FINAL
Generic Environmental Impact Statement
on the
Proposed Amendments
to the
State Environmental Quality Review Act (SEQRA) Regulations

6 NYCRR - Part 617

PREPARED BY
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EXECUTIVE SUMMARY

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The Department of Environmental Conservation is amending 6 NYCRR 617, the statewide regulations that implement the State Environmental Quality Review Act (SEQRA), Article 8 of the Environmental Conservation Law. The revisions are aimed at clarifying and streamlining the regulations and to address issues raised by state and local agencies, the public, project sponsors and the courts during the last seven years of SEQR implementation.

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 (EIS) as the means for describing the changes. Through the draft generic EIS which was released for public comment on May 4, 1994 its associated 79-day formal public comment period and the series of 22 public hearings held at 11 locations across the State and the revised draft generic EIS which was released on June 12, 1995 and the subject of a 30 day written comment period the DEC has: 1) discussed the objectives and the rationale for the amendments; 2) presented alternative measures which were considered; and 3) provided the maximum opportunity for public participation. Nearly 300 written comments on the proposed regulatory changes were submitted for the Department's consideration.

The substantive comments which were received during the public comment period were summarized and a response provided. These responses are found in the final generic EIS grouped with other comments on the specific area of the regulation that was being discussed.

The revisions on cumulative impacts which were included in the May 4, 1994 proposal have been deleted from the rulemaking. This particular area generated the most vigorous response from all parties. Some commentors felt that any deviation from the Court of Appeals decision was improper while other groups felt that the Department did not go far enough in the effort. Given the disparate views and the importance of the issue, the Department has decided to establish a interdisciplinary working group to develop a proposal.

The proposal to expand the use of CNDs to Type I actions and the proposed Type II actions dealing with comprehensive planning and adaptive reuse have also been deleted from the rulemaking in response to public comments. The short and full EAF have been revised to specifically address potential for impact to CEAs and the entire regulation has been reorganized to follow the conduct of an environmental review.

The remaining amendments are consistent with the May 4, 1994 proposal with some modifications due to public comments. These include: scoping amendments to provide more thorough guidance on what should be in a scope; the additions to the Type II list of actions; changes in the critical environmental area (CEA) designation and review requirements to focus more attention on the review of impacts on a CEA rather than the current focus on procedural requirements; extensive

revisions to the EIS format which allow more flexibility in the format of an EIS and provide that if an item is not applicable or significant it should not appear in the EIS; procedures for amending and rescinding negative declarations; amendments related to contents of findings statements and guidance on when findings can be amended; language clarifying that a lead agency may charge future project sponsors to recover costs of a generic EIS; and updates to bring the regulations into compliance with statutory amendments enacted during the past seven years, plain language edits and minor editorial corrections.

Alternatives to the various proposed amendments are discussed in the sections where appropriate. Some sections lack a discussion of alternatives, as none, other than the no action alternative, have been identified.

FINAL GENERIC ENVIRONMENTAL IMPACT STATEMENT

DESCRIPTION OF THE ACTION

Back

The New York State Department of Environmental Conservation (DEC) is amending the regulations that implement the State Environmental Quality Review Act (Title 6, New York Code of Rules and Regulations (6 NYCRR Part 617). The goals of the Department are to streamline and simplify the SEQR process and to clarify certain provisions of the regulations. These changes will improve the substance of environmental reviews, make the regulations easier to use and understand and improve agency administration of the SEQR process by eliminating from review those actions that do not have a significant adverse impact on the environment, thus, allowing agencies to focus resources on the actions that have a potential for causing significant adverse environmental impact.

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 (EIS) as the means for describing these changes. Through the generic EIS, DEC: 1) discusses the objectives and the rationale for the proposed amendments; 2) presents alternative measures which have been considered; and 3) provides the maximum opportunity for public participation.

As part of this rulemaking effort, DEC consulted with an advisory committee regarding the potential amendments. The advisory committee comprised of 30 individuals representing local government, business, environmental groups, environmental consultants and environmental attorneys (see Appendix A) was formed in September, 1993. Each individual was then asked to reach out to 4 to 6 other individuals/organizations. Our goal was to broaden the participation beyond the individuals known to the Department. Comments were accepted from the advisory committee until November 30, 1993. Following the review of the advisory committee comments, a positive declaration that contained a draft scope of items to be addressed in the draft generic EIS was filed on January 26, 1994 (see Appendix B). The draft scope:

1) provided a summary list of items under consideration for amendment;
2) provided a brief discussion of the objectives and rationale for the major anticipated amendments, including sections of text for cumulative impact, scoping, Type II list and EIS format;
3) incorporated a list of suggestions we had received from others for consideration; and
4) proposed to revise the organizational structure of the regulations to better follow the SEQR process and, therefore, make the regulations more "user friendly".

DEC then conducted a public scoping of the issues to be addressed in the draft generic EIS to allow for early public participation in the rulemaking process. The draft scope was made available to the public through mailings, notice in the Environmental Notice Bulletin (ENB) and electronically on the New York State Office of Rural Affairs' Rural Assistance Information Network (RAIN). A teleconference to accept comments on, and to answer questions about, the draft scope was held on February 16, 1994. The teleconference was downlinked by satellite to 26 locations statewide with

approximately 275 people in attendance. A New York City downlink location was not available and, consequently, we conducted a second scoping session in New York City on February 23, 1994. Comments on the draft scope were accepted by the Department until February 28, 1994. In addition to the comments made during the teleconference, we also received more than 80 comment letters on the draft scope (see Appendix C). The regulations and the accompanying draft generic EIS which considered the comments we received from both the advisory committee and public scoping processes were released for public review and comment on May 4, 1994. A 79-day public comment period was provided. During the comment period, a total of 22 hearings were held at 11 locations across the state (see Appendix E). At the close of the public comment period over 100 written comment letters had been submitted for consideration (see Appendix F). The close of the comment period did not end the Department's outreach efforts. The Department met with representatives from the environmental community, the business community and local/state government in an effort to provide these groups with an opportunity to question the Department regarding the proposed changes and to explain the nature of their concerns in greater detail.

Based on the review of the substantive comments received and the changes made in the proposed regulation as a result of those comments, the Department decided to allow for an additional public review of the revised SEQR regulations. A notice of revised rulemaking was filed with the Department of State on June 6, 1995 and published in the State Register on June 21, 1995. A 30-day public review period was provided to allow for review of the sections of the regulation that have been changed since the May 4, 1994 version of the regulations. The revised draft generic EIS which was noticed as complete on June 12, 1995 (see Appendix G) in the ENB served as the responsiveness summary that was required under the State Administrative Procedures Act.

The major proposed change in the revised regulation was the deletion of the language regarding cumulative impact analysis. This particular area generated the most vigorous response from all parties. Some commentors felt that any deviation from the Court of Appeals decision was improper while others felt that the Department did not go far enough in the effort. Given the disparate views and the importance of the issue, the Department has decided to establish a interdisciplinary working group to develop a proposal.

The suggested amendment to expand the use CNDs to Type I actions and the proposed Type II actions dealing with comprehensive planning and adaptive reuse were also deleted from the rulemaking in response to public comments that expressed concern regarding the nature and extent of these activities. The reorganization of the regulation to follow the conduct of an environmental review and the changes in the environmental assessment forms (EAFs) are other areas where there were changes in the proposal. The changes proposed for the EAFs complement the changes regarding the assessment of impacts on critical environmental areas.

The remaining proposed amendments were consistent with the May 4, 1994 proposal with some modifications due to public comments. These included: the additions to the Type II list of actions; scoping amendments to provide more thorough guidance on what should be in a scope; changes in the critical environmental area (CEA) designation and review requirements to focus more attention on the review of impacts on a CEA rather than the current focus on procedural requirements;

extensive revisions to the EIS format which allow more flexibility in the format of an EIS and provide that if an item is not applicable or significant it should not appear in the EIS; procedures for amending and rescinding negative declarations; amendments related to contents of findings statements and guidance on when findings can be amended; language clarifying that a lead agency may charge future project sponsors to recover costs of a generic EIS prepared to support a comprehensive plan; and updates to bring the regulations into compliance with statutory amendments enacted during the past seven years, plain language edits and minor editorial corrections.

A total of 46 comment letters were received before the close of the comment period on July 21, 1995 (see Appendix H). Based on a review of the substantive comments received during the course of this rulemaking, the Department has decided to complete the revision of the Part 617 regulations. There have been no substantive changes to the regulations from the revised regulatory language which was released on June 21, 1995. Minor modifications have been made in response to public comment. This final generic EIS contains a summary of the comments received from both the May 1994 and the June 1995 proposals and the Department's response.

ENVIRONMENTAL SETTING

Back

Enacted into law on August 1, 1975, the State environmental Quality Review Act (SEQRA) is a process that requires the consideration of environmental factors along with social and economic considerations in the early planning stages of actions that are directly undertaken, funded or approved by local, regional or state agencies. By incorporating a systematic interdisciplinary approach to environmental review in the early planning stages, projects can be modified to avoid adverse impacts.

The primary tool of the SEQR process is the EIS. If it is determined that a proposed action may have a significant adverse impact on the environment, then a draft EIS is prepared to explore ways to avoid or minimize impacts and to identify potentially less damaging alternatives.

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. This may result in project modification or even project denial if environmental concerns are overriding and adequate mitigation of adverse impacts or adequate alternatives are not available.

A very important aspect of SEQR is its public participation component. There are opportunities for public participation throughout the SEQR process. This includes scoping of the draft EIS, conduct of a SEQR hearing on a draft EIS, and the required 30 day public comment period on the draft EIS. These opportunities allow other agencies and the public to provide input into the review process, resulting in projects which reflect broad perspectives. It also increases the likelihood that the project will be consistent with community values.

To accomplish the purposes of SEQR, the law directed the Commissioner of DEC to establish procedures to guide all agencies in their implementation of the statute. These procedures are found in Part 617 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR Part 617).

Part 617 was initially promulgated in 1976. A series of amendments were adopted in order to reflect the evolving SEQR process. Amendments were made as follows:

1. January 24, 1978 - The Type I and Type II lists were amended. There were clarifications to the language and procedures. The amendment identified and provided procedures for "Excluded" (grandfathered) actions.

2. November 1, 1978 - Procedures were provided for the "Unlisted" category of actions subject to SEQR. The amendment also totally revised the Type I list of actions likely to require an EIS so that it could be more easily used by nontechnical agency decision-makers. Also provided was a practical (model) environmental assessment form (EAF) to assist the lead agency in determining significance for Type I actions and a model short EAF to assist in determinations for Unlisted actions.

3. December 12, 1978 - A minor revision reinstated one of the Type II actions that had been omitted in the November 1, 1978 amendment regarding extension of utility service to certain types of residential development.

4. October 8, 1982 - Procedures were added within Part 617 to accommodate the provisions of the Waterfront Revitalization and Coastal Resources Act of 1981, Article 42 of the Executive Law.

5. June 1, 1987 - This was a substantial revision which: 1) added a number of procedural changes such as scoping, conditioned negative declarations, supplementing draft and final EISs, rescission of negative declarations, and redesignation of lead agency; 2) clarified what is a reasonable alternative; 3) added new definitions; and 4) provided guidance on legally sufficient negative declarations, the substantive nature of SEQR, and the documentation requirements for Unlisted actions.

The Department routinely conducts SEQR workshops for counties and major organizations. In addition, DEC staff routinely respond to more than 2,000 inquiries on SEQR annually. From these interactions the Department has become aware of a number of issues that need to be addressed in Part 617.

REORGANIZATION Back

The regulations have been reorganized to follow the steps in the SEQR process. Commentors thought that if the regulations were reorganized in this fashion it would be easier, as you are working your way through the process on a particular project, to find the particular provision you need. The reorganization was not presented with the original proposal for fear it would confuse the substantive analysis of the amendments. However, the draft generic EIS did contain an outline of the proposed reorganization.

> Comment: The section "Actions Involving a Federal Agency" should follow the "Determining Significance" section since it is at that point that the lead agency must decide how to coordinate its review with a federal agency.
>
> Response: For a great majority of the actions reviewed under SEQR there is no involvement by federal agencies. Therefore, the section regarding federal agencies was placed at the back of the regulation because it is rarely used.

617 REORGANIZATION

617.1 Authority, Intent and Purpose
617.2 Definitions
617.3 General Rules
617.4 Type I Actions
617.5 Type II Actions
617.6 Initial Review of Actions and Establishing Lead Agency
617.7 Determining Significance
617.8 Scoping
617.9 Preparation and Content of Environmental Impact Statements
617.10 Generic Environmental Impact Statements
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617.12 Noticing and Filing
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617.14 Individual Agency Procedures
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617.16 Confidentiality
617.17 Referenced Material
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617.19 Effective Date
617.20 Appendices

PROPOSED TEXT AMENDMENTS Back

The Department is using a flexible EIS format for this final generic EIS. The following discussion of the proposed amendments to 6 NYCRR Part 617 identifies each substantive change by section number and may include, as appropriate:

1) an identification of the issue that is the basis for each substantive amendment in the section;
2) a brief synopsis of the text amendments;
3) a discussion of the implications (purpose/need/benefit) of the proposed amendment;
4) a description of the alternatives which were considered, where applicable. In some instances there is no discussion of alternatives, as none, other than the no action alternative, have been identified; and
5) a summary of the substantive comments received and the Department's response.

In order to minimize confusion, references to the existing 1987 regulation and the May, 1994 proposal are clearly noted. All other citations are in reference to the SEQR regulations which will be effective on January 1, 1996.

General Comments

Comment: The final EIS should include a detailed discussion of the purpose, public need and benefits, an explanation of who will benefit from the proposed changes and the impacts from the changes.

Response: A detailed discussion of the purpose, need, benefits and impacts including an identification of how the proposed change will benefit the SEQR process and groups/activities subject to SEQR is included under each change.

Comment: The final EIS should discuss the specific ways this proposal will advance public involvement.

Response: The requirement that scoping, if conducted, include a public participation component will increase public involvement. Improvements in the Environmental Notice Bulletin (ENB) will provide better and more timely notice of actions (see page 87 for more details on the improvements to the ENB). All of the above changes will advance public involvement in the SEQR process.

Comment: Many commentors felt that the change from "impact" to "adverse impact" was a substantive change in the scope of SEQR that was not consistent with Article 8. They noted that this change was considered during the 1987 revision to SEQR and dismissed by DEC in the Final Generic EIS For Revisions to 6 NYCRR 617, February 18, 1987, pages 17 & 18 because "It is clearly not the intent of Article 8 to limit EIS's to consideration of adverse effects."

Response: This change was considered and dismissed by the Department in 1987 as noted by the commentors. However, on page 58 of the 1987 generic EIS it is noted that "Experience with SEQR since 1978 indicates that, in fact, no draft EIS need be prepared unless the action contains at least one significant adverse effect (Niagara Recycling Inc. v. Town Board of Niagara, 83 AD2d 335, aff'd 56 NY 2d 859 (1982)). Court cases since the 1982 Niagara Recycling decision have continued to hold to this standard as the test for an EIS. (see also comment and response on page 75).

The environmental assessment stage still requires that the lead agency identify all relevant areas of environmental concern related to an action. If the conclusion following the completion of the environmental assessment is that none of the identified relevant areas of environmental concern will have a significant adverse impact on the environment then a negative declaration can be prepared. If there is a potential for a significant adverse environmental impact then an EIS or a CND is required. This standard has not been changed by the revisions.

Nor does this change limit the discussion of beneficial environmental impacts in an EIS. Project sponsors are still required to identify and discuss the "… proposed action, its purpose, public need and benefits, including social and economic considerations" (617.9(b)(5)(i)).

Comment: SEQR timeframes should be mandatory and there should be automatic default provisions provided to allow the review to proceed.
Response: Providing mandatory timeframes and default provisions is outside of the scope of the Department's authority (ECL §§ 8-0107, 8-0109 (second paragraph)). Those changes would require legislative action.

Comment: There is a need for objective, third party oversight of the SEQR process. This third party could be used to: insure timely and proper project review, guide agencies through the SEQR process, and to insure that decisions of the lead agency are based on appropriate facts and in accordance with the SEQR regulations.
Response: The Legislature specifically withheld from Article 8 any broad authority for administrative oversight.

Comment: This rulemaking should have included a Rural Area Flexibility Analysis as required by Chapter 171 of the Laws of 1994.
Response: This requirement applies to all rules proposed on or after October 12, 1994. Since the SEQR rulemaking was initiated prior to October 12, 1994 (May, 1994) a Rural Area Flexibility Analysis is not required.

617.1 AUTHORITY, INTENT AND PURPOSE Back

No substantive changes

Comment: Environmental Equity - Some commentors requested that this rulemaking address the "environmental equity" issue which has raised concerns that adverse environmental impacts are being disproportionately borne by minority and low income communities relative to the rest of the population.
Response: Clearly, social and neighborhood impacts are addressed in the SEQRA statute and regulations to the extent they relate to the definition of the environment. One of SEQRA's purposes is "to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources" (ECL §8-0101). "Environment" is broadly defined in the SEQRA statute and regulations to encompass "patterns of population concentration, distribution, or growth, and existing community or neighborhood character" and, the regulatory definition of "environment" includes "human health" (ECL §8-0105(6); Part 617.2(l)).

In addition, the following criteria are considered indicators of significance of an action: the creation of a material conflict with a community's officially approved plans; impairment of the character or quality of existing community or neighborhood character; and, the creation of a hazard to human health (Part 617.7(c)(1)(iv),(v)&(vii)). Also, the importance of this criteria is determined in connection with certain factors including the setting for a project and the number of people affected (Part 617.7(c)(3)(vii)).

Finally, an EIS must assess the public need and benefits of a project including social and economic considerations, and must describe the environmental setting (Part 617.9(b)(5)(i)&(ii)). As part of the environmental setting, community character including demographics and socio-economic information and infrastructure may be discussed in EISs. In deciding whether to approve a project, social and economic considerations are weighed against the potential environmental harm in the agency findings.

While SEQR gives lead, involved and interested agencies ample opportunity to raise and analyze issues with substantial environmental equity implications, the environmental equity issue, as a whole, has implications beyond SEQR. It concerns issues such as zoning and local land use planning. The Department believes that environmental equity warrants integrated policy initiatives by all levels of government and wide consultation with members of community, civic, environmental and scientific groups.

Comment: Some commentors questioned the authority of the Department to cite broad statutory power (ECL §§3-0301(1)(b) and 3-0301(2)(m)) as bases for adopting Part 617 when a specific statute (ECL § 8-0113) specifically empowers the Department to act in this area. In support of their position, commentors cited American Petroleum Institute v. U.S. E.P.A., 52 F.3d 1113, 1119 (D.C. Cir. 1995).

Response: The Department believes that citing general rulemaking power (ECL §§3-0301(1)(b) and 3-0301(2)(m)) in conjunction with specific rulemaking authority (ECL § 8-0113) when such broad authority is not in conflict with the specific statute is appropriate under fundamental rules of statutory construction, which require that all parts of an act to be read and construed together (see McKinney's Statutes §97). However, it would not be appropriate for the Department to rely on general rulemaking authority to override specific statutory directives of ECL §8-0113. This is the holding in American Petroleum Institute v. U.S. E.P.A. , 52 F.3d 1113. The Department's action here in citing the Article 3 provisions of the ECL is not controlled by this federal case.

617.2 DEFINITIONS Back

New definitions are identified and discussed below.

Adaptive reuse

Issue: The SEQR regulations need to be more responsive to the sustainable development objectives encouraged by Article 8 of the Environmental Conservation Law (ECL).

Revision: None. The proposed definition of adaptive reuse has been deleted from this rulemaking based on comments received. See also discussion on page 80.

Cumulative Impact

Issue: The existing regulations use the term "cumulative effects" and have required them to be considered in determining the environmental significance of an action and analyzed in EISs. The

decision in Long Island Pine Barrens Society v. Planning Bd. of Brookhaven, 80 NY2d 500 (1992) failed to examine the impacts of a proposed action in the context of impacts from other actions that may affect the same resources. The focus of analysis should be primarily on the relationship between the impacts rather than the actions themselves.

Revision: None. The proposed definition of cumulative impact has been deleted from this rulemaking based on comments received.

Discussion: Articles 3 & 8 of the Environmental Conservation Law state a policy that encourages harmony with the environment and promotes efforts to prevent or eliminate environmental damage. In enacting SEQRA, the Legislature recognized the need to understand our relationship to ecological systems. It also recognized that the capacity of the environment is limited and that governments must identify critical thresholds and prevent them from being met and conduct themselves as stewards of the environment for future generations. These legislative statements form the statutory basis for the requirement to review and address cumulative impacts in the SEQR process, since assessment of cumulative impacts is an essential tool in avoiding critical environmental thresholds. That responsibility has been upheld by the Court of Appeals in several cases.

Alternatives considered: See discussion of amendments to the SEQR criteria for determining significance at section 617.7 on page 47 and the contents of an EIS at section 617.9 on page 78.

Comment: Several commentors objected to the use of the term "incremental" as being either too narrow or confusing or unduly putting emphasis on smaller actions or impacts.

Comment: Several commentors objected to the term "probable future actions" on grounds it was either too speculative or that it required a greater than 50/50 chance of certainty. Others objected to language regarding agencies or persons undertaking other actions as being confusing, either unfair to project sponsors or too restrictive.

Comment: Others generally thought the definition either too overreaching or not inclusive enough.

Response: The proposed revisions related to the analysis of cumulative impacts have been deleted from the rulemaking. This particular area generated the most vigorous response from all parties. Some commentors felt that any deviation from the Court of Appeals decision was improper while other groups felt that the Department did not go far enough in the effort. Given the disparate views and the importance of the issue, the Department has decided to establish a interdisciplinary working group to develop a proposal. The working group will be comprised of representatives from the business, environmental, legal and local/state government communities. An outside facilitator will be assigned to this effort. The charge for this working group will be to develop an approach for the analysis of cumulative impacts under Article 8 of the ECL. The group will be formed in summer of 1995 with the goal of producing a product by January 1, 1996. A separate rulemaking would be initiated to incorporate any proposed changes into Part 617.

Comment: The Cumulative Impact Working Group must be conducted in a fair and open manner which is conducive to informed and reasoned decision-making.
Response: The Department agrees with this comment. The Cumulative Impact Working Group, which will have an independent facilitator, will contain about 20 individuals comprised of representatives from the business, environmental, legal and local/state government communities. All meetings of the working group will open to the public.

Impact

Issue: With the deletion of the word "effect" and replacing it with the word "impact" there is a need to define impact.

Revision: A definition of the term impact is included in the regulations.

Comment: There is no statutory authority for the change from "effect" to "impact".
Response: The statute and current Part 617 use the words "effect" and "impact" interchangeably. For clarity, the word "impact" was selected and "impact" has been defined to include "effect". This clarification does not change the substance of an environmental review under SEQR.

Comment: Several commentors were concerned that the change from the word "effect" to "impact" would result in less sensitivity in the environmental assessment stage of the review and that it would violate the statute.
Response: The word "impact" is defined to mean to have an effect or to change an aspect of the environment. This does not change the substance of a review conducted under SEQR and is consistent with the intent of the statute.

Comment: A lack of a definition for the words "significant and "adverse" is a major defect in the SEQR regulations.
Response: Providing a precise definition for the word significant that would have application in every location across New York State would not be possible. Significance is determined by assessing the magnitude and importance of the impact against the existing environmental conditions. Since the environmental conditions in New York State vary from Montauk to the Adirondack High Peaks to Manhattan to the Erie and Ontario lake plains it is impossible to fashion a single standard for significance.

The dictionary definition of the word "adverse" is adequate to cover all situations under SEQR. The Department has not defined in the SEQR regulations terms which have a common definition that is not unique to SEQR.

Mitigation

Issue: This definition is included to clarify in plain language this SEQR "term-of-art" used in both the existing statute and regulation.

Revision: Definition was revised to read "avoid or minimize adverse environmental impacts."

Comment: Several individuals commented that by placing the word reduce before avoid (617.2(y) May, 1994 Proposal) the proposed definition emphasized reducing impacts rather than avoidance. Others stated that the definition should present a hierarchy of mitigation that should start with avoidance, move to reducing and end with compensation.
Response: The definition was revised to list avoidance as the first level of mitigation. The Department agrees that compensation or off-site mitigation should be considered only after all other reasonable methods of avoiding or reducing an impact have been considered. Compensatory mitigation is discussed in The SEQR Handbook (1992), pages 66 & 67) where the concept and its use was noted.

Comment: The definition of the word "mitigation" should track the statutory language and read " minimize or avoid." This would assist agencies in meeting the findings requirement that impacts revealed in the EIS be minimized or avoided.
Response: Agreed. The change has been made. The sequence was reversed in response to comments received on the May 1994 proposal where it was noted that an agency's should first attempt to avoid the impact followed by reducing it.

Comment: Mitigation should mean a way to avoid or reduce significant adverse environmental impacts.
Response: Even impacts which are not significant can be mitigated by the project sponsor either in the design of the project or at the direction/request of a lead agency.

Comment: DEC should provide specific guidelines for lead agencies on the subject of adequate mitigation.
Response: This type of guidance is not appropriate for a regulation. The SEQR Handbook (1992) contains a discussion of mitigation and provides examples of typical forms of mitigation. The Department will look at this issue in the next revision of the handbook.

Other amendments to definitions

In addition to the new definitions, the following changes have been made to section 617.2:

- The definition of Environmental Impact Statement (EIS) has been revised to include additional guidance and to include supplemental EISs;
- The definitions of excluded and exempt actions have been moved to section 617.5 and placed on the Type II list; and
- The definition of findings has been revised to clarify the purpose and intent of a findings statement.

Comment: The word transportation should be included in the definition of "environment" if the EAFs are removed from the regulations and a separate definition of transportation that

includes both infrastructure and all modes of travel should be added.

Response: The EAFs will be included in the regulation therefore the word "transportation" was not included in the definition of the word "environment." A definition of the word "transportation" is not needed. The SEQR regulations do not change the common definition of the word.

Comment: The definition for the term "residential" does not recognize condominium and cooperative developments.
Response: The existing definition clearly would include these as residential developments.

