



19 May 2017

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Conservation

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Since 1922

RE: State Environmental Quality Review Act Regulations-Proposed Amendments 2017, (SEQR, Title 6 New York Code of Rules and Regulations (6 NYCRR), Part 617)

Dear James,

The Adirondack Mountain Club (ADK) appreciates the opportunity to comment on the draft Generic Environmental Impact Statement (dGEIS) on the Proposed Amendments to the State Environmental Quality Review Act Regulations-Proposed Amendments 2017, and the *Regulatory Impact Statement, Regulatory Flexibility Analysis for Small Businesses and Local Governments, Rural Area Flexibility Analysis, and Statement in lieu of Job Impact Statement Pursuant to Section 202 of the State Administrative Procedure Act*.

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We are extremely concerned that the Department of Environmental Conservation's (DEC) stated goal is to 'streamline' the State Environmental Quality Review process (SEQR).¹ Regarding the changes to Part 617 please consider our comments and concerns as follows.

Type I Actions

Under section 2.2 of the dGEIS, we support changes that would lower numeric thresholds for residential subdivision developments in considering their inclusion as Type I Actions, 617.4 (a) (5) (iii), (iv), and (v). However, the proposed threshold numbers are still much too high. Further, thresholds for this type of action should capture the degree to which the project is impacting land that has not been previously developed and other attributes such as the lateral expansion of infrastructure including roads, sewer, and water lines.² Making a determination about impact based on whether or not the units will be connected to existing water

and sewerage systems and treatment works will not necessarily limit sprawl or ensure that an appropriate environmental review is conducted.

We support the creation of numeric vehicle thresholds for determining if parking lots will be considered Type I Actions, 617.4 (a) (6) (iii) and (iv), but these threshold numbers are too high.

We do not support the addition of “that exceeds 25 percent of any threshold established in this section” to 617.4 (a) (9). This proposed change weakens protection of historic and archaeological sites and structures.

Type II Actions

The proposed amendment would increase the Type II Actions to 54 categories, which is an increase from 21 Type II Actions in the 1987 SEQR regulations. This is the stated intention under the Regulatory Impact Statement, on p, 54 of the dGEIS document,

“This rule making is intended to update the SEQR regulations with additional Type II actions, i.e., adding more actions to the list of actions not subject to further review under SEQR”.³

We do not support the addition of categories of projects and activities that are not subject to review under SEQR. We do not agree with the DEC’s statement in the dGEIS (p.12) that the “reduced SEQR workload” will cause “no cost to the environment.”

The proposed changes to the Type II actions list in the dGEIS will significantly reduce the ability of the public and government decision-makers to determine a proposed project’s potential impacts to the environment because the amount and quality of information about proposed projects will be significantly reduced. Further, alternatives and mitigation measures will not be systematically considered during project review. In fact, classes of actions added to the Type II Action list under SEQR will not even have a requirement to submit an Environmental Assessment Form (EAF), which is used to help determine the environmental significance of actions. An EAF simply provides enough information to describe the proposed action, its location, purpose, and its potential to impact the environment.

There is no corresponding tool, mandated under state law, for projects listed as Type II Actions. Even this basic information will not be available to the public and government decision makers for categories of actions on the expanded Type II Action list proposed in the dGEIS. The absence of information on whole classes of projects as proposed in the dGEIS deprives the public, and government agencies charged with protecting the public and the environment, of the opportunity to be fully informed and to comment meaningfully on projects.⁴

We do not support the change to 617.5 (c) (3), which allows the upgrade or retrofitting of existing facilities incorporating green infrastructure to be considered a Type II Action. These changes are contrary to the intent and requirement of SEQRA. Environmental Conservation Law (ECL) Section 8-0113(1)⁵ explains that the purpose of SEQR regulations is to implement the provisions of SEQRA, not to further other policies or regulations. In the Final Scope document on p. 5, as DEC attempts to justify the expansion of the Type II Action list, the agency clearly explains its strategy to disregard the statutory limitation on the DEC Commissioner's rulemaking powers,⁶

