatives: The "no action" alternative would remove this item from the Type II list and continue to require a SEQR review for minor subdivisions. An alternative would be to disallow the small or minor subdivision Type II when there are sensitive environmental features on the site (e.g., designated critical environmental areas or other identifiable resources). Other alternatives would be to make the Type II item less restrictive by removing one or more of the conditions, e.g., 1) removal of the restriction on establishment of new roads since the restriction may impede context sensitive design for small subdivisions, or 2) removal of the restriction on acres.

3.2.6 Regulatory Text Amendment:

- The recommendation of a county or regional planning entity made following referral of an action pursuant to General Municipal Law, sections 239-m or 239-n.

Objectives and Rationale: This is one of the most frequently asked questions by town and county planners. Since these reviews under 239-m & n are not binding and can be overturned by a majority plus one vote by the municipality they have been interpreted as not triggering SEQR.

Alternatives: The "no action" alternative would remove this item from the Type II list.

3.2.7 Proposed Text Amendment:

- On a previously disturbed site in the municipal center of a city, town or village having a population of less than 20,000, with adopted zoning regulations, construction or expansion of a residential or commercial structure or facility involving less than 8,000 square feet of gross floor area where the project is subject to site plan review, and will be connected (at the commencement of habitation) to existing community owned or public water and sewerage systems including sewage treatment works which have the capacity to provide service and does not involve the construction of new public roads.

- On a previously disturbed site in the municipal center of a city, town or village having a population of greater than 20,000 but less than 50,000, with adopted zoning regulations, construction or expansion of a commercial or residential structure or facility involving less than 10,000 square feet of gross floor area where the project is subject to site plan review, and will be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works which have the capacity to provide service and does not involve the construction of new public roads;

- On a previously disturbed site in the municipal center of a city, town or village having a population of greater than 50,000 but less than 150,000, with adopted zoning regulations, construction or expansion of a commercial or residential structure or facility involving less than 20,000 square feet of gross floor area where the project is subject to review under local land use regulation, and will be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works which have the capacity to provide service and does not involve the construction of new roads.

- On a previously disturbed site in the municipal center of a city, town or village having a population of greater than 150,000, with adopted zoning regulations, construction or expansion of a commercial or residential structure or facility involving less than 40,000 square feet of gross floor area where the project is subject to review under local land use regulation, and will be connected (at the commencement of habitation) to existing community or public water and

sewerage systems including sewage treatment works which have the capacity to provide service and does not involve the construction of new roads.

Objectives, Rationale, and Benefits: Building a structure on a previously disturbed lot with existing road, sewer and water infrastructure substantially reduces the number and severity of potential impacts that must be considered in an environmental review. The four proposed Type II actions that allow for a sliding scale of development depending on population levels are intended to serve as an incentive for development on previously disturbed sites within existing municipal centers. Development of sites that have been previously disturbed and that have existing infrastructure result in less environmental impact than developing undisturbed greenfield sites and these impacts can be readily addressed through the land use review process. Also, the notion that development should be encouraged and funneled into existing sites in municipal centers with existing infrastructure that supports such development, has become part of the State's public policy.

Alternatives: The "no action" alternative would remove these items from the Type II list. Other suggested alternatives include changing the population numbers and the amount of allowed development for each item and the addition of more environmental conditions under which the development would not be allowed such as prohibiting use of this item when the project includes demolition or if site is located substantially contiguous to a designated or eligible historic structure or district.

3.2.8 Regulatory Text Amendment:

- Replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site, including upgrading of buildings to meet building, energy, or fire codes, or to incorporate green building infrastructure techniques, unless such action meets or exceeds any of the thresholds in section 617.4(b)(6),(8),(9),(10) and (11) of this Part.

Objectives and Rationale: The inclusion of upgrades of existing building to meet new energy codes is consistent with the current intent of the item. Also, the current item on replacement, rehabilitation or reconstruction is limited to "in kind" construction. This allows for some limited deviations from the existing structure but could be interpreted to preclude the use of green infrastructure in place of the existing more conventional development techniques. Installation of green roofs or other green infrastructure techniques can substantially improve energy efficiency and reduce generation of runoff. The addition of the specific Type I thresholds provides additional clarity for the application of this item and places limits on the size of the replacement, rehabilitation or reconstruction that could be undertaken as a Type II action.

Alternatives: The "no action" alternative would return the item to its current wording in the regulation. Another alternative would be to not include the provision regarding green building infrastructure techniques.

3.2.9 Regulatory Text Amendment:

- Installation of rooftop solar energy arrays on an existing structure that is not listed on the National or State Register of Historic Places or determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places, or installation of less than 25 megawatts of solar energy arrays on closed sanitary landfills.

Objectives and Rationale: The installation of solar energy arrays can substantially reduce energy costs and the generation of greenhouse gases. The rooftops of many commercial and industrial facilities are already home to a myriad of heating ventilation and air conditioning (HVAC) equipment. This is just another type of HVAC system. This provision would not allow installation on designated historic structures. The redevelopment of a closed sanitary landfill as a solar energy site would return a currently under used site to a productive use. Many closed sanitary landfills currently generate energy from the combustion of methane gas and have the necessary infrastructure in place to connect to the electrical grid.

Alternatives: The "no action" alternative would remove this item from the Type II list. Other suggested alternatives: delete the restriction for designated historic properties, place a limit on the size of roof top installations and reduce the size of an installation on closed sanitary landfills.

3.2.10 Regulatory Text Amendment:

- Installation of cellular antennas or repeaters on an existing structure that is not listed on the National or State Register of Historic Places or determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places.

Objectives and Rationale: The current Type II item [617.5(c)(7)] that precludes the installation of radio communication and microwave transmission facilities as a Type II action has generated a substantial number of questions on the SEQR classification for installation of antennas and repeaters on existing structures. These antenna and repeaters can in many locations be installed on existing buildings and preclude the construction of a new tower.