Comment: A clear definition of segmentation is needed.
Response: A definition of segmentation is found in subdivision 617.2(ag) and further discussion regarding segmentation is contained in subdivision 617.3(g). Additional guidance regarding segmentation can be found in The SEQR Handbook (1992) pages 21 & 22.

Comment: The definition of Environmental Assessment Forms should define a "full" EAF and Parts 1,2 & 3 as this terminology is used in paragraph 617.6(a)(2) and is not clearly defined.
Response: The model full and short EAFs are included in the regulation as appendices. The instructions for completion and use of the forms is clear and this information does not need to be included in the definition.

Comment: The definition of "action" should be revised to include regional compacts and multi-community planning initiatives to consolidate delivery of community services.
Response: The definition of an "action" is already broad enough to address the situations noted by the commentor.

Comment: The definition of "agency" should be broadened to include such quasi-governmental agencies such as the Greenway Conservancy and the New York City Public Development Corporation.
Response: The definition of "agency" is further defined by the definitions for a "local agency" and "state agency". The agencies identified in the comment would fall into these categories.

Comment: The definition of "environment" and "physical alteration" should include electromagnetic fields (EMFs). Lawsuits regarding the potential impact of EMFs from electric distribution lines on real estate values and human health could have been avoided if EMFs were considered in facility siting and planning.
Response: Including EMFs in these definitions would not address the problem as identified by the commentor. The impact on real estate values is an economic impact not an environmental

impact and therefore it is not an issue to be assessed under SEQR. Human health is already included in the definition of "environment" and impacts on human health from a proposed project are assessed under SEQR where that impact is determined to be relevant and significant.

617.3 GENERAL RULES Back

In this proposal, certain items have been moved from the General Rules section to other more relevant sections that are more frequently referred to by the public and other language has been transferred to the general rules section.

- 617.3(c) and (d) which identified activities that do not require SEQR review have been added to Section 617.5 as Type II actions.
- 617.3(e) which stated that a lead agency can waive the requirement for an environmental assessment form (EAF) has been moved to section 617.6 where the use of an EAF is discussed.

Comment: The language in subdivision 617.3(a) pertaining to prohibiting a project sponsor from commencing physical alteration of property until SEQR has been complied with is without statutory foundation. It could have the effect of imposing a moratorium on ordinary landowner activities that may take place on a piece of property and may be beyond the authority of reasonable rulemaking activity. A project sponsor may have reasons unrelated to the action (e.g. safety concerns) for needing to commence existing building demolition on a site slated for development. This provision should be eliminated.

Response: Although this entire passage is underlined as new, it is a rewrite of the existing 617.3(a), therefore, it is not a new provision. This provision is intended to prevent vegetation removal and site grading where such activities are related to an action subject to SEQR but when the review has not been completed. Additionally, the basis for this provision is the concept that environmental review must encompass the "whole action". Part 617.2(b), the definition of an action includes activities that may affect the environment which logically encompasses "any physical alteration related to an action." Since SEQR must be complied with before undertaking an action, it only makes sense that any physical alteration related to an action, for which an application has been made, would be prohibited prior to SEQR compliance. Allowing a project sponsor to proceed with physical alteration of a site during the conduct of an environmental review under SEQR would severely limit the lead agency's opportunity to consider the full range of alternatives and mitigation measures. A landowner is free to use his or her property so long as that use does not constitute part of the action under agency review. This provision is supported by Federal court decisions construing NEPA to require that no part of an action subject to NEPA be undertaken before the Federal EIS process is complete (Maryland Conservation Council, Inc. v. Gilchrist, 808 F. 2d 1039; 4th Cir. 1986).

Comment: How does an agency enforce the no physical alteration language found in paragraph 617.3(a) and what remediation is expected in cases where work is done prior to the receipt of an application?
Response: This provision would be enforced and remediation imposed based on the underlying jurisdiction of the agency.

Comment: Since all Type II actions are not subject to SEQR, subdivision 617.3(a) must contain an additional exception for all Type II actions.
Response: The activities which are noted are those which relate to the collection of information and the conduct of studies in relation to the proposed action. These activities do not commit the agency to approve the action under review nor do they allow for widespread disturbance of the site.

Comment: Make the following changes to 617.3(a) "…An involved agency may not issue a decision on an action [that], if it knows any other involved agency has determined that the action may have a significant adverse impact on the environment, until a final EIS [and findings statement have] has been filed by the lead agency.…"
Response: The changes as proposed have been adopted except for the proposed elimination of filing the findings statement. The written findings statement is required before any involved agency may make a final decision (see subdivision 617.11(c)).

Comment: Language that attempts to clarify segmentation is too broad. Language should be added to define what constitutes a long range plan. Alternatives should include defining it to mean only those long range plans of the project sponsor.
Response: The language that was in subdivision 617.3(g) of the May 4, 1994 proposal has been put back in the criteria for determining significance (617.7(c)(2)(iii)). Additional guidance regarding segmentation can be found in The SEQR Handbook (1992), pages 21 & 22.

Comment: The definition of an "action" says that "actions include: agency planning and policy making activities that may affect the environment and commit the agency to a definite course of future decisions…". Does this mean that the long range plan referred to in 617.7(c)(2)(iii)(1), (617.3(h) in the May 1994 proposal) are only to those actions that commit an agency to a definite course of future decisions?
Response: No. The long-range plans referred to in 617.7(c)(2)(iii)(1) could be plans of an agency or they could be the plans of a project sponsor to develop a particular site in several phases.

Comment: Amend 617.3(e), May 94 proposal (617.6(b)(3)(iii)) to allow an involved agency to object to the lead agency's determination of significance or findings regarding an EIS in the

event the lead agency has not addressed the substantive issues raised by an involved agency.
Response: If an involved agency believes there are potentially significant adverse impacts to be addressed regarding a project they should contest for lead agency status. Developing a mechanism to allow an involved agency to challenge a lead agency's determination of significance following a coordinated review or findings would require powers similar to that of the Federal Council on Environmental Quality. Article 8 of the ECL did not provide DEC with the authority for this kind of administrative oversight.

Comment: Because not every contingency or potential impact can be foreseen, the regulations should allow involved agencies to raise substantive and significant issues later in the process and should require the lead agency to specifically address these issues.
Response: Involved agencies and individuals may raise substantive issues to the lead agency at any time in the process. However, they have the obligation to come forward with information at the earliest possible time. There are specific opportunities such as during the solicitation of lead agency, scoping, review of a draft EIS and hearings where the identification of substantive issues is specifically encouraged. Involved agencies can always address substantive concerns within their jurisdiction in the issuance of their permit or approval.

Comment: Insert the word "identified" before the phrase "lead agency" in the last part of 617.3(e), May 94 proposal, (617.6(b)(3)(iii)).
Response: The intent of this provision is that if an agency does exercise "due diligence" in coordinating the environmental review no subsequent agency may require any additional SEQR compliance. Inserting the word "identified" would not address agencies that became involved late in the process after the completion of the environmental review.

Comment: Add local municipal officials to the list of agencies which must be consulted in 617.3(d).
Response: Local municipal officials are considered as representatives of agencies.

Comment: The phrase "due diligence" should be added to 617.6(c)(3), (94 proposal) as they relate to the same thing or, as an alternate, incorporate amended 617.3(e) into 617.6(c)(3).
Response: This phrase has been revised and moved to 617.6(b)(3)(iii).

Comment: Do not delete examples in 617.3(h), (94 proposal).
Response: This type of guidance is more appropriately addressed in The SEQR Handbook (1992), pages 21 & 22 and other guidance documents regarding implementation of these regulations.

Comment: Amend first sentence of 617.3(i), (94 proposal) to read "Agencies must fully

carry…"

Response: The requirement to fully implement the requirements is implicit in the existing language.

Comment: In 617.3(c)(1) does "negative declaration" include "conditioned negative declaration" as the point of determining completeness?

Response Yes. A CND is a form of a negative declaration. The CND comment period would run concurrent with the rest of the application similar to the draft EIS.

Comment: In 617.3(e) add "potentially significant adverse" to modify "impacts."

Response: This language has been adopted.

Comment: Restore the bracketed phrase "[and to identify areas of controversy relating to environmental issues]" to 617.3(d).

Response: This language has been reinstated.

617.4 TYPE I ACTIONS Back

Unlisted actions in a critical environmental area not Type I.

See discussion on 617.14, page 93.

Add Unlisted qualifier to non-agricultural activities

Issue: In the 1987 revisions, DEC clarified that exempt, excluded and Type II actions cannot be elevated to Type I status. The change in 1987 was made for actions occurring in a CEA, and for actions affecting parkland or historic resources. However, the Type I listing for non-agricultural uses in an agricultural district was not clarified.

Revision: The Type I list regarding non-agricultural uses in an agricultural district will be revised to clearly indicate that only Unlisted actions are elevated to Type I status when the threshold is triggered.

Discussion: This change is proposed to make the agricultural item consistent with the other Type I items describing resource areas.

Comment: The regulations should clearly state that the Type I actions contained in this section represent the minimum list of actions.

Response: The section on Type I actions (Part 617.4) contains many references to the opportunity for agencies to adopt additional Type I actions, to lower thresholds and to use previously adopted lists of Type I actions. Additional clarification is not needed.

Comment: The phrase "to be connected (at commencement of habitation)" needs to be defined.

Response: The phrase "to be connected at the commencement of habitation to existing

community or public water and sewerage systems" means those facilities must be either in place or have completed the environmental review/approval process prior to the proposed action. It does not include projects that have the construction of a package sewage treatment facility and/or community water system as part of the proposal. This explanation is found in The SEQR Handbook (1992), page 16.

Comment: The thresholds for numbers of residential units, use of water, physical disturbance of land and number of vehicles are too high for the locations identified. The threshold would be better expressed as a percentage increase of existing hookups.
Response: All agencies have the authority to develop their own SEQR procedures and to reduce the Type I thresholds to a level that they determine is appropriate for their particular location.

Comment: The phrase "within the district" should be deleted from 617.4(b)(2). The adoption of changes in allowable uses affecting 25 or more acres anywhere within the municipal boundaries should be Type I.
Response: The phrase was added to clarify the provision and is consistent with the present interpretation of this Type I item. The uses allowed within any zoning district are specific to that district. Any changes in the list of allowable uses must be evaluated against the specific land use objectives of the district.

Comment: 617.4(b)(6)(v) is unclear whether the facility with more than 240,000 square feet of gross floor area refers to the entire facility or to the part of the facility which is the subject of the action. For example, if the part of the facility which is the subject of the action is 200,000 sq. ft. and is part of a larger facility of 800,000 sq. ft., will the action be classified as a Type I action.
Response: The thresholds apply to the part of the facility which is the subject of the application. So if the application was for the construction of a **new** 200,000 sq. ft. non-residential structure in a city, town or village having a population of more than 150,000 persons, the action would be an Unlisted action. If the proposed action was the construction of a 200,00 sq. ft. **expansion** of an existing non-residential structure it would be a Type I action because the proposed expansion of 200,000 sq. ft. exceeds the applicable Type I threshold (50% of 240,000 sq. ft.) for the expansion of a non-residential structure in a city, town or village having a population of over 150,000 persons.

Comment: 617.12(b)(9) should be reworded to "Any action occurring wholly or partially within or substantially contiguous to, any building, structure, facility, site or district that has been listed in or determined eligible for listing in the State or National Registers of Historic Places unless the action is designed for the preservation of the facility or site or has been reviewed and approved by the New York State Office of Parks Recreation and Historic

Preservation in the manner set forth in §14.09 of Parks and Recreation and Historic Preservation Law."

Comment: The expansion of 617.4(b)(9) to include properties that have been determined **eligible** for listing in the State register of historic places should be deleted. It will substantially increase the number of actions classified as Type I.

Response: This provision was proposed by the Office of Parks, Recreation and Historic Preservation (OPRHP). It also had the support of many members of the historic preservation community. This change would have expanded the present item to also include any building, structure, facility, site or district that has been **determined eligible for listing**. The goal was to offer the same level of protection to properties that have already completed the eligibility review. The Department added this provision in the June 1995 revised proposal with the understanding that OPRHP would supply the list of properties that have been determined eligible to all units of government and would update this list, as appropriate. OPRHP has now indicated that they will be unable to supply a continually updated listing of all properties determined eligible for inclusion in the State Register of Historic Places. This provision has been dropped from the Type I list because the information will not be readily available and the difficulty in obtaining the information would substantially slow the classification step of the process.

Comment: The provision contained in 617.4(b)(9) does not accurately reflect Section 14.09 of the OPRHP Law. OPRHP does not have the authority to approve projects. Suggests the wording be changed to "…review required by section 14.09 has been completed".

Response: OPRHP requested that this provision be added to forward the concepts of regulatory reform and eliminate redundant reviews. The Department agrees that OPRHP's authority is not a review and approval but a review and comment. While researching the response to this comment it was determined that placement of this item on the Type I list is inappropriate. The provisions of Section 14.09, which apply only to state agencies, are initiated after the project has already been classified and a historical or archeological resource concern has been identified. Based on the above this provision has been deleted from the regulation.

Comment: 617.4(b)(9) should be revised to include as Type I actions any historic resource that has been the subject of a public hearing regarding designation as a historic resource or any historic or prehistoric site or structure that has been the subject of an archaeological study.

Response: The purpose of the Type I and Type II lists is to allow agencies to classify potential actions for the purpose of conducting an environmental review. This is a very preliminary step in the review process and it should be able to be completed in a short period of time, usually one day or less based on readily available and reliable information. The suggested revision

could result in agencies conducting lengthy searches for days or weeks to determine if any hearings or studies have been conducted.

Comment: The following items should be added to the Type I list:

- planting of vegetation in waterways and wetlands;
- projects and activities in waterways and wetlands;
- construction of sewers, water mains or other infrastructure to support development in undeveloped areas.

Response: The activities suggested are very broad in nature and would conflict with some of the existing Type II actions. The Department is not aware of any problems with the Type I list that would necessitate these changes and has decided to not make additions to the list at this time. Individual agencies may through a local procedure supplement the statewide list of Type I actions.

617.5 TYPE II ACTIONS

Back

Structure of the List

Issue: Existing regulations establish and separately list three classes of actions which require no agency review under SEQR. These are "Excluded," "Exempt" and "Type II." Also, existing Part 617.3 (General Rules) separately lists other activities which do not require environmental review under SEQR. For easy reference, all of these items should be located in one section. In addition, the current Type II list is too narrowly drawn and requires expansion.

Revision: One section is established for all of the actions which do not require any determination or procedure under SEQR. Although it is still called the Type II list, it is now defined to include actions which do not have a significant effect on the environment, excluded actions, exempt actions and those activities currently referred to in the General Rules. The terms "excluded" and "exempt" are dropped from the regulations. Similar actions are grouped together.

Discussion: Since an important first step in the environmental review process is to ascertain whether SEQR applies to an action, the public is well-served by having to refer to only one section to determine if SEQR applies. In addition, §8-0113(2)(c)(ii) of the ECL requires the Department to identify actions which do not have a significant effect on the environment and which do not require EISs. The Department can meet these goals by consolidating and expanding the list of actions not requiring any determination or procedure under SEQR. As a result, an agency's time, efforts and resources will be focused on reviewing those actions which may have potentially significant adverse impacts on the environment. Sixteen years of experience, a review of materials in the SEQR data base, a review of judicial interpretations of items on the Type II list and a review of other states' regulations all support this revision and expansion. The Department finds that the new and revised items which have been added to the Type II list (Numbers(#) 2, 7, 8, 9, 10, 11, 13, 14, 17, 30, 31 and 32) do not have a significant

effect on the environment. This finding is based on the discussion that accompanies each new or revised Type II item.

Alternatives: The no action alternative would maintain the separate lists for activities that do not invoke SEQR and would not give the public and involved agencies a quick answer to whether a particular action requires compliance with SEQR. In addition, the no action alternative would maintain the existing Type II list without any additions. This alternative is not acceptable since the Department would be abrogating its statutory duty to identify actions which do not have a significant effect on the environment. Finally, the no action alternative would preclude the Department from not only re-defining, reorganizing and expanding the Type II list, it would also not allow the addition of clarifying language for certain items. Thus, the no action alternative is not acceptable to realizing the Department's goals.

The proposed May 1994 regulations contained a different list and deleted the term "Type II." That list constitutes another alternative that has been further revised in response to public comments. The following items have been deleted from that proposed list:

- reuse of a non-residential structure not requiring a change in zoning or a use variance and consistent with local land use controls;
- amendments to a zoning ordinance/local law and/or map that conform to an up-to-date adopted comprehensive plan which addresses all of the topics listed in subdivision 4, section 28-a of the general city law, subdivision 4, section 272-a of the town law and subdivision 4, section 7-722 of the village law and that conform to the thresholds and conditions of the generic EIS that must be prepared in conjunction with such plan; and
- one time only subdivision of land into two residential lots.

Comment: Article 8 of the ECL defines what an "action" is and also lists activities that are not included in the definition of "action." Thus, the statute requires identifying separate lists of items not subject to SEQR.

Response: The Department recognizes that the statutory definition of "action" refers to separate exempt and excluded items and that under a strict statutory interpretation exempt and excluded items are not actions. However, in practice exempt, excluded and Type II all result in the decision that SEQR review is not required. As was evidenced by the numbers of comments received regarding the proposal to rename the Type II list, the public is familiar and comfortable with the term "Type II".

This revision will make it easier for people to determine if a particular activity is subject to SEQR. The Department is not changing the statutory definition of an action. Rather, the intent of the statutory definition is being carried out in the regulation in plain language. Activities which have been excluded or exempt from SEQR under Article 8 continue to retain that status.

Comment: If the state agency which most likely would have been the lead agency has

classified an action as Type II, all other involved agencies should be bound by that classification.

Response: If an agency classifies an action as Type II it is no longer an involved agency under SEQR. Agencies are allowed and encouraged to enter into cooperative agreements with other agencies to coordinate review of actions. However, SEQR was never intended to change the jurisdiction between or among agencies. The statute does not authorize one agency to preclude a second agency from applying SEQR to an action over which the second agency has approval.

Comment: There is no explanation for dropping "reuse of a non-residential structure" from the list.

Response: Many commentors objected to including this item and provided examples which illustrated that the location of the structure to be reused, the change in character of the surrounding community, the length of time structures often remained unused and the nature of the use were factors that together could contribute to the reuse having a significant adverse impact on the environment even where rezoning or a use variance was not required.

Comment: Some commentors suggested additional items for inclusion on the Type II list.

Response: The Department is unable to add new items to the Type II list at this late stage in the rulemaking process because they could be construed as substantial revisions under the State Administrative Procedure Act and require further public review. Agencies suggesting additions should consider whether the activities are appropriate for their own Type II lists.

Comment: An agency should be allowed to include on its Type II list items that are different from the Statewide Type II list.

Response: An agency can supplement the Statewide Type II list with activities that occur frequently and do not have a significant impact on the environment so long as the items are no less protective of environmental values and do not meet or exceed a statewide Type I threshold. Agencies are not allowed to delete or modify Type II actions to make them more restrictive.

Comment: Some commentors suggested deleting certain longstanding items from the Type II list for various reasons.

Response: In the Department's experience all of the items suggested for deletion appropriately belong on the Type II list and have not had significant adverse impacts on the environment to justify removal.

Comment: The addition of items to an agency's Type II list should require a supplemental EIS and full public review.

Response: An agency which intends to adopt its own supplemental Type II list or add new

items to an existing list must follow its own local procedures, and hold a public hearing as required by 617.14. Additions to a local agency Type II list are an action subject to SEQR and the agency would have to assess and discuss the potential significant adverse impacts from adding new Type II actions. Adding an item to the type II list should result in no significant adverse impacts to the environment so in most cases a negative declaration should be sufficient.

Comment: Commentors argued that many agencies have not yet recognized how important comprehensive planning is in preventing critical environmental thresholds from being reached and in carrying out environmental stewardship responsibilities mandated by Article 8 of the ECL. The comments also indicated that members of the public often do not fully participate in those processes that lead to adoption of comprehensive plans and/or zoning changes. In addition, generic EISs are not being widely recognized or embraced as a valuable tool to assist in comprehensive planning.
Response: The Department agrees that it is premature to add the above-noted items to a statewide Type II list at this time so they have been deleted. However, the SEQR regulations continue to authorize agencies to establish conditions and thresholds in generic EISs and findings that can determine whether subsequent related actions will require any further SEQR compliance, supplemental findings, a negative declaration or a supplemental EIS.

Comment: Commentors indicated that inclusion of the item regarding the subdivision of land would encourage segmentation of projects and could be abused unless it were properly controlled and monitored.
Comment: The item concerning a "one-time only subdivision of land" should not have been deleted. Abuse can be adequately monitored. Whether a parcel is being re-subdivided is an issue routinely confronted by local planning boards. They consult tax map parcels or final plats filed with the town clerk. Involved agencies have easy access to this information and can ensure that subsequent subdivisions after the first one are subject to SEQR.
Response: The item was deleted because the Department has been unable to devise a method to ensure that only one owner in the chain of title be allowed to subdivide a parcel without the application of SEQR. A local government which has a reliable system in place to enforce this item could add it to its own Type II list. However, the Department will defer including it on the statewide Type II list.

SPECIFIC REVISIONS (Those items that have been renumbered as part of the reorganization and which were not the subject of substantive comment are also listed):

1. maintenance or repair involving no substantial changes in an existing structure or facility; (formerly 617.2(q)(3))

2. replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site, including upgrading buildings to meet building or fire codes, unless such [facility] action meets or exceeds any of the thresholds in section 617.4 of this Part; (formerly Type II #1 and #8)

Discussion: The additional language clarifies that the item includes renovation of existing structures or facilities. It applies to those activities which fall between the former exempt maintenance/repair category in the existing regulation and the existing term "replacement." Although "stick-for-stick" replacement is not required to qualify for this item (see Anderberg v. DEC, 141 Misc.2d 594 (Sup.Ct., Albany Co., 1988)), "substantial expansion" of a structure or facility triggers SEQR (McKelvey v. DOT, 150 Misc.2d 39 (Sup.Ct., Albany Co., 1991) aff'd 184 A.D.2d 834 (3rd Dept., 1992). Upgrading of buildings belongs more appropriately here in this item than its current placement in the item pertaining to accessory/appurtenant structures. Replacement in kind that conforms a structure or facility to current engineering and design standards is also covered by this item.

Comment: Commentors stated this item is too broad and would adversely affect CEAs, historic structures and energy efficiency goals.
Response: This revision is really just a clarification of existing language. The Department has always interpreted the regulations to include rehabilitation of an existing structure as an activity not subject to SEQR review. Since replacement in kind and maintenance/repair are already not subject to review it makes sense that activities that fall between these listed activities would also not be subject. The courts, as discussed above, seem to concur with this approach. The new language here should, among other things facilitate rehabilitation of historic structures and the upgrading of structures to comply with modern building codes and design standards that address energy efficiency.

3. agricultural farm management practices, including construction, maintenance and repair of farm buildings and structures, and land use changes consistent with generally accepted principles of farming; (formerly Type II #3)

4. repaving of existing highways not involving the addition of new travel lanes; (formerly Type II #4)

5. street openings and right-of-way openings for the purpose of repair or maintenance of existing utility facilities; (formerly Type II #5)

6. maintenance of existing landscaping or natural growth; (formerly Type II #9)

7. construction or expansion of a primary or accessory/appurtenant, non-residential structure or facility involving less than 4,000 square feet of gross floor area and not involving a change in zoning or a use variance and consistent with local land use controls, but not radio communication or microwave transmission facilities; (new)

Discussion: This item is intended to cover any structure or facility not used for permanent or seasonal habitation and includes the expansion of existing commercial structures and new construction of small commercial facilities. The primary issue of concern in almost all cases is the compatibility of the proposed use with existing uses. (e.g., should this fast food facility be constructed adjacent to an existing residential community?) This issue should be addressed under zoning and it should be decided prospectively before an application is received. However, since many communities have not updated their local land use controls to reflect current development patterns, the SEQR process can be easily abused to make up for unsatisfactory zoning.

The primary environmental impacts associated with these types of actions are usually infrastructure-related concerns such as traffic, storm water drainage and sewage disposal, or nuisance issues such as noise, lighting and littering and they do not rise to the level of significance that would require preparation of an EIS. Records show that these projects do not require the preparation of an EIS. For 1988, 1990 and 1992 a total of 51, 39 and 39 negative declarations were issued, respectively.

Even in circumstances where these impacts are identified as being of concern, they do not rise to the level of significance envisioned by the statute as requiring an EIS and they can be adequately addressed through the site plan review process which affords a locality broad authority to consider the physical environment, health, safety and the general welfare of the community.

A review of the filed SEQR records identified 11 positive declarations issued for the proposed construction of small commercial facilities of less than 4,000 square feet of gross floor area since 1984 which would have been classified as Type II actions under the proposed revision. Only two of the positive declarations resulted in draft EISs and only one of these draft EISs proceeded to a final EIS. Between 200 and 400 EISs are prepared each year in New York State.

For communities that have no land use controls such as zoning or site plan review these types of small commercial projects usually require only a building permit. Issuance of most building permits is a ministerial act and exempt from SEQR. Therefore, these communities never had to apply SEQR to these projects.

Impacts to wetlands or air sheds from these projects also do not rise to the level of significance and are subject to review under other existing local, state or federal regulatory requirements.

This item does not include radio communication facilities, including towers (as defined in 47 USC §153(b)) or microwave transmission facilities.

Comment: This item should be further narrowed to exclude projects which would require a "conditional use permit" or "special permit" or "special exception" in addition to use variances and zoning changes.
Response: Special permits enable the use of land which is in concept appropriate with the municipality's land use planning objectives (See, Coon and Damsky, All You Ever Wanted to Know About Zoning, pp. 135, New York Planning Federation, 1993). It is this presumption that a use subject to special permit is consistent with land use objectives that sets it apart from use variances and changes in zone.