A second and more important reason for many of the proposed additions to the Type II list is to try and encourage environmentally compatible development...The overall goal is to provide a regulatory incentive for project sponsors to further the State's policy of sustainable development.⁷

ADK supports smart growth, sustainable development, and green infrastructure, but promoting this development through the SEQR review process exceeds the DEC Commissioner's authority under SEQRA.⁸

Arthur Giacalone, in his article, *Proposed SEQR regulations: developers and SEQR-adverse agencies win, the environment and public lose*, explains the problem of including smart growth projects as Type II Actions,

The express "purpose" of the Smart Growth Act is "*to augment the state's environmental policy*," not to weaken laws such as SEQRA. Not only is this "policy" not part of the ECL Article 8 provisions underpinning the DEC's SEQR rulemaking authority, the introduction to the "smart growth public infrastructure criteria" expressly mandates that state agencies "*meet() other criteria and requirements of law* governing approval, development, financing and state aid for the construction of new or expanded public infrastructure." [ECL Section 6-0107(1)] Compliance with SEQRA's mandates is one of such "requirements of law." Additionally, the most

effective way to effectuate one of the Smart Growth Act criteria – “*to protect, preserve and enhance the state’s resources, including agricultural land, forests, surface and groundwater, air quality, recreation and open space, scenic areas, and significant historic and archeological resources*” [ECL Section 6-0107(2)(d)] – is to conduct the site-specific environmental assessment required under SEQRA and its regulations.⁹

DEC also incorrectly concludes in the Final Scope that a project should be a Type II Action if it occurs on a lot that has already been disturbed and has existing infrastructure, because the number and severity of potential impacts will be substantially reduced (p. 89 dGEIS Appendix E).¹⁰ However, this conclusion contradicts 6 NYCRR Section 617.7 (a)(1),

To require an EIS for a proposed action, the lead agency must determine that the action may include the potential for at least one significant adverse environmental impact.¹¹

Section 617.7 (a) (1) shows that even one significant adverse environmental impact can trigger the preparation of an EIS.¹²

DEC must also not add a class of actions to the Type II list where it is “foreseeable that in some instances – depending on the configuration of the parcel, or nearby manmade or natural resources – one or more aspects of the environment, including non-physical elements in SEQR’s definition of “environment” such as aesthetics or existing neighborhood or community character, *may* be adversely impacted.”¹³ The ability of local government or the public to fully consider “the specific natural and manmade surroundings, or the existing neighborhood or community character” of a proposed project is significantly impacted and substantially reduced by the expansion of the Type II Action list proposed in the dGEIS.¹⁴

We do not support the change to 617.5 (c) (7) to include as a Type II Action, “Installation of fiber-optic or other broadband cable technology in existing highway or utility rights of way.” Such projects will be extensive, encompassing many miles of roadway per project, and will likely require excavation and stream crossings. New York State must not make a blanket determination that a project will not have a significant impact on the environment simply because it occurs in an existing right of way for a roadway. Much of this infrastructure will be installed in the

Adirondack Forest Preserve, on areas adjacent to forest preserve, or on lands with conservation easements.

We are also concerned with, and do not support, the change to 617.5 (c) (14) to include as a Type II Action “the installation of cellular antennas or repeaters on an existing structure that is not listed on the National or State registers of historic places or located within a district listed in the National or State registers of historic places or that has not been determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places pursuant to sections 14.07 or 14.09 of the Parks, Recreation and Historic Preservation Law;” This change does not take into account other important cultural designations that can be affected by viewshed impacts, including New York State’s “National” Designated Scenic Byways, New York State Designated Scenic Byways, and additional legislated New York State Scenic Byways (NYS Highway Law, Article 12-C, Section 349-dd).¹⁵ This addition would undermine Scenic Byway Programs and Corridor Management Plans.