Alternatives: The "no action" alternative would remove this item from the Type II list and continue to require a SEQR review prior to the installation of cellular antennas and repeaters on existing structures. Other suggested alternatives include: adding the phrase "structure or district" to the proposed listing to prohibit the applicability of this item in a designated historic district, prohibit the installation of cellular antennas or repeaters within 500 feet of a designated historic structure or district and require that all cellular antennas and repeaters that are located within 500 feet of a historic structure or district be camouflaged to reduce visibility.

3.2.11 Regulatory Text Amendment:

- Brownfield site clean-up agreements under Title 14 of ECL Article 27.

Objectives and Rationale: This item would clarify that the development and implementation of a Brownfield clean-up agreement is a Type II action. *See Matter of Bronx Comm. for Toxic Free Schools v. New York City Sch. Constr. Auth*., 20 N.Y.3d 148, 160 (2012) where Judge Read stated as follows: "…it is uncertain how BCP and SEQRA requirements fit together so as to offer meaningful and non-duplicative re-view of a project. Perhaps DEC will clarify this issue in the context of its proposed SEQRA amendments." The DEC has considered these types of agreements and clean-ups as civil or criminal enforcement proceedings [617.5(c)(29)], which belong to the Type II category.

Alternatives: The "no action" alternative would remove this category of action from the Type II list.

3.3 Mandatory Scoping of EISs

3.3.1 Regulatory Text Amendment:

- 617.8(a) - 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 [non] not significant. Scoping should result in EISs that are only focused on relevant, significant, adverse impacts. Scoping is [not] required for all EISs [. Scoping] and may be initiated by the lead agency or the project sponsor.
- 617.8(f)(2) - the potentially significant adverse impacts identified both in Part III of the environmental assessment form [positive declaration] and as a result of consultation with the other involved agencies and the public, including an identification of those particular aspect(s) of the environmental setting that may be impacted;
- 617.8(f)(7) - A brief description of the prominent issues that were raised during scoping and determined to be not relevant or not environmentally significant or that have been adequately addressed in a prior environmental review [.] and the reason(s) why those issues were not included in the final written scope.
- 617.8(h) - The project sponsor may incorporate information submitted consistent with subdivision 617.8(g) of this section into the draft EIS at its discretion. Any substantive information not incorporated into the draft EIS must be considered as public comment on the draft EIS. Information submitted following the completion of the final scope and not included by the project sponsor in the draft EIS cannot be the basis for the rejection of a draft EIS as inadequate.

Objectives and Rationale: The Department proposes to:

(5) Require public scoping for all EISs. Currently scoping is not mandatory but all parties have come to accept the importance of public scoping as a tool to focus an EIS on the truly substantive and significant issues. Seeking public input early in the EIS process helps to ensure that all of the substantive issues are identified prior to the preparation of the draft EIS.

(6) Place more emphasis on using the EAF as the first step in scoping. The revised EAFs are much more comprehensive than the previous versions. This should allow the lead agency to assess, in a thorough fashion, all of the potential impacts and to establish a basis for determining those issues that need additional scrutiny in an EIS and issues that do not require any further analysis and can be excluded from the EIS scope. Scoping can then be used to determine the depth and type of assessment that will be required in the draft EIS.

(7) Provide clearer language on the ability to target an EIS. All parties agree that many EISs are currently filled with information that does not factor into the decision. This is driven by the defensive approach agencies and project sponsors take in developing the EIS record. In pursuit of the "bullet proof EIS" the tendency is to include the information even though the environmental assessment has already concluded that the issue is not substantive or significant.

(8) Provide better guidance on the basis for accepting or rejecting a draft EIS for adequacy. The current regulations give to the project sponsor the responsibility for accepting or deferring issues following the preparation of the final written scope. A lead agency cannot reject a draft EIS as inadequate if the project sponsor has decided to defer an issue and treat it as a comment on the draft EIS. Language would be added to clarify that the decision of the project sponsor cannot serve as the basis for the rejection of a draft EIS as not adequate to start the public review process.

Alternatives: The "no action" alternative would result in scoping remaining an optional procedure. Other suggested alternatives: provide the lead agency with the authority to include "late items" after the preparation of the final scope and require that scoping must include a public meeting.

3.4 PREPARATION AND CONTENT OF ENVIRONMENTAL IMPACT STATEMENTS

3.4.1 Regulatory Text Amendment:

- 617.9(a)(2) - The lead agency will use the final written scope [,if any,] and the standards contained in this section 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 [in accordance with the standards in this section] within 45 days of receipt of the draft EIS. Adequacy means a draft EIS that meets the requirements of the final written scope and section 617.9(b) of this Part.

  (i) If the draft EIS is determined to be inadequate, the lead agency must identify in writing the deficiencies and provide this information to the project sponsor. Information submitted following the completion of the final scope and not included by the project sponsor in the draft EIS cannot be the basis for the rejection of a draft EIS as inadequate but such information may require the preparation of a supplemental EIS in accordance with section 617.9 (a)(9).

(ii) The lead agency must determine whether to accept the resubmitted draft EIS within 30 days of its receipt. The determination of adequacy of a resubmitted draft EIS must be based solely on the written list of deficiencies provided by the lead agency following the previous review.

- 617.9(a)(5) - Except as provided in subparagraph (iii) of this paragraph, the lead agency must prepare or cause to be prepared and must file a final EIS, within [45 calendar days after the close of any hearing or within 60] 180 calendar days after the lead agency's acceptance of the draft EIS [, whichever occurs later].

