Hodgson Russ

Battery Energy Storage Systems (BESS) in New York

A Practical Guide

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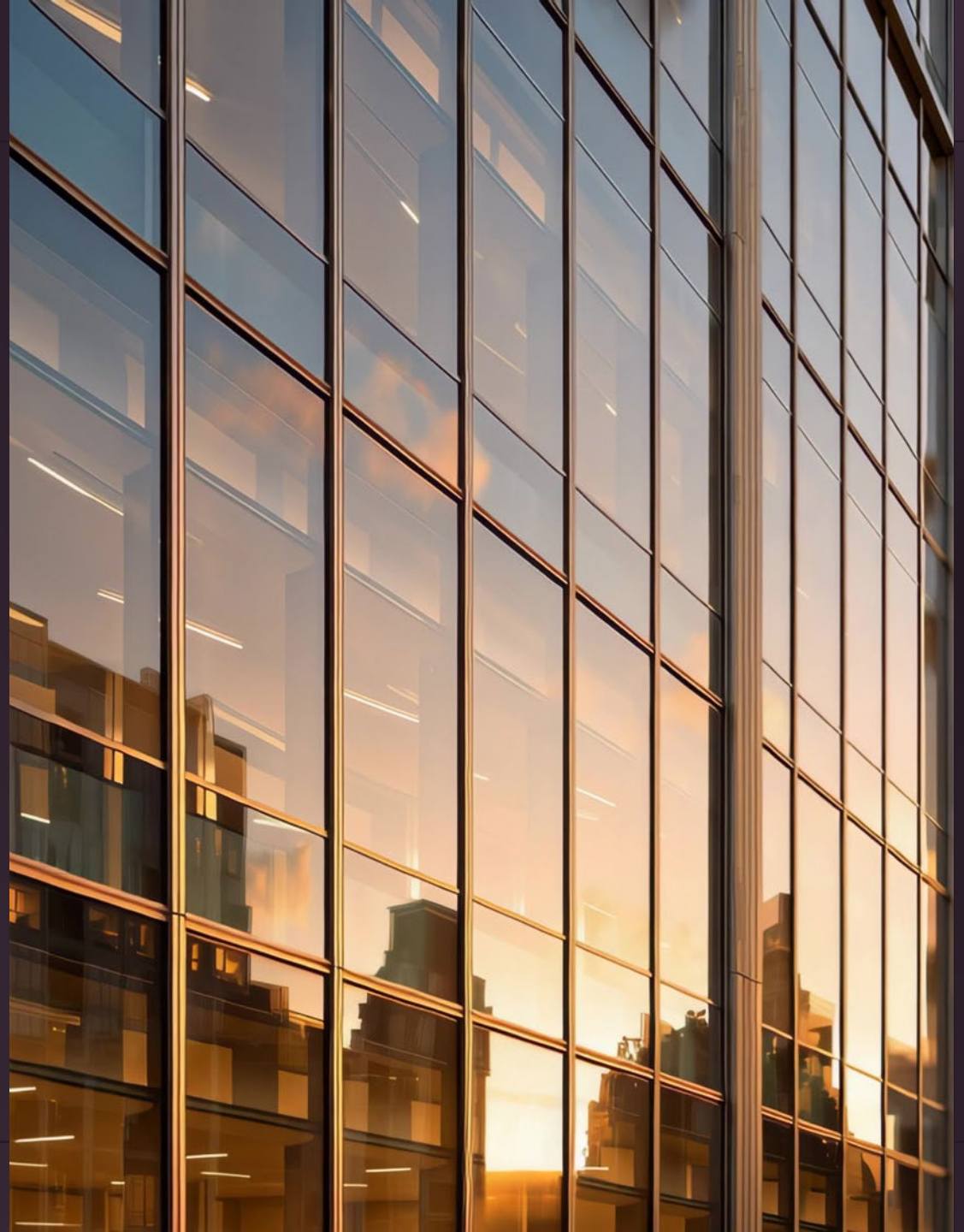

Roadmap

- Why BESS, and why now
- What is a BESS?
- Zoning Considerations:
  - Moratoria done right
  - Drafting your local law
- Recent safety overhauls
- A practical checklist

Why BESS, and Why Now

- Community solar changed distributed energy in New York.
- Retail BESS is the next step—delivering resilience, flexibility, and local reliability.
- Storage smooths intermittent solar/wind, shifts load, provides backup and grid reliability.
- State policy driver: New York's goal of **6 GW of energy storage by 2030.**
- Result: a wave of applications statewide.
  - **Your community is likely already in a developer's pipeline.**

Local Challenges in New York
Common Barriers to BESS Permitting

- Undefined or outdated zoning categories (“where does storage fit?”).
- Temporary moratoria following national incidents.
- Noise and visual objections near residential uses.
- Limited firefighter training and community familiarity.

Who Regulates What: Permitting Jurisdiction Overview

- Co-located systems (with generation): reviewed under ORES or Article 10 (regardless of size) if paired with 25MW+ production.
- Standalone retail BESS: local zoning + SEQRA.
- Standalone Systems > 80 MW: also subject to licensing by the Public Service Commission (PSL §68).
- Key legal precedent:
  - Consol. Edison Co. v. Hoffman, 43 N.Y.2d 598 (1978) — public utility variance test.
  - Freepoint Solar LLC v. Town of Athens ZBA, 234 A.D.3d 127 (3d Dep't 2024) — extends to renewable IPPs.

Zoning Considerations I: Get the Framework Right

- Anchor the law in your **comprehensive plan**.
- Decide the use treatment: permitted, special use permit, or site plan review – by tier.
- Map where BESS belongs (industrial/commercial districts vs. residential) and where it doesn’t.
- Don’t rely on silence or overly restrictive laws – both routes invite ad hoc decisions and litigation.
- NYSERDA model law.

Zoning Considerations II: Substantive Standards

- Setbacks & separation (property lines, and sensitive receptors).
- Screening/landscaping/lighting/noise.
- Decommissioning plan + financial security for end-of-life removal.
- Emergency Response Plan filed with the fire district.
- Road use agreements and other host community agreements (PILOT).
- Signage, fencing, security, stormwater.

Public Utility Classification and the “Zoning Out” Problem

- A municipality cannot totally exclude a use that serves a broader regional/State need.
- Outright bans and de facto total prohibitions are the most vulnerable.
- The CLCPA sharpens the exclusion risk – total bands are demonstrably against declared State energy policy.
- Safer path: regulate where and how, not whether.

The Public Utility Variance Standard (PUV):

- Consol. Edison v. Hoffman (1978): Public utilities get a reduced variance burden.
- Freepoint Solar (2024): Extended to renewable and storage developers.
- Test:
  - The project serves a public necessity (safe, adequate electricity).
  - Compelling reasons make this site more feasible than alternatives.
- Burden reduced where community impacts are minimal.

- **Key distinctions for BESS:**
  - Smaller footprint; minimal visual or agricultural impact.
  - Public necessity = grid reliability, peak-shaving, resiliency.
  - Front-load Emergency Response Plan, UL 9540A data, and fire-containment design.
  - Present record showing safe, necessary infrastructure serving the public interest.

Moratoria: Permissible, but With Limits

- A moratorium is a legitimate tool to pause while you study and legislate.
- Validity factors: reasonable duration, a genuine problem to address, and demonstrable progress towards a solution (active study/drafting).
- Pitfalls: open-ended or serially renewed moratoria, “studying” with no work product, using moratorium as a de facto permanent ban.
- Estimated ~1 GW of queued storage statewide sits under local moratoria – developers, courts, and the State are watching.

Drafting Your Local Law

- Start from the NYSERDA Battery Energy Storage System Model Law & Guidebook.
- Consider the unique needs of your own municipality – tailor to districts, comprehensive plan, and project profile.
- Adopt the underlying comprehensive plan basis first.
- Build in SEQRA compliance/tiered process.

Fire & Safety
The Peer-Review Process

- AHJs often lack the in-house expertise to vert technical BESS permit packages – peer review fills that gap.
- NYSERDA requires independent peer review for code compliance for all supported programs (retail + bulk storage). Failure to meet standards = incentives withheld.
- 2025 Fire Code extends a peer-review requirement for installations above certain capacity thresholds (more on this later).
- Runs parallel to local permitting – local government keeps its approval authority.

Fire & Safety
Applicable Safety Standards

- New York State is a national leader in BESS safety. The 2025 NYS Fire Code has some of the most rigorous safety standards in the nation which are based on NFPA 855 and the International Fire Code (IFC).
- 600 kWh capacity is the Maximum Allowable Quantities (MAQ) threshold established by the IFC and NFPA 855.
- Systems that are 600 kWh or greater must comply with additional safety measures or face more stringent code requirements. For lithium-ion BESS, this includes a Hazard Mitigation Analysis (HMA) and large-scale fire testing (UL 9540A).

Fire & Safety
Inspections, ERPs, and Fire-District Coordination

- Bring the fire district/first responders in early – not at the public hearing.
- Require the ERP to be filed and approved before operation.
- Leverage state training: NYSERDA local government webinars/guidebook.

Practical Checklist for Boards

- Confirm whether you have a BESS law – if not, this is urgent.
- Adopt/confirm comprehensive plan basis.
- Adapt NYSERDA model law with conditions (consult with counsel).
- Tier by size, channel by district, condition by special use permit/site plan if desired.
- Avoid total bans/open ended moratoria.
- ERP/fire district signoff.
- Reference peer-review/inspection regime.

Key Takeaways & Resources

- Regulate where and how, not whether – bans are a legal weak point.
- The State has built a real safety framework you can rely upon (FSWG, fire code, peer review).
- Act before the application arrives.
- Tie in resources as appropriate (NYSERDA, specialized training, consultations with local counsel).

Thank you.

