Adirondack ADK Mountain Club

Working for Wilderness

11 May 2017

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Via Email: seqra617@dec.ny.gov.

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

We are pleased that DEC has made some significant revisions to the proposed amendments based on information provided by the public during the last comment period. However, we are still 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 revised 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 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. The proposed change would also violate mandated consultation with Interested Indian Nations and Sovereign Native American Nations.

Any archaeological research must be in consultation with the appropriate Tribal Historic Preservation Office (THPO), that is, with the Saint Regis Mohawk THPO, and the Seneca Nation of Indians THPO.[3] OPRHP Policy Directive HP-POL-005 (11/01/2016) states,

> Historic preservation carried out by federal and state agencies is a collaborative process that encourages communities to be involved in decisions affecting their history. The New York State Office of Parks, Recreation and Historic Preservation and its State Historic Preservation Office (collectively in this document referred to as SHPO) have developed this Policy for incorporating the knowledge and concerns of Indian Nations and Tribes (collectively in this document referred to as Indian Nations) into reviews of projects affecting their historic properties.[4]

The policy directive also states,

> This Policy clarifies SHPO's process when reviewing projects that directly or indirectly involve interested Indian Nations; it cannot substitute for the obligations of other State and federal agencies regarding consultation with Indian Nations.[5]

Type II Actions

We applaud the Department of Environmental Conservation (DEC) for removing several categories of new Type II actions from the proposed changes to the SEQR regulations. DEC should resist any pressure to reinstate the eliminated categories. The proposed amendment still increases the Type II Actions to 46

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. 142 of the revised 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".[6]

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 revised dGEIS (p.24) that the "reduced SEQR workload" will cause "no cost to the environment."

The proposed changes to the Type II actions list in the revised 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 revised dGEIS. The absence of information on whole classes of projects as proposed in the revised 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.[7]

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)[8] explains that the purpose of SEQR regulations is to implement the provisions of SEQRA, not to further other policies or regulations.

Section 617.7 (a) (1) shows that even one significant adverse environmental impact can trigger the preparation of an EIS.[9]

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."[10] 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 revised dGEIS.[11]

We do not support the change to 617.5 (c) (7) to include as a Type II Action, ***Installation of telecommunication cables in existing highway or utility rights of way utilizing trenchless burial or aerial placement on existing poles.*** 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 could be installed in the Adirondack Park, on Forest Preserve, on areas adjacent to forest preserve, or on lands with conservation easements. This proposed Type II Action may be in conflict with a 2017 New York State Constitutional Amendment (Article XIV, Section 6), which defines how telecommunication lines can be installed on Forest Preserve.

We are also concerned with certain aspects of 617.5 (c) (14), which involve the installation of solar energy arrays where the installation involves a physical alteration of 25 acres or less. Although the proposed amendment clarifies that these solar installations would have to be sited on brownfields, closed landfills, hazardous waste disposal sites, wastewater treatment facilities, industrial use zones, parking lots or parking garages; there is still the potential for a significant environmental impact, especially in areas near rivers and waterways where waste water treatment plants are located. This should 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 should be considered a Type I Action.

We are pleased that DEC has dropped the acreage to 25 acres from 100 acres in 617(c)39, which would classify as a Type II Action an agency's acquisition and dedication of 25 acres or less of land for parkland, or dedication of land for parkland that was previously acquired, or acquisition of a conservation easement. However, 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, 25 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.[12]

Environmental Impact Statements (EIS)

We are pleased with DEC's decision to require all future Environmental Impact Statements (EIS) --other than Supplemental EISs--to undergo the "Scoping" process. This proposal will help make certain that future EISs focus on potentially significant adverse impacts, and not irrelevant or non-significant impacts. However, the proposed changes to the SEQR regulations fail to address the low number of projects across the state that require an EIS. As noted in the revised dGEIS, there are only about 200 EISs being prepared annually statewide – despite the thousands of proposed actions under consideration which are obligated to comply with SEQRA.[13]

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."[14]

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,[15]

> … 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 revised 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 still allowing for information and issues to be shut down after the scoping stage (by allowing these to be simply included in an appendix to the EIS), the opposite is pursued.[16]

At a minimum, the SEQRA regulations must be amended to include the language contained in the SEQRA statute at ECL Section 8-0109(2): "All agencies (or applicant as hereinafter provided) shall prepare, or cause to be prepared by contract or otherwise an environmental impact statement on any action they propose or approve which may have a significant effect on the environment."[17]

We supported the change in the previous draft of the proposed amendment for 617.9 (a) (7) (iii) (b) (5) (iv), which required an EIS to include "a description of the mitigation measures, <u>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."</u> The new placement of this proposed amendment at 617.9 (b)(5)(iii)(i) must also require discussion of relevant and significant impacts associated with climate change.

Changes to the 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

We appreciate that DEC removed "to the extent practicable," under 617.12 on page 39. This section now reads

"(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 the draft and final EISs. The website posting of such scopes and statements may be discontinued one year after all necessary federal, state and local permits have been issued or after the action is funded or undertaken, whichever is later. Printed filings and public notices shall clearly indicate the address of the website at which such filings are posted."

There was 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. Thank you for making the change.

Scoping

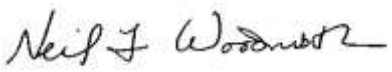
Under 617.8 Scoping, we applaud DEC for proposing mandatory scoping for all Environmental Impact Statements (EIS). However, we strongly disagree with the changes proposed in 617.9 (a) (2), which would allow information, data, or issues to be simply appended to an EIS rather than requiring them to be addressed in a meaningful way that impacts the outcome of the project. The changes proposed by DEC allow issues and data, that is not submitted or raised before the completion of the final scope, to be simply catalogued in an appendix of a 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 revised dGEIS is still 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] https://www.dec.ny.gov/permits/83389.html
http://www.dec.ny.gov/press/109020.html
[2] https://www.merriam-webster.com/dictionary/urban%20sprawl
[3] http://nathpo.org/wp/thpos/find-a-thpo/#ny
[4] https://parks.ny.gov/inside-our-agency/documents/GuidancePolicies/ConsultationofIndianNationsTribes.pdf

[5] https://parks.ny.gov/inside-our-agency/documents/GuidancePolicies/ConsultationofIndianNationsTribes.pdf

[6] https://withallduerespectblog.com/2017/03/05/proposed-seqr-regulations-developers-and-seqr-adverse-agencies-win-the-environment-and-public-lose/

[7] https://withallduerespectblog.com/2017/03/05/proposed-seqr-regulations-developers-and-seqr-adverse-agencies-win-the-environment-and-public-lose/

[8] http://codes.findlaw.com/ny/environmental-conservation-law/env-sect-8-0113.html

[9] https://withallduerespectblog.com/2017/03/05/proposed-seqr-regulations-developers-and-seqr-adverse-agencies-win-the-environment-and-public-lose/

[10] https://withallduerespectblog.com/2017/03/05/proposed-seqr-regulations-developers-and-seqr-adverse-agencies-win-the-environment-and-public-lose/

[11] https://withallduerespectblog.com/2017/03/05/proposed-seqr-regulations-developers-and-seqr-adverse-agencies-win-the-environment-and-public-lose/

[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/author/artg2012/

[14] https://withallduerespectblog.com/2017/03/05/proposed-seqr-regulations-developers-and-seqr-adverse-agencies-win-the-environment-and-public-lose/

[15] https://withallduerespectblog.com/2017/03/05/proposed-seqr-regulations-developers-and-seqr-adverse-agencies-win-the-environment-and-public-lose/

[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/author/artg2012/