  [(i) No final EIS need be prepared if:
  (c) the proposed action has been withdrawn or;
  (d) on the basis of the draft EIS, and comments made thereon, the lead agency has determined that the action will not have a significant adverse impact on the environment. A negative declaration must then be prepared, filed and published in accordance with section 617.12 of this Part.]
  (i) If the Final EIS is not prepared and filed within the 180-day period, the EIS shall be deemed complete on the basis of the draft EIS, public comment and the response to comments prepared and submitted by the project sponsor to the lead agency. The response to comments must be submitted to the lead agency a minimum of 60 days prior to the required filing date of the final EIS or this provision does not take effect.
  (ii) The lead and all involved agencies must make their findings and can issue a decision based on that record together with any other application documents that are before the agency.
  [(a) if it is determined that additional time is necessary to prepare the statement adequately; or
  (b) if problems with the proposed action requiring material reconsideration or modification have been identified.]
  (iii) No final EIS need be prepared if:
  (c) the proposed action has been withdrawn or;
  (d) on the basis of the draft EIS, and comments made thereon, the lead agency has determined that the action will not have a significant adverse impact on the environment. A negative declaration must then be prepared, filed and published in accordance section 617.12 of this Part.

Objectives and Rationale: The Department proposes to add language to require that the adequacy review of a resubmitted draft must be based on the written list of deficiencies and revise the timeline for the completion of the FEIS.

Determining the adequacy of a draft EIS, which is the province of the lead agency, is a challenging step of the EIS process. If the document has been rejected as not adequate, the lead agency must provide a written list of the identified deficiencies that the project sponsor needs to correct. When the document is re-submitted the second

review must be based on the list of deficiencies that were identified in the first round of review. This is an issue of fairness and will lead to a more efficient process. The goal is to provide a document that is adequate to start the public review.

The current language regarding the timeframe for the preparation of the final EIS is unrealistic. It requires that the final EIS be prepared within 45 days after the close of any hearing or within 60 days of the filing of the draft EIS. Rarely, if ever, are these timeframes met. The Department proposes to extend this timeframe and provide certainty for when the EIS process will end.

Currently in SEQR any timeframe may be extended by mutual agreement between a project sponsor and the lead agency [See 617.3(i)]. So for large complex projects where the lead agency and the applicant agree that additional time is necessary to prepare the final EIS there is already a provision that would allow the six-month clock to be extended. This provision would also not apply to direct actions of an agency.

Alternatives: The "no action" alternative would result in no change to the current language on determining adequacy and the timeframe for preparation of a final EIS. Other suggested alternatives are as follows: Require that the submitted draft EIS be determined complete if it contains all items listed in the final scope and require default acceptance of the submitted draft EIS if the lead agency exceeds the time provided for acceptance; require the applicant to submit a demand letter before the default acceptance is triggered; or add language that would create a narrow exception to the final timeframe where an action is subject to a trial-like adjudicatory hearing which by law becomes part of the record.

3.4.2 Regulatory Text Amendment:

617.9(b)(5) - (iii) …The draft EIS should identify and discuss the following impacts only where applicable and significant: …
(f) impacts of greenhouse gas emissions from the proposed action on climate change;
…
(iv) a description of the mitigation measures, including, where relevant, adaptation measures to reduce or avoid an action's vulnerability to the effects of global climate change;

Objectives and rational

The major scientific agencies of the United States — including the National Aeronautics and Space Administration (NASA) and the National Oceanic and Atmospheric Administration (NOAA) — agree that climate change is occurring and that humans are contributing to it. Scientists are still researching a number of important questions, including exactly how much the Earth will warm, how quickly it will warm, and what the consequences of the warming will be in specific regions of the world. However, there is enough certainty in the scientific community about basic causes and effects of climate change to justify taking actions that reduce future risks. Under the National

Environmental Planning Act (NEPA, on which SEQR was modeled) and SEQR, the effects of greenhouse gas emissions on the environment is an impact on the environment, which if determined significant by the lead agency would be a topic in an environmental impact statement including measures to avoid or reduce greenhouse gas emissions. The Governor's 2100 Commission, accordingly, made the following recommendation: "The Commission recommends that the State require lead agencies to assess climate change adaptation and resilience measures, as well as actions to mitigate climate change, as part of their SEQRA environmental impact review. To accomplish this, the State would have to amend its SEQRA Handbook to include such a requirement. The State should also ensure that the SEQRA "workbooks" make clear that adaptation and resilience to climate change should be properly considered when determining the significance of an action under SEQRA."[42]

The added language will implement the NYS 2100 Commissioner report and codify existing practice.

Major storm events in the last few years have resulted in significant impacts on the environment in the state. Scientists are predicting that storms similar to those experienced will increase in both frequency and intensity due to the effects of climate change. The added language (6.17.9[b][5][iv]) will require project sponsors in areas vulnerable to storm damage (floodplains and coastal areas) to take adaptive measures that will lessen the impacts that their project will have on the environment as a result of the effects of climate change.

Impacts:

There are no adverse environmental impacts expected from the proposed, additional regulatory language. Inclusion of the language will reduce any regulatory uncertainty about whether climate change must be considered in an EIS where the lead agency has determined that greenhouse gas emissions may be significant. The same would apply to the proposed regulatory language to include a discussion of adaptation for projects that would be especially vulnerable to the impacts of storm damage. Some project sponsors may face the additional cost of conducting the greenhouse gas emissions impacts assessment.

Alternatives:

The "no action" alternative would result in no change to the existing language of the SEQR regulations. Project sponsors may still be required to discuss climate change where the lead agency has determined that the impact of greenhouse gas emissions from a project may be significant. The same would be true for adaptation measures.