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Labor and Employment Update

Municipal Law Seminar

June 11, 2026

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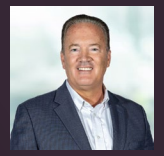

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Agenda

- Wage and Benefit Changes
- New NYS Employment Legislation
- Reminder on Law Regarding Pregnant Employees
- Pending Legislation of Note
- Labor Updates

Changes to Wages and Benefits

Increased Pay for Jury Duty Leave

- N.Y. Jud. Law § 519
  - "Right of juror to be absent from employment. Any person who is summoned to serve as a juror under the provisions of this article and who notifies their employer to that effect prior to the commencement of a term of service shall not, on account of absence from employment by reason of such jury service, be subject to discharge or penalty. An employer may, however, withhold wages of any such employee serving as a juror during the period of such service; provided that an employer who employs more than 10 employees shall not withhold the first ***seventy-two dollars*** of such juror's daily wages during the first 3 days of jury service. Withholding of wages in accordance with this section shall not be deemed a penalty. Violation of this section shall constitute a ***criminal contempt of court*** punishable pursuant to section seven hundred fifty of this chapter.
- Went into effect on June 8, 2025.

New York Statutory Benefit Increases

- Unemployment Insurance
  - The annual Interest Assessment Surcharge has been eliminated, but . . .
  - New York significantly increased the maximum weekly unemployment benefit from $504 to $869. At 26 weeks, this amounts to $22,594.
    - This represents over a 72% increase!
    - Change was effective as of October 6, 2025.
  - Taxable wage base is indexed to 18% (a 2% increase from the previous 16%) of the state average weekly wage. Impact on taxable wage base has been clear:
    - 2026 - $17,600
    - 2025 - $12,800
    - 2024 - $12,500
  - At the new employer rate of 4.1%, that is an *additional* $196.80 per employee per year. For employers at the highest UI rate (9.9%), that is an *additional* $475.20 per employee per year.

New NYS Legislation

Trapped at Work Act

- Initial version of the Act was signed into law on December 19, 2025.
  - Prohibits employers from requiring workers to enter into an “employment promissory note” as a condition of employment.
    - Promissory note is defined to include any agreement or contract provision that requires a worker to pay an employer a sum of money if the worker separates from the employer before a specified date.
  - The language of this law contained various ambiguities that created confusion as to its application and scope.
- In response, the Legislature passed an amendment to the Act that was signed by the governor on February 13, 2026.

Trapped at Work Act – Key Change of February 2026 Amendment

- Delayed Effective Date
  - Act's effective date is delayed by "one year."
    - It is unclear whether this will be interpreted as one year from the Act's original December 19, 2025, date or from the date of the amendment on February 13, 2026.
- Narrowed Scope of Coverage
  - Instead of applying to all "workers and prospective workers," the amendment now limits the act so that to only applies to employees and prospective employees.
    - Employee is defined as "any person employed for hire by an employer in any employment."
    - Will not apply to independent contractors, volunteers, interns, apprentices and sole proprietors who provide services to or on behalf of an employer.

Trapped at Work Act – Key Change of February 2026 Amendment

- The following agreements are not prohibited or voided by the Trapped at Work Act:
  - An agreement that requires an employee to pay an employer for property sold or leased to the employee, as long as such sale or lease was voluntary;
  - An agreement that requires an employee to repay a financial bonus, relocation assistance, or other non-educational incentive or other payment or benefit that is not tied to specific job performance, unless the employee was terminated for any reason other than misconduct or the duties or requirements of the job were misrepresented to the employee;
  - An agreement requiring educational personnel to comply with any terms or conditions of sabbatical leave granted by their employers; and
  - An agreement that is part of a program agreed to by the employer and its employees' collective bargaining representative.

Trapped at Work Act

- Also not prohibited are agreements that require an employee to reimburse an employer for the cost of tuition, fees, and required educational materials for a “transferrable credential,” provided that they:
  - Are set forth in a written contract and offered separately from any contract for employment;
  - Do not require the employee to obtain the transferrable credential as a condition of employment;
  - Specify the repayment amount before the employee agrees to the contract, and the repayment amount does not exceed the cost to the employer;
  - Provide for a prorated repayment amount during any required employment period that is proportional to the total repayment amount and the length of the required employment period, and does not require an accelerated payment schedule if the employee separates from employment; and
  - Do not require the employee to repay the employer if the employee is terminated, unless the termination is for misconduct.

Trapped at Work Act

- Definition of a Transferable Credential
  - “any degree, diploma, license, certificate, or documented evidence of skill proficiency or course completion that is widely recognized by employers in the relevant industry as a qualification for employment, independent of the employer’s specific business practices, or that provides skills or qualifications that demonstrably enhance the employee’s employability with other employers in the relevant industry.”
  - Excluded are:
    - non-transferrable training information that is internal or proprietary to a specific employer;
    - instruction that would not qualify an employee for a new occupational title, classification, or industry-recognized credential; and
    - mandated safety or compliance training.

Trapped at Work Act

- No express private right of action.
- Complaints must be filed with the NYS Department of Labor.
  - Upon the finding of a violation by the Commissioner, a fine between $1,000 and $5,000 will be imposed on the employer.
  - Each employee who is required to execute an unlawful promissory note constitutes a separate violation of the Act.
- When considering the fine amount, the Commissioner considers the following factors:
  - Size of the employer;
  - The good faith basis for the employer to believe they were complying with the Act;
  - The gravity of the violation; and
  - Previous history of violations.
- Attorney's fees may also be awarded to an employee who successfully defends a suit by an employer for the enforcement of an unlawful promissory note.

Consumer Credit History Ban

- An amendment to the New York Fair Credit Reporting Act prohibits employers from requesting or using an individual's "consumer credit history" for employment purposes or to discriminate based on that history in hiring, compensation, promotion, discipline, or other terms and conditions of employment.
- This restriction applies to both applicants and employees.
- In practice, simply asking an applicant about prior bankruptcies or collections and using that information in a decision can trigger the law.
- Consumer credit history is defined as "An individual's credit worthiness, credit standing, credit capacity or payment history, as indicated by:
  - Their consumer credit report;
  - Their credit score; or
  - Any information an employer obtains direction from the individual regarding details about credit accounts, including the individual's number of credit accounts, late or missed payments, charged-off debts, items in collections, credit limits or prior credit report inquiries, or bankruptcies, judgments or liens."

Consumer Credit History Ban

- The following positions are not subject to the ban on the consideration of consumer credit history:
  - Use of credit history for employment purposes as required by other state or federal law.
  - Peace, police, and law enforcement positions.
  - Positions subject to state background investigation if the position involves a high degree of public trust.
  - Employees required to be bonded by or to have security clearance under state or federal law.
  - Non-clerical positions having regular access to trade secrets, intelligence information or national security information.
  - Positions with signatory authority over third party assets valued at $10,000+ or involving fiduciary responsibility with the authority to enter financial agreements valued at $10,000+.
  - Positions with regular duties allowing the employee to modify digital security systems established to prevent the unauthorized use of the employer's or client's networks or databases.

Consumer Credit History Ban

- Potential Penalties
  - Law classifies violations into two categories: (1) willful noncompliance, and (2) negligent noncompliance.
  - Penalties for willful noncompliance:
    - Actual damages sustained by the consumer.
    - Punitive damages as permitted by the court.
    - Litigation costs and attorneys' fees.
  - Penalties for negligent noncompliance:
    - Actual damages sustained by the consumer.
    - Litigation costs and attorneys' fees.
- There is a two-year statute of limitations for bringing a claim under this law.

Clean Slate Act

- Provides that certain individuals will have their criminal records automatically sealed once they have completed their sentences - including probation or parole time - and do not reoffend.
- Misdemeanor offenses will be sealed after three (3) years.
- Eligible felonies will be sealed after eight (8) years.
  - Felonies that are not eligible for seal:
    - Sex Crimes, as defined in Section 130 of the N.Y. Penal Code;
    - Sexually Violent Offenses, as defined in Section 168-a(3) of the N.Y. Corrections Law; and
    - Class A felonies, as defined in Section 220 of the N.Y. Penal Code.
      - Except that Class A felonies related to Drug offenses shall be eligible for seal.

Clean Slate Act

- Entities, including those that work with children, the elderly, or vulnerable adults, that are required or authorized by law to conduct a fingerprint-based background check, are not impacted by the Act.
- Law enforcement agencies are not affected.
- Entities that are entitled to request and receive a fingerprint-based check of criminal history currently will continue to have access to these records.
- A conviction record that was sealed pursuant to the Act and was not provided to an employer upon request for conviction record history cannot be introduced as evidence of negligence against the employer.
- Article 23-A of the New York Corrections Law still applies with regard to the application and employment of an individual with a criminal record.
- Courts have until 11/16/2027 to seal records.

Reminder: Changes Regarding the Rights of Pregnant Employees

Rights to Express Breast Milk at Work

- New York Labor Law Section 206-C was amended, effective June 19, 2024, to expand the protections of employees to express breast milk at work, both with respect to break time and the availability of a private space.
- This law applies to all public and private employers in New York, regardless of the size or nature of their business.
- At the federal level, the PUMP Act entitles certain employees to reasonable break time and a private space to express breast milk.
  - New York Labor Law Section 206-C provides more generous protections to employees.
  - Employers with employees outside of New York should consider the PUMP Act and any analogous state law to ensure compliance.
  - Employers must also consider municipality. For example, New York City's ordinance on expression of breast milk at work has some important nuances.

Rights to Express Breast Milk at Work

- Under Section 206-C, employers must provide all employees with **paid break time** to pump breast milk at work.
  - Specifically, the employer must provide a 30-minute paid lactation break each time a covered employee has a reasonable need to express breast milk.
  - The employer must also allow employees to use existing paid break time or meal periods for any lactation break in excess of 30 minutes.
  - The number of paid breaks an employee will need to express breast milk is unique to each employee.
- Employers **cannot** require an employee to work before or after their normal shift to make up for any time used to express breastmilk.
- Employees are entitled to this paid break time for up to **three (3) years** following the birth of a child.

Rights to Express Breast Milk at Work

According to guidance from the New York State Department of Labor:

- Employees who wish to pump breast milk at work must notify their employer in advance, preferably before they return from maternity leave.
- Request must be made in writing and sent to the employee's direct supervisor and any staff member the employer has designated to receive such requests (e.g., an HR Director).
  - "Written" does not necessarily mean formal. Requests may be sent through email, text message, written correspondence, or any chat-based app regularly used by the organization for correspondence that allows for the retention of messages.
- The request should include:
  - Employee's anticipated return to work date;
  - Details regarding how many breaks the employee anticipates needing during the workday; and
  - Any preferred times for expression.