Comment: If a project requires site plan approval then SEQR should continue to be applied because site plan review is not a substitute for SEQR and cannot address off-site impacts like traffic.
Response: The Department agrees that site plan review is not necessarily a substitute for SEQR. However, the impacts from a project of this size which is an allowable use within a local district do not rise to the level of significance requiring preparation of an environmental impact statement. Clearly, there may be increases in traffic (e.g., from a drive-through window) and concerns regarding the placement of points of ingress and egress from the site. However, localities have the authority to address these impacts at the local level. State statutes pertaining to site plan review allow a governing board to authorize a planning board by local law or ordinance to consider any elements reasonably related to the health, safety and general welfare of the community (See, Coon and Damsky, All You Ever Wanted to Know About Zoning, pp. 153-156, New York Planning Federation, 1993). And, the Third Department has held that a planning board could deny site plan approval because of traffic and drainage concerns (Grossman v. Planning Board of the Town of Colonie, 126 A.D.2d 887 (1987).

Comment: There will be significant impacts to wetlands, endangered or threatened species, significant habitats, CEAs, designated historic structures or districts and impacts from flooding and hazardous wastes.
Response: Experience and the filed records maintained by DEC have shown that these projects result in the preparation of negative declarations because they do not result in significant adverse environmental impacts. In addition, there are multiple regulatory controls already in place and which could be put into place at the local level, if needed, to address impacts to sensitive environmental features. Project sponsors may be required to obtain wetlands permits from state, local and federal agencies. Coastal erosion permits are required for construction in coastal erosion hazard areas. Construction in floodplains and floodways is regulated by the Floodplain Management Program. Hazardous waste storage and generation are rigorously controlled by state and federal regulation. The Department's rationale for including this item on the Type II list is as follows:

- the SEQRA statute recognizes that there are projects that do not have significant

effects on the environment and that do not require preparation of environmental impact statements prior to decision-making, and it authorizes the Department to list them;

- statutes, regulations, and local codes and ordinances that outline objective processes for review are in place at the federal, state and local levels which allow agencies to assess impacts noted by commentors that typically do not rise to the level of significance;
- local agencies are not precluded from adopting controls at the local level such as overlay districts to protect specific identifiable resources; and
- the SEQR regulations should assist agencies in focusing their time and resources on those projects that have the potential to result in significant adverse environmental impacts.

Comment: This addition to the Type II list does not reflect the requirement of the SEQRA statute and regulations that agencies incorporate environmental factors into existing planning, review and decision-making processes.

Response: Clearly, Article 8 of the ECL requires that environmental factors be incorporated into planning, review and decision-making processes. It also establishes thresholds and criteria for determining the significance of an action and requires the Department to use its authority to determine which actions do not rise to the level of significance. With respect to planning, the Department, through this rulemaking, has emphasized the importance of SEQR in local comprehensive planning and zoning enactments. Proper land use planning with an accompanying SEQR review that considers and avoids sensitive environmental features can protect the environment in a more efficient manner than SEQR reviews generated by site-specific projects. Protection of sensitive environmental features is more effective when it is done prospectively.

Comment: Allowing expansions of up to 4,000 square feet will encourage segmentation of projects. A reviewing agency may not be prescient enough to discern the true intentions of a less than candid developer.

Response: Segmentation is the division of the environmental review such that various activities or stages are addressed as though they are independent, unrelated activities needing individual determinations of significance. The Department is aware that some project sponsors will attempt to separate phases of a project. It is speculative to say that adding this item to the Type II list will encourage segmentation. Notwithstanding its receipt of an application for construction or expansion of a non-residential structure of less than 4,000 square feet, an agency is not relieved of its responsibility to discern and consider all known phases of a project. The basic test for segmentation is contained in The SEQR Handbook (1992), page 22. A prudent agency should maintain, in its own files, a brief record showing that the proposed action was considered under SEQR and that it met the requirements for a Type II action. If

segmentation is an issue, the record must demonstrate that the review will be no less protective of the environment. The courts have not hesitated to annul actions that were improperly segmented (see Kirk Astor Drive v. Pittsford, 106 AD2d (4th Dept. 1984) appl. dsmsd. 66 NY2d 896).

Comment: Although inconsistency with land use controls is a basis for preparation of an EIS, consistency with land use controls does not make it automatic that consideration of environmental factors can be dispensed with.
Response: The impacts from these small projects do not rise to the level of significance such that an EIS would be required. Consistency with local land use controls is only one consideration. It ensures that local concerns are addressed. Environmental factors are considered in deciding whether to grant subdivision and site plan approvals at the local level.

Comment: Location and nature of a structure are important factors in determining whether there may be a significant effect on the environment. Proximity of a small commercial structure or a commercial structure wanting to expand to a residential area could result in impacts to community character or traffic. Structures located adjacent to or directly across the street from a district zoned residential should be subject to SEQR.
Response: The Department's review indicates that these actions do not require preparation of an environmental impact statement and the issues associated with such proposals can be addressed under the local site plan review authority.

Comment: Planning and zoning can not anticipate all of the types of actions which come before a local government for review. SEQR serves as a safety net for reviewing these actions.
Response: The Department and state and local agencies have had 20 years of experience in reviewing actions under SEQR. Although specific projects may not be anticipated, potential environmental impacts can and have been anticipated in this rulemaking. The Department is required by law to identify actions which have been determined not to have a significant effect on the environment and which do not require an EIS.

Comment: The Department's analysis did not address whether there could be significant adverse impacts from land intensive actions other than the construction of fast food restaurants such as a car wash, junk yard, drive-in movie theater, trucking station, bus depot, sand and gravel mine, construction materials processing yard. This item only addresses building size and fails to limit the amount of land which could be developed as part of the action. Thus, this item may conflict with the 10-acre threshold for physical disturbance of land on the Type I list.
Response: The Department's analysis was not limited to convenience stores and fast food restaurants. However, these were the most common types of projects in this size range so

they were used as examples. Where an action under consideration by an agency includes both Type I and Type II aspects the **whole action** must be considered by the agency in the classifying the action for purposes of conducting a SEQR review.

Comment: The 10,000 square foot threshold should also be applied to commercial structures in item 7 because it would give property owners more flexibility to expand.
Response: The different thresholds have been chosen because the Department concurs with information provided by the State Education Department indicating that the higher threshold includes activities that do not result in significant adverse impacts to the environment (see also discussion below).

8. routine activities of educational institutions [not involving capital construction], including expansion of existing facilities by less than 10,000 square feet of gross floor area and school closings, but not changes in use related to such closings; (formerly Type II # 17)

Discussion: This item has been changed to account for several problems. The phrase "not involving capital construction" has been removed. That phrase was originally inserted so that an environmental review would be conducted for projects such as the construction of a new school and the major expansion of an existing school. However, the existing language could be construed to require educational institutions to apply SEQR to activities such as maintenance and repair which are exempt or the upgrading of structures to meet fire and building codes which are presently Type II. This language change will allow capital projects involving less than 10,000 square feet expansions to be conducted without a SEQR analysis. The language change also makes the Type II threshold in item #7 of less than 4,000 square feet for new construction projects and the other Type II thresholds pertaining to capital construction applicable to schools.

The State Education Department indicates that projects of less than 10,000 square feet would include expansions for new classrooms (typically eight rooms or less), elevators, special facilities for handicapped access, libraries, lunch rooms, special education facilities, computer laboratories, garages, caretaker residences, teacher centers, child-care centers, storage buildings, pole barns, press boxes and greenhouses to name a few. Impacts resulting from these projects have not reached significant levels. Thus, inclusion of these expansion activities on the list of actions that will not require review is warranted. The construction occurs on existing sites that are being used for educational purposes, so there will be no change in use. Also, any new disturbance from projects of this small size usually occurs in areas that have previously been disturbed by construction or school use.

Comment: Expansions of 10,000 square feet exceed the size of some schools and flooding and drainage problems could result.
Response: It is true that there may be some situations where an expansion of 10,000 square

feet could exceed the size of the existing structure. However, from an environmental perspective size alone is not determinative. According to the State Department of Education, Facilities Planning Unit expansions that exceed the size of an existing structure are rare and this relatively small increase in the footprint of an existing building has not resulted in a substantial increase in potential for flooding or drainage problems. The affected areas have typically already been cleared, graded and any increase in runoff can be easily controlled through the imposition of standard construction techniques.

Comment: This item should only apply to public institutions or it should only apply to private institutions.
Response: From an environmental perspective, there is no rational reason to differentiate here between public and private institutions. The impacts to the environment will be the same. This item has always been interpreted to apply to both public and private schools.

Comment: By adding this item to the Type II list you are taking away the public's ability to comment on these types of expansions.
Response: The public's right to vote on public school expansions is contained in Section 416 of the Education Law. Currently, public school expansions are not subject to local site plan approval. According to the State Education Department, projects of this small size rarely generate public controversy and when they are controversial the issues are not environmental but social/economic in nature.

Comment: The same square footage threshold for expansions should apply to all non-residential facilities.
Response: The larger threshold was applied to school expansions because: the construction will occur on existing sites that are being used for educational purposes so there will be no change in land use; typically no new clearing will be needed to accommodate the expansion since school sites have been previously disturbed by construction or related school uses; and the expansion of a school structure does not typically involve issues such as use or storage of chemicals, air/water emissions and compatibility with surrounding land uses that can be associated with the expansion of a non-residential facility.

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 subsection (11) and the installation, maintenance and/or upgrade of a drinking water well and a septic system; (new)

Discussion: Probably the most common activity across the state is the construction or expansion of a single-family, two-family or three-family dwelling. This activity is regulated by zoning in most communities and, in all communities, the issuance of a building permit.

Often, these projects are being reviewed after a subdivision plat has been approved.

In some communities, the construction or expansion of any residential dwelling may require a permit or approval in addition to a building permit. In these communities a SEQR review is conducted. In 1988, a total of 11 positive declarations and 39 negative declarations were issued for this type of activity. In 1990, the numbers were 7 positive declarations and 97 negative declarations and in 1992 it was 1 positive declaration and 51 negative declarations. The typical impacts associated with the construction of single, two or three family residence are limited to the clearing, grading and filling of the site, noise, dust and runoff. These impacts are minor in nature and easily controlled by standard construction techniques. Additional impacts from occupancy of the structure 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/expansion and subsequent occupancy are well known and predictable the preparation of an EIS for these projects offers no value to an agency. This may also be a reason for the decline in the number of EISs prepared on them.

In addition, there are multiple regulatory controls already in place to prevent impact to sensitive environmental features. Project sponsors may be required to obtain wetlands permits from state, local and federal agencies. Coastal erosion permits are required for construction in coastal erosion hazard areas. Permits are required for the construction of onsite sanitary systems from state and county health departments. In any event, the construction of one single-family, two-family or three-family home should never result in the preparation of an EIS.

Placing the construction of a residential structure on the list of actions that do not require environmental review also reduces unnecessary administrative burdens on agencies and homeowners. It may make it easier for agencies to deny an application when it is clear that the regulatory standards for issuance cannot be met. At present, agencies must either require an EIS or issue a negative declaration before the application can be denied. This causes a significant administrative burden on agencies and forces project sponsors to spend money for an environmental review which is unnecessary.

Comment: Two issues were identified by many commentors. First, some presume that construction of a dwelling on a site containing environmentally sensitive features such as wetlands, steep slopes and coastal sand dunes will have a significant impact on the environment. The other issue identified is the potential for these activities to have a cumulative impact on an identified resource.

Response: Impacts from the construction of a house do not rise to the level of significance. It is an abuse of the SEQR process to require an EIS for construction of one of these dwellings no matter where they are located. Any of the non-significant impacts that result from the construction of a house are subject to review under other existing local, state and federal regulatory programs and they can be controlled through these jurisdictions. Proper

local land use planning, zoning and subdivision regulations can and do protect readily identifiable unique features from the impacts of inappropriate development.

The issues pertaining to sensitive resources which were raised by commentors should be identified during the zoning or subdivision approval process and not upon construction of an individual dwelling where the burden falls on the individual homeowner. The subdivision review stage is the proper time to consider environmentally sensitive features such as wetlands, steep slopes, soils and coastal dunes. It is during the planning/design stage that project sponsors and municipalities have the greatest amount of flexibility to identify and avoid these resources.

The most appropriate way to control potential cumulative impacts is through local zoning and proper land use planning. A SEQR review done at the time of zoning or subdivision of the site is the proper time and place to look cumulatively at the impacts from residential development. Local governments have statutory authority to identify stressed resources and plan and zone accordingly. A locality should determine which areas are susceptible to inappropriate development and have these protections in place to control land use and density before it receives an application for construction.

Comment: Any increase in impervious surface area from a project should be reviewed under SEQR.
Response: This item is very broad, it would conflict with many of the existing and new Type II actions and result in a SEQR review for almost any type of construction activity. This proposed item would also be inconsistent with statutory intent that a SEQR review is triggered by the need for a discretionary permit of approval from a state or local agency. Many activities that result in an increase in impervious surface area are not subject to permit or approval. The criteria for determining significance presently recognize that a substantial increase in erosion, flooding, leaching or drainage problems can be an indicator of a significant adverse impact on the environment. Lowering the standard to any increase is not feasible.

Comment: This item should be limited by a certain square footage of gross floor area. Single-family, two-family and three-family dwellings have different impacts depending upon the size of the community where they are being built.
Response: The Department believes it is unnecessary to limit this item by a size restriction since their construction does not warrant preparation of EISs. Local zoning ordinances or laws can prescribe siting requirements for these dwellings that will control size. The size of the community has no bearing on the associated environmental impacts of these dwellings.

Comment: An agency should be able to issue a positive declaration and deny a project without waiting for the EIS to be prepared.
Response: A positive declaration is issued when it has been determined by the lead agency

that a project **may** have a significant adverse impact on the environment. The EIS is then prepared to analyze the potential for impact. Allowing an agency to deny a proposed action prior to the completion of the EIS pre-supposes that the lead agency has definitively determined that the activity will have significant adverse environmental impacts that cannot be mitigated and must be denied. This provision would also violate the due process rights of the project sponsor.

Comment: There are countless undeveloped lots that were approved without SEQR review and prior to local subdivision regulations. The build out of these lots will have potential significant impacts which must be examined. SEQR is essential to the evaluation of alternatives to impacts from expensive houses and structures on fragile coastal areas. Many of SEQR's benefits from coordinating agency review and preparing an EAF for these projects would be lost.
Response: The Department's experience in reviewing the construction and use of one single family, one two-family or one three-family residence indicates that these individual projects invariably result in preparation of negative declarations. The Department acknowledges that local governments, especially on Long Island have required homeowners to prepare EISs on the construction or expansion of single family dwellings. Some towns have adopted natural resources permits which triggers the application of SEQR. However, in the most locations in New York State the construction/expansion of a single family dwelling requires only a building permit. Most building permits are ministerial in nature and thus do not trigger SEQR. In rare instances, where SEQR does apply, a negative declaration is generally issued. Impacts that fall below significance thresholds are reviewed under existing federal, state and local regulatory programs (see discussion on page 29).

Comment: Additional language should be added to clarify that this item includes all activities associated with construction, including utility connections and installation, maintenance and upgrading of septic systems.
Response: Agreed. The change has been made.

Comment: The commentor cited cases in Environmental Impact Review §4.10, Gerrard, Ruzow and Weinberg where an agency has required an EIS for a single family dwelling.
Response: The Department has reviewed the cases cited. The decisions turned on whether the proposed projects met DEC, Department of Health or local permit issuance standards and/or whether the projects complied with local zoning. The EISs did not substantively contribute information that added to the lead agency's decision. The handful of cases cited do not undermine the Department's position (see discussion on page 29) that the actions do not require an EIS.

10. construction, expansion or placement of minor accessory/ appurtenant residential structures

[accessory or appurtenant to existing facilities], including garages, carports, patios, decks, [home] swimming pools, tennis courts, satellite dishes, fences, barns, storage sheds or other buildings not changing land use or density [including upgrading of buildings to meet building or fire codes]; (formerly Type II #8)

Discussion: This item is changed to include the expansion of minor accessory/appurtenant structures in addition to construction and placement. It also clarifies that it only applies to residential structures. In contrast to item 7 which pertains to non-residential accessory/appurtenant structures, here, the accessory/appurtenant structures must continue to be "minor" ones. Although new examples are included, the list in this item is illustrative only. Upgrading of buildings is deleted and moved to item 2.

Comment: Size limits and the requirement that these facilities be associated with existing facilities have been eliminated.
Response: No. There have never been size limits associated with this Type II item and in order for a structure to be accessory/appurtenant there must be a principal structure on the site. This item has been changed to clarify that it also applies to expansions of accessory/appurtenant residential structures and new examples have been added.

11. extension of utility distribution facilities, including gas, electric, telephone, cable, water and sewer connections [to serve new or altered single or two-family residential structures or] to render service in approved subdivisions or in connection with any action on this list; (formerly Type II #20)

Discussion: This item currently excepts from SEQR the extension of utility distribution lines to service new or altered single-family or two-family residences or to approved subdivisions. The change clarifies that if the extension of utility service is functionally dependent on an action on the Type II list then all parts of the action constitute the whole action and are not subject to SEQR. This item would not apply to the extension of utility service to larger projects such as a new subdivision undergoing review by a planning board. In these cases, the SEQR review would include all phases or components of the activity consistent with the "whole action" concept of review. Separating the utility extension from the review for the rest of the project would constitute segmentation. If an action under this subsection may arguably be both a Type I and a Type II action, it should be reviewed as a Type I action.

In addition, this item only covers distribution lines not transmission lines. High voltage transmission lines (an electric transmission line of a design capacity of 125 kV or more extending a distance of one mile or more, or of 100 kV or more and less than 125 kV, extending a distance of ten miles or more) and gas transmission lines (a gas transmission line extending a distance of 1,000 feet or more to be used to transport fuel gas at pressures of 125 pounds per square inch or more) are reviewed under Article 7 of the Public Service Law.

Redundant language pertaining to utility hook ups for single or two-family residences is deleted since construction of those dwellings is specifically covered by item 9 on the Type II list.

Comment: Broadening this item could encourage segmentation of projects.
Response: Agencies are not relieved of their responsibilities under SEQR to avoid segmentation of projects except where it can be justified that a segmented review is clearly no less protective of the environment. The extension of utility distribution facilities should be considered with the underlying action or project being serviced by the utility. The fact that an action appears on the Type II list does not justify segmentation of an action. The regulations specifically direct agencies to consider the whole action.

Comment: Examples abound of distribution lines crossing environmentally sensitive areas.
Response: Yes. There are many examples where distribution lines have crossed sensitive resources. However, these lines would still be subject to the existing regulatory controls such as wetland permits (Articles 24 & 25 of the ECL and Federal Clean Waters Act), Protection of Waters permits (Article 15 of the ECL) and Water Quality Certifications (Section 401 of the Federal Clean Water Act). In addition, if the construction of distribution lines is part of a larger overall project that is not Type II it would still be subject to review under SEQR.

Comment: Include as examples of utility distribution facilities the following items: gas, electric, water and sewer hookups.
Response: Yes. The change has been made and telephone and cable utilities have also been added.

12. granting of individual setback and lot line variances; (formerly Type II #2)

13. granting of an area variance(s) for a single-family, two-family or three-family residence; (new)

Discussion: Item #12 pertains to all structures; item #13 pertains only to the types of residences listed. So, area variances (which are now defined in state statute) for these residences do not require a SEQR analysis. These actions do not have a significant effect on the environment and do not require preparation of an EIS. Presently, zoning boards of appeals must weigh the benefits to the applicant if the area variance is granted against the detriment to the community, and must decide whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district. Granting an area variance (except setbacks and lot lines) for all other structures continues to be subject to SEQR. The granting of a use variance also continues to be subject to SEQR.

Comment: If a proposed development does not meet minimum standards designed to protect the environment (e.g., setbacks from wetlands and primary dunes) then it is likely that it will have a significant effect. The SEQR process (and the EAF, in particular) are used to support local zoning and to deny variances. This addition to the Type II list could help undermine zoning.
Response: Set back and lot line variances have been Type II actions since 1978. This item expands the existing listing to include all other area variances for single, two and three family residences. Seeking relief from an existing dimensional requirement imposed by zoning does not equate with a significant environmental impact and an impact statement will not provide the decision-making board with any information that it doesn't already have regarding the project. This change will allow boards to issue or deny variances based on the standards and criteria established by the zoning code.

Comment: Clarify what "individual" means and indicate whether this item only applies to setbacks from property boundaries.
Response: This item only applies to setbacks from property boundaries (front, back, width and depth). "Individual" denotes one project on one lot.

14. public or private best forest management (silvicultural) practices [,other than the removal of trees] on less than 10 acres of land, but not including waste disposal, land clearing not directly related to forest management, clear cutting or the application of herbicides or pesticides; (formerly Type II #7)

Discussion: The Department of Environmental Conservation is the steward and manager of State forest lands. DEC's experience in managing State land and in working closely with and advising other managers and landowners indicates that these activities have not resulted in significant adverse impacts on the environment and do not require preparation of an EIS. Most forest management practices on private lands generally do not involve any state or local agency funding or approval and, therefore, are not actions subject to SEQR review. However, some local governments now require tree cutting or tree removal permits. If the permits are for activities listed here, then granting or denying them would not trigger an environmental review under SEQR. Land clearing and clear cutting associated with other regulated activities such as the approval of a site plan would not be covered by this item.

Comment: Guidance is required on best forest management practices.
Response: Information is available from the DEC Regional Forestry Offices located in each DEC region or information can be obtained by contacting the Division of Lands and Forests, New York State Department of Environmental Conservation, Room 404, 50 Wolf Road, Albany, New York 12233-4250, (518) 457-2475.

Comment: Cutting trees in State parks for purposes other than maintenance and safety cannot be considered Type II.
Response: This item clarifies that best forest management practices may include the cutting of trees on less than ten acres. This activity does not result in a significant impact on the environment and does not require compliance with SEQR. This change does not imply that the cutting of trees is always an appropriate management practice on State parkland. The management of state park lands is determined through the preparation of park management plans prepared by the State Office of Parks, Recreation and Historic Preservation.

Comment: The 10-acre Type I threshold for physical disturbance which limits this Type II item is too low when put in the context of industrial forestry management practices and actions. Removal of trees for forest management on lots greater than ten acres in size should not be subject to the presumption that this action is more likely to require preparation of an EIS.
Response: Most industrial forest management occurs on private land and does not require state or local permits and therefore SEQR does not apply to these activities.

Comment: This item would be prone to abuse and it could result in loss of forested area and destruction of habitats.
Response: The Department's own experience to date indicates that these forest management practices (and removal of trees on much larger parcels of land) routinely result in the preparation of negative declarations and that is appropriate because responsible forest management practices minimize impacts, allow wise use of timber resources and provide a renewable and sustainable yield of forest products.

15. minor temporary uses of land having negligible or no permanent [effect] impact on the environment; (formerly Type II #19)

16. installation of traffic control devices on existing streets, roads and highways; (formerly Type II #6)

17. mapping of existing roads, streets, highways, natural resources, land uses and ownership patterns; (formerly Type II #10)

18. information collection including basic data collection and research, water quality and pollution studies, traffic counts, engineering studies, surveys, subsurface investigations and soils studies that do not commit the agency to undertake, fund or approve any Type I or Unlisted action; (formerly Type II #18)

19. official acts of a ministerial nature involving no exercise of discretion, including building

permits and historic preservation permits where issuance is predicated solely on the applicant's compliance or noncompliance with the relevant local building or preservation code(s); (formerly 617.2(q)(2))

Discussion: For a discussion of ministerial versus the less commonly occurring discretionary building permit see Atlantic Beach v. Gavalas, 81 NY2d 322 (1993).

20. routine or continuing agency administration and management, not including new programs or major reordering of priorities that may affect the environment; (formerly Type II #15)

Discussion: This change clarifies that any new programs or major reordering of priorities that commit an agency to a definite course of action and that may affect the environment are not Type II actions.

The Department is frequently asked about an agency's responsibility under SEQR when it prepares capital and operating budgets and appropriations requests. These activities primarily involve routine administration and management and fit under this item. However, this item should be read in conjunction with item 21 below (preliminary planning activities) and the definition of an action at 617.2(b)(2) which require SEQR to be applied to those non-routine activities that commit an agency to a course of conduct which may affect the environment.

With respect to capital improvements, the budget process merely sets aside funds without committing to their expenditure. These budget items are usually not definitive enough with respect to design of the project, and often even location, to be reviewable at the time the budget is adopted. However, municipal or agency bonding of a particular capital project would require SEQR compliance before it could be undertaken.

Comment: This item should be deleted from SEQR. It is too broad, cryptic and courts have automatically exempted agency actions with arguably significant impacts (Citing West 97th West 98th Street Block Assn. v. Volunteers of America, 190 AD2d 303 (1st Dept. 1993); Vinnie Montes Waste System v. Town of Oyster Bay, 567 NYS2d 335 (Sup. Ct. Nassau Co. 1991), aff'd. 606 NYS2d 41; Village of Tully v. Harris 119 AD2d 7 (4th Dept. 1986)).

Response: A review of the cited court decisions indicates that the courts have carefully analyzed this regulatory language and judiciously applied it to the particular facts of each case. The decisions do not reflect the granting of automatic exemptions and the impacts from the specific actions described were not found to be significant.

21. conducting concurrent environmental, engineering, economic, feasibility and other studies and preliminary planning and budgetary processes necessary to the formulation of a proposal for action, provided those activities do not commit the agency to commence, engage in or approve such action; (formerly 617.3(c)(1))

22. collective bargaining activities; (formerly Type II #13)

23. investments by or on behalf of agencies or pension or retirement systems, or refinancing existing debt; (formerly Type II #14)

Comment: This item should be expanded to include Industrial Development Agency (IDA) financing where there is a transfer of ownership to an IDA as security for the loan or guarantee.
Response: Where IDA funding is a substitute for private funding (refinancing) of an approved or existing project it is clearly covered by this item even where the refinancing involves the IDA taking a security interest in the property. However, often the IDA is the only agency with a discretionary approval for a new project and the only trigger for a SEQR review. By limiting this Type II item to only refinancing it will preserve the application of SEQR to IDA activities.

Comment: The actions of an Industrial Development Agency (IDAs) or the Housing Development Corporation (HDC) in passing through private funding for a project allowed as-of-right under local zoning should not be subject to SEQR.
Response: Agreed. If an IDA is providing funding for a Type II action then SEQR is not triggered. However, IDAs and entities like the HDC become involved with many types of projects, some complex and some simple. Sometimes funding is accompanied by a transfer of land from public to private ownership or the funding action is the only discretionary decision needed. IDAs and HDC can and should adopt their own Type II lists which address specific types of projects they routinely fund that do not result in significant adverse impacts on the environment.