3.5 SEQR Fees

3.5.1 Regulatory Text Amendment:

617.13(e) [Where an applicant chooses not to prepare a draft EIS, t] The lead agency shall provide the applicant, upon request, with an estimate of the costs for preparing or reviewing the draft EIS calculated on the total value of the project for which funding or approval is sought. The applicant shall also be entitled, upon request to, copies of invoices or statements for work prepared by a consultant.

Objectives and Rationale: The Department proposes to clarify existing fee assessment authority by amending language to provide project sponsors with the ability to request an estimate of the costs for reviewing the EIS and a copy of any invoices or statement of work done by any consultant for the lead agency. This is primarily an issue of fairness and disclosure. A project sponsor should have the right to receive an estimate of the lead agency's costs for the review of the EIS along with written documentation to support such fees. Currently, the lead agency must provide an estimate to the project sponsor when they take on the responsibility for the preparation of the EIS.

Alternatives: The "no action" alternative would remove this item from the Fees section. Other suggested alternatives: require that a fee be collected for all EIS and the EIS be prepared by a third party hired by the lead agency.

4.0 Issues Not Included in the Final Scope

A total of 37 comments letters were received during the public comment period that expired on August 10, 2012. The following is a brief discussion of the major issues that were considered for inclusion in the final scope of the regulatory changes but were dismissed from further consideration in this rule making.

4.1 Allow Conditioned Negative Declarations to be used for Type I Actions

This issue has been debated since the changes to SEQR made in 1987 that recognized the use of conditioned negative declarations (CND) and allowed them to be used for actions classified as Unlisted. It was rejected in 1987, reconsidered and rejected again in 1995. There are three primary concerns regarding the expansion of CNDs to Type I actions. First, Type I actions are presumed, to require the preparation of an EIS. Second, as it stands, the CND process adds an arguably unnecessary level of procedural complication to SEQR and the DEC does not favor carrying it over to Type I actions (which are by definition often the most environmentally significant types of actions. Third, the DEC questions whether it has the statutory authority for expanding the use of CNDs to Type I actions. The 1995 Final Generic EIS on the changes to SEQR has a complete discussion of this issue.
http://www.dec.ny.gov/docs/permits_ej_operations_pdf/finalgeis.pdf

4.2 Establish a Board or Council to Review SEQR Decisions

This issue has been raised by many parties over the years. It would establish an independent board or council that could, on request, review disputes and issue opinions

on the proper implementation of SEQR. The make-up of the body, whether the determination was advisory or mandatory and identifying what parties could seek a review are elements that would have to be established. This issue has been rejected because it is outside of the scope of this regulatory action. Establishing a board or council that could issue a binding decision would require legislation and a change to Article 8 of the Environmental Conservation Law.

4.3 DEC Should Develop a Best Practice Manual

The suggestion has been raised that DEC should prepare a "Best Practices Manual" to establish the recommended or required practices that should be applied for issues that are frequently involved in the environmental review of an activity. This issue would not require a regulatory change so long as the practices were not required to be used by agencies. The suggestion has great appeal. DEC has, for many years, made available a SEQR Handbook to help SEQR practitioners with the process questions. A workbook to help users prepare and review the revised EAF forms is in preparation but it will not contain standard methodologies for the conduct of a traffic study, air analysis, wetland survey, etc. New York City (NYC) has taken this approach for activities that are subject to environmental review under the City Environmental Quality Review Act (CEQRA) and this manual is a great source of information. Preparing a best practice manual to cover even the most common environmental issues that could be fairly applied to the varied environments in New York State would be an expensive task which is currently beyond the fiscal capabilities of the DEC.

4.4 Rely on a Licensed Professional to Attest to the Accuracy of the Review

The issue was raised that the regulations should allow or require a lead agency to rely on the expertise of licensed professionals in the resolution of issues during an environmental review. If a licensed professional is willing to attest to the completeness and accuracy of an environmental impact review by affixing his or her stamp on the plan/assessment, that issue should not be the subject of additional scrutiny or debate by the lead agency or interveners. Making this change would significantly undermine the powers of the lead agency and much of the fact-finding that is part of the SEQR process. Although a licensed professional may have arrived at a conclusion there is no guarantee that the selected approach is the most environmentally compatible approach or that the professional is in fact correct or objective. Allowing other experts and the public the opportunity to review and offer comment is a healthy process. Obviously, the conclusions of a licensed professional should carry significant weight in the resolution of an issue. But, it should not be the only determining factor. Giving deference in this fashion would require legislation and a change to Article 8 of the ECL.

APPENDIX F

SUPPORTIVE RESEARCH FOR SUSTAINABLE DEVELOMENT TYPE II ACTION

I. Sustainable Development and Transportation

a. *Moving Cooler: An Analysis of Transportation Strategies for Reducing Greenhouse Gas Emissions*, Urban Land Institute (2009).

This report finds that changes in land use patterns, combined with improved transit and transportation options "could achieve meaningful GHG reductions by 2050, ranging from 9 percent to 15 percent without economy-wide pricing."

b. *Location Efficiency and Housing Type – Boiling it Down to BTUs, EPA*/Jonathan Rose Companies (2011).

Energy-efficient land use factors identified in this report include (in order of impact): location efficiency – access to transit; size of home; attached versus detached units. The report concludes that "household energy consumption associated with housing and transportation decreases significantly in smaller housing types located in compact, transit-oriented development when compared to similar housing types in conventional, largely automobile-dependent communities."

c. *Can Smart Growth Policies Conserve Energy and Reduce Emissions?* Todd Litman, Portland State University's Center for Real Estate Quarterly, Vol. 5, No. 2, (Spring 2011).

The report emphasizes that density alone will not achieve the full potential for smart growth to significantly reduce VMT; rather, communities and regions should strive for a potpourri of mutually-reinforcing land use and development patterns – mixed uses, connectivity, transit access, parking access, centeredness and regional accessibility to daily amenities.

d. *Driving and the Built Environment: The Effects of Compact Development on Motorized Travel, Energy Use, and CO2 Emissions,* Transportation Research Board (TRB) Special Report 298, (2009).