Rights to Express Breast Milk at Work

- The room or location designated for expression of breast milk must:
  - Provide good natural or artificial light
  - Be private – both shielded from view and free from intrusion – which includes:
    - A functioning lock or, if that is not possible, a sign warning that the location is in use and is not accessible to others or the public
    - Any window must have a curtain, blind or other covering available
  - Have accessible, clean running water nearby
  - Have an electrical outlet (unless the workplace is not supplied with electricity)
  - Provide a chair and a desk, small table, counter or other flat surface
- There does not need to be a separate space for each nursing employee. Rather, the employer can designate a single room or other location for breast milk expression.
- If the workplace has a refrigerator, employers must allow employees to use it to store breast milk.

Rights to Express Breast Milk at Work

- Employers are required to notify employees of their rights under the law by providing the New York Department of Labor's model policy to each employee **upon hire**, **annually thereafter**, and **any time an employee returns to work following the birth of a child**.
- The model policy can be found on the New York Department of Labor's website: https://dol.ny.gov/expressing-breast-milk-workplace.
- Employers are prohibited from discriminating against an employee who chooses to express breast milk in the workplace.

Pending Legislation of Note

Pending Legislation: the No Severance Ultimatums Act (S372A)

- Most recent iteration of the bill passed the Senate on February 11, 2026 and is awaiting consideration on the floor of the Assembly.
- Under this proposed law, severance agreements for any employee, regardless of age, would be required to include:
  - A 21-day consideration period;
  - A 7-day revocation period; and
  - A notification of the right to consult with an attorney regarding the agreement.
    - These requirements closely track the release requirements mandated under the federal Older Workers Benefit Protection Act (OWBPA), which applies to employees who are age 40 and older.
- Employees would be able to waive the 21-day consideration period so long as their consent is knowing, voluntary, and not induced by fraud, misrepresentation, or threats by their employer to withdraw or alter the agreement's terms if the proposed legislation is enacted.

Pending Legislation: Employee Personnel Records Access Bill (S3460)

- The bill would require employers to provide current and former employees with copies of their personnel records within five business days of a written request, notify employees when negative information is added to their files, and comply with new recordkeeping and anti-retaliation obligations. The bill would amend Section 210-b of the New York State Labor Law. The law would apply to both public and private sector employers.
- Passed by both chambers of the New York Legislature
- If the Governor signs the bill, it will take effect sixty (60) days after her signature
- The term “personnel records” is broadly defined to include records used, or records that may be used, in connection with an employee’s qualifications for employment, compensation, promotion, transfer, or discipline, including applications, evaluations, and disciplinary documents.
- Records must be provided at no cost to the employee or former employee.

Labor Negotiations Updates

The Current Bargaining Environment

- Still inflationary pressures (or at least expectations) on wages
- Staffing shortages continuing to some extent
- The cost of Tier 6 enhancements
- Health insurance costs are significantly rising

The Current Bargaining Environment

- New York State is heading towards tough fiscal choices.
- Artificial intelligence
- Retirement system rates are creeping up.
- The limiting nature of the tax levy cap.
- Union activism and influence.

Know Your Starting Point When Negotiating

- "Past Practice." Certain past practices may be enforceable either through specific contract language protecting such practices, or through PERB's improper practice procedures for those practices which are unequivocal, consistently long-standing and for which there is a reasonable expectation that the practice would continue.
- Management Rights and Current Contract Language. Be sure to fully assess your current right to implement changes based on current contract language. Be careful not to underestimate or overestimate your authority.

Obligation to Bargain in Good Faith

- Summary of “good faith” bargaining – Evidence a sincere desire to reach agreement:
  - Must present comprehensible proposals.
  - Must be able to explain the objectives of the proposals.
  - May have to provide information to substantiate the basis for the proposals.
  - No obligation compelling either party to agree to a proposal or change its position.

- Matter of Buffalo City School District, 50 PERB ¶ 4532 (2017).

Obligation to Bargain in Good Faith

- "Hard bargaining" is acceptable and, arguably, encouraged by the Taylor Law. On the other hand, "surface bargaining," *i.e.*, going through the motions without actually intending to reach a final agreement, constitutes an improper practice.
- "Regressive bargaining" may be permissible if explained by intervening circumstances, *e.g.*, decline of budget and/or economic situation, loss of benefit of health insurance cost reductions, etc. Cannot be used to retaliate, or to "teach a lesson."

Evaluate Mandatory and Non-Mandatory Subjects of Bargaining

- Mandatory Subjects - Matters which if raised must be negotiated. Note: Just because a subject is mandatory does not mean that either side is required to agree.

  Examples: wages, health insurance benefits, paid leave, subcontracting

- Non-mandatory - Matters which if raised need not be negotiated but which may be negotiated by mutual agreement. Note: Sometimes referred to as "permissive."

  Examples: minimum staffing, other management prerogatives

- Impact Bargaining - Although a municipality need not bargain over decisions regarding non-mandatory subjects of negotiations, it must, upon demand, bargain over the impact of such decisions.

The Limits and Possibilities of Mediation/Fact-Finding

Mediation:

- PERB appoints a mediator to meet with parties and try to encourage settlement.
- Neither party has any obligation to agree to anything (only to act in good faith).
- Mediator is not your friend, simply there to achieve settlement regardless of whether the settlement is fair or unfair for either side.
- But the mediator can serve a useful role as an “outside” arbiter of what is reasonable, consistent with what is going on elsewhere, etc.

The Limits and Possibilities of Mediation/Fact-Finding

Fact-finding:

- Only mandatory terms are submitted to the fact finder.
- Produces a recommendation only.
- Carefully prepare the employer's position at fact finding.
- Consider the impact of the fact finder's report on the public and the unit membership.

The End of the Impasse Process?

- Legislative imposition
- Interest arbitration
  - Available to police and fire unions
- Remember – No matter the twists and turns of the bargaining process, no one can compel you to grant a pay raise or enhance a benefit (except an interest arbitration panel).

Public Communications

- A public employer may communicate directly with union members and/or the general public to explain its bargaining positions and/or to respond to inaccurate statements by the union.
- However, any such communications which are deemed to constitute “direct-dealing” with employees, or which threaten reprisals for protected activity, may be improper under the Taylor Law. *e.g.*, *City of Rochester,* 9 PERB ¶ 4542*; County of Onondaga*, 14 PERB ¶ 4503.
- Be factual (*e.g.*, permissible to publish a union’s proposals in local newspaper together with analysis of impact on tax rate [*Brookhaven CSD*, 6 PERB ¶ 3018]).

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The Formation and Improvement of Special Districts

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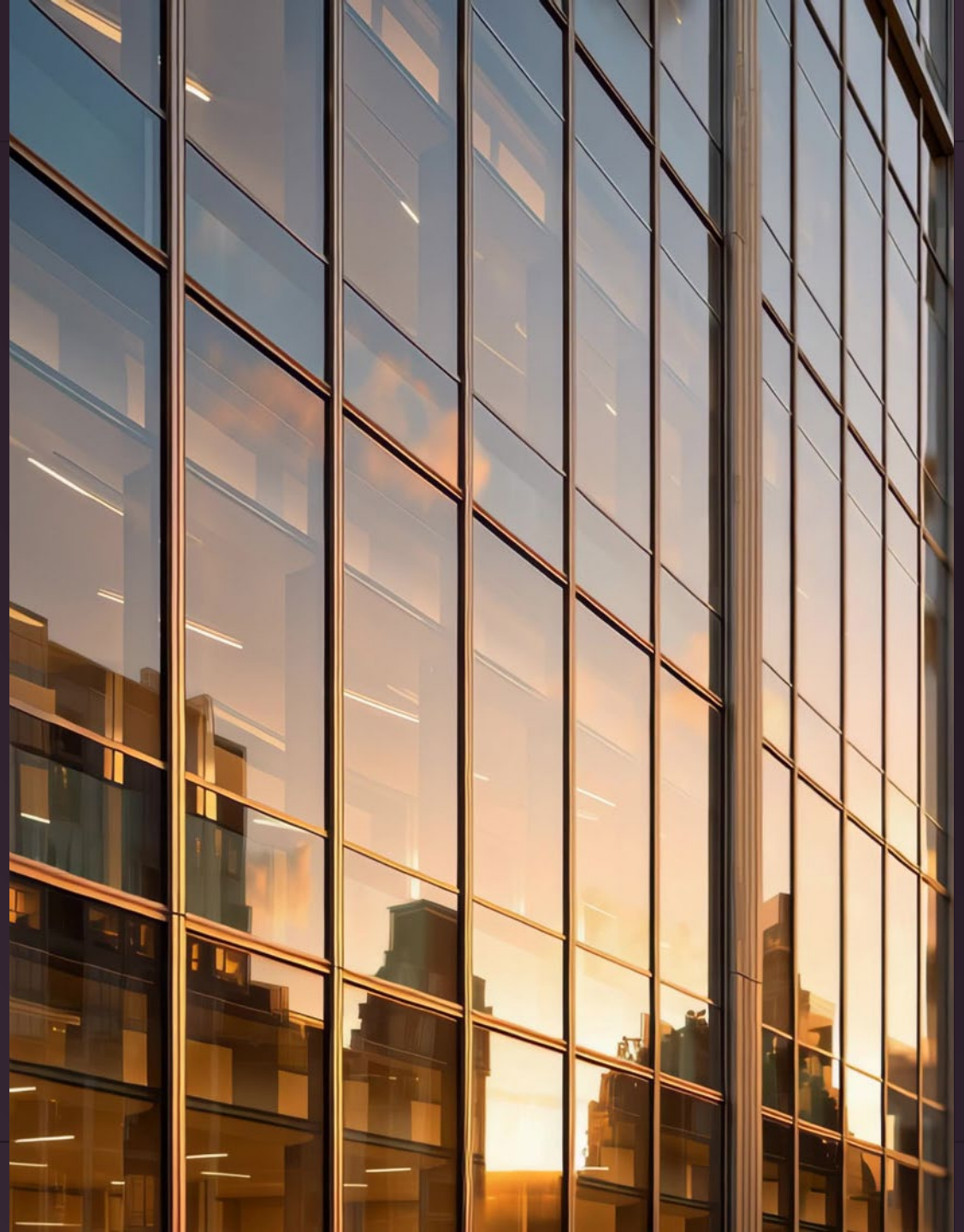

What is a Special District?