We are also concerned with certain aspects of 617.5 (c) (15) and (16), which involve the installation of solar energy arrays of five megawatts or less. A five megawatt solar array can create a physical footprint of 25 acres or more. This must not be considered a Type II Action. Although creating greater capacity in clean, green, renewable energy is desirable, developing this capacity still impacts the environment and must be considered a Type I Action.

We are also very concerned with the proposed changes to Section 617.5(c)(45) which would classify as a Type II Action an “acquisition of less than one hundred acres of land for parkland.” We do not support this change, which could very likely lead to the segmentation of an action. It would also undermine the need to consider environmental impacts early in the decision-making process. Additionally, 100 acres is not an insignificant amount of land, especially in an urban area. There is a broad range of activities, such as large crowd gatherings or festivals, which are likely to occur in parkland that could impact adjacent ecologically sensitive areas. These impacts require an informed assessment before acquisition. SEQR review must not be eliminated at the acquisition stage, which would impact the public’s ability to have a meaningful role in the decision-making process.¹⁶

Environmental Impact Statements (EIS)

DEC should include revisions that motivate or compel state and local agencies to comply with the letter and the spirit of SEQRA in ensuring that Environmental Impact Statements (EIS) are prepared more frequently. New York's appellate courts recognize that an EIS is "the heart of the SEQRA process," and that the threshold for requiring an EIS is "relatively low."¹⁷

The Appellate Division, Third Department in *Shawangunk Mountain Environmental. Assn. v. Planning Board of Town of Gardiner*, 157 AD273, 275-276 (AD3 1990) explains the critical role of the EIS,¹⁸

... The EIS process is especially designed to insure the injection of full, open and deliberative consideration of environmental issues into governmental decision making. The EIS process guarantees comprehensive review of a project's adverse environmental effects, consideration of less intrusive alternatives to the proposed action, including "no-action", and consideration of mitigation measures. To assure accountability of the lead agency and avoidance of any oversight in that agency's assessments, the regulatory scheme requires public access to the information by making the draft and final EIS available with sufficient lead time to afford interested persons an opportunity to study the project, its environmental effects and proposed mitigating measures, and then comment thereon. Additional safeguards are found in the substantive requirements that the lead agency must act and choose among alternatives so as to minimize adverse environmental consequences, consistent with other social, economic and policy considerations, and must then make appropriate written findings to that effect.

There is no attempt at all in this dGEIS to "insure that agencies will err on the side of meticulous care in the environmental review," as called for in *King v. Saratoga County Bd. of Supervisors*, 89 NY2d 341 (NYCA 1996). In fact, by expanding the Type II Action list and shutting down information and issues after the scoping stage, the opposite is pursued.¹⁹

We support the change on page 34 proposed for 617.9 (a) (7) (iii) (b) (5) (iv), which requires an EIS to include "a description of the mitigation measures, including measures to avoid or reduce both an action's environmental impacts and vulnerability from the effects of climate change such as sea level rise and flooding."

However, changes to SEQR regulations must also include a climate test as a standardized part of the SEQR process. Every project should undergo an extensive review of any impacts that the changing climate will have on the project and, in

turn, the role the project may play in fueling climate change. In 2009, the DEC adopted a policy, “Assessing Energy Use and Greenhouse Gas Emissions in Environmental Impact Statements.” This policy should be incorporated as a requirement under SEQR.

Document Preparation, Filing, Publication, and Distribution

Under 617.12 on page 40 the following section is proposed.

“(5) The lead agency shall publish or cause to be published on a publicly available website (that is free of charge) the draft and then final EIS scopes and, to the extent practicable, the draft and final EISs. The website posting of such scopes and statements may be discontinued one year after all necessary permits have been issued by the federal, state and local governments. Printed filings and public notices shall clearly indicate the address of the website at which such filings are posted.”

There is no reason to qualify this proposed change with “to the extent practicable,” when referencing the draft and final EISs. All draft and final EISs should be publicly available online.