This report projected more modest (compared with other reports cited), but still meaningful, reductions in VMT from Smart Growth changes, concluding that doubling residential density reduces VMT by 5 to 12 percent, or by as much as 25 percent when combined with other changes.

e. *Land Use and Driving: The Role Compact Development Can Play in Reducing Greenhouse Gas Emissions*, Urban land Institute, Washington, D.C (2010).

The ULI analyzed and summarized three recent studies on the connection between compact land use /development patterns and driving/VMT – Moving Cooler, Growing Cooler and TRB (all discussed in this section). The report concluded generally that "The benefits of compact development over sprawl are clear and well documented. Compact development creates the underlying foundation for a variety of types of

vibrant, healthy, and pedestrian friendly communities—the types of communities that, many Americans have discovered, improve quality of life. Recent market trends and surveys indicate that Americans want to live in these communities. Adding to this advantage, compact development is a recognized strategy to reduce public infrastructure costs, protect environmentally sensitive lands, and enable a variety of transportation choices. It also helps protect families from increasing household costs, especially those of transportation and utilities, which are directly tied to the price of fuel and energy."

f. *Transportation's Role in Reducing U.S. Greenhouse Gas Emissions: Report to Congress*, U.S. Department of Transportation, 2010

This study was mandated by the Energy Independence and Security Act (P.L. 110-140, December 2007) to study "the impact of the Nation's transportation system on climate change and strategies to mitigate the effects of climate change by reducing GHG emissions from transportation." Regarding land use and transit access, the report concluded: "Significant expansion of urban transit services, in conjunction with land use changes and pedestrian and bicycle improvements, could generate moderate reductions of 2 to 5 percent of transportation GHG by 2030. The benefits would grow over time as urban patterns evolve, increasing to 3-to-10 percent in 2050. These strategies can also increase mobility, lower household transportation costs, strengthen local economies, and provide health benefits by increasing physical activity."

g. *Transit Oriented Development and the Potential for VMT-related Greenhouse Gas Emissions Growth Reduction*, Center for Neighborhood Technology/Center for Transit Oriented Development (2010).

Location matters. For any given household, the number of autos it owns, and how many miles households drive those autos, is largely determined by where the household lives. A household's VMT and carbon footprint can be dramatically reduced by living in a location efficient neighborhood… this paper shows that by simply living in a central city near transit, the average household can reduce it GHG emissions by 43 percent, compared to the average household… in the most location efficient transit zones [downtowns], a household can reduce its GHG emissions by as much as 78 percent… All this leads to the potential for TOD to contribute to reductions of VMT-related GHG emissions."

h. Predicting Transportation Outcomes for LEED Projects, Journal of Planning Education and Research, April 12, 2012.

This peer-reviewed article shows VMT reductions associated with various Smart Growth and transportation scenarios. The article found that in communities built to the US Green Building Council's LEED for Neighborhood Development standards, VMT has been reduced between 24 and 60%, relative to the surrounding region's metropolitan averages.

II. <u>Sustainable Development and Water Quality</u>

a. *Protecting Water Resources with Smart Growth*, US Environmental Protection Agency, Washington, DC, May 2004, p. 10.

Strategically-located, higher-density development – particularly in developed areas and traditional "municipal centers" -- has been found to reduce overall per capita storm-water run-off pollution, in turn helping to protect source water quality and the ecosystems/habits it sustains. The EPA concluded that low-density sprawling development patterns actually increase the overall amounts of impervious surface at the watershed level – roods, parking lots, driveways, landscaped lawns -- thus disrupting natural water-cleansing hydrologic functions and increasing pollution from unnatural surface storm-water flow. The EPA found: "Low densities at the site level can increase imperviousness at the watershed level, however, leading to worse overall water quality. This effect is due to the fact that the infrastructure and housing footprint requirements for low-density development at the site level can increase the rate at which land within the watershed is developed… such development also requires greater amounts of transportation-related impervious infrastructure, such as roads, driveways, and parking lots."The EPA further concludes: "On the other hand, smart growth approaches – such as reusing previously developed land; regional clustering; and developing traditional towns, villages, and neighborhood centers – can accommodate the same activity on less land. In turn, this approach reduces overall imperviousness at the watershed level, thus maintaining watershed functions… higher population densities in concentrated areas can reduce water quality impacts from impervious surfaces by accommodating more people and more housing units on less land." Id., at pp. 10 – 11.

b. *Protecting Water Resources with High-Density Development*, US Environmental Protection Agency, 2006.

Focusing specifically on density, the EPA found that higher-density development generally yields less storm-water pollution run-off than typical low-density sprawl. The EPA concluded that a group of eight houses on quarter-acre lots (moderate-density, village-form scale) generates about 6,000 cubic feet of pollution run-off per year; a typical suburban subdivision of eight homes on one-acre lots, in contrast, generates three times the storm-water pollution run-off, or 18,000 cubic feet annually.

c. The Value of Green Infrastructure: A Guide to Recognizing Its Economic, Environmental and Social Benefits, *Center for Neighborhood Technology and American Rivers*, 2010.

This analysis calculated kWh energy savings from green infrastructure – in particular, cooling, heating and water treatment energy savings from green roofs.

III. Agricultural/Forest Land Preservation

a. *Planning for Agriculture in New York, American Farmland Trust*, 2011, p. 5.

Dispersed, low-density, single-use development on the metropolitan fringe is the greatest threat to the preservation of agricultural and forest resources. The American Farmland Trust – NY Chapter concluded that, "The loss of New York farmland is largely driven by the migration of residents from cities into

the suburbs and rural communities surrounding them, not by population growth."

b. *Putting Smart Growth to Work in Rural Communities*, Smart Growth Network/International City/County Management Association, 2010, p. 4.