- A Special District is a geographic area within a town established to address specific needs of the property owners within that district and serve as funding mechanisms for public improvements and services.
- There are various types of Special Districts, including water, sewer, garbage, park, lighting, fire protection, drainage, and other less common district types. They are characterized by a special levy or assessment on real property to finance these services
- The most common types of Special Districts are water and sewer districts. These will be the focus of our discussions today.

District Formation

- The formation of a Special District is governed by New York Town Law Articles 12 and 12-A.
- Both processes are similar, but one is typically initiated by residents and one is typically initiated by the Town Board.
- Regardless of which Article is applied, approval from the Office of the State Comptroller is required if the Town is issuing bonds or notes and if the project exceeds a certain cost threshold.

Necessary Prerequisites for a Special District Project

- Prior to beginning the process of creating a special district, a community should:
  1. Hire a licensed engineering firm to draft the necessary designs and reports for the Project,
  2. Hire a municipal advisor to assist the creation of a plan of financing and the underlying accounting for the Project,
  3. Local Counsel to assist with potential litigation and underlying authorization documentation, and
  4. Bond Counsel to ensure compliance with local finance law and develop the bond structure.

District Formation Under Article 12

- The first step in the Special District formation process is the Map, Plan, and Report.
- This document is drafted by the engineer and outlines the scope and cost of the Project.
- The second step is the petition.
- The petition must be signed by at least half of the assessed valuation of all the taxable real property of the proposed district, as shown upon the latest completed assessment-roll of said town. It also must state the borders and cost of the proposed district.
- If only a portion of a particular property is within the district, then the Town Board may determine the relative value of such property.

Article 12 Formation Continued

- The third step is the Order Calling a Public Hearing.
- This document must be adopted by the Town Board and published in the Town's official newspaper no more than 20, but no less than 10, days before the public hearing. The Order Calling Public Hearing also must be posted on the Town's signboard and mailed to property owners within the same time frame.
- The public hearing allows members of the public to speak in front of the Board regarding the project.
- If required, a copy of the Order Calling Public Hearing is also mailed to the Office of the State Comptroller.

Article 12 Formation Continued

- SEQRA must be addressed by your Engineer prior to the next steps in the Article 12 process.
- The next document that must be adopted by the Town Board is the Resolution Creating the Establishment of a District.
- It is at this point that we would submit an application to the Office of the State Comptroller if one is required.
- Such an application is only required when bonds and/or notes are being issued and the annual cost to the typical property benefitted by the Project exceeds a limit set by the Comptroller.
- For 2026, this limit was $1,010 for sewer projects and $1,218 for water projects.

Article 12 Formation Continued

- The next step after the Resolution Creating the Establishment of a District is the filing of the Final Order Creating the District. This filing must occur within 10 days of the adoption of the Resolution Creating the Establishment of a District .
- After all of the aforementioned acts have been completed, the Town can adopt a bond resolution. The adoption of the bond resolution authorizes the Town to finance the project.
- An estoppel notice, which limits potential lawsuits against the Town, is highly encouraged to be published but is not required.

District Formation Under Article 12-A

- This process is very similar to the Article 12 process we described earlier.
- Just like in Article 12, a Map, Plan, and Report must be completed before anything else.
- The main difference is that no petition is needed for this process.
- Instead, the Town must hold a public hearing.
- To begin this, there must be an Order Calling Public Hearing adopted. The notice for such hearing must be posted and published no more than 20, but no less than 10, days prior to the hearing.

Article 12-A Formation Continued

- The public hearing is then held to allow the public to voice their opinion on the project.
- SEQRA must then be completed prior to the adoption of any resolution.
- The Resolution Establishing the District can the be adopted. This resolution is subject to permissive referendum.
- Permissive referendum is a 30-day period that allows the public to come forward if they want a vote on the Project. Notice of such referendum must be posted and published within 10-days of the adoption of the resolution.

Article 12-A Formation Continued

- If New York State Comptroller approval is required, the application process would begin here.
- Assuming the public does not ask for a vote (and no comptroller approval is required, or such approval is given) the Final Order Establishing the District can be adopted.
- After this, the bond resolution and corresponding estoppel procedure can be adopted and undertaken.

Amending Procedures

- Should a project need to be amended, the entire process (regardless of if it is an Article 12 or 12-A) needs to be completely restarted.
- This can be a cumbersome, time consuming, and costly process.
- Therefore, it is important that as many details as possible regarding the project are finalized before this process begins.

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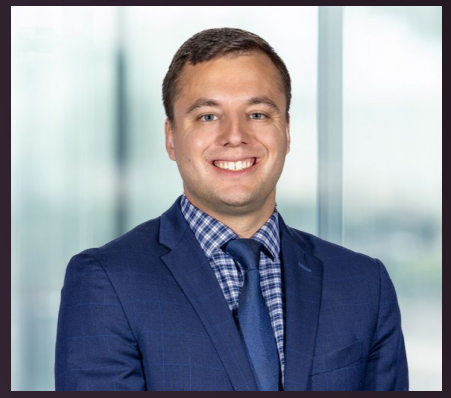

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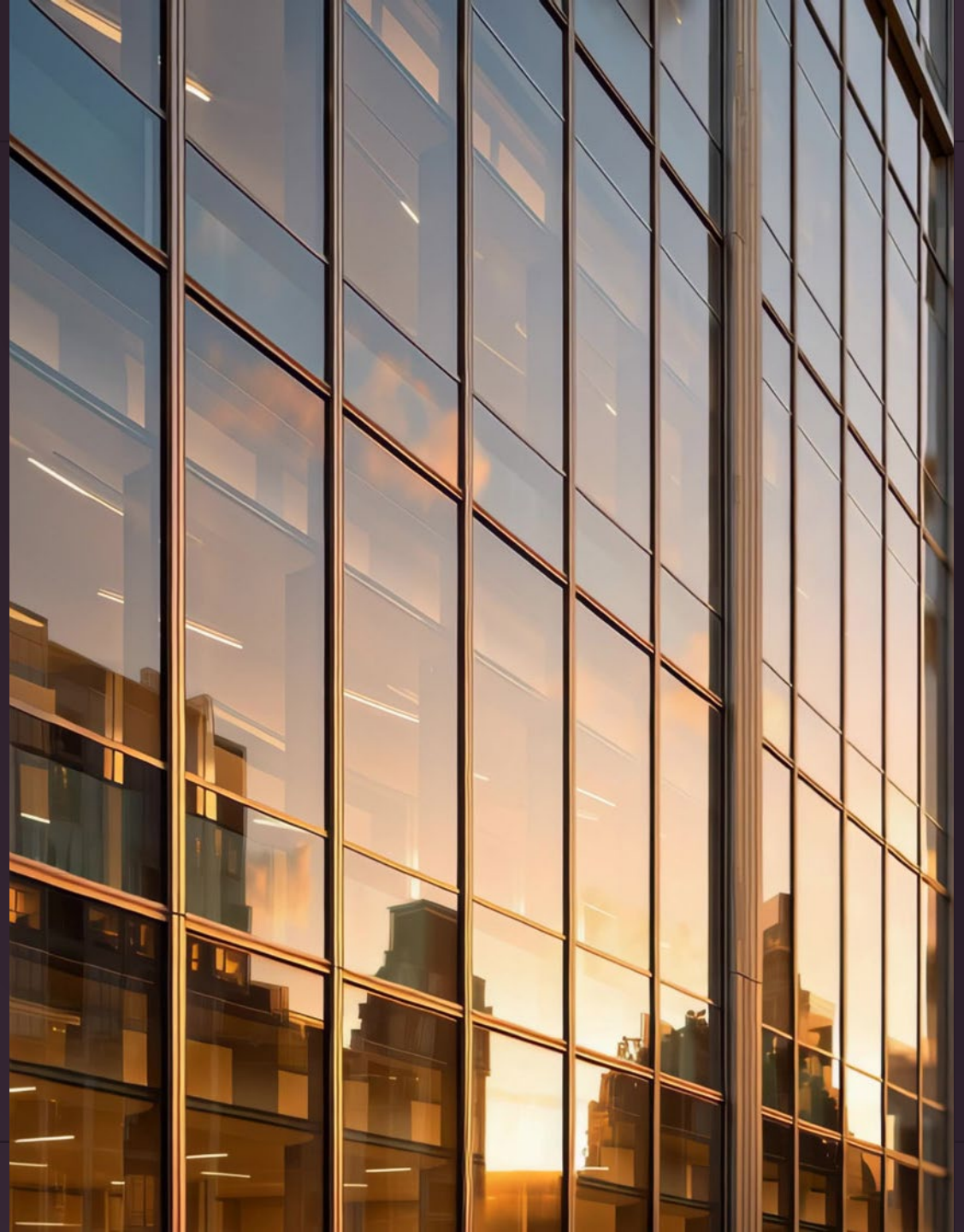
Hodgson Russ

Real Property Tax Law Update

Municipal Law Seminar

June 11, 2026

HENRY ZOMERFELD, PARTNER



Agenda

- Assessment methodology
- RPTL 420-a non-profit exemption eligibility
- “Concrete plans” to develop vacant property under RPTL 420-a
- IDA benefits and the authority and discretion of IDAs to award such benefits
- RPTL 575-b solar and wind assessment model effective after previous budget legislation
- Executive Budget – Revenue Bill highlights

Matter of Cuba Lake Comm. for Fair Assessments v. Town of Cuba, 246 AD3d 1497 (4th Dep't 2026)

- Challenge over validity of 2023 assessment roll. Trial court voided the entire roll and reinstated, in its place, the 2022 assessment roll until the Town performed a revaluation.
- Town appeals and Fourth Department unanimously reverses.
- Because Petitioners were attaching the methodology, they brought the suit as a combined CPLR Article 78 and declaratory judgment action.
- The crux of the challenge by Petitioners was the allegation that the methodology used in determining the 2023 tax assessment roll was arbitrary or capricious and unconstitutional.
- Contrary to the trial court's decision, the Fourth Department held that Petitioners did not meet their burden to overcome the presumption of validity of valuation or that the methodology was arbitrary and capricious.