24. inspections and licensing activities relating to the qualifications of individuals or businesses to engage in their business or profession; (formerly Type II #11)

25. purchase or sale of furnishings, equipment or supplies, including surplus government property, other than the following: land, radioactive material, pesticides, herbicides, or other hazardous materials; (formerly Type II #12)

26. license, lease and permit renewals, or transfers of ownership thereof, where there will be no material change in permit conditions or the scope of permitted activities; (formerly Type II #16)

Comment: This item should not apply to renewals or transfers of ownership to "bad actors."
Response: Subjecting all permit renewals to an additional SEQR review would substantially slow the issuance of permits by administrative agencies with minimal increase in

environmental protection. Renewals have been Type II actions since 1978 and the limits placed on the treatment of renewals as Type II actions are sufficient to allow agencies to conduct SEQR reviews where material changes in permit conditions or the scope of the permitted activity require additional scrutiny. SEQR is not the appropriate mechanism to address issues pertaining to "bad actors." Problems relating to "bad actors" are more appropriately addressed through an agency's other regulatory and enforcement programs.

27. [promulgation] adoption of regulations, policies, procedures and local legislative decisions in connection with any [Type II] action [in] on this [Part] list; (formerly Type II #21)

Discussion: This clarifies application to local legislative decisions; state legislative actions also continue to be exempt. No change in meaning is intended by substitution of the word "adoption" for "promulgation."

28. engaging in review of any part of an application to determine compliance with technical requirements, provided that no such determination entitles or permits the project sponsor to commence the action unless and until all requirements of this Part have been fulfilled; (formerly 617.3(c)(2))

29. civil or criminal enforcement proceedings, whether administrative or judicial, including a particular course of action specifically required to be undertaken pursuant to a judgment or order, or the exercise of prosecutorial discretion; (formerly 617.2(q)(1))

Comment: Administrative enforcement proceedings should be subject to SEQR because they often require substantial construction.
Response: Enforcement proceedings are precluded from review by Article 8 of the ECL. The crux of the enforcement exemption is whether "a particular course of action [is] specifically required to be undertaken." There is no reason to differentiate between administrative and judicial enforcement orders. When an administrative or judicial enforcement order is explicit, the action is exempt. However, if the order leaves discretion as to the methods for implementing the order these discretionary aspects may be subject to SEQR. For example, where a party is ordered to apply for a permit, SEQR would apply.

30. adoption of a moratorium on land development or construction; (new)

Discussion: These actions do not have a significant effect on the environment and do not require preparation of an EIS. They simply maintain the status quo. Court decisions have enumerated various factors that must be present to sustain a valid moratorium. These include: strict adherence to procedures for enactment, reasonable duration, a process for developing or updating a comprehensive plan or zoning ordinance/law and absence of vested rights. (See,

Coon and Damsky, All You Ever Wanted to Know About Zoning at pp. 159-170, published in 1993 by the New York Planning Federation).

Comment: Imposing a moratorium could result in adverse effects on public concerns and issues that are not the targets of the moratorium; therefore, each moratorium proposal should be reviewed on a case-by-case basis under SEQR and should qualify as an emergency action under item #33.
Response: The SEQR process requires agencies to consider environmental impacts prior to making a decision to fund, undertake or approve an action. The term "environment" is broadly defined and includes "existing patterns of population, concentration and growth" and "existing community or neighborhood character" (emphases added). The purpose of adopting a moratorium is to temporarily maintain the status quo, i.e., the existing conditions. Therefore, a moratorium does not have a significant effect on the environment and does not require preparation of an EIS. Any adverse, solely economic impacts from a moratorium would not be assessed under SEQR. Certain moratoria may also be covered under item #33 (emergency actions).

Comment: A moratorium on the mining of sand and gravel can alter the flow of truck traffic and disrupt the supply of building materials. These impacts could be significant and require that a "hard look" be taken prior to the adoption of a moratorium.
Response: A moratorium prohibiting the siting of new mines maintains the status quo. This means that existing mines will continue to supply building materials within the framework of their existing permits to operate. The potential impacts identified by the commentor are speculative and they could apply to any business or endeavor that would be temporarily restrained due to a moratorium. The bottom line is that a moratorium temporarily maintains the status quo and therefore the adoption of a moratorium will never have a significant adverse impact on the environment.

Comment: Mining operations are consumptive by nature, a moratorium may leave a wide geographical area without a supply of building materials as existing permitted supplies are exhausted. As the state and municipal governments attempt to maintain and repair infrastructure, keep ice and snow off roads, filter water and provide other materials-based services, a moratorium on new land development or construction may have a very significant effect on the environment.
Comment: Moratoria relate to land use and zoning and in enacting them local governments should conduct an economic impact statement and determine whether private property rights are being redefined. A moratorium should be based upon clear and present danger to the environment and substantiated by a record because private property rights are being suspended and free functioning of the economy is being stopped. By adding this item to the Type II list the government's action in adopting a moratorium becomes immune from scrutiny.

Comment: Land use decisions required to enhance environmental protection may be caught in a moratorium, e.g. municipal approval for construction of a sewerage system or construction that would alleviate neighborhood stormwater management problems. Moratoria can and do have temporary effects which may cause adverse impacts. A case-by-case analysis is preferable.

Response: The Department has carefully considered all of the comments in opposition to adding the adoption of a moratorium to the Type II list and believes the item is appropriately listed for the following reasons. Most of the comments address what are economic impacts not properly the subject of an environmental impact statement. SEQR's purpose is to inject environmental considerations into decision-making. A moratorium is a decision to temporarily maintain the status quo. It allows a local government a chance to take a look at the long term impacts and to better consider environmental impacts over a broad area rather than considering these issues on a case by case review. If actions are not being approved then environmental impacts are minimized and avoided. A moratorium because of its very nature does not result in a significant adverse impact to the environment. A moratorium is temporary and there are usually provisions for exemptions to address the remote and speculative examples listed in the last comment. Local government procedures ensure public participation in the decision to adopt a moratorium so this action will be scrutinized. Finally, one of the goals of this rulemaking is to streamline the regulatory process and local governments strongly support this addition to the Type II list.

31. interpreting an existing code, rule or regulation; (new)

Discussion: This activity does not have a significant effect on the environment and is listed because it does not fit the definition of an action in subdivision 617.2(b) of this Part. Interpretations of local law made by a zoning board of appeals pursuant to its appellate jurisdiction are covered by this item.

Comment: This item should be limited to those interpretations of codes, rules or regulations involving actions listed as Type II. This is the same approach used for the adoption of regulations, policies, procedures and local legislative decisions in item number 27 on the Type II list. It would protect against agencies that issue guidelines or interpretations that meet the statutory threshold for rulemaking.

Response: Limiting this item as suggested is not practicable. It would mean that anytime an administrative agency issued a written or oral interpretation of an existing rule or regulation for an activity not on the Type II list it would have to complete an environmental review under SEQR. This would be a substantial burden to impose just to protect against those agencies which might potentially abuse this provision. It is impossible for a regulation of statewide applicability to be constructed to preclude any possible abuses. The State Administrative Procedure Act (SAPA) defines what constitutes a "rule" and what should be

promulgated (SAPA §102(2)(a)).

Comment: The language of a code, rule or regulation should be interpreted and not its intent. The language should delete reference to "intent."
Response: The intent of a statute is what must be ascertained through the language and then the legislative history.

> Generally, in the construction of statutes, the intention of the Legislature is first to be sought from a literal reading of the act itself or of all the statutes relating to the same general subject matter. In this respect, the legislative intent is to be ascertained from the words and language used in the statute, and if language thereof is unambiguous and the words plain and clear, there is not occasion to resort to other means of interpretation. What the Legislature intended to be done can only be ascertained from what it has chosen to enact, and it is only when words of the statute are ambiguous or obscure that courts may go outside the statute in an endeavor to ascertain their true meaning.

(McKinneys Statutes §92(b))

Comment: "Clarifying" may involve a discretionary policy function which should be subject to SEQR and state agency interpretations should be limited to declaratory rulings.
Response: The word "clarifying" has been deleted from this provision. State agency interpretations of statutes are not limited to declaratory rulings or interpretations made in a quasi-judicial context.

32. designation of local landmarks or their inclusion within historic districts; (new)

Discussion: The recognition that a structure or feature meets the criteria for designation as a local landmark has no impact on the environment. The designation is intended to preserve the qualities of historic resources. According to the experience of the Office of Parks, Recreation and Historic Preservation these actions do not require preparation of an EIS. See also, Shubert Org. v. New York City Landmarks Preservation Commission, NYLJ, December 11, 1989, at p. 25, col. 5 (Sup. Ct. New York Co. 1989) aff'd 166 AD2d 115, appeal den., 79 NY2d 751 (1980), cert. den. 112 S. Ct. 2289 (1992).

33. emergency actions that are immediately necessary on a limited and temporary basis for the protection or preservation of life, health, property or natural resources, provided that such actions are directly related to the emergency and are performed to cause the least change or disturbance, practicable under the circumstances, to the environment. Any decision to fund, approve or directly undertake other activities after the emergency has expired is fully subject to the review procedures of this Part; (formerly 617.2(q)(4))

34. actions undertaken, funded or approved prior to the effective dates set forth in SEQR (see chapters 228 of the Laws of 1976, 253 of the Laws of 1977 and 460 of the Laws of 1978), except in the case of an action where it is still practicable either to modify the action in such a way as to mitigate potentially adverse environmental impacts, or to choose a feasible or less environmentally damaging alternative, the commissioner may, at the request of any person, or on his own motion, require the preparation of an environmental impact statement; or, in the case of an action where the responsible agency proposed a modification of the action and the modification may result in a significant adverse impact on the environment, an environmental impact statement must be prepared with respect to such modification; (formerly 617.2(p)(1)(i)(ii))

35. actions requiring a certificate of environmental compatibility and public need under Articles VII, VIII or X of the Public Service Law and the consideration of, granting or denial of any such certificate; (formerly 617.2(p)(2))

36. actions subject to the class A or class B regional project jurisdiction of the Adirondack Park Agency or a local government pursuant to section 807, 808 and 809 of the Executive Law, except class B regional projects subject to review by local government pursuant to section 807 of the Executive Law located within the Lake George Park as defined by subdivision one of section 43-0103 of the Environmental Conservation Law; (formerly 617.2(p)(3)) and

Comment: Regulatory language on the exclusions from SEQR for Public Service Commission and Adirondack Park Agency actions should track the statutory language.
Response: Agreed. The changes have been made in items 35 and 36.

37. actions of the Legislature and the Governor of the State of New York or of any court, but not actions of local legislative bodies except those local legislative decisions such as rezoning where the local legislative body determines the action will not be entertained (formerly 617.2(q) and 617.3(d))

Discussion: Until the recent lower court decision in Hudson River Sloop Clearwater et. al. v. Cuomo et. al. (NYLJ 1/12/95) the Department believed the conclusion that the Governor was exempt from SEQRA was so obvious that it did not need to be added to the regulations. However, since that decision relied upon the absence of a specific exemption for the Governor in the regulations, the Department must now clarify that the Governor is not a state agency as defined in ECL §8-0105(1) or 617.2(c) and (hh) (1987 regulation) or new 617.2(c) and (ah). Although no explicit statutory exemptions have existed for the State Legislature and the Judiciary, the regulations have always exempted these branches of government from compliance with SEQR (617.2(q)(5) 1987 regulation). Now DEC is explicitly excluding the Governor from SEQR's purview as well.

A review of the legislative history and the statement of purpose and legislative findings set forth at ECL §8-0101 and 8-0103 and the definitions indicates that the term "state agency" encompasses only traditional administrative entities. Clearly, the divisions within the Executive Department such as the Division of the Budget and the Office of General Services are subject to SEQR. However, in contrast, the Governor's activities within the Executive Office/Chamber are exempt from SEQRA. The Governor's Office has always been apprised of the Department's interpretation that the SEQRA statute and regulations do not apply to the Governor (compare, the broader definition of state agency and the specific exceptions in Public Officers Law §86 (FOIL)).

In addition, SEQRA must be read in such a manner as to render it constitutional (Statutes §150). Many of the Governor's acts are expressly authorized by Articles 4 and 7 of the New York State Constitution and they may not be limited by the Judiciary or the State Legislature.

Comment: The State Constitution enumerates those Governor's actions which are exempt from SEQR but these are limited. Section 30 of the Executive Law states that the Governor is head of the Executive Department and "department" is used within the definition of agency at ECL §8-0105(1). "Executive chamber" and "executive office" refer to physical location rather than a unit of government. The only capacity in which the Governor may act is as head of the Executive Department. Although the State Constitution confers "executive power" on the Governor, this power is what he exercises in his capacity as head of the Executive Department. Thus, the actions of the Governor should be subject to SEQR.
Response: The plain language meaning of the term "state department" in the definition of agency refers to traditional state departments within the Executive Branch of government e.g., the Department of Civil Service. The Executive Department is not one of those entities. It is a branch of government.

Comment: According to the Hudson River Sloop Clearwater et. al. v. Cuomo et. al. (NYLJ 1/12/95) opinion former Governor Cuomo's use of the MOU to transfer property "without SEQRA would enable any state agency to circumvent SEQRA by gubernatorial fiat and totally undermine its efficacy." The opinion also noted there exists "no regulatory exemption for the Governor."
Response: The issue of whether the Governor's actions are subject to SEQR has never before been discussed in a case during the twenty years since enactment of SEQR. There has been no abuse of the SEQR process by any Governor. The MOU in the Clearwater case required compliance with SEQR, and with New York City's Environmental Quality Review (CEQR) and the Uniform Land Use Review Procedures (ULURP); it was not self-executing. Part of the judicial reasoning for applying SEQR to the MOU is based upon the lack of a specific exemption for the Governor in the SEQR regulations. Now, in response to this decision, the

Department is explicitly stating what it has always interpreted the SEQR statute to mean with respect to actions of the Governor.

The National Environmental Policy Act (NEPA) upon which SEQRA is modeled similarly does not include the President as an agency subject to its requirements (40 CFR §1508.12; Alaska v Carter, 462 F. Supp. 1155, 1159-60 (1978).

617.6 INITIAL REVIEW OF ACTIONS AND ESTABLISHMENT OF LEAD AGENCY Back

Determination of significance following a coordinated review is binding on all involved agencies.

Issue: The existing regulations implicitly state this, but several recent court cases have raised the need to make this statement explicit.

Revision: The statement "A determination of significance issued by the lead agency following coordinated review is binding on all other involved agencies" has been added to the regulation.

Comment: Several comments were received regarding this issue. Some felt that the explicit recognition of this fact would diminish the ability of involved agencies to influence or dispute a determination of the lead agency. Others wanted this provision removed and replaced with specific language that would allow an involved agency to act contrary to the lead agency when they disagreed with the lead agency's decision.

Response: This is a basic concept of coordinated review. Eliminating this provision would violate the statutory direction to carry out the terms of the statute with minimum procedural and administrative delay, to avoid unnecessary duplication and to establish a lead agency responsible for making the determination of whether or not the action may have a significant effect on the environment.

Comment: Whenever an agency is undertaking a direct action that agency should automatically become the lead agency. Experience has shown that the most appropriate lead agency is the one that is undertaking the action.

Response: § 8-0109(4) and §8-0111(6) contain the statutory authority for the establishment of lead agency in the SEQR process. This language clearly envisioned that the lead agency role would require discussion between the involved agencies.

The commentor is right in stating that in most cases the agency that is directly undertaking the action is the most appropriate lead agency. But there are situations, such as when an Industrial Development Agency is promoting a development, that the lead agency role may be assumed by one of the permitting agencies.

The provision in the regulations (617.14(d)) that allows agencies to enter into cooperative agreements can be used to streamline the designation of lead agency step of the SEQR process. An example of this is the memorandum of understanding between the Department of Environmental Conservation (DEC) and the Department of Transportation

(DOT) that establishes DOT as lead agency for all direct actions of DOT that require permits from DEC.

Comment: The project sponsor should not be the lead agency. Another involved agency should be required to act as the lead agency to preserve objectivity.
Response: This only occurs when a state or local agency is undertaking a direct action. In many cases, there is no other involved agency, such as when an agency is adopting rules, regulations and land use management plans. It is the project sponsor that has the most thorough understanding of the project and its impacts and is in the best position to efficiently develop the environmental review record. The existing system of checks and balances are adequate to ensure that agencies conduct an objective evaluation of the impacts.

Comment: When involved agencies cannot agree on lead agency within 30 days the affected residents should be able to request that the Commissioner of DEC assign a lead agency.
Response: The establishment of a lead agency during coordinated review is a very preliminary step in the process. This step may exceed the allotted 30 day time period as the involved agencies confer and decide which is the most appropriate lead agency. Allowing additional players into this step of the process would probably result in an increase in lead agency disputes and delay the onset of substantive review of the action. At the present time, the number of lead agency disputes is only about 20 per year. This indicates that this part of the process is generally working well and does not need any changes.

Comment: The criteria used by the Commissioner to designate a lead agency should include an assessment of the ability of an agency to conduct the review objectively.
Response: The third criterion does require the Commissioner to consider the capability of an agency to conduct a thorough environmental assessment. The technical expertise or the ability to obtain the necessary expertise can be assessed and considered in the resolution of a lead agency dispute. However, determining the objectivity of an agency is not a readily measurable standard. The concern regarding objectivity arises most often when the lead agency is also the project sponsor. Involved agencies and the public review help to ensure that the lead agency conducts a fair assessment of the projects potential impacts.

Comment: Why is the agreement of the project sponsor required before lead agency can be reestablished?
Response: The agreement of the project sponsor is only required when a review is already underway and the lead agency role is being changed without a failure of the lead agency's basis of jurisdiction. Under these circumstances, it is a matter of equity and fairness because decisions may have been made by the lead agency that have caused a substantial investment by the project sponsor and a change in the lead agency may cause a financial hardship.

Comment: An agency such as a town board should not be able to ignore the opinion of a local or county planning board in the rezoning process.
Response: SEQR does not change jurisdiction between or among agencies. When a planning board is acting in an advisory capacity such as when it reviews a proposed rezoning, the legislative body retains its full jurisdiction over the action and can accept or reject the advisory opinion of the planning board.

Comment: The new language that allows an agency to waive the requirement for an EAF if a draft EIS is prepared and submitted should be deleted. The EAF is an important, early summary of the actions impacts and it should always be required.
Response: This is not new language. It was previously found in the general rules section. In some cases, the submitted draft EIS contains much more information than the EAF and it is counterproductive to require that an EAF be completed. In other cases, the submitted draft EIS is very deficient and an EAF is necessary. The language allows the lead agency the flexibility to determine when to waive the need for the EAF.

Comment: There should be additional provisions that require a lead agency that accepts a draft EIS in lieu of an EAF to subject that draft EIS to scoping and a review of adequacy.
Response: When a project sponsor submits a draft EIS with its application it is subject to the full review procedures under SEQR. If a positive declaration is issued, this document could become the draft scope to be used by the lead agency in the preparation of a final written scope.

617.7 DETERMINATION OF SIGNIFICANCE Back

Remove the agency option to develop additional criteria for determination of significance
See discussion on 617.14, page 92.

Add, as a new criterion, "the impairment of the environmental characteristics of a critical environmental area as designated pursuant to subdivision 617.14(g) of this Part"
See discussion on 617.14, page 93.

Cumulative impact
Issue: The existing 1987 regulation at 617.11(a)(11) requires consideration of cumulative impacts, but uses the term "related actions" which unduly restricts the circumstances under which consideration of related impacts is required. In addition, existing 617.11(b), which more appropriately relates to the issue of segmentation and related actions, has been used by the courts to define "related actions" for purposes of 617.11(a)(11), (see 617.7(c)(1)(xii)) thereby further restricting the circumstances under which cumulative impacts must be assessed. The regulations were not intended to be construed so narrowly, but the language relating to the interrelationship among actions currently forces a narrow

interpretation of when cumulative impacts assessment is required. Lead agencies continue to have the discretion to require a cumulative impact assessment in an EIS for a proposed project.

Revision: None. The Department has decided not to change the existing language in this rulemaking and to defer any changes to a separate rulemaking which will follow the completion of the working group efforts on this topic. See discussion on page 9 for additional details regarding the Cumulative Impact Working Group.

Alternatives considered: The "no action" alternative, which the Department has chosen to pursue in this rulemaking, is the current language of the regulations which has been interpreted to require cumulative impact analysis only for related actions or where there is a long range plan of which the action is a part.

The originally proposed alternative was rejected based on the public comments received. The issue requires additional study and input from project sponsors and the public. See responses to comments.

Another alternative considered would more closely track NEPA and the California Environmental Quality Act in definition and consideration of past, present and reasonably foreseeable future actions. Concerns were expressed during scoping that using such a standard would open cumulative impact up to a limitless degree and be an unfair burden to project sponsors.

Comment: Keep the standard set by the Court of Appeals decision, Long Island Pine Barrens Society v. Planning Bd. of Brookhaven, 80 NY2d 500 (1992) for when cumulative impact assessment is required.

Response: The Court's decision in that case was based on the existing regulatory scheme that emphasizes the relationship among actions rather than impacts and supported regulatory criteria for determining significance that the Department now believes are too narrow. Whether or not a particular document constitutes a long range plan is not really relevant to whether or not cumulative impacts are likely to result. As the Court itself noted: "…development in one part of the region could have unforeseen consequences in another…" This is not to say that the Court should have ruled differently or that the existence of cumulative impact criteria would have resulted in a different decision. However, the Department believes that a change in the rules on which the Court based that decision is necessary to allow the recognition of cumulative impact and to lead to some assessment of it. Unfortunately, the comments on the Department's proposal were so polarized that it is difficult to craft language that would be acceptable to project sponsors and the public. The issue requires a further initiative to try to obtain a consensus.

Comment: Cumulative impacts should include synergistic, economic and social impacts.

Response: Synergistic impacts are subsumed in the term cumulative impacts and describes an impact that is different because of the combined impacts of two or more other events; for

example, the impact known as acid deposition is a synergistic impact caused by the combination of sulfur dioxide and nitrogen oxides which react in the atmosphere to form sulfates and nitrates. With regard to social impacts, the SEQR definition of "environment" includes several items generally thought of in those terms, such as impairment of community character. In addition, when an EIS is prepared, public needs and benefits, including social and economic benefits, must be weighed against environmental harm; however, the statute's primary purpose is to analyze and avoid or reduce environmental impact, not social and economic impact.

Comment: Mandatory cumulative impact assessment is not statutorily authorized.
Response: SEQRA, like NEPA, does not use the term "cumulative impact"; however, it has, as one of its primary purposes, the avoidance of critical thresholds necessary for the health and welfare of the people of the state. See, ECL §8-0101, 0103(5). Cumulative impact assessment is an essential tool to identify these thresholds by allowing a determination at an early stage of what the capacity of the environmental or natural resource medium is to tolerate impact and still provide appropriate functions and benefits. The Department, in its rulemaking and other capacities, also has the authority and responsibility to "take into account the cumulative impact upon all…resources…." ECL §3-0301.1(b).

Comment: These changes will impose undue burdens on small project sponsors and result in a proliferation of EISs.
Comment: Commentors objected to the proposed language in 617.11(b)(3)(i), (94 proposal) of the cumulative impact criteria which required that activities be sufficiently related physically so as to change the same aspect of the environment. Primary comments were: this should be restricted to municipal limits; add the term "proximate"; this is too restrictive and doesn't allow addressing of impacts miles away.
Comment: Commentors universally disliked various provisions of 617.11(b)(3)(ii), (94 proposal) that said other activities reviewed must be proposed to be commenced by the time the proposed action was to be completed (build-year). Some wanted more certainty as to what should be reviewed; others said this would encourage segmentation; some thought the time period was too restrictive and did not like the build-year concept.
Comment: Commentors objected to criterion 617.11(b)(3)(iii), (94 proposal) which required consideration of activities that were proposed or very likely to be proposed; there was also a distinction made between what should be considered for private project sponsors versus public agencies and the latter were tied to maximum build-out. Commentors argued this should be limited to pending applications and that maximum build-out was unrealistic and too broad; others felt that this was too confusing.
Response: These comments taken together indicate that there is more work to do to build a consensus or a better compromise on how cumulative impacts should be analyzed under SEQR, hence these issues will become part of the charge for the working group to address.

Comment: Many commentors also disliked proposed paragraph (d), 94 proposal, because of the connection of planning and the generic EIS.
Response: This provision has been deleted.

Comment: The phrase "eliminated or adequately" should not be deleted from 617.7(d)(1)(iii).
Response: Since the word "mitigation" is now defined it is no longer necessary to redefine it every time it is used in the regulation.

Conditioned Negative Declaration provisions for Type I Actions

Issue: Streamline the environmental review process by allowing agencies to use conditioned negative declarations (CND) for Type I actions.

Revision: None. The proposed expansion of CNDs to Type I actions has been deleted from this rulemaking based on comments received.

Discussion: The generic EIS prepared for the 1987 revisions to SEQR contained a thorough discussion of the use of the "new" CND procedure for Unlisted actions. At that time, the Department expressed reservations regarding the expansion of CNDs to Type I actions. The Department had felt that due to the presumption that Type I actions are more likely than Unlisted actions to require the preparation of an EIS, it was not appropriate to extend the use of CNDs to Type I actions.

The Department also made a commitment in 1987 to monitor the use of CNDs to ensure that the process was not abused. This was done for a period of 19 months (June 1, 1987 - December 31, 1988) during which time, a total of 274 CND's were issued. Of this total, the City of New York issued 170. This was not unexpected, given that the CND process originated in New York City. The Department found no flagrant or unusual abuses or misuses of the process. Since the end of the monitoring period random spot checks of CNDs have supported this initial finding. The only problem that the Department is aware of regarding the use of CNDs is the inappropriate practice of certain agencies placing conditions in the CND that require a project sponsor to conduct a future study or obtain a permit/approval from another agency. These are not conditions that mitigate a project impact. All relevant information should be obtained and analyzed before a negative declaration or a CND is issued. If further study is warranted and there is a potential for significant impact an EIS is required. These are not fatal flaws in the process and have been handled through public education efforts such as The SEQR Handbook.