The USDA found that between 2002 and 2007 nearly 47,700 acres of farmland in NYS were developed – roughly 9,000 acres annually. And the Brookings Institution found that Upstate New York was experiencing a particularly deleterious development pattern, which it termed "Sprawl Without Growth" – that is, 425,000 acres of farmland were developed between 1982 and 1997, contributing to a 30% increase in developed land with only a 2.6% increase in population. Nationwide trends show a similar pattern. Most population growth is occurring in rural areas at the metropolitan fringe – in the mid-1990s, for example, three-quarters of all development occurred at and beyond the urban fringe, nearly all on one-acre lots or larger.

c. *Planning for Agriculture in New York,* American Farmland Trust, 2011*; see also* www.farmland.org *and Putting Smart Growth to Work in Rural Communities,* Smart Growth Network/International City/County Management Association, 2010.

Streamlining and incenting development in municipal centers has the potential to reduce the pressure to build further and further from existing develop areas on rural farm and forest land, and increase opportunities to preserve such lands before sprawling development occurs.

IV. Historic Rehab/Adaptive Re-Use

Many historic structures are located within municipal centers; indeed, one would be hard-pressed to find a successful downtown revitalization effort that did not have historic preservation as a central component – Syracuse, Buffalo, Oswego here in NYS, among others. A focus on municipal centers provides the greatest opportunity to re-develop and re-use existing structures.

Rehabilitation of an existing historic building avoids the "embodied energy" required for new construction – i.e., the energy (and concomitant pollution and environmental degradation) required to extract, produce and transport new construction materials, and the actual construction of the building. (A common phrase among green building advocates is "the greenest building is the one that isn't built."[43]) A historic structure already possesses its embodied energy, with the exception of maintenance and rehabilitation. And unlike new construction, historic rehabilitation involves largely labor (usually local), and less materials -- as a general rule, new construction requires half materials/half labor; historic preservation involves 60-70% labor.

Historic rehabilitation also avoids the disposal of building materials in a landfill that would result from the ultimate demolition of an existing old building that is not maintained or restored.[44] Since one-quarter of our garbage in solid waste facilities is comprised of construction debris (much of which from building demolition), the minimization or avoidance of building demolition through historic rehabilitation reduces solid waste. Historic preservation is, in effect, another form of recycling.

Historic preservation in municipal centers also reaps environmental benefits through Brownfield clean-up and re-development.

APPENDIX G

TABLE OF COMMENTERS

Commenter	**Number**
Adirondack Council	1
Adirondack Mountain Club	2
Amato Law Group	3
Anonymous	4
Assemblymembers Steve Englebright and Aravella Simotas	5
Assemblyman Steven Otis	6
Atlantic States Legal Foundation	7
Bacon, James Bryan, Esq. for Marian Rose	8
Baltus, Charlotte	9
Barthel, Anita	10
Bauer, Harold	11
Biesanz, Karen	12
Bigelow, Deborah E	13
Black, Mike	14
Bodkin, Cora	15
Brennan, Roger	16
Bright Energy Services	17
Brown, Kristin	18
Burger, Chris	19
Burkhardt, Laura	20
Caffry & Flower	21
Calsolaro, Dominick	22
Campbell, Cynthia	23
Carlisle, Valerie	24
Carucci, Franco	25
Catskill Mountain Keeper – Kathleen Nolan	26
Citizens Campaign for the Environment	27
Citizens for Local Power	28
Carucci, Rebecca	29
City of Buffalo	30
Cohen, Elana	31
Columbia Land Conservancy	32
Columbia Law School – Michael Gerard	33

Concerned Citizens of Allegany County Inc	34
Conroy, Sheila	35
Cornell University	36
CTIA and WIA	37
Dalton, Andrew	38
Davenport, Charles	39
Davis, Steve and Laura	40
DCS	41
Depoli, Euro	42
Diana, Albany	43
DiMarco, Christina	44
Doe, John	45
Doerfer, Rebecca	46
Dorn, Robert	47
Dubois, Susan J	48
Dubois, Susan J	49
Dubois, Susan J	50
Dutchess County Legislature	51
Dwyer, Wendy	52
Dwyer, Wendy	53
Ellis, Tom	54
Ellis, Tom	55
Ellis, Tom	56
Ellis, Tom	57
Environmental Advocates of New York	58
Environmental Energy Alliance of New York	59
Ermer, Thomas	60
Fallert, Johanna	61
Fallert, Johanna	62
Finkelstein, Matthew K	63
Finneran, Ann L	64
Fjalltoft, Michelle	65
Frys, Michael	66
Garofalo, James	67
Giacalone, Arthur	68
Giacalone, David	69
Gibson, Vivien	70
Village of New Paltz Planner – David Gilmore	71
Glidden, Suzannah	72
Glustoff, Barbara	73
Goldfarb, Joanne	74
Goldhammer, Allan	75

Golubski, Ashley	76
Grande, Paula	77
Grassroots Environmental Education	78
Gray, Katherine	79
Gregg, Daria	80
Grosso, Mike	81
Groten, Arthur H	82
Hanley, Linda	83
Hardin, Melinda	84
Heinzen, Barbara	85
Helmer, Daniel J	86
Hertz, Michele	87
Hinkelman, Carol	88
Hodgkins, Thomas	89
Hopkins, Stephen	90
Houser, Gerard	91
Howard, Sally	92
Hudson Valley Pattern for Progress	93
Hurlburt, Cheryl	94
Huston, William	95
Jackson, Lynne	96
Jackson, Patricia	97
Jacques, Susan	98
Jenkins, Pam	99
Jhun, William	100
Johnston, Sarah	101
Joyce, Janice	102
Kantrowitz, Edith	103
Kidney, Barbara	104
Kiefer, Dooley S	105
Kielb, Christine	106
Kilpert, Rob	107
Kimball, Hubert D	108
King, Allison	109
Kingston CAC	110
Kirschner, Andrew	111
Kissam, Sandra	112
Kletter, Amy	113
Klimkova, Madelynn	114
Kocher, Wayne	115
Kopald, Deborah	116
Kramer Levin Naftalis & Frankel – Gary Tarnoff	117
Krane, Lori	118
Kremer, Kate	119