Matter of Cuba Lake Comm. for Fair Assessments v. Town of Cuba, 246 AD3d 1497 (4th Dep't 2026)

- Petitioners "merely asserted that the professional real estate appraisal and consulting firm hired by the Town to perform the reassessment had used a flawed methodology."
- In support of their assertion, they relied upon a "land assessment analysis" report prepared by a non-expert property owner who was a litigant in the suit to try to show anomalies in the Town's assessment. But this was not adequate evidence to rebut the presumption.
- The Court looked at the record and determined that the appraisal firm "rationally employed a market value method of valuation that included a comparative property analysis of residential sales and necessarily took into account the affect on marketability of those properties located on leased land."

In the Matter of Congregation Yeshiva Yoreh Deah Inc. v. Ozomek, as Assessor of the Town of Liberty, et al., 245 A.D.3d 1077 (3d Dep't 2026)

- RPTL 420-a non-profit exemption.
- Petitioner purchased two parcels of land in 2016.
- In 2019, began applying for RPTL 420-a exemption, which Assessor denied and Board of Assessment Review upheld.
- Petitioner sued challenging the denials and sought summary judgment.
- Trial court denied the motion without written decision.
- On appeal, the Third Department performed an analysis of RPTL 420-a and its requirements, that the entity seeking the exemption: (1) be exclusively organized for the purposes under the statute; (2) the property is used primarily for those purposes; (3) no pecuniary benefit to the officers, members, or employees of the entity; and (4) that the entity is not a guise for a profit-making operation.
- The Court went on that the violation of the locality's zoning code is a complete defense in denying the exemption.

In the Matter of Congregation Yeshiva Yoreh Deah Inc. v. Ozomek, as Assessor of the Town of Liberty, et al., 245 A.D.3d 1077 (3d Dep't 2026)

- The Court focused on Petitioner's submissions, holding deficient the affirmation that articulated "conclusory statements" that there was no pecuniary benefit to any officer or employee of the entity.
- Absent from the submission was any income and expense statement, tax filing, or other information pertaining to the financials of the corporation.
- The IRS letter alone, according to the Court, was not enough to satisfy RPTL 420-a as this does not create, by itself, the presumption of entitlement to the exemption.
- The Court thus affirmed the denial of summary judgment to Petitioner.
- But it reversed on the grant of summary judgment to the Town.
- Key to the analysis was that the information submitted by the Town, which consisted only of an attorney affirmation. Though "an appropriate vehicle" to offer documents, there was no zoning map submission or personal knowledge by the Assessor or other individual with knowledge as to the Town's zoning code and any violations thereof.

Matter of Reformed Dutch Church of Schodack at Muitzeskill v Assessor of the Town of Schodack, 88 Misc.3d 1206(A) (Sup. Ct., Rensselaer Cnty., Jan. 13, 2026)

- RPTL 420-a exemption for contemplated construction - - what are “good faith contemplated plans” under the statute.
- Petitioner is a religious corporation that acquired a parcel of land for its church. It sought an RPTL 420-a exemption.
- The application submitted is crucial to the holding.
- On Part I about the property’s use for exempt purposes, Petitioner indicated that the newly acquired building is not currently being used. But the church hired a contractor to restore the property. Payments were made for services rendered prior to the acquisition, but no future work had been assigned.
- On Part II about the actual use of the property, Petitioner indicated that the structure on the property was currently unusable and checked “no” when asked about buildings or improvements contemplated on the unimproved land.

Matter of Reformed Dutch Church of Schodack at Muitzeskill v Assessor of the Town of Schodack, 88 Misc.3d 1206(A) (Sup. Ct., Rensselaer Cnty., Jan. 13, 2026)

- The question about when construction would begin was left blank. In another similar section, Petitioner wrote “N/A.”
- Petitioner then noted the parcel would be used for church storage, additional church parking, church and community offices, and church meeting spaces.
- The application was denied, and Petitioner brought suit to review and annul the determination.
- The Court held that while RPTL 420-a recognizes the exemption is available for those who have good faith contemplated plans, this requires “concrete and definite plans for utilizing and adopting the property for exempt purposes within the reasonably foreseeable future.”
- Here, Petitioner’s application fell short of this standard. Beyond the inconsistencies in the application itself, no such plans were offered. In litigation submissions, Petitioner’s own affidavit raised a question of fact.
- Though, the Court reasoned that “concrete and definite plans” do not require submissions of plans to the Town with attendant approvals. But to meet its burden, Petitioner was required to come forward with more than just a sworn statement as to general progress.

Wyandanch Union Free School Dist. v. Town of Babylon Indus. Dev. Agency, 250 N.Y.S.3d 586 (2d Dep't 2026)

- What is a "project" under the New York State Industrial Development Agency Act (the "Act") (Article 18–A of the General Municipal Law)?
- The IDA adopted a resolution determining that a planned affordable senior housing project is included in the type of projects eligible for certain financial assistance and benefits under the Act.
- Petitioners brought an Article 78 challenging the IDA's determination.
- Supreme Court dismissed and Petitioners (the School District, BOE, and BOE President) appealed.
- The Second Department affirmed finding that the IDA properly acted within its statutory authority (General Municipal Law Section 854(4)).
- The basis for the challenge related to the contention that the tax benefits sought (and awarding same) were prohibited under the Act and carried out without proper authority by the IDA.
- The IDA contended this was within the plain definition of a "commercial" project under the Act.
- The proposed project would promote jobs and improve economic welfare.

Wyandanch Union Free School Dist. v. Town of Babylon Indus. Dev. Agency, 250 N.Y.S.3d 586 (2d Dep't 2026)

- The Second Department analyzed General Municipal Law Sections 862 and 854(4), both providing IDA broad discretion and authority in approving projects for financial benefits. Based on these provisions and the Court's interpretation, it upheld the IDA's interpretation and application of the statutes in approving the project.
- Additionally, the Court went on that the IDA's interpretation was consistent with legislative intent and history.
- Based on these interpretations, the Court affirmed the dismissal of the Article 78 proceeding.
- Aside from deference to an IDA in interpreting its governing statute, this case confirms the broad application of the Act in the context of projects seeking economic benefits.

Solar and Wind Assessment Model Under RPTL 575-b

- Last year, Governor Hochul signed legislation resolving the latest attack on the solar and wind real property tax assessment model. The legislation, Senate Bill S.8012 (Assembly Bill A.8332) (the "Legislation"), is in direct response to the *Airey, et al. v. State of New York, et al.*, Index No. 903991-24, case in Albany County Supreme Court (the "Challenge").
- The Legislation amends RPTL § 575-b in several key ways. Section 1 adds subsections (d) and (e). Subsection (d) directs that expenses associated with certain host community benefits, the decommissioning of solar and wind energy systems, and community solar subscriber management costs associated with solar energy systems shall be included as expenses. Subsection (e) describes that federal investment and production tax credits granted by the Internal Revenue Code and environmental values, including but not limited to renewable energy credits, shall be deemed intangible assets and not included as revenue streams.
- Section 2 adds the new subdivision 5, which clarifies that no costs will be imposed against any assessing unit's established valuations on the basis of the Model. Such costs would have been allowable under RPTL § 722 in certain circumstances. The Legislation takes effect immediately per Section 3.

Solar and Wind Assessment Model Under RPTL 575-b

- The Legislation ends any uncertainty on the point, and adds additional confirmation that decommissioning costs and host community agreements should also be counted as expenses.
- The Legislation confirms the original purpose of RPTL § 575-b of bringing real property tax assessments of wind and solar systems in line with the considerations that system buyers and sellers employ in determining fair market value, and recognizing that only the real property income and expense values, not intangible or goodwill values, are taxable for real property tax purposes.
- The Legislation also codifies case law on this point. *See, e.g.*, *Mirant New York, Inc. v. Town of Stony Point Assessor*, 13 Misc.3d 1204(A), 824 N.Y.S.2d 756 (Sup. Ct., Rockland Cnty., 2006) ("Intangible assets and working capital were quantified and deducted to arrive at the value attributable to the real property.")
- This is because the goal of real property assessment is to reflect "the value of real estate alone, while business income is a measure of the real property, personal property, and the intangible assets of the business." *Miriam Osborn Mem'l Home Ass'n v. Assessor of City of Rye*, 80 A.D.3d 118, 142-43 (2d Dep't 2010) (citing 13 Warren's Weed, New York Real Property, Incomes Compared § 132.10 (5th ed.) and Appraisal of Real Estate, at 29 (Appraisal Institute 13th ed.)).

Solar and Wind Assessment Model Under RPTL 575-b

- The most recent model for this year (2026) includes an option for solar + storage (hybrid projects), but not standalone battery storage.
- Be sure to ask about these if you send out requests for the inputs.

FY2027 Executive Budget – Revenue Bill

- STAR Program Technical Corrections
  - Clarifies that recent operational updates regarding the age eligibility timeline for the Enhanced STAR credit apply explicitly to taxable years starting in 2026.
  - Eliminates the redundant supplemental credit payment application previously required from participating property taxpayers.
  - Removes the unnecessary supplemental credit payment application requirement for taxpayers.
  - Restores inadvertently repealed language that generally authorized the credit for low-income filers who are not required to file a personal income tax return.
  - Consolidates the protest provisions and eligibility determination, making them consistent across all variations of the STAR program.
  - Modifies “good cause” extension rules to match the reality that standard applications for the Enhanced STAR Exemption are no longer active.

Questions?

Thank you!