Based on these results, and in the interest of maximizing opportunities for regulatory reform, the Department in the May 4, 1994 proposal reconsidered expansion of CNDs to Type I actions.

One concern raised about the use of CNDs is that it would eliminate the preparation of EISs and reduce the ability of the public to participate in the process. However, the data does not support this position. It is more likely that the CND process has allowed more public participation as negotiations that have previously resulted in negative declarations to

avoid the possibility of an EIS, could now be subject to the CND process that requires public notice and review.

Another concern was that to avoid preparation of an EIS the CND procedure would become an iterative process where agencies and project sponsors would produce amended CNDs as new impacts were identified. To address this potential problem, the Department in the 94 proposal restricted the CND process by not allowing any substantive amendments. This gives more impetus to the project sponsor and the lead agency to ensure that the "hard look" is taken early on and to consider preparing a CND only where the lead agency is confident that the mitigative conditions it imposes will result in the action having no significant adverse impact on the environment.

The CND process was developed to allow the imposition of conditions on a project sponsor to address impacts that fell outside of the lead agency's jurisdiction and outside of any other involved agency's jurisdiction. Mitigating conditions which are applied by lead agency as part of its own permit or approval process such as numerical or narrative standards or requirements that an applicant is legally obligated to meet need not be incorporated in a CND. Under these circumstances the lead agency could issue a negative declaration. These conditions which are within an agency's authority to impose do not transform a negative declaration into a CND. Thus, it would be appropriate to impose such conditions in a permit or approval granted by a lead agency on a Type I Action and also to issue a negative declaration on that action. This principle is discussed in The SEQR Handbook (1992) at page 48.

In addition, if an application, as initially submitted, incorporates mitigation measures as part of the project design to satisfy the lead agency's concerns about potential significant adverse impacts, that application could receive a negative declaration rather than a CND. Under this principle, if applicants become aware of the additional mitigation measures to be imposed by the agency, they can withdraw the application prior to issuance of a CND, incorporate the appropriate mitigation measures into the project design, resubmit the application and receive a negative declaration instead of a CND, because the action, as resubmitted, will not result in an significant adverse environmental impact. This is also discussed in the SEQR Handbook (1992) at page 48. Court decisions that justify overturning negative declarations that containing these types of jurisdictional conditions for Type I actions often fail to make this distinction (See for example, Miller v. City of Lockport, 210 AD2d 955 (4th Dept., 1994))

Alternatives considered: Retain the present language that restricts CNDs to only Unlisted actions. This alternative was selected based on the comments received.

Another alternative available is the total elimination of the CND process. This alternative is not preferred because:

- There is no evidence available which indicates that the current CND process is generally being abused or misused.

! The CND process offers agencies a legitimate way to reduce their workload by reserving EISs for those actions that require in-depth analysis.

Comment: Many individuals and environmental organizations commented that it is not appropriate to expand the CND process to Type I actions due to the presumption that a Type I action may have a significant impact on the environment. They also felt that the expansion to Type I actions would seriously undermine SEQR's goal of encouraging informed decision-making by not allowing a full and open discussion of mitigation and alternatives, that it would reduce the SEQR process to a negotiation between the project sponsor and the lead agency with the public shut out of the discussions and that the safeguards were not adequate to prevent abuse.

Comment: Business groups and some municipalities expressed support for the expansion of the CND process to Type I actions stating that it provided for the same level of environmental protection as an EIS without the costs associated with an EIS.

Comment: The Department's rationale for withdrawing the expansion of use of CNDs from Type I actions appears to be unfounded. All of the substantive concerns identified have been adequately addressed by the Department.

Response: The Department has deleted the proposal from this rulemaking and the regulations continue to restrict the use of CNDs to Unlisted actions. This decision is based primarily on the lack of a clear statutory basis for the expansion of CNDs to Type I actions. Department legal counsel have determined that the expansion of CNDs to Type I actions would be extremely vulnerable to challenge based on the fact that Type I actions are generally large in scope and because of the statutory presumption that Type I actions are likely to require the preparation of an EIS. The courts have acknowledged this presumption: "[P]articularly in a Type I project, there is a relatively low threshold for requiring an EIS" (Shawangunk v. Planning Board of Gardiner, 157 AD2d 273, 3rd Dept., 1990 citing H.O.M.E.S. v. UDC, 69 AD2d 222). The Department will consider a statutory amendment to specifically allow the use of CNDs for Type I actions. This initiative will be evaluated for inclusion in the Department's legislative package for the 1995 - 1996 legislative session.

Comment: Agencies should be able to revise and reissue CNDs.

Response: Conditioned Negative Declarations are a form of a negative declaration and they are subject to the same regulatory provisions regarding amendment and rescission as any other negative declaration (see 617.2(h), the definition of a CND). The provision that CNDs could not be substantively amended was part of the May 1994 proposal for expanding the use of CNDs to Type I actions. That provision has been deleted from the rulemaking.

Comment: The regulations should contain a formal procedure for handling comments received on a CND which require a notice to the involved agencies and publication in the

ENB within 30 days of the close of the comment period.

Response: The Department has chosen not to require any new notices as part of the CND process. When comments are received on a CND the lead agency must review the comments to determine if they raise any substantive issues. If the comments raised are not substantive the CND is final. If the comments raise substantive issues as described in 617.7(d)(2) then the lead agency must rescind the CND and issue a Positive Declaration requiring the preparation of an EIS. Like any negative declaration a CND can be amended.

Comment: CNDs should also be allowed for direct actions of an agency.

Response: Agencies have unlimited ability in the design and planning of a direct action to change a project to avoid or reduce potential significant impacts. There is no logical reason for an agency to impose conditions on itself.

Comment: The regulation should include a formal notification process for the rescission of a CND and a requirement for public notice when the agency decides to let the CND stand.

Response: If a CND is rescinded it must result in the filing of a positive declaration. The positive declaration would then be distributed to all involved agencies and logically to all individuals that commented on the CND. Providing a separate notice requirement for rescission is not necessary. If the CND is not rescinded, the action can continue to decision just like any other project that has received a negative declaration.

Comment: The regulations should clarify that project changes in the course of a review do not constitute mitigation measures forced by the lead agency as conditions to awarding a negative declaration. This interpretation has lead courts to overturn negative declarations especially for Type I actions.

Response: All projects are changed, in some fashion, during the course of review. This project evolution is normal and generally leads to a better project. If these project changes are made part of the application prior to the determination of significance then the lead agency should consider the project, as revised, in making its determination. A negative declaration on a revised project should not be construed to be a CND. However, in some cases the negative declaration explicitly requires project changes. These determinations transform the negative declaration into a CND and they should be consistent with the limitations placed on the use of CNDs by the regulations.

Amendment of a negative declaration

Issue: Provide guidance to lead agencies and the public regarding the process of amending a negative declaration.

Revision: This revision clarifies that lead agencies are allowed to amend a negative declaration where substantive changes are proposed for the project or substantive new information is discovered; or where there is a substantive change in circumstances which was

not previously considered and it is determined that there will be no significant adverse environmental impacts.

Discussion: It is not unusual during the course of project review for a project plan to change the details of construction or implementation. This evolution of projects often causes lead agencies a great deal of consternation when the changes occur after they have issued a negative declaration. How does an agency account for these changes in the SEQR documentation? The existing regulations provide a process for rescinding a negative declaration, but a necessary result of rescission is the subsequent issuance of a positive declaration. However, in many cases although the project changes are substantive they do not result in significant adverse environmental impacts and, therefore, do not require the preparation of a draft EIS.

Lead agencies are also uncertain about the proper course of action under SEQR when substantive new information is discovered that was not available during the environmental review or circumstances arise, such as a substantive change in the environmental setting, and the final agency decision to fund or approve a project has yet to be made. This revision will clarify that lead agencies have the authority to assess these types of situations and, if they do not result in a significant adverse impacts, to issue an amended negative declaration. The amended negative declaration must contain reference to the original negative declaration and discuss the reasons supporting the amendment. This will ensure that the lead agency adequately documents the amendment process and allows the public to track the changes. Allowing a negative declaration to be amended addresses a current gap in the regulations that has caused confusion and it provides a lead agency with flexibility for dealing with project changes. The Court of Appeals recently upheld the use of amended or revised negative declarations (Chemical Specialties Manufacturing Assn. v. Jorling, 1995 WL50698 (2\9\95)).

It is not necessary to amend a negative declaration to correct minor deficiencies such as typographical errors or to account for minor project changes that do not result in a potential for environmental impacts. Only those changes that require material reconsideration should result in the amendment of the negative declaration.

Alternatives considered: Retain the current format. This alternative is not preferred because:

- It fails to provide guidance to agencies regarding the proper procedure for amending a negative declaration.
- Without an acknowledged procedure for amending a negative declaration, agencies are reluctant to formally assess new information or project changes.
- There is no opportunity for public notice since the informal process for amending a negative declaration does not require filing the amended declaration.

Comment: Clearly defined criteria and the specific circumstances must be included in both the amendment process and the rescission process to avoid unequal implementation by agencies.

Response: The criteria and circumstances have to be broad enough to cover the range of legitimate reasons that would result in the need to amend/rescind a negative declaration.

Comment: The conditions for amending and rescinding a negative declaration are the same.
Response: The conditions are the same. The difference is that in the case of amending, the lead agency has determined that no significant adverse impact(s) will occur while in rescission the lead agency has determined that there may be a significant adverse impact(s). Having the same conditions apply to both procedures places the emphasis on the determination of potential impact.

Comment: Amending a negative declaration should require notice to the applicant and an opportunity to respond.
Response: The Department did not include these requirements since there is no change in the actual determination. The applicant would receive a copy of the amended determination as part of the filing requirement. Including a provision for applicant notification and comment would add an additional step into the process with a subsequent increase in time.

Comment: A lead agency should be able to amend a negative declaration to correct deficiencies.
Response: The amendment process provides agencies with this opportunity. However, minor deficiencies which do not change the determination should not require amendment. It is not the intent of the Department to turn the negative declaration into an iterative process. The decision to amend or rescind a negative declaration should be triggered only by changes that require material reconsideration of the negative declaration.

See also the response to comments on rescinding a negative declaration.

Rescinding a negative declaration

Issue: The current language regarding rescission of a negative declaration does not indicate what happens following rescission.

Revision: The revised language specifically states that the rescission of a negative declaration results in the requirement for preparation of a draft EIS.
Discussion: Presently there is uncertainty regarding the rescission process. Agencies have rescinded negative declarations and then reissued them. Other agencies have assumed that once a negative declaration is rescinded, an EIS is required. The language regarding amendments to a negative declaration address how to proceed where non-significant adverse impacts have been identified. In contrast, rescission of a negative declaration requires the preparation of a draft EIS.
Alternatives considered: The no action alternative is not preferred because current uncertainties related to rescission of negative declarations would continue to cause concern.

Comment: DEC, not the lead agency, should have the authority to determine that changes are not adverse enough to warrant reversal of a negative declaration.
Response: Article 8 of the ECL did not provide the DEC with the authority for administrative oversight. Each agency is responsible for ensuring that its actions are consistent with the requirements of SEQR.

Comment: Rescission of a negative declaration should provide an applicant with an opportunity to object before the decision is made.
Response: The regulations require that the project sponsor be informed and provided with a reasonable opportunity to respond prior to the rescission.

Comment: The new rescission section gives an agency wider discretion in deciding whether or not to rescind a negative declaration.
Response: The new language does not expand the lead agency's discretion. However, it does provide clearer guidance on the grounds for rescission by specifically including the discovery of new information as a condition for rescission.

See also the response to comments under amending a negative declaration.

617.8 SCOPING Back

Section rewritten to clarify the required content of a scope.

Issue: The revised language attempts to address the problems which have been brought to the Department's attention over the past seven years since scoping was formally recognized in the SEQR regulations. The present regulations do not provide lead agencies and project sponsors with sufficient guidance to enable them to accomplish the primary goal of scoping which is to produce a draft EIS that concisely and effectively discusses the potential significant adverse impacts from a proposed project. Project sponsors are hesitant to participate in scoping due to the perception that it presently has no definitive end point and the public objects to the lack of a requirement for public participation.

Revision: The changes in the scoping section are:

- The entire section has been rewritten to increase clarity.
- The concept of a draft scope and a requirement for public review are incorporated.
- Specific direction is provided regarding the content of a scope.
- The time period is extended to 60 days for preparation of a final written scope so that public participation can occur.
- Anyone who raises an issue after the preparation of the final written scope must provide a written statement that supports the need for the incorporation of the information into the draft EIS.
- The project sponsor is provided the option to incorporate into the draft EIS, or delay until the final EIS, new issues received after preparation of the final written scope.

Discussion: Once a lead agency has determined that there are potential significant adverse impacts which need to be analyzed through an EIS and it issues a positive declaration, lead agencies often reopen the discussion of all potential impacts for inclusion in the EIS regardless of significance or relevance. Impacts which were determined to be non-significant in the assessment phase of the process should not be brought back into the analysis. EISs should not be bloated with information irrelevant to the decision-making process. This diminishes the analysis required for those impacts which initially caused the EIS to be prepared, and sometimes allows project sponsors to bury the important information and analysis under pounds of trivial data.

Contributing to this problem is the lack of clear direction in Part 617 on the proper content of a scope. To address this deficiency, specific guidance regarding the contents of a final written scope is added to the regulations.

Two guidance issues warrant individual discussion. One new requirement is that scoping identify the potential significant adverse impacts that require discussion in the draft EIS. This is a critical step in the process. The draft EIS should not be a forum for discussing those impacts that were already determined to be non-significant during the assessment process. Restricting the draft EIS to only the potential significant adverse impacts should reduce the size of EISs, make them easier to review and understand and allow lead agencies and project sponsors to increase the depth of analysis of the impacts that are significant in the decision-making process.

Another new requirement directs the lead agency to identify the issues that were raised during the scoping process but were determined to be either non-relevant, non-significant or adequately discussed in a prior environmental review. Although scoping has always been presented as a way to focus the EIS, it rarely happens. Lead agencies and project sponsors have been hesitant to eliminate issues from the EIS even when those issues have been considered during the environmental assessment and determined to be not significant. The fear of litigation prompts the lead agency and project sponsors to include the material. This results in EISs that contain too much information on impacts that are not significant and it tends to detract from the real issues of importance to the decision-makers and the public. These two changes will substantially improve the quality of scoping and, consequently, the quality of draft EISs. They, along with the other changes, will make the EIS a document that is more consistent with the objectives of Article 8 of the ECL.

A concern with the present scoping requirements is the lack of a requirement for public participation. To address this problem, the proposal requires an opportunity for public participation. The manner by which the public is allowed to participate is left to the discretion of the lead agency.

In the Department's experience, the circulation of a draft scope is the most effective way of obtaining public comment. It provides sufficient information necessary to understand the proposed project, allows the public an opportunity to see what issues have been included and allows commentors to focus on what additional material should be included. A lead

agency may, at its discretion, use other methods for public participation such as an informational meeting or workshop.

To address the issue that scoping has no definitive end, the Department is proposing that substantive information raised after the preparation of the final written scope and prior to the completion of the draft EIS meet a strict test for inclusion. The individual/organization/agency raising the issue must identify: the nature of the information; the importance and relevance of the information to a potential significant impact; and the reason(s) why the information was not identified during scoping and why it should be included at this stage of the review. This information must be submitted to the lead agency and project sponsor. However, the project sponsor will have the discretion whether to include this new information in the draft EIS. If the information is substantive and the project sponsor does not include this information in the draft EIS, it must be treated and addressed as public comment on the draft EIS.

Giving this authority to the project sponsor is reasonable because the project sponsor is usually responsible for the preparation of the draft EIS. If the issue is substantive and relevant then it is in the project sponsor's best interest to include it in the draft EIS. 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 will assume. The lead agency will, in most cases, provide the project sponsor with its position whether to incorporate this material into the draft EIS, but the final decision would be the responsibility of the project sponsor. This change will give definite closure to the scoping process.

Alternatives considered: Retain the current language. This option is not preferred because:

- The current language found in 617.7 does not provide specific guidance regarding the content of a proper scope.
- There is currently no requirement for public participation in scoping.
- There is currently no definitive end to scoping.
- The current 30 day timeframe does not allow adequate time for public participation.

Another alternative is to make scoping mandatory for all EISs. This option is not preferred because:

- It imposes an additional requirement on agencies.
- A mandate to scope would have to be balanced by a reduction in the specific requirements. Presently, almost all EISs are scoped in some fashion. Providing more specific guidance on the scoping process will improve performance and is preferred to mandatory scoping with significant flexibility in the procedures.
- Certain projects may not require scoping due to the limited nature of the associated impacts and/or limited interest or concern about the project.

A third alternative is to set a page limit on EISs. This option is not preferred because:

- ! It is an arbitrary cap that is not responsive to the issues involved or the substantive quality of the EIS.
- ! It may only further a trend of superficial analysis, just using fewer pages.
- ! It is not the key problem to be addressed. Average EIS length over the last several years, not including appendices, has been 90 pages. Project sponsors often attach lengthy appendices to EISs which can be intimidating but are not necessarily essential to a basic understanding of the issues which are being evaluated. Instead, an effective executive summary in the EIS can overcome the problem decision-makers and the public have in reviewing large amounts of material.
- ! A page limit could force important analyses to be buried in the appendices.

Comment: The concept of scoping should be the subject of a public forum before it is placed in the regulation.
Response: The concept of scoping and its benefits are well established in both the existing state and federal environmental review processes. The concept of scoping has been the subject of an extensive public forum in this rulemaking.

Comment: The draft generic EIS suggests that the primary goal of scoping is the production of a draft EIS that concisely discusses the potential impacts from a proposed action. The primary goal of scoping should be to encourage and promote an open discussion of all issues and their potential impacts.
Response: The Department believes that the primary goal as stated in the regulations and draft generic EIS is correct and the final written scope should reflect this goal. However, the kind of discussion envisioned by the comment is necessary prior to the preparation of the final written scope in order for this goal to be met. That is why the provision for public review was made a required component of scoping.

Comment: Scoping should be required for all EISs.
Response: The Department believes that scoping would improve the quality of all EISs and strongly encourages agencies to scope. However, leaving scoping optional allow agencies, project sponsors and the public to gain experience with the new provisions and opportunities afforded by the changes in the regulations. If the proposed changes to scoping are successful in focussing the EIS, then project sponsors and agencies will routinely call for scoping. In this way, the effectiveness and benefits of the provisions can be tested before they are considered as a mandate.

Comment: Involved agencies should be allowed to initiate scoping when the lead agency declines to scope.
Response: The decision to scope is the responsibility of the lead agency. Involved agencies

should consider their positions with respect to the need for an EIS and scoping at the time of the establishment of the lead agency. If they feel strongly that scoping is necessary then that involved agency should vie for the lead agency role. Allowing an involved agency to initiate scoping would be contrary to the goals of coordinated review.

Comment: If scoping is left optional there should be language included that allows concerned citizens to petition the lead agency to scope with an appeal mechanism through the Commissioner of DEC.
Response: The Department lacks the statutory authority to establish the Commissioner in such a role. Without a final arbiter this type of procedure would not work.

Comment: Providing only 20 days for public review of a draft scope is not adequate. It often takes several days for the public to become aware that a document is available for review. This leaves insufficient time to obtain the document, review it and provide comments.
Response: The Department has eliminated the set timeframe for public participation. When scoping is conducted consistent with the regulations public participation is a required component but the method and timeframe has been left to the discretion of the lead agency.

Comment: There should be a minimum public comment period, at least 30 days, for review of a draft scope.
Response: The amount of time allotted and the manner of public participation is being left to the discretion of the lead agency. This was done to provide lead agencies with the greatest amount of administrative flexibility possible. The concern that has been expressed is that lead agencies will diminish the opportunity for public participation by providing only a short period (2 to 3 days) for public review and comment. Scoping is still a voluntary process and it is unlikely that agencies/project sponsors which choose to scope would attempt this knowing that any public participation could have been avoided by not scoping at all. The lead agency has the obligation to provide for a reasonable and meaningful opportunity for public participation during scoping. The Department, in the above discussion and response to comments has provided guidance on this issue. Future guidance will be included in The SEQR Handbook. The concept of reasonableness as described in The SEQR Handbook (1992) pages 4 & 5 would apply to this part of the review if the courts were required to address this issue.

Comment: Allow lead agencies the discretion to expand scoping timeline to 90 days by local rule.
Response: SEQR already provides agencies with the authority to vary the time periods established in Part 617 (see 617.14(b), 617.4(b) 1987 regulation). In addition, a lead agency and project sponsor can mutually agree to expand the scoping timeframe for large or complex

projects (see 617.3(i), 617.3(m) 1987 regulation).

Comment: The public should receive early notification when scoping will not occur.
Response: The positive declaration will serve as notice regarding the intentions of the lead agency with respect to scoping.

Comment: Notice that the draft scope is available for review should be published in the ENB and the draft scope should be provided directly to all interested parties.
Response: The regulation has been revised to require that the positive declaration which is published in the ENB state if scoping will be conducted. A requirement that the draft scope be provided to all interested parties was part of the proposed revisions and has been retained (see 617.8(b)). The Department believes that agencies should consider other methods such as the possibility of requiring that notice of scoping be provided to residents within 500 feet of the project site. This effort could take many forms, for example: in a highly urban setting, a notice posted in the lobby of those structures located within 500 feet of the proposed activity; in a more rural setting, a notice to each resident may be appropriate; for some projects such as the construction of a highway, a combination of sign boards erected in the right-of-way and notices might be used. This approach would not apply to activities such as the passage of laws, rules, regulations and other actions that have broad applicability not tied to a specific project site.

Comment: DEC should maintain a list of all agencies and interested parties that wish to be notified of proposed projects in their community.
Response: In special circumstances, the Department has kept service lists for a limited time. However, the responsibility to maintain, update and provide this type of notice routinely would overwhelm current staff. The Department cannot take on this labor intensive task knowing that it was doomed to fail due to a lack of resources.

Comment: The general public must be more effectively made aware of scoping sessions through publication of notices in a local newspaper, the posting of the notice at the project site, certified mailings to the surrounding area and through the media, including radio and television.
Response: The requirement that the positive declaration indicate if scoping will be conducted and the details for public participation and the requirement that copies of the draft scope be provided by the lead agency to all known interested parties will substantially improve the noticing for scoping. Few people read the newspaper legal notices. Other options such as the use of display advertisements, radio and television announcements can be very expensive. Posting would require that the Department establish: minimum sizes for the sign and lettering, guidelines for placing the sign at the project location, guidelines for protecting the sign from the weather and rules governing the replacement of damaged or stolen signs. Lead

agencies and project sponsors could choose to use any of these techniques, as appropriate.

Comment: Scoping section should include a specific requirement that environmental assessment forms be made freely available to the public.
Response: All SEQR notices, forms, EAFs and EISs are public documents. There is no legitimate reason why these documents should be withheld from the public following their submission to a lead/involved agency. The public availability of these documents is addressed in paragraph 617.12(b)(3)).

Comment: Requiring a public notice of a draft scope adds another requirement on municipalities.
Response: The Department is sensitive to this issue and has combined notice of scoping into the positive declaration.

Comment: Scoping should include the requirement for at least one public session.
Response: As stated in the discussion section, the Department believes 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. However, lead agencies are allowed the option of using any or all such methods in the conduct of scoping.

Comment: If an involved agency fails to participate in scoping it should be precluded from submitting comments on the draft EIS. Involved agencies should be required to participate in scoping.
Response: The Department agrees that all involved agencies should participate in scoping. However, an involved agency cannot be prohibited from participating in the review of the draft EIS. The SEQR statute clearly states that it does not change the jurisdiction between or among agencies. If an agency has an approval to issue it cannot be prohibited from participating in the associated environmental review.

Comment: If the final written scope is the responsibility of the lead agency how can the project sponsor incorporate late material into the scope?
Response: This language has been changed to allow the project sponsor to incorporate late material into the draft EIS, not the final written scope.

Comment: The proposed regulations limit public participation to an initial scoping process.
Response: The requirement for public participation in scoping is in **addition** to the other opportunities for public participation in the SEQR process. The present regulations do not require any public participation in scoping.

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.

Comment: The lead agency, not the project sponsor, should make the decision to incorporate new issues received after the final written scope into the draft EIS or to delay consideration until the final EIS.
Response: The reasons for giving this authority to the project sponsor are identified in the discussion section. It is the Department's experience that lead agencies are generally reluctant to make a decision on late information even when that information is clearly not relevant to the project. This delays the preparation of the draft EIS and many times results in draft EISs that are filled with information that is not critical to the decision. Giving this authority to the project sponsor puts the decision into the hands of the party that has the most to gain or lose if an incorrect decision is made regarding the inclusion of late information into draft EIS.

Comment: It is unrealistic to expect that all relevant issues will be raised before issuance of the final written scope. Poor public awareness of the project at this stage, lack of participation at scoping meetings and lack of details regarding the project argue against placing too much emphasis on scoping.
Response: The Department believes that the changes to scoping that will require the preparation of a draft scope and better public notice will address the issues identified by the commentor that tend to reduce the effectiveness of scoping.

Comment: Why was the requirement that the "probable accuracy" of late information be demonstrated deleted from paragraph 617.8(g)?
Response: This phrase was deleted because it is redundant. The discussion of the importance and relevance of the information to a potential significant impact will provide the same information.

Comment: 617.8(g) puts a severe restriction on the introduction of new information. Often impacts, alternatives and especially mitigation measures are not immediately evident. Parties should not have to meet this stringent burden to raise them. This runs counter to the entire purpose of SEQRA. Would rather see a provision that requires the project sponsor to rebut late information to show that it should not be included.
Response: The reasons for including this definitive endpoint to scoping are identified in the discussed section. This provision is consistent with the statutory requirement that agencies carry out its terms with minimum procedural and administrative delay. The proposed test will encourage agencies and individuals to raise issues at the earliest possible time so that the review can proceed with minimal delay. Making this aspect subject to rebuttal could lengthen the process and not provide closure. Project opponents may withhold information and submit it late knowing that this will require the project sponsor to provide a rebuttal therefore delaying the preparation of the draft EIS. It also could lead to a separate step because the lead agency would have to be the arbitrator when there is a difference of opinion regarding the need to incorporate the information.