Krimsky, Pamela B	120
Kurtz, Peggy	121
Kyger, Elizabeth	122
LaBella Associates	123
Lawrence, Susan	124
Lawson, Nancy	125
Livingston, Alida	126
Looker, Peter	127
Lowenbraun, Joseph	128
Lugo, Joy	129
Lynn, Mickie	130
MacDermott, L L	131
Machtay, Richard	132
Malecki, Jessie	133
Mallick, Pramilla	134
Mandelbaum, Seth M	135
McCabe, Vincent	136
Marshall, M F	137
McGovern, Michelle	138
Menon, Suku	139
Messer, Nancy	140
Monroe County Department of Planning	141
Mulroy, Jan	142
Murphy, Sharon	143
Myles, Margo	144
NFIB – Michael Durant	145
NYCMA – Dave Hamling	146
NYCSA	147
NYLPI	148
NYPF	149
NYPIRG	150
NYS Bar Association	151
NYS Builders Association	152
NYSEIA	153
NYSERDA	154
NYSPHRP	155
NYSTA	156
NYSWRI	157
Oblong Land Conservancy – Theresa Ryan	158
Onondaga Nation – Alma L Lowry	159
Osuna, Ellen	160
Ontario County Resolution #286-2017	161
Passas, Alex	162
Peek, Laurie	163

Peterson, Lorna	164
Petition	165
Petsos, Cassandra	166
Phelan, Terry	167
Perkins, Linda	168
Pietris, Christopher	169
Porter, Lois	170
Porter, Don	171
Postcard (#) comments	172
Postcard Form Letter Comment	173
Preservation League of NYS	174
Protect Orange County – Pramilla Malick	175
Rapchick, Joe	176
Ravnitzky, Jerry	177
Reese Hurd, Kate	178
Reilly, Andrew C	179
Reinhardt, Bill	180
Riverkeeper Comment Form Letter	181
Riverkeeper	182
Riverkeeper – Buffalo, Niagara	183
Ross, Hume	184
Ruland, Ron	185
Sack, Susanne	186
Sacred Spaces – Jeffrey Gagnon	187
Save the Pinebush	188
Scenic Hudson	189
Schaeffer, Mark	190
Schenectady Heritage Foundation	191
Schmidt, Leia	192
Schue, Keith	193
Schultz, Sara	194
Schwartz, Marian R	195
Scott, Gudrun	196
Senator George Amedore, Jr	197
Senator Christopher L Jacobs	198
Seymour, Donna	199
Shafer, Stephen	200
Shafer, Elizabeth	201
Sheasby, Heidi	202
Sheff, Daniel	203
Sheth, Kanan	204
Siegfried, Heidi	205
Sierra Club	206
Sierra Club Atlantic Chapter	207
Sierra Club Long Island Chapter	208

Sinclair, Frederick	209
Skripak, Pam	210
Smith-Spanier, Karin	211
Sokolow, Alice	212
Sough, J P	213
Spanier, Wayne	214
Starke, Alexis	215
Staropoli, Sue	216
Stephens, Lynda	217
Steubing, Sandy	218
Sullivan, Charles	219
Sussman & Associates – Valeria A Gheorghiu	220
Tansey, Carol	221
The City of New York Law Department	222
The Stockade Association	223
Tick, Paul	224
Tignanelli, Doreen	225
Tompkins County Environmental Management Council	226
Town of Bedford Planning Board	227
Town of Brookhaven	228
Town of New Paltz	229
Town of Queensbury	230
Town of Southeast	231
Treichler, Rachel	232
Tyrrel, Mike	233
Van Cott, Paul – NYS APA	234
Varian, Mariam	235
Vaughan, Raymond C	236
Waller, Sydney	237
Waterman, Carol	238
WCA - William Mooney	239
Weiksnar, William	240
Weininger, Ellen	241
Wenk, Jay – Woodstock Councilman	242
Werner, Marie	243
Wilner, Marjorie	244
Wilson, Joseph	245
Witek, Krystof	246
Witek, Tanya	247
Wooster, Margaret	248
Wright, Diana	249