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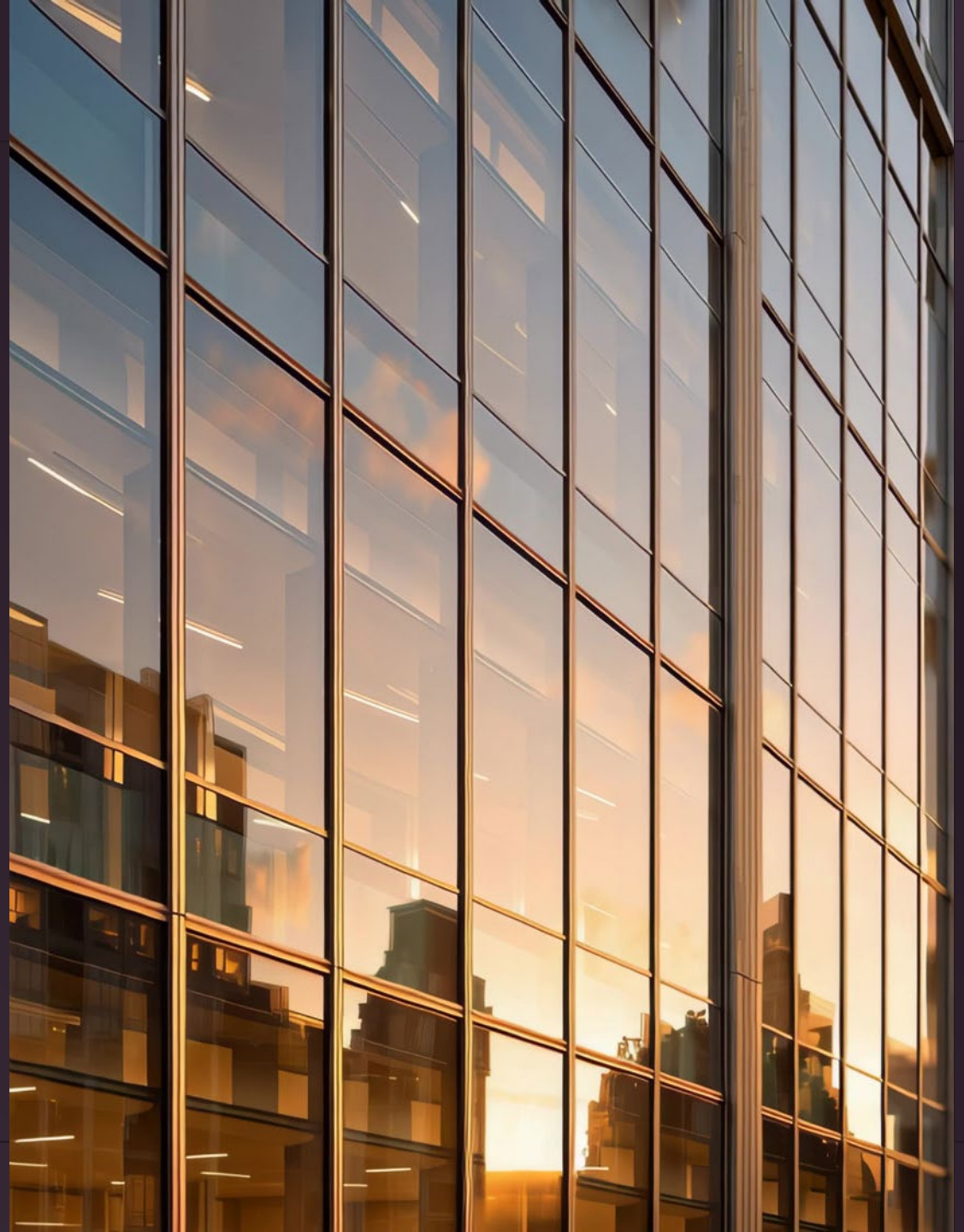
Hodgson Russ

NYS Budget SEQRA Reform 2026

What Changed, and What It Means for Your Municipality

MICHAEL BONCARDO, ASSOCIATE



Roadmap

- 90-second SEQRA refresher
- What passed?
- New definitions
- New Qualified Action Exemptions
- New EIS Deadlines
- New Statutes of Limitations

- **What does this mean for you?**

SEQRA in 90 Seconds

- ECL Article 8 – purpose: consider environmental impacts before agencies act.
- Classifications: **Type I/Unlisted/Type II.**
- Lead Agency, Environmental Assessment Form (EAF), **Negative vs. Positive Declaration.**
- Pos. Dec. – **Environmental Impact Statement (EIS).**
- Municipalities are usually the lead/involved agency on local approvals.

What Passed/Policy Background

- **Part R**, FY2027 Transportation, Economic Development & Environmental Conservation budget bill (**TED Part R**); **S.9008-C/A.10008-C.**
- Signed/adopted **May 26, 2026**
  - **Effective immediately**
  - **Applies to pending proceedings**
    - **Exception:** does not disturb determinations made before the effective date on whether to require an EIS.
- Part of the Governor's **"Let Them Build"** agenda – accelerate housing, cut duplicative review.
- NY's reforms follow a national trend: California amended CEQA; federal NEPA implementation was also recently streamlined.
- Amends ECL Sec. 8-0105, 8-0109, and 8-0111.

Overview of Amendments

- Part R amends the Environmental Conservation Law in four ways:
  - **Adds three new defined terms** to the ECL — "previously disturbed site," "small community water system," and "public school facilities" — each of which gates eligibility for the new exemptions.
  - **Creates a new category of exempt actions** — "qualified actions" that the responsible agency determines are exempt from environmental review under Article 8 of the ECL.
  - **Establishes new procedural deadlines** — a one-year limit for lead agencies to determine whether an EIS is required, and a two-year deadline for completion of any EIS once required.
  - **Codifies the statute of limitations accrual date** for Article 78 proceedings challenging agency determinations under SEQRA.

Qualified Action Exemptions Overview

- New exemptions added for certain **“qualified actions.”**
- Responsible agency must find that, considered **as a whole**, *each* component meets the exemption criteria.
- The agency has **120 days** (extendable) from receipt of the application to make the qualification determination.
- Effect of qualification determination: qualifying projects are removed from the standard SEQRA review track.

Housing Exemptions: Eligibility Criteria

- **Universal Conditions — Apply in Both NYC and Outside NYC:**
  - Built on a previously disturbed site.
  - Connected to existing water and sewer systems at occupancy.
  - Phase I Environmental Site Assessment completed and certified (except land use, zoning, and variance applications).
  - Does not consist solely of a single-family residence on a large lot (1/2 & 1 acres).
- **New York City**
  - 50,000 sq. ft. maximum non-residential.
  - Up to 250 units (standard districts).
  - Up to 500 units (medium- or high-density residential or mixed-use districts).
- **Outside New York City**
  - Non-residential uses: 50,000 sq. ft. or 20% of gross floor area, whichever is less.
  - Up to 300 units — urbanized areas (US Census definition).
  - Up to 100 units — non-urban areas.
  - Up to 20 units — unzoned municipalities.

The “Previously Disturbed” Site Requirement Qualifications

- **Why it matters:** Every housing exemption, regardless of location, requires the site to qualify as **"previously disturbed."**
- **“Previously disturbed site" means a parcel of land that is determined by a responsible agency to have been substantially altered by an occupied, formerly occupied, or demolished building or by another improvement or use at least two years prior to the application for a permit or authorization for an action.**

The "Previously Disturbed" Site Requirement Disqualifications

Flooding

- *Municipalities with population fewer than one million:*
  - Located in a FEMA-designated **100-year floodplain** or **special flood hazard area.**
    - *Exception*: does not apply where the municipality has adopted a law or ordinance requiring new construction to be elevated above the base flood elevation as defined by FEMA.
- *New York City (population more than one million):*
  - Located in a **flood hazard area** as defined in Section 202 of the NYC Building Code.
    - *Exception*: does not apply where the city has adopted a law or ordinance requiring new construction to be elevated above the base flood elevation as defined by FEMA.

Agricultural Use

- Currently being used for agricultural purposes; or
- Used for agricultural purposes within the **immediately preceding two years**; or
- Used for agricultural purposes in **three of the last five years** before the application.

Adjacent Parcel *(municipalities with population fewer than one million, outside an urban area only)*

- The parcel does not abut, adjoin, or be opposite from another parcel occupied or formerly occupied by a building or improvement at least two years prior to the application; or
- The only adjacent parcel is occupied by an industrial or agricultural use.
- **Coastal Erosion:** Located in a designated **coastal erosion hazard area.**

Beyond Housing: The Non-Housing Exemptions

Water and Wastewater Infrastructure

- Replace, rehabilitate or reconstruct municipal water or wastewater infrastructure, in-kind and on the same site, including lead service line replacement.
- Replace, rehabilitate, upgrade or reconstruct an existing small community water system, including lead service line replacement.
- Provide sewer service to a disadvantaged community served by one or more inadequate sewage treatment systems that has been determined by the department not to require a permit or approval pursuant to ECL Articles 15, 24 or 25.

Public Space and Recreation *(at a previously disturbed site)*

- Construction of public parks that do not include performance centers, athletic stadiums, or other venues for mass gatherings, or other buildings or structures which do not serve public park, recreation, or open space purposes.
- Construction of multi-use bicycle and pedestrian trails.

Beyond Housing: The Non-Housing Exemptions

Public School Facilities

– Construction of public school facilities to be connected at the commencement of use to existing community or public water and sewerage systems, including sewage treatment works, in a city with a population of one million or more.

– Limited to educational facilities of a city school district over which the Department of Education has jurisdiction, for purposes of meeting class size compliance targets under Section two hundred eleven-d of the education law.

Green Infrastructure

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

What the Exemption Does NOT Touch

A SEQRA exemption removes one layer of review. It does not clear the full regulatory landscape.

- Amendments do **not** override existing law on: historic preservation, disadvantaged communities, air & water quality, wetlands, endangered species.
- **Local zoning and land use:** Cities, towns, and villages retain full authority — site plan review, traffic studies, contamination testing, and water/wastewater capacity determinations all continue.

New Procedural Deadlines: Accountability for Agencies

Stage	Deadline	Trigger
Qualified action determination	120 days (+ up to 30 day extension)	Receipt of application
EIS determination	1 year	Lead agency established
EIS completion	2 years	Determination that EIS is required

Takeaways for Municipalities

- **Potential for fewer projects in full review.** Less EIS workload, but less leverage to extract mitigation through SEQRA.
- **New deadlines.** 120-day qualification, 1-yr/2-yr EIS deadlines present potential for delay-litigation exposure; calendar accordingly.
- Pending matters should be reassessed **ASAP.** Update local procedures for qualification-determination workflows.
- **Lean on land-use tools.** Robust site plan and special use permit standards carry more weight on qualified projects.

Thank you.