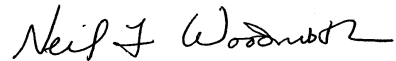
Scoping

Under 617.8 Scoping, we applaud DEC for proposing to make scoping mandatory for all Environmental Impact Statements (EIS). However, we strongly disagree with the changes proposed in 617.9 (a) (2), which would not allow information, data, or issues to be addressed in a meaningful way that impacts the outcome of the project. The changes proposed by DEC do not permit issues and data, that is not submitted or raised before the completion of the final scope (at the discretion of the project sponsor), to be included in the draft EIS. This provision is flawed on many levels. It clearly could create a de facto rubber stamp for projects. The changes will allow project sponsors to avoid important and sensitive issues and elements of a project by simply not acknowledging these issues until the draft EIS stage of the SEQR process. At this point it would be too late for the public and other stakeholders to comment on the issue.

While we applaud the changes that would make scoping of projects mandatory, the dGEIS is unfortunately using scoping in a way that will limit the ability of the public to have meaningful input, and will make it harder for all involved to protect the environment.

Thank you for considering the above comments.

Sincerely,



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¹ <http://www.dec.ny.gov/press/109020.html>

² <https://www.merriam-webster.com/dictionary/urban%20sprawl>

³ <https://withallduerespectblog.com/2017/03/05/proposed-seqr-regulations-developers-and-seqr-adverse-agencies-win-the-environment-and-public-lose/>

⁴ <https://withallduerespectblog.com/2017/03/05/proposed-seqr-regulations-developers-and-seqr-adverse-agencies-win-the-environment-and-public-lose/>

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- ⁵ <http://codes.findlaw.com/ny/environmental-conservation-law/env-sect-8-0113.html>
- ⁶ <https://withallduerespectblog.com/2017/03/05/proposed-seqr-regulations-developers-and-seqr-adverse-agencies-win-the-environment-and-public-lose/>
- ⁷ http://www.dec.ny.gov/docs/permits_ej_operations_pdf/617finalscope.pdf
- ⁸ <https://withallduerespectblog.com/2017/03/05/proposed-seqr-regulations-developers-and-seqr-adverse-agencies-win-the-environment-and-public-lose/>
- ⁹ <https://withallduerespectblog.com/2017/03/05/proposed-seqr-regulations-developers-and-seqr-adverse-agencies-win-the-environment-and-public-lose/>
- ¹⁰ http://www.dec.ny.gov/docs/permits_ej_operations_pdf/drft617geis.pdf
- ¹¹ [https://govt.westlaw.com/nycrr/Document/14ec3ce62cd1711dda432a117e6e0f345?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)&bhcp=1](https://govt.westlaw.com/nycrr/Document/14ec3ce62cd1711dda432a117e6e0f345?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)&bhcp=1)
- ¹² <https://withallduerespectblog.com/2017/03/05/proposed-seqr-regulations-developers-and-seqr-adverse-agencies-win-the-environment-and-public-lose/>
- ¹³ <https://withallduerespectblog.com/2017/03/05/proposed-seqr-regulations-developers-and-seqr-adverse-agencies-win-the-environment-and-public-lose/>
- ¹⁴ <https://withallduerespectblog.com/2017/03/05/proposed-seqr-regulations-developers-and-seqr-adverse-agencies-win-the-environment-and-public-lose/>
- ¹⁵ <https://www.dot.ny.gov/display/programs/scenic-byways/lists>
- ¹⁶ <https://withallduerespectblog.com/2017/03/05/proposed-seqr-regulations-developers-and-seqr-adverse-agencies-win-the-environment-and-public-lose/>
- ¹⁷ <https://withallduerespectblog.com/2017/03/05/proposed-seqr-regulations-developers-and-seqr-adverse-agencies-win-the-environment-and-public-lose/>
- ¹⁸ <https://withallduerespectblog.com/2017/03/05/proposed-seqr-regulations-developers-and-seqr-adverse-agencies-win-the-environment-and-public-lose/>
- ¹⁹ <https://withallduerespectblog.com/2017/03/05/proposed-seqr-regulations-developers-and-seqr-adverse-agencies-win-the-environment-and-public-lose/>