END NOTES

[1] ECL §8-0109(8); *see also, for example*, Ulasewicz, Thomas A., *The Department of Environmental Conservation and SEQRA, Upholding its Mandates and Charting Parameters for the Elusive Socio-Economic Assessment*, 46 Albany Law Review 1255-1256 (1982).
[2] In addition to the public outreach that was had through the stakeholder review process, the Department also conducted scoping for this GEIS. A positive declaration for this rulemaking with a link to a proposed draft scope appeared in the July 11, 2012 Environmental Notice Bulletin. The public was notified of the final scope in the November 28, 2012 Environmental Notice Bulletin.
[3] A more complete description of prior rule makings appears in the 1995 FGEIS, which is published on the DEC's website at http://www.dec.ny.gov/permits/357.html.
[4] 171 Misc. 2d 454 (Sup. Ct. Albany Co. 1996), modified by 242 A.D.2d 91 (3d Dept. 1998), appeal denied by 92 N.Y.2d 802
[5] *West Village Comm*, *supra*, 242 A.D.2d at 100.
[6] *See* http://www.dec.ny.gov/permits/6191.html. The new forms, which became effective on October 7, 2013, are fully electronic and contain an interactive EAF mapper that allows project sponsors to almost instantly identify important environmental resources such as state regulated wetlands are present on the project site. Through a click of a button, the mapper searches the Department's geographic information system for the presence of environmental resources that must be considered in the SEQR process.
[7] See City of New York, Mayor's Office of Environmental Coordination, http://www.nyc.gov/html/oec/html/ceqr/forms_templates.shtml.
[8] The new electronic forms were originally scheduled to become effective in October 2012; the effective date was set back to October 7, 2013.
[9] *See*, http://www.nyc.gov/html/oec/html/ceqr/ceqr.shtml/
[10] *Parking Standards*, Michael Davidson and Fay Dolnick, American Planning Association, Planning Advisory Service Report Number 510/511, 2002.
[11] These proposed changes have been prepared in consultation with the Office of Parks, Recreation and Historic Preservation.
[12] *See* Orloff, Neal, *SEQRA: New York's Reformation of NEPA*, 46 Albany Law Review 1128 (1982).
[13] *See* ECL Article 6 (State Smart Growth Public Infrastructure Policy Act).
[14] *See* 47 USC §1455(a) (adopted on Feb. 22, 2012, P.L. 112-96, Title VI, Subtitle D, § 6409, 126 Stat. 232); the Federal Communications Commission recently issued guidance on the meaning of what does it mean to "substantially change the physical dimensions" of a tower or base station and what is a wireless tower or base station.
[15] *See* https://www.ny.gov/reforming-energy-vision/learn-more.
[16] *See* http://energyplan.ny.gov/, last visited on October 6, 2015.
[17] *See* website for New York City Mayor's Office of Sustainability, http://www.nyc.gov/html/planyc/html/sustainability/sustainability.shtml, last visited on October 6, 2015.
[18] New York State Conservationist, December 2012, page 23-25.
[19] See PlaNYC, 2007, page 115, http://www.nyc.gov/html/planyc2030/html/home/home.shtml.
[20] DEC, New York State Conservationist, December 2012, page 23-25.
21 Preserve NJ, July 7, 2008.
22 " NEXAM October 9, 2012.
[23] New York State Department of State, *Subdivision Review in New York*, James A. Coon Technical Series, p. 11 (Revised 2015).
[24] New York State Department of State, *Subdivision Review in New York State*, James A. Coon Technical Series, p. 19 (Revised 2011).
[25] See Department of Environmental Conservation, *Construction Stormwater Toolbox*, published on the Department's website at http://www.dec.ny.gov/chemical/8694.html.
[26] *Id*., Review of the Subdivision, beginning on page 48.

[27] The Department wishes to express its appreciation to the Department of State, which assisted in providing the supportive research that appears in Appendix F.
[28] See, for example, ECL Article 6 (Smart Growth Public Policy Infrastructure Act).
[29] *See* Regional Plan Association, 2013 Long Island Index Special Analysis, How the Long Island Rail Road Could Shape the Next Economy, available at http://www.longislandindex.org/explore.
[30] *See* Regional Plan Association, Places to Grow, An Analysis of the Potential for Transit-Accessible Housing and Jobs in Long Island's Downtowns and Station Areas, January 2010, available http://www.longislandindex.org/explore/ba2fab1cacfbf6edd9f2339ca40c9679.
[31] *See* Metroland, April 24, 2013, http://metroland.net/2013/04/24/blight-fight/.
[32] *Historic Preservation and Green Building: A Lasting Relationship*, Environmental Building News, January 2007.
[33] *Economics, Sustainability, and Historic Preservation*, Donovan Rypkema, National Trust for Historic Preservation, October 2005.
[34] See, generally, Organics: Co-Digestion Economic Analysis Tool (CoEAT). (2014, December 29). In United States Environmental Protection Agency. Retrieved April 6, 2015, from http://www.epa.gov/region9/organics/coeat/index.html and
United States Environmental Protection Agency. (2014, February 28). Municipal Solid Waste (MSW) in the United States: Facts and Figures. In United States Environmental Protection Agency. Retrieved March 11, 2015, from http://www.epa.gov/epawaste/nonhaz/municipal/msw99.html
[35] One or more of the participants in the stakeholder outreach that proceeded this EIS suggested that DEC bring back the scoping checklist.
[36] 171 Misc. 2d 454, 458, 654 N.Y.S.2d 230 (Sup. Ct. Albany Co. 1996), *modified by* 242 A.D.2d 91 (3d Dept. 1998), *appeal dismissed by* 92 N.Y.2d 802 (1998).
[37] The primary reasons for a draft EIS to be rejected multiple times is usually because the lead agency has failed to identify all of the items that need to be addressed or there is pressure from project opponents to add additional analysis of impacts into the document either because the document is truly deficient or as a way to defeat the project by delay or cost.
[38] 171 Misc. 2d 454, 458, *supra*.
[39] NYS 2100 Commission, *Recommendations to Improve the Strength and Resilience of the Empire State's Infrastructure*, p. 139, available at http://www.rockefellerfoundation.org/uploads/files/7c012997-176f-4e80-bf9c-b473ae9bbbf3.pdf.
[40] For a discussion of the issue of whether the lead agency should prepare the draft EIS, see Gerrard, Ruzow and Weinberg, *Environmental Impact Review in New York*, §3.08[2] (Matthew Bender & Company 2012).
[41] Governor Cuomo's 2100 Commission Report, http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/assets/documents/NYS2100.pdf, accessed on March 10, 2015.

[43] *Historic Preservation and Green Building: A Lasting Relationship*, Environmental Building News, January 2007.
[44] *Economics, Sustainability, and Historic Preservation*, Donovan Rypkema, National Trust for Historic Preservation, October 2005.