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McKinney's Consolidated Laws of New York Annotated
Environmental Conservation Law (Refs & Annos)
Chapter 43-B. Of the Consolidated Laws (Refs & Annos)
Article 24. Freshwater Wetlands (Refs & Annos)
Title 1. General Provisions and Public Policy (Refs & Annos)

McKinney's ECL § 24-0107

§ 24-0107. Definitions

Effective: January 1, 2025
Currentness

1. [Eff. until Jan. 1, 2028. See, also, intro. par. below.] "Freshwater wetlands" means lands and waters of the state, that are not tidal wetlands as defined in subdivision one of section 25-0103 of this chapter, that have an area of at least twelve and four-tenths acres or, if less than twelve and four-tenths acres in size, are of unusual importance, and which contain any or all of the following:

1. [Eff. Jan. 1, 2028. See, also, intro. par. above.] "Freshwater wetlands" means lands and waters of the state, that are not tidal wetlands as defined in subdivision one of section 25-0103 of this chapter, that have an area of at least seven and four-tenths acres or, if less than seven and four-tenths acres in size, are of unusual importance, and which contain any or all of the following:

(a) lands and submerged lands commonly called marshes, swamps, sloughs, bogs, and flats supporting aquatic or semi-aquatic vegetation of the following types:

(1) wetland trees, which depend upon seasonal or permanent flooding or sufficiently water-logged soils to give them a competitive advantage over other trees; including, among others, red maple (Acer rubrum) willows (Salix spp.), black spruce (Picea mariana); swamp white oak (Quercus bicolor), red ash (Fraxinus pennsylvanica), black ash (Fraxinus nigra), silver maple (Acer saccharinum), American elm (Ulmus americana), and Larch (Larix laricina);

(2) wetland shrubs, which depend upon seasonal or permanent flooding or sufficiently water-logged soils to give them a competitive advantage over other shrubs; including, among others, alder (Alnus spp.), buttonbush (Cephalanthus occidentalis), bog rosemary (Andromeda glaucophylla), dogwoods (Cornus spp.), and leatherleaf (Chamaedaphne calyculata);

(3) emergent vegetation, including, among others, cattails (Typha spp.), pickerelweed (Pontederia cordata), bulrushes (Scirpus spp.), arrow arum (Peltandra virginica), arrowheads (Sagittaria spp.), reed (Phragmites communis), wildrice (Zizania aquatica), bur-reeds (Sparganium spp.), purple loosestrife (Lythrum salicaria), swamp loosestrife (Decondon verticillatus), and water plantain (Alisma plantago-aquatica);

(4) rooted, floating-leaved vegetation; including, among others, water-lily (Nymphaea odorata), water shield (Brasenia schreberi), and spatterdock (Nuphar spp.);

(5) free-floating vegetation; including, among others, duckweed (Lemna spp.), big duckweed (Spirodela polyrhiza), and watermeal (Wolffia spp.);

(6) wet meadow vegetation, which depends upon seasonal or permanent flooding or sufficiently water-logged soils to give it a competitive advantage over other open land vegetation; including, among others, sedges (Carex spp.), rushes (Juncus spp.), cattails (Typha spp.), rice cut-grass (Leersia oryzoides), reed canary grass (Phalaris arundinacea), swamp loosestrife (Decodon verticillatus), and spikerush (Eleocharis spp.);

(7) bog mat vegetation; including, among others, sphagnum mosses (Sphagnum spp.), bog rosemary (Andromeda glaucophylla), leatherleaf (Chamaedaphne calyculata), pitcher plant (Sarracenia purpurea), and cranberries (Vaccinium macrocarpon and V. oxycoccos);

(8) submergent vegetation; including, among others, pondweeds (Potamogeton spp.), naiads (Najas spp.), bladderworts (Utricularia spp.), wild celery (Vallisneria americana), coontail (Ceratophyllum demersum), watermilfoils (Myriophyllum spp.), muskgrass (Chara spp.), stonewort (Nitella spp.), water weeds (Elodea spp.), and water smartweed (Polygonum amphibium);

(b) lands and submerged lands containing remnants of any vegetation that is not aquatic or semi-aquatic that has died because of wet conditions over a sufficiently long period, provided that such wet conditions do not exceed a maximum seasonal water depth of six feet and provided further that such conditions can be expected to persist indefinitely, barring human intervention;

(c) lands and waters substantially enclosed by aquatic or semi-aquatic vegetation as set forth in paragraph (a) of this subdivision or by dead vegetation as set forth in paragraph (b) of this subdivision, the regulation of which is necessary to protect and preserve the aquatic and semi-aquatic vegetation; and

(d) the waters overlying the areas set forth in paragraphs (a) and (b) of this subdivision and the lands underlying paragraph (c) of this subdivision.

2. “Freshwater wetlands map” shall mean a map developed by the department pursuant to section 24-0301 of this article on which are indicated the boundaries of any freshwater wetlands. Freshwater wetland maps depict the approximate location of wetlands and are not necessarily determinative as to whether a permit is required pursuant to section 24-0701 of this article.

3. “Boundaries of a freshwater wetland” shall mean the outer limit of the vegetation specified in paragraphs (a) and (b) of subdivision one of this section and of the lands and waters specified in paragraph (c) of such subdivision.

4. “Local government” shall mean a village, town, city, or county.

5. “State agency” shall mean any state department, bureau, commission, board or other agency, public authority or public benefit corporation.

6. “Person” means any corporation, firm, partnership, association, trust, estate, one or more individuals, and any unit of government or agency or subdivision thereof, including the state.

7. “Board” shall mean the freshwater wetland appeals board.

8. “Pollution” shall mean the presence in the environment of human-induced conditions, or contaminants in quantities or characteristics which are or may be injurious to human, plant or wildlife, or other animal life or to property.

9. “Unusual importance” shall mean a freshwater wetland, regardless of size, that possesses one or more of the following characteristics as determined by the department pursuant to regulations:

(a) it is located in a watershed that has experienced significant flooding in the past, or is expected to experience significant flooding in the future from severe storm events related to climate change;

(b) it is located within or adjacent to an urban area, as defined by the United States census bureau;

(c) it contains a plant species occurring in fewer than thirty-five sites statewide or having fewer than five thousand individuals statewide;

(d) it contains habitat for an essential behavior of an endangered or threatened species or a species of special concern as defined under section 11-0535 of this chapter or listed as a species of greatest conservation need in New York's wildlife action plan;

(e) it is classified by the department as a Class I wetland;

(f) it was previously classified and mapped by the department as a wetland of unusual local importance;

(g) it is a vernal pool that is known to be productive for amphibian breeding;

(h) it is located in an area designated as a floodway on the most current Digital Flood Insurance Rate Map (DFIRM) produced by the Federal Emergency Management Agency;

(i) it was previously mapped by the department as a wetland on or before December thirty-first, two thousand twenty-four;

(j) it has wetland functions and values that are of local or regional significance; or

(k) it is determined by the commissioner to be of significant importance to protecting the state's water quality.

10. “Delineation” shall mean a precise representation of a regulated freshwater wetland as defined in subdivision one of this section.

Credits

(Added L.1975, c. 614, § 1. Amended L.1977, c. 654, § 2; L.2022, c. 58, pt. QQ, § 2, eff. Jan. 1, 2025; L.2022, c. 58, pt. QQ, § 17, eff. Jan. 1, 2028.)

Editors' Notes

PRACTICE COMMENTARIES

by Kevin Anthony Reilly

2023

This section was amended in 2022 (L.2022, ch. 58., pt. QQ). The current section presents not only textual complexity but also legal complexity for lawyers advising clients whose interests may touch on wetlands on or near their property. The current text is effective only until January 1, 2025, and minor parts of the 2025 test will change again in 2028, although the relatively minor amendments tend to add clarity rather than much substance. However, the overall effect is to impose strict restrictions and requirements for topographical features that, even with the additional clarity, may be innately shifting and impermanent.

At the outset, certain definitions can be quickly dispensed with. Local governments are those of the usual municipalities. "State agency" is broadly construed to include the usual ones, but also public benefit corporations. "Person" includes several legally created entities along with units of government as well as, well, persons. "Board" refers to the Freshwater Wetlands Appeals Board, yet title 11 in Article 24 under which it operated has been repealed. Pollution and pollutant are conventionally defined. However, unlike the federal Clean Water Act where the broad reference is to additions to a water body that alter the physical, biological or chemical composition of the receiving water body, the terms here are more narrowly referenced to potential injuries to people, plants, wildlife, other animals, or property. Hence, the shift is from the nature of the addition to its consequences. The innocuous sounding "unusual importance" actually might be very important insofar as particular characteristics may convert a wetland that ordinarily would not fall within Article 24 jurisdiction into one subject to DEC regulation. The term is further defined by reference to a number of circumstances added by the 2022 legislation and comes into effect in 2025. The regulation (6 NYCRR 662.1[k]) cross-references to section 23-0105(7) for an itemization of the wetland resources that would bring a *de minimis* wetland possessing some of those benefits within the reach of Article 24. This provides helpful clarification whereas the former use of the term had more of an *ad hoc*, statutorily undefined, character.

Turning to the more seminally important definition, current subsection (1) and 6 NYCRR 662.1(k) define freshwater wetlands as lands and waters of the state, shown as such on the freshwater wetlands map, which contain certain topographical characters often termed marshes, swamps, sloughs, bogs, and flats, and support a wide variety of biota. Notably, wetlands fauna is left unmentioned even though their habitat was legislatively recognized to be important policy reason for enacting Article 24. The listed plant species fall within the botanical categories of wetland trees, shrubbery, emergent vegetation "rooted floating-leaf vegetation," "free-floating vegetation," wet meadow vegetation, bog mat vegetation, and submergent vegetation, each described in more detail in the statute and regulations. Land subject to a persistent inundation less than six feet deep where dry land vegetation has died because of the inundation might also satisfy the definition. This gets around the problem that occasionally arose in the past involving non-natural "artificial" wetlands, when dry land might have been regularly flooded by human means (see the discussion in the Commentary for section 25-0103 as applied to tidal wetlands). In a different sense it also anticipates some of the consequences of sea level rise. Also included in the definition of wetlands are areas basically surrounded by submerged areas with vegetation killed off by inundation which are important to the health of the latter, and which will likely remain inundated indefinitely. This, too avoids, the problem of how to define locations submerged by human as

well as natural activity. The replacement text that is effective from January 1, 2025, until January 1, 2028, formalizes in the definition the minimum jurisdictional area of 12.4 acres that is noted elsewhere in Article 24 (see section 24-0507), and explicitly excludes tidal wetlands (see section 25-0103) from the definition of freshwater wetlands. The replacement text effective in 2028 reduces the minimum area triggering Article 24 regulation from 12.4 acres to 7.4 acres (also reflected in the amended section 24-0507), and alters the listed vegetation in minor degree.