Comment: The proposed scoping language presents a genuine risk of lengthening the overall EIS process by adding an additional formal procedure.
Response: Any additional time spent in scoping will have a direct payback by saving time presently spent in the preparation of a document and it should reduce the amount of time required for EIS adequacy review. For the reasons identified in the discussion, scoping should make the EIS a clearer, more focused document that addresses the potential significant adverse impacts from a project. In addition, the scoping provisions which provide for a definitive end to the scoping process will ensure that actual preparation of the draft EIS begins in a timely fashion.

Comment: The language of the regulations should be clear that the scoping process does not exclude a project sponsor from having to address legitimate concerns raised during the public comment period.
Response: The process for responding to public comments on the draft EIS is unchanged by the revised scoping requirements. The substantive comments as determined by the lead agency will require response in the final EIS.

Comment: Propose that 617.8(e)(8) (617.7(f)(8), 94 proposal) be revised to read: "those potential significant impacts which were identified in the positive declaration along with the prominent issues which were raised during scoping and determined to be not relevant or environmentally significant to warrant inclusion in the draft EIS or which have been adequately addressed in a prior environmental review."
Response: This proposed change is not acceptable. It would allow impacts that were determined to be potentially significant during the assessment phase to be dismissed after

further review in scoping. Allowing this change would push the substantive review of impacts from the draft EIS stage forward into scoping. This would blur the distinction between the two steps in the process and could result in situations where project sponsors expend significant analysis to get impacts dismissed during scoping to avoid an EIS.

Comment: The regulations should require that a record of the comments made during scoping be kept by the lead agency.
Response: If the lead agency chooses to hold a scoping meeting it is incumbent that some type of record of the proceeding be maintained. The circulation of a draft scope and submission of written comments is a more efficient means of obtaining public input into the scoping process and eliminates the need for a separate record.

Comment: Elements 617.8(e)(4), (5) & (6) may be too technical or voluminous for a lead agency to handle on a timely basis. There may be various methodologies available and mitigation may become more apparent during the formulation of the EIS.
Response: Scoping is the correct time to determine which methodology to use. Impact analysis methodologies can require significant investments of time and money and to let a project sponsor perform an analysis using the wrong methodology and to try and correct this error late in the EIS process is a substantial penalty. Some early attention to this issue in scoping is time well spent. The Department agrees that additional mitigation may become apparent as EIS preparation occurs. The goal during scoping is not to identify all applicable mitigation but to provide guidance regarding the impacts that will require mitigation and some indication of the nature and depth of the mitigation that may effectively address the impacts. The identification of the reasonable alternatives must occur during scoping to ensure that the alternatives discussed are ones that will result in a reduction in impact when compared to the proposed action.

Comment: The identification of mitigation at the scoping stage is not realistic. Once additional work is completed the mitigation proposed may not be adequate and the project sponsor will be relieved of the responsibility to develop further mitigation.
Response: The final scope only requires that the lead agency provide guidance to the project sponsor regarding an **initial** indication of mitigation to be considered. A project sponsor is not absolved from exploring mitigation in greater detail and proposing additional mitigation as the true nature and magnitude of the impacts is disclosed in the draft EIS. A project sponsor would also have the opportunity to include in the draft scope any mitigation already incorporated into the project.

Comment: It is impossible to determine the alternatives to be considered before the draft EIS is prepared and analyzed.
Response: The identification of the alternatives to be considered is one of the most critical

components of a good scope. Early identification of alternatives in scoping particularly some identification of project layout, size and alternative technologies can direct project sponsors to consider ways to avoid or minimize a potential significant impact. Getting clear direction from the lead agency during scoping can lessen the possibility that the draft EIS will be rejected for failure to consider a reasonable alternative.

Comment: The final scope should contain the rationale for eliminating an issue.
Response: The regulations require that the prominent issues that were raised during scoping and determined to be not relevant or not environmentally significant or covered by a previous environmental review be identified in the final scope. A rationale is not required. However, the lead agency must be able to support its decision to eliminate issues.

Comment: Delays in the process occur from a lack of analysis in the draft EIS not from a lack of scoping. Applicants can still ignore issues identified by the lead agency that would adversely affect the project.
Response: The Department agrees that inadequate analysis is an issue that needs better attention in SEQR reviews. Scoping conducted in accordance with the regulations would not only eliminate non-significant issues but also provide project sponsors with clear guidance regarding the type and depth of analysis for the key issues to be addressed. Problems encountered in draft EIS preparation often result from mismatched expectations. The lead agency may not clearly identify the depth of analysis it wants or the applicant may not understand the lead agency's verbal direction.

If scoping is not conducted, it can be expected that there will be a greater number of situations where issues are not addressed. Conducting scoping will make it much more difficult for a project sponsor to ignore an issue that has been clearly included in the final scope. In addition, it will make it easier for the lead agency to review the submitted draft EIS for adequacy when it has a written scope to use as its guide.

Comment: The proposed regulation may discourage lead agencies that choose not to scope from engaging in informal professional communication during the preparation of the preliminary draft EIS due to a fear of litigation from project opponents that such meetings require public notice and opportunity for comment.
Response: It is possible that some project sponsors and lead agencies may be discouraged from participating in scoping due to the fear of litigation. However, if neither the project sponsor or the lead agency choose to scope then they are not precluded from engaging in the sort of informal professional dialogue that has always been a component of project review.

Comment: Commentors disagreed that scoping could eliminate non-significant issues from consideration in the draft EIS. Article 8 of the ECL requires not only that all significant impacts must be addressed in the EIS but that other adverse impacts be addressed at an

appropriate level of detail. Point should be to get more information for sound agency decisions.

Response: This interpretation of the statute has lead to the current problems that are being experienced in the EIS process. As discussed in the draft generic EIS, the draft EIS should not be used to bring back into the review process those impacts that were determined to not be significant during the assessment phase of the review. This causes the draft EIS to be bloated with information that is not essential to the decision-making process and directs analysis away from the truly significant adverse impacts. The Department agrees that the goal is to assemble information to assist decision-making. However, the scoping process is the means to identify the necessary information to be included in the EIS.

Comment: The changes to scoping will allow lead agencies to ignore substantive comments raised after the issuance of the final scope.

Response: Once the final scope is issued , the project sponsor is empowered to decide the fate of late comments. Any late comment must first meet the test contained in 617.8(g) to be considered, at all. Assuming they meet the test and are substantive, the project sponsor may decide to incorporate them into the draft EIS before it is accepted, particularly if the comments might otherwise require a supplement (see 617.9(a)(7)). Alternatively, a comment must be responded to in the final EIS. A comment that has been determined to be not relevant/substantive by the project sponsor cannot be the basis for the lead agency rejecting a submitted draft EIS in the determination of adequacy phase of the review.

However, the lead agency, as the agency responsible for the preparation of the final EIS, could require that a comment determined to be not relevant/substantive by the project sponsor be responded to in the final EIS.

This process will insure that the preparation of the draft EIS is not delayed by the submission of late comments and it also insures that all substantive comments are ultimately addressed.

Comment: Scope must include as relevant and substantive: impacts on property, town and county taxes, sewer taxes, water taxes, water treatment taxes, impact on property values, any tax increase due to subsidy of the project, loss of unique character, loss of jobs, closure of businesses. Also should discuss community's need for the project.

Response: An EIS is required to discuss the potential significant adverse **environmental** impacts from a proposed project. Most of the items listed above constitute economic/fiscal impacts which are not within the purview of SEQR. Impacts to community character should be discussed if determined to be relevant and significant for the project under review. A discussion of the need for the project has been a required component of an EIS since the 1978 version of the regulations. It was clarified in the 1987 version of SEQR to mean public need. This provision has not changed (see 617.9(b)(5)(i)).

Issue: Need to partially offset additional time provided for scoping.

Revision: 617.9(a)(2) has been revised to eliminate the additional 30 days for determining adequacy of an EIS. A single 45 day period is now provided for the review of a submitted draft EIS for adequacy.

Discussion: To partially offset the increase in time provided for scoping, the Department has reduced the amount of time for determining the adequacy of a submitted draft EIS from the present 30 plus 30 days to 45 days. A properly scoped draft EIS should not require 60 days to determine adequacy. The effort placed into scoping should result in a document that requires less review time, not more. This is a change from the May 94 proposal where the time period had been reduced to 30 days. If the document does not adequately reflect the scope, the lead agency still has the authority to reject the document and upon its resubmission gets another 30 days to review it for adequacy.

Comment: Many commentors objected to the reduction from 60 to 30 days. Most felt that 30 days was insufficient time for review by local agencies. Other commentors stated that a reduction in this time period would burden local agencies which often meet only once a month and it could require them to schedule additional meetings.

Response: The timeframe has been extended to 45 days. This is still a reduction of 15 days from the present regulations. This is a reasonable compromise that partially offsets the additional 30 days provided for scoping. The concern raised that this change would be a hardship on municipal agencies that only meet one a month is addressed by the change to a straight 45 day time period. In addition this issue must be placed in the proper perspective. During 1993, a total of 201 EISs were produced in New York State. State agencies and public authorities were lead agency for 68 of these EISs. This leaves a total of 133 EISs where there was a local lead agency. During 1994, the total number of EISs was 165 (62 and 103, respectively). There are 1530 cities, towns and villages in New York State and each municipality is comprised of several distinct agencies. This means that in any given year it is unlikely that an agency will be serving as lead agency for more than one or two projects that will require an EIS. Even if an agency were required to schedule a special meeting, that would not be an onerous burden when you consider that EISs are relatively rare, and, perhaps, should warrant a special meeting since the agency has already determined that the project impacts are potentially significant.

Comment: A reduction in the time period for the adequacy review would limit the ability of a lead agency to obtain technical assistance in the review.

Response: The need for technical assistance should be determined during the scoping process. At that stage, it should be apparent to an agency that technical assistance will be required. If scoping is not conducted, the need for technical assistance should be considered by the lead agency following the issuance of the positive declaration. Delaying this decision to the

adequacy review period will substantially slow the adequacy review. In limited cases where the lead agency determines late in the process the need for outside technical assistance they should seek the agreement of the project sponsor to extend the adequacy review period consistent with 617.3(i).

Comment: Revise Part 617.9(a) subparagraph (2) to clarify that the acceptance by a lead agency of a draft EIS "as adequate" is based on whether it is "adequate for public review"--the phrase subsequently appearing in subparagraphs (3) and (4).
Response: Language has been added back into 617.9(a)(2) to make it clear that the lead agency must decide whether to accept the draft EIS as adequate "for the purpose of commencing public review." The lead agency determination of the adequacy of the draft EIS for public review, as stated in 617.9(a)(2), is based on "the final written scope, if any, and the standards contained in this section". This concept is discussed in The SEQR Handbook (1992), pages 69 & 70.

Comment: The minimum time period for public review of a draft EIS should be 60 days.
Response: The Department feels that the current 30 day minimum public comment period is adequate. Lead agencies have the discretion to provide additional time when circumstances warrant.

Delete preparation of a negative declaration after a draft EIS

Issue: Reduce the options that a lead agency has in the conduct of the environmental review. The fewer options available, the more consistent the review and the less potential for procedural errors and subsequent litigation.

Revision: None. The Department had proposed to eliminate 617.8(e)(ii) (617.9(a)(5)(i)(b), 95 proposal) which allows a negative declaration to be issued following the issuance of a draft EIS. However, in response to public comment this provision has been retained.
Discussion: The present regulations allow a lead agency to issue a negative declaration on an action that has been the subject of a draft EIS when, following completion of the public comment period, it has determined that the action will not have a significant effect on the environment. This means that no final EIS will be prepared. Initially this may appear to be a good option. It ends the SEQR process when a draft EIS has disclosed that there will not be significant impacts. However, in reality this provision is rarely used. In 1993 only 1 negative declaration after a draft EIS was issued by a local lead agency. In 1992 the number of negative declarations following a draft EIS was 3. The reason for this lack of use is the minimal benefit with a comparatively large legal risk.

If the draft EIS has shown that the proposed action will not have a significant effect on the environment and no substantive comments have been received, all that the completion of the final EIS requires is putting a new cover on the draft and issuing a notice of completion of the final EIS. Then, after 10 days, findings can be issued. This process is almost identical

to the work that would be involved in the preparation of a legally sufficient negative declaration. The only savings is that you can proceed with the decision without waiting 10 days to make findings.

The risk is that you have taken a short cut in the process. Even though it is allowed by the regulations it can be perceived as an attempt to avoid responding to substantive comments and to preclude the public from reviewing a final EIS. An intervenor could make the argument that the agency has failed to bring the process to its logical conclusion by not preparing a final EIS. Many attorneys counsel their clients that the benefit is not worth the risk.

Comment: Several commentors objected to the removal of this option. The feeling was that even if it is not widely used it still offers a lead agency an approach to complete the review process in those cases when the draft EIS following public review has revealed that the project will not result in any significant impacts.
Response: The Department still believes, for the reasons identified above, that this provision is unnecessary. However, the provision for a negative declaration after a draft EIS has been retained in the regulations in response to public comment.

Comment: The provision in 617.9(a)(5)(ii)('a') that the date for preparation and filing of the final EIS may be extended "where it is determined that additional time is necessary" is vague and should be eliminated.
Response: The Department believes that this provision which is part of the existing regulations has provided necessary discretion to the lead agency to extend the due date for preparing and filing the final EIS. It also carries with it the obligation that the lead agency explain to the project sponsor the reasons for the needed additional time.

Supplemental EISs

Comment: The reasons for requiring a supplemental EIS should be expanded to cover situations where the lead agency inadvertently declares the draft EIS complete.
Response: The three circumstances under which a lead agency may require the preparation of a supplemental EIS are sufficiently broad enough to cover the above situation.

Comment: Part 617.9(a)(7)(i)('c') which provides that a supplemental EIS may be required in connection with "a change in circumstances" is vague and should be qualified to make it clear that the "change in circumstances" must be directly relevant to the project and to its impacts.
Response: The Department agrees that the change in circumstances should be relevant to the project and a significant adverse environmental impact. See 617.9(a)(7)(i).

Comment: Under Part 617.9(a)(7) there should be an additional criterion for supplemental EISs to address the contingency if a lead agency accepts a draft as complete that does not

sufficiently address a significant and substantive issue identified in scoping. This could also provide an opportunity for requiring additional information when scoping has not been conducted.

Response: Substantive public comments on a draft EIS must be responded to and addressed by the lead agency. This would include substantive public comments that demonstrate a draft EIS has not addressed a significant adverse impact that was identified in scoping or in the EAF. An supplemental EIS is only required under the circumstances outlined in the regulations (see 617.9(a)(7)).

Comment: A provision should be added to Part 617.9(a)(7)(iii) to permit a draft EIS before the public hearing or the final EIS to be supplemented by the provision of additional information, such as in response to comments or in a revised draft, so that this supplemental information is not subject to the full procedures required for a supplemental EIS.

Response: The regulation requires that a supplemental EIS be subject to the full procedures to allow an opportunity for public review of the new information. Supplements should be prepared only in those situations where a significant adverse impact has not been addressed or has been inadequately addressed in the EIS record. Incorporation of additional information to clarify an impact discussion in the draft EIS or providing additional information in the final EIS as part of a response to a public comment does not require a supplement.

Public hearings on EISs

Comment: A public hearing should be mandatory for all draft EISs.

Response: The Department does not agree that this is necessary. Further, ECL 8-0109(5) clearly provides that hearings are optional. The Department is not aware of any problem that this optional procedure has caused.

Revise EIS format

Issue: Incorporate recent statutory amendments and reorganize the EIS format to eliminate redundancy in EISs and to clearly state that the EIS format is flexible.

Revision: The following changes have been made in the EIS format:

- Include in the impact discussion an analysis of the following issues only where applicable and significant:
  - reasonably related short- and long-term impacts, cumulative impacts and other associated environmental impacts;
  - unavoidable environmental impacts;
  - irreversible/irretrievable commitments of resources;
  - growth inducing aspects;
  - effects on the use and conservation of energy;
  - effects on solid waste management;
  - impacts of public acquisitions on agricultural production and agricultural

lands; and,

- effects on special groundwater protection areas.

! Include a specific statement that the EIS format is flexible.

Discussion: Since 1989 the items to be discussed in an EIS have been expanded, by the legislature, through amendments to Article 8 of the ECL. New items to include, where applicable and significant, are the effect of the proposed action on: solid waste management; special groundwater protection areas; agricultural resources; urban cultural parks; and, consistency with the state energy plan. These amendments must be incorporated into Part 617 so that agencies and project sponsors are aware of the additional requirements for preparing an EIS.

Additionally, guidance is required to help preparers and reviewers focus EISs on the potential significant adverse impacts from a proposed project. Currently, many agencies believe that the EIS format is inflexible. This perception is based on the specific list of required EIS sections that are presently contained in section 617.14. A slavish adherence by lead agencies and project sponsors to what is perceived as an inflexible format has resulted in impact statements that are long on form but, in some cases, woefully short on substance. Many lead agencies hesitate to adjust the format under the mistaken impression that all of the sections, in the exact order they appear in the regulations, must appear in each EIS or the document is defective. This procedural issue is often raised by project opponents who are trying to stop a project. In some cases, an action does not lend itself to the typical EIS format and lead agencies should have the flexibility to modify the format. The substance of the analysis is more important than the form.

The present EIS format also leads to a tremendous amount of redundancy in an EIS. The current EIS format requires a project sponsor to disclose certain project impacts in six separate sections. In many cases this results in a specific impact discussion being repeated in different areas of the EIS. This increases the length of the EIS, tends to confuse reviewers and adds nothing substantive to the analysis. Some of the sections require discussion only if the impact is applicable and significant. However, many lead agencies and project sponsors hesitate to eliminate these sections from the EIS under the threat of litigation. The threat of litigation encourages project sponsors to "say something" even when the analysis is not applicable to the proposed action. Including irrelevant information adds to the cost of EIS preparation, reduces the amount of time that is available for analysis of significant issues and can often obscure important information about the significant adverse impacts. It has become apparent to the Department and SEQR practitioners that a change is needed in the EIS format.

The major change being proposed is to group all of the impact analysis in one section and require discussion of only those issues which are applicable and significant. This change will have several advantages. Grouping all impact analyses in one section will consolidate the discussion of impacts making the discussion more cohesive. It will also eliminate repetition

and reduce time and costs of preparation and review of EISs for project sponsors and agencies. This change will also make EISs easier for the public to review and would be consistent with Article 8 which states "Such statements (EISs) should be clearly written in a concise manner capable of being read and understood by the public, should deal with the specific environmental impacts which can be reasonably anticipated and should not contain more detail than is appropriate considering the nature and magnitude of the proposed action and the significance of its potential impacts." (§8-0109(2))

By clearly stating that issues need to be discussed only if they have been identified by the lead agency as applicable and significant, the Department hopes to eliminate or at least substantially reduce the "I have to say something" syndrome. It will allow agencies and project sponsors to focus their analyses on those issues that are significant and to better analyze those issues. The change in EIS format will complement the changes in scoping and should produce documents that are more focused and easier to read and understand.

By formally acknowledging that the format can be flexible, more EISs should be prepared for management plans, comprehensive plans and zoning changes so that potential impacts can be assessed in a logical, cohesive fashion. Another viable EIS format that the Department has seen is the grouping of the components of the environmental setting, impact analysis and mitigation all in one section on an issue by issue basis. This format, which can be very effective, can now be used without the fear of a procedural challenge.

Some individuals are comfortable with the existing format and may have difficulty finding certain sections such as "Use and Conservation of Energy" which was previously highlighted as a separate section. By changing the current format certain impacts may receive diminished attention. The Department acknowledges this but expects that where those same impacts are applicable and significant to a particular project they will receive the necessary and appropriate attention.

Alternatives: Retain the current format. This option is not preferred because:

- It would not update the regulations to include recent legislative changes.
- The current EIS format does not complement the scoping changes.
- The current format results in EISs that lack focus and are redundant.

Another alternative is to revise the section to only incorporate legislative changes. This option is not preferred because:

- Adding in the legislative changes without also providing flexibility allowing for inclusion of only relevant information will increase the number of mandatory sections in a draft EIS.
- Increasing the number of mandatory sections will exacerbate the current problems regarding EIS "focus" and the perception that you have to "say something" to cover each section even if it does not apply to the action under review.

Comment: Do not delete language in 617.14(a) 1987 regulation, which describes the EIS.
Response: This language has been reworded and moved to the definition of an EIS (see

617.2(n)) and the concept of integrating the EIS process with other concurrent review processes is contained in the General Rules (see 617.3(c)).

Comment: Section 8-0109 (2) of the ECL requires an EIS to analyze all impacts (including beneficial ones) and it specifies the impacts which are to be analyzed only when they are applicable and significant.
Response: The Department acknowledges that the phrase "where applicable and significant" does not modify all of the items listed in subdivision 2 of Section 8-0109 of the ECL. However, there is language in Section 8-0109 and in court decisions to support the proposed text change.

First, and most importantly, the closing paragraph of subdivision (2) of Section 8-0109 states:

> Such [environmental impact] statement should be clearly written in a concise manner capable of being read and understood by the public, should deal with the specific significant environmental impacts which can be reasonably anticipated and should not contain more detail than is appropriate considering the nature and magnitude of the proposed action and the significance of its potential impacts. (emphasis added)

Second, it does not add anything to the decision making to require discussion of an impact that was not "applicable" to a proposed action. In addition, the introductory paragraph to the cited subdivision clearly requires that an EIS be prepared on an action which may have a "significant" effect on the environment. If no impacts are determined to be significant, then an EIS will not be required.

Third, the language in the next to last paragraph of subdivision 4 of Section 8-0109 on the special groundwater protection area (SGPA) implies that there could be non-significant impacts to the SGPA which would not require preparation of an EIS but which would require a separate statement on consistency with the SGPA statutory provisions. So, it is implied in Article 8 that impacts to the SGPA must only be addressed "where applicable and significant," notwithstanding the absence of specific language to that effect.

Comment: Limiting EISs to an evaluation of adverse impacts is not consistent with 617.1(d) which states that "it was the intention of the Legislature that the protection and enhancement of the environment … should be given appropriate weight…" Also, this commentor suggested a different format for an EIS which places the discussion of alternatives before the description of the proposed action.
Response: The complete citation which is paraphrased above forms the basis for the findings requirement that agencies balance the potential environmental impacts with social and economic considerations. However, agencies are not precluded from using the EIS process to

assess an action that will have beneficial or positive impacts. Many agencies have used a generic EIS to provide a vehicle to explain their rationale for acting, receive early public input and present the different alternatives available. Language in 617.10(a)(4) states that agencies may use generic EISs to discuss changes in land use plans, and agency comprehensive resource management plans.

The optional format offered by the commentor would be acceptable. The ability to accommodate other formats is the basis for the Department's proposed change that "The format of the draft EIS may be flexible" as long as the elements listed are included. The specific format offered by the commentor is one that would have more utility for public agencies that typically have a broader range of alternatives to consider.

Comment: Under the new format, EISs will only be required to analyze identified significant adverse impacts, however, these impacts are often not identified until the EIS stage. In addition, beneficial impacts should be addressed in an EIS.

Response: A critical step in the SEQR process is identifying all significant adverse environmental impacts. The proposed text change does not alter this process. If no potential significant adverse environmental impacts are identified, then a negative declaration is prepared and you never reach the EIS stage. If at least one potentially significant adverse environmental impact is identified, then an EIS will be required and any other potentially significant adverse impacts will likely be identified at scoping or through public comment on the draft EIS. The criteria for determining significance and the EAFs address potentially significant adverse impacts.

In the 1987 regulatory revisions the Department decided not to limit EISs to consideration of only "adverse" impacts. Experience with SEQR both prior to and since 1987 indicates that the bulk of the EISs prepared contain much information that is irrelevant to what the agencies and the public need to know to decide whether to approve or deny a project. Indeed, the more unnecessary information there is in an EIS, the less likely it is to be read and used as the valuable tool it was intended to be. The courts, early on, recognized that an EIS is required only where the lead agency identifies a significant adverse environmental impact (Niagara Recycling Inc v. Town Board of Niagara, 83 AD2d 335, aff'd 56 NY2d 859 (1982)). The Department has opted to explicitly acknowledge current practice and interpret the court decisions and the statutory language in such a way that the EIS will become a more useful document for decision-makers and the public.

Section 8-0109(2)(b) of the ECL does not preclude consideration of beneficial or positive impacts. Nor does the statute preclude an agency from preparing a generic EIS on an action it is undertaking that will have only beneficial or positive impacts so they can better explain their rationale for acting and receive early public input.

If a potential significant adverse environmental impact is identified, an EIS is required. In that EIS, "public need and benefits" must be discussed as part of the description of the action (see 617.9 (b)(5)(i)). In that section, project sponsors should discuss the

beneficial or positive environmental impacts and any other benefits of the action. The Department has found that project sponsors do not fail to discuss the benefits (environmental or otherwise) of proposed actions.

Comment: The proposed regulations provide that an EIS "must analyze" impacts. Clarify what is required by the analysis (i.e. should this include: the conclusions of the analysis, the methodology of the analysis, or the facts processed through that methodology).
Response: An EIS analysis should be a summary of the potentially significant adverse impacts. Any detailed discussion of methodology or other highly technical aspects of the analysis of the impacts should be included in an appendix to the EIS. This intent is made clear in the regulations. Part 617.9(b)(1) states that EISs must be "analytic and not encyclopedic." Part 617.9(b)(2) states that "EISs must be clearly and concisely written in plain language that can be read and understood by the public…EISs should not contain more detail than is appropriate considering the nature and magnitude of the proposed action and the significance of its potential impacts. Highly technical material should be summarized and, if it must be included in its entirety, should be referenced in the statement and included in an appendix."

Comment: Language pertaining to the environmental setting should be amended to require analysis of demographic characteristics of a community, socio-economic status of residents and recent public and private projects.
Response: An amendment to the existing language is unnecessary. Presently, demographic information, socio-economic information and existing facilities may be included in the description of the environmental setting. The inclusion of these issues should be determined by the lead agency during scoping. Those components of the environmental setting that relate to potential environmental impacts should be the focus of the description.

Comment: One commentor suggested that the following provision be inserted at Part 617.9(b)(5): "for a state agency action within a heritage area or urban cultural park, the draft EIS must indicate the action's consistency with an approved heritage area management plan or urban cultural park management plan." Pursuant to Section 35.07(3) of Parks, Recreation and Historic Preservation Law, state agencies are required to coordinate their activities with state parks and the appropriate local government when approved management plans are in effect.
Response: Agreed. The change has been made.

Comment: Part 617.9(b)(5)(iii)('g') appears to suggest that the EIS need not address agricultural impacts for actions taken outside agricultural districts or within districts when the filing of a notice of intent is not required pursuant to section 305(4) of the Agriculture and Markets Law. The commentor suggested that this point should be clarified, because SEQR should address impacts on agriculture regardless of the applicability of section 305(4).

Response: Agreed. A substantial change in the use or intensity of use of agricultural land is a criterion to be considered in determining significance under Part 617.7(c)(1)(viii) and must be addressed in an EIS when it has been identified as a significant adverse impact.

Comment: The items for analysis in an EIS should include adequacy of infrastructure, consistency with community character, consistency with adopted plans, effect on generation of hazardous, radioactive or infectious waste and reduction methods.
Response: These items are covered in the criteria for determining significance and if they result in identification of potential significant adverse environmental impacts, they are discussed in the EIS. It is unnecessary to list them separately.

Comment: Define "reasonableness."
Response: The concept of reasonableness is discussed in The SEQR Handbook (1992), at page 4.

Comment: Delete the language which limits the alternatives that a private project sponsor should consider.
Response: In some cases, it may be quite unreasonable to require private project sponsors to commit to sites which they do not own or have an option to purchase or to commit to projects that are not feasible given the project sponsor's objectives and capabilities. If the suitability of the site for the proposed activity is an issue a conceptual discussion of siting may be required. The existing language allows the lead agency to assess the appropriateness of such an obligation on a case by case basis.

Comment: All items on the list of underlying studies, reports and other information obtained and considered in preparing the EIS should be made available by the lead agency for public inspection, and preparers should certify the EIS and be required to meet with the public. Court decisions have allowed data and calculations to be kept secret and developers can conceal the methods used to demonstrate potential impacts.
Response: The studies and reports used to prepare the draft EIS should be available for public review at the time the notice of completion is issued. Gaining access to these documents should not require a Freedom of Information Law (FOIL) request. Many times these items are general reference books or scientific articles that can be obtained at local public or university libraries. If certain reports are not in the public domain then it is incumbent on the lead agency to have the project sponsor make these items available for public inspection either at the offices of the lead agency or at a local library. Factual data used in impact analysis are available consistent with the requirements of FOIL. Making preparers available to the public for informal questioning is often done at informational meetings. However, requiring this as part of the EIS process would require a formal venue

and probably lead to an attorney-driven process that would parallel DEC adjudicatory hearings in procedure. Making the process more formal would likely diminish the exchange of information and limit the ability of the general public to participate.

Comment: Part 617.9(b)(8) recognizes that final EISs are frequently made up of the draft EIS, the substantive comments received and the lead agency's responses. A possibly better practice is a partial or complete revision of the draft. For such situations, subsection (b)(8) should be revised so that it is clear that the draft EIS itself need not be bound into the final EIS, but incorporated by reference.

Response: Since subsection (b)(8) states that the "draft EIS may be directly incorporated into the final EIS or may be incorporated by reference", it may be logically inferred that where a final EIS consists of a revised draft EIS, the draft EIS itself may be incorporated by reference. This issue is discussed in The SEQR Handbook (1992), page 74.

Guidance for cumulative impacts in EISs

Issue: The existing regulations merely require analysis of cumulative impacts in certain limited circumstances; more specific guidance is needed. In addition, guidance is needed for those lead agencies which exercise their discretionary authority to analyze cumulative impacts where they believe it is relevant and important to do so.

Revision: None. The Department has decided to defer drafting guidance to give project sponsors and the public an opportunity to assist in its development (see discussion on page 9).

Alternatives considered: The no action alternative leaves the regulations with the need to address cumulative impacts, where necessary, but provides no guidance on the scope of the analysis to be included. The Department has decided to adopt the no action alternative to allow further study and discussion of this complex issue.

Comment: Commentors are concerned about including in a cumulative impact analysis new projects that came to light during the EIS process. Would these new projects have to be addressed? Since new projects are always being proposed how would an analysis ever be completed?

Response: Scoping offers the opportunity to place limits on what needs to be reviewed in an EIS. As the courts have previously noted, SEQR is a review process that is intended to result in a decision; it is not an endless re-studying process. See, Jackson v. NYSUDC, 67 NY2d 400 (1986).

Comment: Guidance is needed on mitigation of cumulative impacts.

Response: The Department agrees and believes it is a key element in the SEQR process where cumulative impacts have been identified and analyzed. Guidance will be developed following the completion of the efforts of the Cumulative Impact Working Group.

Comment: Concerns were expressed about the prospective scope and detail of EISs analyzing cumulative impacts, especially whether quantitative analysis would be required and whether all projects in the area of the proposed action must be included.

Response: The intent of the regulations should be to focus on those cumulative impacts that may reasonably be expected to occur. Qualitative analysis may be sufficient, especially when quantitative information is not available or difficult to obtain. Similarly, every project in a described area need not be included in a cumulative impact analysis. One example is a public highway; the project sponsor would not have to consider the interaction of that highway with everything else in the vicinity, but only those specific aspects of the environment that would reasonably be affected. For example, if the highway would result in the partial filling of a wetland and other projects were pending that would also contribute to that result, cumulative impacts to the wetland would be reasonable to consider if they were determined to be significant. The extent of the analysis required for specific types of projects requires further consultation with project sponsors and the public.

Future no action alternative

Issue: Improve the objective consideration of the no action alternative for project proposals.

Revision: The new change compels the EIS writer to consider specifically the capability of a site to environmentally improve, recover or be amenable to restoration and remediation in the absence of the proposed project.

Discussion: This goes beyond a characterization of the site only as it applies today, which may be in a less than optimal state. To only look at a site today or in the near term is an unfair characterization that may inappropriately preclude opportunities for natural or engineered site enhancement and increased value that should be weighed more objectively against the project proposal. This balancing becomes more pivotal in urban settings where the possibly diminished natural values of remaining open spaces that are undeveloped or historically disturbed are "written off" rather than identified as prospects for improvement of the urban environment.

Alternatives considered: The no action alternative for this amendment to the regulations is not preferred as it does not improve the depth of the alternatives analysis in an EIS.

Comment: The Department has required that the no action alternative also discuss the adverse or beneficial changes that are likely to occur on the project site in the reasonably foreseeable future, in the absence of the proposed action. One commentor requested that the term "build year" be added, presumably to limit how far into the future one should look to analyze what will happen to the site if the proposed action is not approved. Another commentor requested that the Department identify the no action alternative as any action not requiring an agency approval that would trigger SEQR (as-of-right).

Response: The phrase "reasonably foreseeable future" contained in the proposed text limits

the analysis of what will happen to the site to a time period that necessarily varies with the site. The "build year" varies with the nature of the project and is not applicable to planning and policy actions. The "build year" refers to the project. In contrast, the term "reasonably foreseeable future" refers to site changes, absent the proposed action. The analysis of the future no action alternative may require looking at potential site changes that will occur after the project's build year. So, the term build year may denote a time period that is too short to allow for a thorough analysis and, therefore, it is not used.

Private project sponsors, at their discretion, may continue to include in the analysis of the no action alternative a discussion of the as-of-right alternative.

Adaptive reuse/Sustainable development

Issue: Need to address the trend of increasing and irretrievable commitment of terrestrial resources, including significant habitats, wetlands, mineral and forest product resources, aquifer recharge areas, open spaces and buffers between other land uses. Encouraging development on existing developed footprints on the land is a key element to ensuring long-term, sustainable development in New York.

Revision: None. The proposed addition of "adaptive reuse" to the list of items to be included when reviewing alternatives for a non-residential project proposal has been deleted from this rulemaking based on comments received.

Discussion: The intent of the proposed adaptive reuse provision was to consider an innovative option in the design of commercial developments. Design contingencies built into new commercial development projects would enable future adaptive reuse, should they not successfully fulfill their original purpose. This could include set-asides for future expanded parking, movable partitions and flexible heating, ventilation and air conditioning systems. These contingencies could be considered for a new construction project that could be transformed to other uses in the future if the original commercial use (i.e., strip shopping mall) did not succeed. Given the relatively large consumption of land area and resources by these types of development and their often high turnover or short life spans, this seemed to be a prudent measure to enable future economic use of disturbed lands rather than abandonment of an existing project site in favor of further development sprawl into undisturbed areas with valued natural or cultural resources.

Comment: The public comments received on this proposal indicate that our intent was not clear. Some commentors confused the proposal with the familiar practice of adaptive reuse of existing structures to preserve their historical or architectural values while maintaining them for productive use. Other commentors were concerned that this option would be required as a new standard for all commercial construction projects in New York State, therefore, an undue economic burden. Finally, some commentors objected to the framing of the adaptive reuse proposal in the context of sustainable development. The proposal was identified by these commentors as an inappropriate and inadequate representation of the Department's sustainable development policies which should encompass far more than such a provision.

Response: In light of the above comments and concerns, the proposed language regarding adaptive reuse is being deleted from this rulemaking. The regulations are flexible enough to allow lead agencies to pursue such an option if it appears to be a reasonable alternative. The Department will provide guidance on the issue of adaptive reuse in The SEQR Handbook when it is revised. The guidance will help further educate affected parties on the intent and approach involved in adaptive reuse considerations. This will also allow the Department time to develop an overall sustainable development strategy.

617.10 GENERIC ENVIRONMENTAL IMPACT STATEMENTS Back

Incentive for undertaking cumulative impact analysis in planning

Issue: The section on generic EISs includes cumulative impact analysis implicitly, but does not provide any incentive for doing such analyses.

Revision: The amendment clarifies that a generic EIS prepared in conjunction with certain planning or land management documents may reduce or eliminate the need for future project-specific cumulative impact analysis by including such issues and by addressing alternatives, mitigation and thresholds for future actions that will avoid such impacts or reduce them to nonsignificant levels

Discussion: Government agencies may prepare generic EISs that address a wide variety of impacts, including cumulative impacts, at a more conceptual level, often on a larger geographic area, than project-specific or site-specific EISs. Generic EISs prepared before development or other activities are proposed gives agencies an opportunity to plan their future courses of action to avoid or mitigate such impacts. The amendments clarify that a generic EIS prepared with a comprehensive plan that addresses cumulative impacts and adopts mitigation measures and thresholds for future actions, reduces or avoids the need for future project or site specific SEQR review. Comprehensive plans are the most appropriate forum for cumulative impact management. Thorough, environmentally sound comprehensive planning will help eliminate or expedite SEQR reviews for individual future actions that are proposed so that actions that conform to the plan and generic EIS can be approved faster. New Town, Village and General City Law statutory provisions encourage comprehensive planning by municipalities in conjunction with SEQR. Use of generic EISs at the planning or zoning amendment stage may substantially reduce the need for project-specific SEQR analysis and EISs for conforming projects.

Alternatives considered: The no action alternative would leave the existing language in this section concerning management and land use plans. However, that alternative provides no specific guidance or incentive for the inclusion of cumulative impacts in generic EISs and in the preparation of comprehensive plans. The preferred alternative encourages the treatment of cumulative impacts at the plan/generic EIS stage in order to avoid or minimize the need to consider them in project-specific assessments. The no action alternative does not clarify the benefits of combining planning and generic EISs.

Comment: Comprehensive planning and a generic EIS places the costs of up-front environmental assessments on municipalities and taxpayers.
Response: This comment is true if a municipality chooses to undertake this approach. However, the benefits to this approach far outweigh the up-front costs. Comprehensive planning allows a community to "step back" and look at existing and likely future development. The community is then able to plan for future development taking into consideration environmental limitations. The generic EIS is the vehicle that allows the community to identify the environmental conditions and to develop thresholds and performance standards to ensure that future development is directed away from environmentally sensitive areas and into areas that have the available infrastructure to support development. The provision added to the fees section that allows a municipality to recover its costs of preparing a generic EIS through a system of chargebacks to project sponsors was intended to offset the costs of the generic EIS.

Comment: A generic EIS prepared for a comprehensive plan may not adequately address the impacts from a site-specific project even though the project is consistent with the comprehensive plan. Site-specific SEQR reviews which consider an existing generic EIS are the most accurate and appropriate mechanism to address cumulative impacts.
Response: The generic EIS prepared on a comprehensive plan was never envisioned to address all subsequent actions. It does attempt to minimize future SEQR review by including a series of thresholds and performance standards. Development proposed in accordance with these thresholds and standards should not be subject to additional site-specific review. The amount of additional review required will depend on the quality of the work done in the generic. Actions following completion of the comprehensive plan/generic EIS will require review to determine consistency with the plan/generic. Additional SEQR requirements for subsequent projects can range from no additional review, to amended findings, to supplemental EISs to negative declarations consistent with the provisions in 617.10(d).

Comment: 617.10(b) may be interpreted to limit the preparation of generic EISs to actions carried out pursuant to the comprehensive plan legislation.
Response: This paragraph was intended to highlight the use of a generic EIS in the comprehensive plan process. Paragraph (a) contains a discussion of the full range of potential uses for a generic EIS.

Comment: The chief failing of the generic EIS process is that it treats a very dynamic process, environmental change, as though it were a static one.
Response: The generic EIS process contains the flexibility needed to account for subsequent changes over time. Agencies are required to compare the impacts of subsequent actions against the generic EIS and determine if additional site specific review is needed.

Comment: The language in 617.10(a) that directs a generic EIS to discuss the "… constraints and consequences of any narrowing of future options" is inappropriate. This should require an economic impact analysis and a takings inventory analysis by government.
Response: This language is unchanged from the existing regulations. The intent is that agencies may identify and consider in the generic EIS how the proposed land use activity will affect future options.

Comment: Further clarification should be provided in regard to future site-specific actions which were not covered by the generic EIS but will not have a significant adverse impact. Logically, a lead agency will need an EAF and coordinated review to make this determination.
Response: Following a generic EIS, the lead agency will have to compare the proposed action against the generic EIS and findings. This will likely require that a project description including an EAF be prepared and submitted by the project sponsor in order for the lead agency to determine consistency with the existing environmental record and the need for additional SEQR compliance, if any.

Comment: A written findings statement should be required when an agency determines that an action will not require further review following a generic EIS.
Response: The lead agency should document the decision that the proposed action is consistent with the generic EIS. This documentation should show that the required comparison of the impacts of the proposed action against the generic EIS has been conducted and the action was determined to be consistent. Since the proposed action is in conformance with the existing environmental review and findings a separate findings statement is not required.

Comment: Section does not include any new inducements for local governments to increase their comprehensive planning.
Response: The inducements provided for comprehensive planning are limited to a clarification of how a generic EIS prepared in conjunction with a comprehensive plan can serve to reduce future SEQR reviews and the provision for chargebacks to recover the costs of generic EIS preparation. Additional incentives to encourage comprehensive planning will have to come from the Legislature. The Legislative Commission on Rural Resources is presently reviewing this issue.

Comment: Why was the term "significant changes to existing" (617.15(d) 1987 regulation) deleted in reference to land use plans? Significant changes to an existing land use plan could be assessed through a generic EIS.
Response: The term "significant changes to existing land use plans" has been moved to 617.10(a)(4).

Findings may be amended and should contain certain information

Issue: Some agencies, in particular, involved agencies, are uncertain about their responsibility regarding findings.

Revision: The revised language clarifies contents of findings and the authority of agencies to amend findings.

Discussion: The revisions clarify court decisions and existing regulatory language regarding an agency's obligation to consider the significant adverse environmental impacts discussed in an EIS, to weigh and balance adverse environmental impacts against social, economic and other benefits and to provide a written rationale for its decision. The findings should also include any conditions the agency has imposed to mitigate impacts to the fullest extent practicable. No new obligations are added, but existing obligations are stated more clearly.

The amendment of findings is also stated explicitly. This may occur when an approved action or the circumstances change and the lead agency must make a decision on the modification. Typically, either a supplemental EIS has been required or there has been a determination that a supplement is not required; in such cases, amended findings may be appropriate.

Alternatives considered: The no action alternative is not preferred as it leaves involved agency obligations and the ability to amend findings unclear.

Comment: Commentors felt that the language on amendment of findings was confusing. Some stated that it created a way to avoid final decisions; others were not sure what circumstances would allow amendment of findings.

Response: As stated in the discussion above, amendment of findings is allowable in limited circumstances. Nonsignificant changes in projects may occur after final approvals; in such cases, if impacts have been considered in the EIS, findings may be amended to reflect a modified decision and project. See Jackson v. NYSUDC, 67 NY2d 400 (1986); Wilder v. NYSUDC, 154 AD2d 261 (1st Dept 1989). Where impacts are significant and a supplemental EIS is required, the original findings may be amended consistent with that supplemental EIS. Findings do not require amendment to account for project changes that are not material or project changes that result in impacts that were adequately addressed in the original EIS record and findings.

Comment: An agency should not be allowed to substantively modify its findings statement and decision without public input.

Response: Projects evolve as they progress from the planning to the design stage. Some of the project changes require that the agency determine if the proposed change is covered by the existing EIS record. This language will allow agencies to document their review of a modified project. If the change will have a potentially significant adverse impact on the

environment and was not adequately addressed by the existing EIS record then a supplemental EIS would be required.

Comment: Several commentors thought that 617.9(d)(5), (May 94 proposal) omitted the requirement that mitigation be the maximum practicable.
Response: The provision has been revised to make it clear that there is no change in the standard, simply a reordering and restatement of the previous standard (see 617.11(d)(5)).

Comment: Several people thought this provision and/or the definition of findings eliminated the requirement that findings be written and that balancing is still required.
Response: The regulations are clear that findings must be written; however, this has been strengthened by additional use of the term in 617.11(a). Both the definition (617.2(p)) and 617.11(d) have been revised to clarify the duty to balance environmental harm against economic, social and other considerations.

Comment: The proposed change in language emphasize economic and other non-environmental considerations to such an extent as to give the perception that environmental protection is a secondary goal. This changes findings into a cost-benefit analysis.
Response: The changes in the findings language clarify what is currently the requirement for balancing the identified environmental impacts against the social and economic considerations. The revised language does not diminish the weight given to environmental impacts.

Comment: Several people stated that involved agencies should have to file findings statements within a certain time after the lead agency; one commentor suggested that only the lead agency prepare findings with input from involved agencies; another suggested involved agencies should file findings with the lead agency and other involved agencies; and one commentor suggested that the lead agency should be required to provide written notice to the applicant when it would be unable to issue findings within 30 days and could seek an additional period of time not to exceed 30 days.
Response: Since agencies are not always working within the same timeframes and their findings are usually timed with a final decision on an action, it is not possible to set a time period within which involved agency findings must be filed. It is also important to continue to have each involved agency be responsible for making its own findings since each agency may have different perspectives on the information in an EIS based on their particular jurisdiction; this requirement also ensures that each agency independently considers the environmental impacts of its decision. Findings are required to be filed with other involved agencies and this requirement is highlighted in the revised regulations; in this way, involved agencies can tell each other what conditions each is imposing, thereby avoiding conflicts or overlaps. The regulations are clear that a lead agency must make its findings within 30 days if the project involves an applicant. The change proposed by the commentor to allow an

additional 30 days would weaken this requirement and probably result in more lead agencies delaying the release of findings. The lead agency could always seek to extend the 30 day time period consistent with the provisions of 617.3(i).

Comment: One commentor argued that ten days is not long enough for consideration before making findings and would like local government officials to receive findings.
Response: We have not proposed any change to the period following acceptance of a final EIS. There has been at least one case where a final EIS has contained so much new information a supplement might have been required; in such a case, the period following final EIS acceptance was three weeks. This was upheld by the Court of Appeals in Webster Assocs. v. Town of Webster, 59 NY2d 220. In most cases, scoping and the public comment period for review of the draft EIS gives adequate time for public review and comment. The ten days following acceptance of the final EIS is primarily a consideration period for the lead and involved agencies. Regarding the filing of findings, in most cases, the local government is at least an involved agency and would receive findings.

Comment: Requiring a written findings statement when an action is disapproved is contrary to Article 8 and places an unnecessary burden on lead agencies.
Response: This requirement has been in Part 617 since the January 1978 version of the regulations and it is a matter of equity. Without a findings statement the applicant would not have a written explanation of the reasons for the agency's denial.

Comment: The revised regulations mandate that the findings Statement and project approval must be made simultaneously.
Response: Subdivision 617.11(c) states that "findings and a decision **may** be made simultaneously" (emphasis added). This change was made to clarify that a findings and a decision could be made at same meeting of a local agency such as a planning board.

617.12 DOCUMENT PREPARATION, FILING, PUBLICATION AND DISTRIBUTION REQUIREMENTS Back

Current notice and filing requirements are confusing.

Issue: The current language regarding the content of notices and required filing points is confusing.

Revision: The entire section regarding document preparation, filing, publication and distribution has been revised to clarify the requirements.
Discussion: The present language regarding the preparation and filing of SEQR notices is confusing and in many places redundant. The notice requirements have been reorganized to reduce the redundancy and guidance regarding the filing, distribution and publication of notices has been added. Changes have also been made to the publication of the Environmental Notice Bulletin (ENB) in the effort to make the ENB more efficient and timely.

The Department also explored ways to reduce the filing requirements imposed on agencies. One change that is included is the elimination of the Commissioner as a filing point for all notices (see 617.12(b)). This should reduce postage costs for agencies/project sponsors and reduce document storage costs for the Department. The Department is also considering eliminating the filing of draft and final EISs with the Commissioner and using the copy filed with the regional office to satisfy the filing requirement. The Department is also exploring the possibility of having copies of these documents sent directly to the State Archives. At the present time, the Department stores EISs until a complete record has been filed and on a yearly basis transfers them to the archives. Providing these documents directly to the State Archives could make them available to reviewers and researchers in a more timely fashion.

Comment: Lead agencies should be required to provide the project sponsor with the rationale in support of the determination and the documentation used to support the negative declaration.
Response: The rationale is a required part of a determination of significance and a copy must be provided to the project sponsor. Additional documentation used to support a negative declaration is frequently provided by the project sponsor as part of the application. Any new material developed by the lead agency that would assist the applicant in complying with the agency's determination should be included in the decision record for the action and provided to the project sponsor.

Comment: When issuing a positive declaration, the lead agency should provide a detailed determination of which impacts need to be addressed so that the EIS is targeted to the basic findings of the EAF.
Response: The purpose of the positive declaration is to alert agencies and the public that an EIS will be prepared. It does require that the lead agency identify in the notice the potential significant adverse impacts that require preparation of the EIS (see 617.12(a)(2)(ii)). The process for identifying in detail which impacts will be analyzed in the EIS is scoping and this requires that the EAF be reviewed as part of the scoping effort.

Comment: It is inappropriate for the positive declaration to include information regarding how scoping will be conducted. This is too early.
Response: The regulations require that the positive declaration state whether scoping will be conducted. Lead agencies are encouraged to also provide information regarding the conduct of scoping (i.e. the availability of a draft scope and the date/time/location of a meeting) in the positive declaration if that information is known at the time.

Comment: The Environmental Notice Bulletin is frequently late and it is not an effective means of providing public notice.

Response: The Department has contracted for management and production of the Environmental Notice Bulletin (ENB). The Contractor is Business Environment Publication, Inc. of Clifton Park, New York. The contract terms require the publication to be mailed on the issue date to insure more timely receipt of the ENB. Changes in the management of the ENB will improve the timely delivery of public notice via the ENB. In addition, the ENB has been expanded to include a calendar of events that can be used by agencies to provide notice of training events, conferences, meetings and other appropriate events.

Comment: Several commentors stated that it would be unfairly burdensome and inappropriate for the regulations to require that comment periods commence from the date of publication in the ENB. The notices that now must be published in local newspapers (most of which are daily) offset the need to rely on the ENB as a noticing location.
Response: The Department agrees and has deleted this provision to allow the notices to revert to their current publication methods. However, the only SEQR notice that currently must be published in a newspaper of general circulation is the notice of public hearing. The notice of completion of a draft and final EIS, notice of negative declarations for Type I actions and CNDs are only required to be published in the ENB. Comment periods on CNDs will continue to commence with publication in the ENB. This requirement has been in place since 1987. The Department to date has never received a complaint that this provision is burdensome. The concept behind starting comment periods in the ENB is as follows:

- All notices of completion of draft and final EISs, notice of public hearing on draft EISs and negative declarations (CNDs and Type I actions) are currently published in the ENB;

- It would have provided reviewers of EIS's with certainty regarding the start of public comment periods;

- The ENB is required by contract to be mailed on its date of publication;

- There is no cost associated with publication of required notices;

- The ENB provides a single vehicle for publication of all SEQR notices.

Comment: A notice of hearing should be sent directly to the parties, should be published on consecutive days and placed in foreign language newspapers when the community contains a significant number of residents who do not speak English as their primary language.
Response: The regulations require that a notice of hearing be sent to all individuals that have requested a copy. The lead agency has the authority to designate the newspaper to be used

for the notice. It is incumbent on the lead agency to designate the most widely circulated paper in the area affected as the paper for noticing. Publication of the hearing notice in a non-English newspaper should be considered by the lead agency when the community contains a large percentage of residents that do not speak english. Publication of the notice on consecutive days would not be cost effective.

Comment: The requirements regarding noticing should prohibit the issuance of notices during periods when the public is less likely to participate. Times such as holidays and tax time are not conducive to public participation.
Response: Although the time of year is a consideration for all agencies, the Department cannot prohibit the conduct of business during these times. In addition to the two examples noted there are dozens of other periods of time when one group or another would prefer not to become involved in the review of a project. Trying to avoid all the sensitive periods would leave only small, widely separated windows of opportunity. This issue is best left to agencies to consider on a case-by-case basis.

SEQR records need not be kept forever

Issue: There is confusion regarding the amount of time an agency must retain SEQR documentation.
Revision: No change. The provision that SEQR documentation should be retained for a reasonable length of time that was included in the draft regulations has been deleted.
Discussion: SEQR records do not require permanent retention. SEQR documentation should be retained for the same length of time as the rest of the approval/decision record. However, agencies would be wise to keep the EISs and appendices available because they contain valuable information on existing environmental conditions.

Comment: The phrase "a reasonable length of time" is confusing. Either a set retention period should be established or the phrase should be deleted.
Response: The phrase "a reasonable length of time" has been deleted. Agencies should be guided by the applicable record retention policy for the action that the SEQR documentation is a part of, in order to establish the retention time.

617.13 FEES AND COSTS Back

Clarification of fee assessment and calculation methods

Issue: The existing fee assessment authority requires clarification.
Revision: Language is amended to:

- clarify that fees can be collected for draft EIS or final EIS preparation or review;
- clarify the authority of the lead agency to charge future project sponsors for EIS costs incurred when a generic EIS has been prepared;
- add the cost of the land into the basis for calculating SEQR fees for non-

residential development; and

- clarify that the fee calculation equation should include cost or fair market value (FMV) of the land, whichever is higher. Fee caps remain the same.

Each of these amendments will clarify ability to assess SEQRA fees and will guide agencies in the calculation of that fee.

Discussion: Numerous issues have been raised over the years concerning the scope of work to be included in SEQR review fees and the equities of the fee formulas. These changes are intended to strike a balance between the need for lead agencies to assess a fee adequate to cover its necessary review costs and fairness to the project sponsors in the payment of fees. The Department is codifying its longstanding position regarding the ability of lead agencies to chargeback project sponsors for a fair share of generic EIS preparation.

Alternatives considered: The no action alternative is not preferred; it would not clarify this somewhat confusing provision.

Comment: The SEQR statute does not allow charging an applicant for the cost of any EIS which is not directly connected with a specific action which the applicant requests from an agency. This item should be part of a legislative package allowing impact fees. Alternatively, the chargeback process should be optional and should require the written consent of affected applicants prior to a lead agency's undertaking a generic EIS.

Comment: If a lead agency prepares a generic EIS on an action (e.g., traffic improvements in a corridor) and an applicant subsequently prepares a site-specific EIS for a particular project in the corridor (e.g., construction of a commercial building) the SEQR statute does not authorize the lead agency to collect fees for the generic EIS. This is because ECL §8-0109(7)(a) requires that the fee be assessed for a draft EIS or EIS only "on the action which the applicant requests from the agency."

Response: The chargeback, in this case, is part of the total SEQR fee assessed for the applicant's project, and the chargeback and the fee when added together cannot exceed the cap for a site-specific project. It would be impractical to require the written consent of landowners prior to preparation of a generic EIS since their status as a subsequent applicant may not be readily ascertainable.

The SEQR fee is not and should not be tied to an impact fee. It is a fee charged for either the preparation or review of an EIS while an impact fee is assessed to recover the costs of needed infrastructure improvements. The Department disagrees that the SEQR statute precludes allowing the chargeback for preparation of a generic EIS. When ECL §§8-0109(7)(a) and 8-0103(3)(5)(7)(8) are read together, the chargeback "in order to recover costs incurred" in preparing the generic EIS is authorized.

The environmental analysis contained in a generic EIS actually benefits the community and subsequent applicants in two important ways. First, the generic EIS may set out the conditions, criteria or thresholds for which future site-specific actions may be undertaken without the need for further SEQR review. Second, the generic EIS may discuss and resolve

important preliminary issues that applicants would have had to analyze. Thus, applicants are saved money on engineering costs for project design, and they are saved time on the environmental review process. A third advantage is that it enables agencies to evaluate cumulative impacts, infrastructure and broad land use issues prospectively rather than on a case-by-case basis

The commentor's example on the analysis of traffic impacts illustrates how a generic EIS clearly benefits subsequent applicants. Projected traffic impacts and alternatives for needed improvements may be discussed in the generic EIS. This information then becomes available to the sponsor of subsequent projects. Thus, clearly, the generic EIS and the subsequent site-specific environmental review for the applicant's project are interconnected. Clarifying that the chargeback is authorized will make it easier for agencies to identify critical environmental thresholds (as required by the SEQR statute) through the use of generic EISs. At the same time, this clarification should assist agencies in streamlining subsequent site-specific reviews for applicants.

Comment: Clarify that SEQR fees are only for EISs and that additional fees are not allowed for review of EAFs. Also, clarify that a lead agency may collect a fee for: 1) either preparation or review of a draft EIS; AND 2) either preparation or review of a final EIS.
Response: Although we believe that this is apparent from the language of the existing fee section, we have added a provision clarifying that a fee may not be charged for an EAF or determination of significance. We have also clarified the language on fees for either preparation or review of draft EIS/final EIS.

Comment: The fee section mixes terminology regarding cost, value and price. Cost is usually a historic number - what someone has paid; where cost is projected it is more appropriate to say "probable cost". Price is an amount agreed on between a buyer and seller. Value is the fair market value of and asset to render a return on investment.
Response: Changes have been made in 617.13(b) through (d), to reflect these comments and to clarify these differences.

Comment: There were several comments about the use of fair market value (FMV): it is confusing; is it value as the land is fully developed or "as is"; assessed valuation should be used for FMV; use assessed value divided by equalization rate.
Response: We have added language to clarify that FMV is determined by assessed valuation divided by equalization rate; while this will not always reflect what a willing seller would pay because assessed values are not always current, it is a simple, noncontroversial way to quickly establish FMV for SEQR fee purposes. Value of land for assessment purposes is usually based on its projected "highest and best use".

Comment: Cost recovery by lead agencies for generic EISs should not be restricted only to

preparation of comprehensive plans but should apply to areawide planning efforts.
Response: We have modified the language to reflect that fees for an areawide generic EIS may also be subject to chargebacks.

Comment: Fairness requires that fees for non-residential and residential project both be 2%.
Response: Because of the different elements that go into to total project values on which fees are based, the difference in percentages works fairly. We have modified the elements that go into calculation of non-residential projects to help keep this balance.

617.14 INDIVIDUAL AGENCY PROCEDURES TO IMPLEMENT SEQR Back

Remove existing option for adoption of additional criteria for determining significance

Issue: The present language that allows agencies to adopt additional criteria for determining significance can result in different criteria being applied to proposed projects. This could cause confusion for project sponsors and the public.

Revision: The Department proposes to delete language in 617.4(e) and in 617.11(a) that allows agencies to adopt additional criteria.

Discussion: Few agencies have adopted additional criteria for determining significance of an action. This is because there is no benefit gained from the effort. The existing criteria are so broad that they effectively cover all potential situations. Eliminating this option reduces a potential source of confusion for agencies, project sponsors and the public with no adverse effect on the environment.

Alternatives considered: Retain the current language (no action). This alternative is not preferred because:

- Agencies and project sponsors may be confused about which criteria to apply when one of the involved agencies has adopted additional criteria.
- It hinders the consistent application of the regulations statewide.
- Few agencies have exercised the option.

Comment: Agencies should be allowed to adopt additional criteria. It is no more confusing than adopting additional Type I or Type II actions.
Response: The Department believes that the opportunity to adopt additional Type I and Type II actions allows a municipality to tailor the SEQR process to suit the specific environmental concerns of their community. Thresholds can be adjusted, new items can be added. The existing criteria for determining significance are broad enough to cover situations in any municipality.

Comment: Local agencies should not be empowered to adopt their own lists of actions that do not require environmental review without public review and input.

Response: In order to adopt a local Type II list an agency would have to comply with the requirements for adopting a local law, rule, regulation or ordinance and hold a public hearing (see 617.14(a)).

Critical Environmental Areas

Issue: The classification and review of actions proposed wholly or partially within or substantially contiguous to CEAs as Type I actions emphasizes procedure over substance. Agencies and project sponsors view the presence of a CEA as a requirement for more procedural steps and tend to overlook the substantive obligation to consider how the project will impact the CEA. In addition, small Unlisted actions are automatically upgraded to Type I actions which are subject to the additional procedural requirements that overwhelm the review capabilities of agencies.

Revision: A separate criterion has been added, 617.7(c)(1)(iii), to require consideration of a project's impact on the environmental characteristics of a CEA when determining significance; language is revised in section 617.14(g) to clarify what information is needed to designate a CEA and to clearly state that the potential impact of any Type I or Unlisted action on the environmental characteristics of the CEA must be evaluated in the determination of significance; and the provision that upgraded all Unlisted actions to Type I if it occurred within, contiguous to or substantially contiguous to a CEA has been deleted from the Type I list. The EAFs have also be revised to increase the attention on potential for impact to a CEA.

Discussion: A project's location in or near a CEA should focus the reviewer on the project's potential for significant adverse impacts on the specific exceptional or unique environmental characteristics of the CEA that caused its designation. The current full procedural obligations required by a project's classification as Type I do not by themselves focus the environmental assessment on the environmental characteristics and resource values of the CEA. Agencies and project sponsors tend to focus their efforts on the completion of the additional procedural steps required for Type I actions instead of on the substantive impact issues.

The determination of significance for an action in a CEA often fails to contain an analysis of the project's impact on the CEA. In addition, the automatic upgrade to Type I generates excessive paperwork for relatively minor actions in or near CEAs with no environmental benefit. Coordinated review and more extensive filing procedures for actions which are not significant are unnecessarily burdening agencies and diverting time and effort away from actions which may have greater potential for impact.

Designation of a CEA should encourage more sensitivity to the potential adverse impacts on the resources associated with the CEA. Removing projects located in or near CEAs from the Type I list and emphasizing that the adverse impacts from these projects must be assessed in determining significance will increase the substantive requirements of the existing regulations without imposing additional procedural burdens. An agency always has the option to coordinate its review and require the preparation of a full EAF but, it will be able to use discretion in requiring these additional procedural steps. Agencies can also adopt their

own Type I list to require that all Unlisted actions in a CEA located in their political jurisdiction be treated as Type I actions. Requiring that the CEA designation process contain an identification of the area's unique environmental characteristics will ensure public awareness of the resource and will focus attention on the need to protect and preserve these environmental characteristics. The shift from a location-based procedure to one that is based on how a proposed action will impact the CEA's environmental characteristics also removes the uncertainty of "how close" to a CEA a project has to be before impacts on the CEA must be considered in the SEQR review.

Alternatives considered: Retain the current Type I listing for projects located wholly or partially within or substantially contiguous to CEAs. This option is not preferred because:

- It would not enhance substantive review of projects located near CEAs.
- The current environmental review of projects in or near CEAs does not accomplish the initial objective of protecting the exceptional or unique resources of the state.
- The additional procedural steps are causing agencies to spend time on paperwork without environmental benefit.

A second alternative is to require a generic EIS to discuss the resource values of any proposed CEA. This option is not preferred because:

- It would constitute another burden on agencies which want to designate CEAs.
- It may discourage CEAs from being designated.
- It would not address the issue that non-significant actions are unnecessarily being subjected to Type I procedural requirements.

Comment: Many commentors were concerned that deletion of CEAs from the Type I list would result in less attention to the review of projects in a CEA and less protection of these sensitive resources due to the loss of the presumption that the action is likely to have a significant impact.

Response: Unlisted and Type I actions must comply with the same substantive requirements in the determination of significance. It is true that Type I actions tend to receive more attention than Unlisted actions but this is due to the additional procedural requirements. As explained above, the Department wants to shift the attention from procedural compliance to substantive compliance. The addition of a separate criterion to consider in the determination of significance, additional provisions in the EAFs and the specific requirement that the determination of significance for an action must evaluate the potential impact of the action on the environmental characteristics of the CEA will increase the protection of the resources in a CEA.

Comment: All waters of the state should be designated by DEC as a CEA.

Response: CEAs are intended to be specific geographic areas that contain exceptional or unique characteristics. The DEC agrees that the waters of the state are a resource that

requires protection. However, designation as a CEA does not in any way limit or prohibit subsequent uses. Existing regulatory controls such as Article 15, Title 5 of the ECL - Protection of Waters and Article 17, Title 8 of the ECL - State Pollutant Discharge Elimination System permits are more effective ways to protect the water resources of the state from degradation.

Comment: The designation process for a CEA should require coordinated review and public comment should be encouraged.
Response: Since the designation on the local level is usually made by a legislative body there are typically no other involved agencies. Agencies are encouraged to contact other municipalities and agencies that may be affected by the designation to allow their participation and at a minimum they must provide notification following designation. The designation process already requires public notice and a public hearing (617.14(g), see also 617.4(h) 1987 regulation).

Comment: Substantive review of projects in a CEA can be improved by revising the full EAF and requiring broad public notice for any action that may impact a CEA.
Response: The Department has revised, as part of this rulemaking, both the full and short EAF to increase attention on CEAs during the assessment stage of the review. No additional public notice is being proposed.

Comment: The definition of a CEA should be expanded to explicitly include agricultural values.
Response: The word "agricultural" has been added to the list of characteristics that may warrant a site being designated as a CEA.

Comment: If the problem is caused by inappropriate CEAs then DEC should develop a process for the review and approval of CEAs. This should include a provision for the reauthorization of existing CEAs.
Response: The primary problem is the procedural focus of the review that is reinforced by treating all Unlisted actions in a CEA as Type I. Existing CEAs will not require reauthorization under the revised regulatory provisions. Reauthorization would cause an additional burden on local agencies and could result in the loss of valuable CEAs.

Comment: Any action that will affect a CEA should be prohibited unless there is no practicable alternative.
Response: As noted above, the designation of a CEAs does not limit the types of actions or prohibit any action from occurring. The only way to accomplish that goal would be through purchase of the site or the imposition of land use controls such as zoning. Purchase of all lands in a CEA by the state is unrealistic, and zoning is a local matter. A municipality could enact

zoning to protect the resources of the CEA from inconsistent uses but the state does not have that authority.

Comment: New process for designating CEAs will make it more difficult to establish CEAs.
Response: The process for designating a CEA is not changed by this amendment. The only additional requirement is that the notice must identify the specific environmental characteristics of the area that warranted designation as a CEA.

Comment: Proposed language would require that impacts from subsequent actions be assessed at the CEA designation stage. This shifts the burden for project review from project sponsors to the designating agency and will lead to more Article 78 proceedings as the only recourse available to challenge the original assessment of impacts is litigation.
Response: The proposed language was not clear on this issue. The language has been changed to clearly state that the review of impacts takes place after the CEA designation on a case-by-case basis. The burden of evaluating impacts has not been shifted. The project sponsor is responsible for providing the lead agency with information about the proposed action and the potential impacts. The lead agency remains responsible for evaluating those impacts and determining if there is a potential for significant impact on the CEA. No increase in litigation is anticipated.

Comment: Projects in a CEA should be held to a higher not lower standard of review.
Response: The change from a procedurally driven process to one that requires a more substantive analysis of the impacts on a CEA will provide a higher standard of review by forcing lead agencies to consider the impact of a proposed action on the environmental characteristics of the CEA in the determination of significance.

Comment: Limiting review to only the environmental characteristics of the CEA that have been identified severely restricts the process. All potential impacts must be assessed.
Response: The review is not limited to only those environmental characteristics but it must focus on those characteristics. In order to determine if there will be an impact on any one characteristic or resource it is necessary to review the whole action and all of the potential adverse impacts.

Comment: How will the change in the CEA process affect those CEAs already designated that may not have identified the specific environmental characteristics warranting designation?
Response: There is no requirement that these existing CEAs be reauthorized. The Department expects that agencies will be able to easily identify the characteristics that warranted the designation of the area as a CEA by reviewing the record prepared in support of the designation.

Comment: The change to the CEA process is not needed with the changes that have been proposed for the Type II list.
Response: Reducing the number of projects subject to review was not the goal of the change in the CEA process. The Department's primary objective was to increase the substantive review of actions that have the potential to impact the resources of the CEA. The commentor is correct in noting that the changes to the Type II list will reduce the number of Unlisted actions that could be elevated to Type I under the existing provisions.

Comment: Removing the additional procedural requirements may encourage the designation of CEAs for political reasons rather than resource protection.
Response: The Department does not expect any increase in the number of CEAs designated. Removing the procedural burdens associated with the subsequent review of actions in a CEA is not that great of an incentive that it will cause municipalities to consider CEAs for non-environmental reasons. The requirement to clearly identify the exceptional or unique characteristics in the designation process should help to discourage frivolous designations.

Comment: Current requirement for coordinated review offers involved agencies an opportunity to participate at the earliest stage of the review.
Response: Any involved agency has the option to initiate a coordinated review for an Unlisted action. That opportunity has always existed under SEQR. Municipalities with CEAs can choose to require coordination of actions that may impact the CEA. This change gives them the discretion to require coordination as needed. A local agency could also add Unlisted actions in a CEA to its local Type I list.

Comment: Regulations should empower agencies in adjacent municipalities to act as involved agencies when a project will impact a designated CEA.
Response: In order for an agency to be an involved agency it must have the authority to fund, approve or undertake an action. The statute and the regulations are clear that SEQR does not change the existing jurisdiction of agencies nor the jurisdiction between or among agencies (see 617.3(b)).

Comment: Requiring that actions in a CEA be treated as Type I actions provides protection against a lead agency arbitrarily determining that an action will have no significant impact.
Response: A Type I listing for an action does not offer any certainty that an agency will determine significance more appropriately than it would if the action were Unlisted action. Greater protection will be offered by the change to a more substantive requirement for review of actions in a CEA. The Department believes that it will be more difficult for a lead agency to ignore the potential for impact to a CEA, since the regulations require the explicit evaluation of the CEAs unique features as a relevant area of environmental concern.

Comment: The proposed changes to the criteria and the EAFs are sufficient to increase the substantive review of actions in CEAs. It is not necessary to remove them from the Type I list.
Response: Improving the substantive review of impacts to a CEA was the primary goal of this revision but it was not the only goal. The changes will also give a municipality the discretion to require coordination and the full EAF, as needed, instead of the universal obligation that is currently mandated.

Comment: The Department does not have the statutory authority to promulgate the provisions governing the establishment of CEAs within the Part 617 regulations. The authority for agencies to establish CEAs should be deleted.
Response: Sections 8-0101, 8-0103 and 8-0113 give the authority to DEC to establish the CEA procedure within the SEQR regulations. The Department considers the designation of CEAs to be a means by which agencies can identify critical resources. Protecting those resources from inappropriate development is one way to insure that critical thresholds necessary for the health and safety of the State's resources are not reached.

Comment: Commentor suggested that 617.14(g) should require that economic evaluations and studies are done and programs implemented to offset declines, evaluations on wildlife habitat and management plans implemented to preserve habitat and all adjoining property owners are inventoried and it is documented that the CEA designation will have no impact and place no restrictions on all such private property.
Response: Full public disclosure and debate on the proposed designations and their implications is encouraged. The designation of a CEA is a local choice and procedures for documenting the effect of CEA designation are the province of the designating body.

Comment: CEA designations should be reevaluated every 5 years or the designation would automatically lapse. CEAs should be abolished when they are no longer necessary.
Response: Reauthorization of CEAs will not be required based on this rulemaking procedure. To force local governments to reauthorize and reevaluate CEAs would create an administrative burden on the agencies that have no identified benefit. Allowing a CEA to automatically lapse could result in the loss of valuable CEAs. Nothing in the regulations prohibits a local agency from abolishing those CEAs that they have created. The procedure to abolish a CEA would be exactly the same as the procedure to establish a CEA.

Comment: The procedure of requiring a public notice that contains a description and justification of CEA's is onerous.
Response: A description and mapping requirement for CEAs has been in the regulations since 1987. In order for an agency to evaluate the potential environmental impacts of project on a given area containing an identified unique or special characteristic, those characteristics must

be identified at designation to provide a reference for subsequent reviews.

Comment: All individual property owners within a proposed CEA should be directly notified by personal service of the pending designation.
Response: The existing procedures already contain provisions to involve and alert the public in the designation process by requiring public notice and a public hearing at which time the public has the opportunity to present its concerns to the designating agency prior to adoption of the CEA. Providing notice to all affected landowners would be an effective means for providing notice. However, the Department has chosen to allow agencies administrative flexibility in providing notice.

Comment: DEC should review and approve the designation of CEAs.
Response: The regulations give to local and state agencies the authority to designate a specific geographical area within their jurisdiction as a CEA with the objective that the CEA reflect the values and considerations of the community. The Department does review the filings to assure that they comply with the minimum regulatory requirements.

Comment: Dropping the surety that all actions in a CEA are Type I will increase possibility for litigation.
Response: All actions must be classified and all actions subject to environmental review under SEQR must be scrutinized for potential environmental effects. The procedural step of automatically causing an action to be considered as Type I does not necessarily increase this level of review. The Department feels that the proposed changes force agencies to evaluate more specifically the possible effects on the CEA, increasing the level or degree of scrutiny.

Comment: Removal of Type I classification will lead to ruinous over-development or siting of inappropriate facilities in CEAs.
Response: Both Unlisted actions and Type I actions require that the lead agency identify all relevant areas of environmental concern and analyze those areas to determine the potential significance of the action. As noted in the discussion, the additional procedural requirements of a Type I action do not guarantee that the impacts from a proposed action will be adequately assessed or mitigated. However, the substantive improvements contained in this rulemaking will require that agencies consider and assess the potential for impact to CEAs.

Comment: The regulations should provide for a period of time, at least nine months, for local agencies to add actions within a CEA to their local Type I list.
Response: All agencies continue to have the ability to coordinate the review of Unlisted actions and they also maintain the ability to require a full environmental assessment form for any Unlisted action comparable to Type I actions. With an effective date of January 1, 1996, all agencies will have a three month period to consider if local SEQR procedures should be

adopted or modified to place all Unlisted actions within a CEA on their own Type I list.

Comment: Since there are no reported cases challenging an agency's CEA designations it can be inferred that the designations were proper.
Response: The modifications to the CEA process do not address how CEAs were designated or the choices of CEAs. The modifications are designed to emphasis substantive analysis over the present procedural requirements.

Comment: The CEA process should be revised to require that areas contain two or more of the criteria in order to allow designation.
Response: The concept behind the designation of a CEA is to protect unique resources of the state. Requiring that sites contain two or more of the listed criteria may in theory reduce the number of CEA candidates and put sensitive sites at risk. In reality, the criteria listed are so broad that it is likely that all CEAs already meet this test.

617.15 ACTIONS INVOLVING A FEDERAL AGENCY Back
No substantive changes

617.16 CONFIDENTIALITY
No substantive changes

617.17 REFERENCED MATERIAL
No substantive changes

617.18 **SEVERABILITY**
A severability clause has been added to the regulation.

617.19 EFFECTIVE DATE
The effective date for the regulation will be January 1, 1996.

617.20 APPENDICES
Appendices d, e, f, g, h and i have been deleted from the regulations. Forms will continue to be available, but they will be removed from the text of the regulation so that revision of the forms will not require a regulation change.
Issue: Keeping the forms in the regulations acts as a disincentive to the Department to modify the forms.

Discussion: Having the forms in the regulations requires that the Department initiate a formal rulemaking prior to revision. The Department proposed to remove the forms from the regulations to allow revision to occur in a more timely fashion. The Department will continue to attach the forms to all copies of Part 617 provided for public distribution.

Comment: Many individuals objected to the removal of the forms from the regulation. Several commentors identified the statutory requirement for the regulation to contain model environmental assessment forms.

Response: The model environmental assessment forms will be retained in the regulation as required by the statute. The other forms will be deleted from the regulation but included in copies of the regulation provided for public distribution.

Issue: Revise the Environmental Assessment Forms (EAFs) to conform with the changes proposed for review of actions that may impact critical environmental areas.

Revision: Part 2 of the Full EAF will be revised by inserting a new question number 14. Existing questions number 14 through 18 will be renumbered to be questions 15 through 19. Part II of the Short EAF will be revised to include a question regarding the potential for impact to a CEA. Part III will be revised to add a new sentence to read "If D in Part II has been checked yes, then the determination of significance must evaluate the potential impact of the proposed action on the environmental characteristics of the CEA."

Discussion: In order to increase the attention on CEAs during the assessment stage of the review, the Department is proposing to revise both the Full and Short EAF to include specific questions regarding the potential for impact to the environmental characteristics of a CEA. These changes will compliment the changes being proposed to the existing CEA process and it will require agencies in the conduct of an environmental review to consider the environmental characteristics of a CEA that caused the designation of the CEA. Focusing the review on the potential for impact will provide CEAs with greater protection than the current procedural requirements. Following the completion of this rulemaking, the Department will begin the process of a complete revision of the EAFs. This revision will attempt to improve the use of the EAF as a tool in the analysis of impacts and reorganize the EAF to follow more closely the requirements for a legally sufficient determination of significance, as established by the courts. A separate rulemaking under SAPA will be required for this revision to the EAFs.

Alternatives: Retain the current format. This alternative is not preferred because:

- The current EAFs do not contain specific requirements that the potential for impact to a CEA be considered in the assessment.
- The current EAFs do not compliment the changes that have been proposed for the CEA process.

Another alternative for revising the EAFs is to require that each question in Part 2 of the Full EAF contain an additional example to read "Proposed action will have an impact on the characteristics that caused the establishment of a CEA?". For the Short EAF, all of the questions in Part IIC could be revised to include CEAs. This alternative was not chosen because it would not be as effective in directing agencies to the identification and analysis of a proposed projects potential for impact on the environmental characteristics of a CEA.

Comment: Restore the question regarding controversy to the Short Environmental

Assessment Form (EAF).
Response: The question regarding controversy has been restored to the short EAF. Both the short EAF and the full EAF will be revised in the coming year. This issue will be revisited at that time.

Comment: Question 14 of the Full EAF should not be deleted.
Response: The regulatory language in the June 1995 proposal failed to clearly identify the proposed changes to Part II of the full EAF. A new question 14 regarding CEAs will be added to part II of the Full EAF and existing questions 14 through 18 will be renumbered as questions 15 through 19. No questions will be deleted from Part II of the Full EAF.

Comment: The scoping checklist provides an important guide to the identification of potential environmental effects under SEQR. Eliminating it will be a major step backward.
Response: The scoping checklist and the rest of the SEQR forms will be revised and incorporated, as appropriate, into The SEQR Handbook.