Subsection (2) presently defines a freshwater wetland with reference to DEC's wetlands mapping. After a long history where parties relying on the delineation of wetland boundaries often might have been frustrated by trying to rely on DEC's valid although vexing movement of maps' boundaries, the replacement text in 2025 clarifies that the map boundaries depict “the approximate location of wetlands and are not necessarily determinative as to whether a permit is required.” As is apparent throughout these Commentaries, wetland boundaries are not like title or other property interests which confer an ongoing legal reliability for boundaries. Rather, the wetland's boundaries may shift, even often, because of a number of scientific, environmental, meteorological and land use variables. However, while the new cautionary text may not promise predictability, it does clearly alert all interested parties about the boundaries' potential impermanence and the need to exercise due diligence for land use planning in wetland areas.

Notes of Decisions (6)

McKinney's E. C. L. § 24-0107, NY ENVIR CONSER § 24-0107
Current through L.2026, chapters 1 to 49, 61 to 119. Some statute sections may be more current, see credits for details.

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KeyCite Yellow Flag
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Environmental Conservation Law (Refs & Annos)
Chapter 43-B. Of the Consolidated Laws (Refs & Annos)
Article 70. Uniform Procedures (Refs & Annos)

McKinney's ECL § 70-0118

§ 70-0118. Disproportionate impacts on disadvantaged communities

Effective: December 30, 2024
Currentness

1. For the purposes of this section:

(a) "Disadvantaged communities" shall have the same meaning as subdivision five of section 75-0101 of this chapter.

(b) "Applicable permit" shall mean a permit, excluding a general permit, applied for pursuant to:

(i) title fifteen of article fifteen of this chapter for a facility withdrawing and using over twenty million gallons per day of water for cooling purposes;

(ii) article seventeen of this chapter;

(iii) article nineteen of this chapter;

(iv) title seventeen of article twenty-three of this chapter; or

(v) title three, title seven, title nine or title eleven of article twenty-seven of this chapter.

2. (a) When a new project subject to an applicable permit may cause or contribute more than a de minimis amount of pollution to any disproportionate pollution burden on a disadvantaged community, the department shall require the applicant to prepare or cause to be prepared an existing burden report.

(b) In the case of an application for renewal or modification of an applicable permit not subject to the provisions of paragraph (a) of this subdivision which may cause or contribute more than a de minimis amount of pollution to any disproportionate pollution burden on a disadvantaged community the department shall require the applicant to prepare or cause to be prepared an existing burden report; provided, however that the department may elect not to require such existing burden report if the

permit would serve an essential environmental, health, or safety need of the disadvantaged community for which there is no reasonable alternative.

(c) Notwithstanding the requirements of paragraphs (a) or (b) of this subdivision, no existing burden report shall be required for an application for a renewal of a permit if an existing burden report has been prepared with respect to such permit within the previous ten years.

3. (a) When considering an application for an applicable permit, the department shall consider the existing burden report, if any, and an administrative record that includes, but is not limited to, comments received from the public in the disadvantaged community.

(b) The department shall not issue an applicable permit for a new project if it determines that the project will cause or contribute more than a de minimis amount of pollution to a disproportionate pollution burden on the disadvantaged community.

(c) In the case of an application for a modification of an applicable permit, the department shall not issue an applicable permit if it determines that the issuance of the permit would significantly increase the existing disproportionate pollution burden on the disadvantaged community.

(d) In the case of an application for renewal of an applicable permit, the department shall not issue an applicable permit if it determines that the project would significantly increase the existing disproportionate pollution burden on the disadvantaged community.

4. The department shall require actions to implement any appropriate operational changes which would reduce the pollution burden on the disadvantaged community as a condition of an applicable permit, only if such actions are reasonable and practicable, as determined by the department.

5. The department, in consultation with the department of health, shall develop the scope of the existing burden report and may adapt such requirements based on whether a permit application is for a new project, modification, or a renewal of a permit. The department shall provide for at least a thirty-day public comment period prior to finalizing the scope of the report. The report shall provide for an assessment of the following information:

(a) relevant baseline data on existing burdens, including from relevant criteria used to designate the particular disadvantaged communities pursuant to subdivision one of section 75-0111 of this chapter;

(b) the environmental or public health stressors already borne by the disadvantaged community as a result of existing conditions located in or affecting the disadvantaged community;

(c) the potential or projected contribution of the proposed action to existing pollution burdens in the community; and

(d) existing and potential benefits of the project to the community including increased housing supply, or alleviation of existing pollution burdens that may be provided by the project, including operational changes to the project that would reduce the pollution burden on the disadvantaged community.

Credits

(Added L.2022, c. 840, § 7, eff. Dec. 30, 2024. Amended L.2023, c. 49, § 7, eff. Dec. 30, 2024.)

McKinney's E. C. L. § 70-0118, NY ENVIR CONSER § 70-0118
Current through L.2026, chapters 1 to 49, 61 to 119. Some statute sections may be more current, see credits for details.

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

CONSOLIDATED DECISION, ORDER & JUDGMENT

CHAUTAUQUA LAKE PROPERTY OWNERS ASSOCICATION, INC., *et al*.,

Petitioners-Plaintiffs,

Case 1
Index No. 903982-25

-against-

THE STATE OF NEW YORK and the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondents-Defendants.

BUSINESS COUNCIL OF NEW YORK STATE INC., *et al*.,

Petitioners-Plaintiffs,

Case 2
Index No. 904423-25

-against-

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and AMANDA LEFTON, as Acting Commissioner of the New York State Department of Environmental Conservation,

Respondents-Defendants.

VILLAGE OF KIRYAS JOEL and TOWN OF PALM TREE,

Petitioners-Plaintiffs,

Case 3
Index No. 904424-25

-against-

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and AMANDA LEFTON, Acting Commissioner of the New York State Department of Environmental Conservation,

Respondents-Defendants.

CHAUTAUQUA LAKE PARTNERSHIP, INC., *et al*.,

Petitioners-Plaintiffs,

Case 4
Index No. 905313-25

-against-

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, *et al*.,

Respondents-Defendants.

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Hon. Richard M. Platkin, A.J.S.C.

Pending before the Court are four combined CPLR article 78 proceedings/declaratory judgment actions challenging (i) the 2022 legislative amendments ("2022 Amendments") to the Freshwater Wetlands Act (*see* Environmental Conservation Law ["ECL"] art 24), and (ii) the new Part 664 regulations promulgated by respondent New York State Department of Environmental Conservation ("DEC") to implement the 2022 Amendments.

I. BACKGROUND

A. The Original Wetlands Act

The Legislature enacted the Freshwater Wetlands Act ("Act") in 1975 "to preserve, protect and conserve freshwater wetlands and the benefits derived therefrom, . . . consistent with the general welfare and beneficial economic, social and agricultural development of the state" (ECL § 24-0103; *see Spears v Berle*, 48 NY2d 254, 260 [1979]).

The Act principally defined "freshwater wetlands" as "lands and submerged lands commonly called marshes, swamps, sloughs, bogs, and flats supporting aquatic or semi-aquatic vegetation" of eight specified types (*see* former ECL § 24-017 [1] [a] [1-8]). The definition also encompassed certain "lands and submerged lands containing [vegetation] remnants" (*id*. [b]), as well as "lands and waters substantially enclosed" by vegetation or remnants falling into the preceding two categories (*see id*. [c]).

The Act "assign[ed] the Commissioner of DEC the formidable task . . . to study and to map parcels of wetlands throughout the State having an area of at least 12.4 acres or areas measuring less than 12.4 acres deemed of 'unusual local importance'" (*Matter of Wedinger v Goldberger*, 71 NY2d 428, 436 [1988], quoting former ECL § 24-0301 [1]).

As DEC's identification of wetlands progressed, the agency was "directed to prepare tentative maps, detailing the boundaries of the areas determined up to that point in time to be freshwater wetlands" (*id*.). "Prior to promulgation of a final map, DEC [was] required to give the community and affected landowners specific notice and opportunity to be heard" (*id*.).

Although the Legislature supplied DEC with a definition of "freshwater wetlands," the Act provided that "only those lands and waters 'shown on [DEC's final] freshwater wetlands map'" were treated as wetlands (*Matter of Drexler v Town of New Castle*, 62 NY2d 413, 417 [1984], quoting former ECL § 24-0107 [1]). Mapped wetlands became "subject to rigorous regulation" by DEC, "with certain uses permitted as of right and others permissible only by permit" (*Spears*, 48 NY2d at 260). For "lands or waters [not] satisfying either the size or importance criterion, . . . the [Act] reserve[d] entire and exclusive jurisdiction in the local governments" (*Drexler*, 62 NY2d at 417-418).

To implement the Act, DEC promulgated two sets of regulations. Under 6 NYCRR part 663 ("Part 663"), DEC established the procedural requirements and substantive standards for the use of regulated wetlands and the issuance of permits therefor. The standards and procedures for classifying wetlands were established in 6 NYCRR part 664 ("Part 664").

B. The 2022 Amendments

Enacted as part of the 2022-23 State budget, Part QQ of Chapter 58 of the Laws of 2022 amended the Act to remove the requirement that freshwater wetlands be mapped for them to be subject to State regulation. Following enactment of the 2022 Amendments, DEC's wetland maps are merely informational and not necessarily determinative of regulatory jurisdiction (*see* ECL § 24-0107 [2]).

The 2022 Amendments establish "a rebuttable presumption that mapped and unmapped areas meeting the definition of a freshwater wetland . . . are regulated and subject to permit requirements" (*id*. § 24-0301 [4]). "This presumption may be rebutted by presenting information to [DEC] that the area does not meet the [statutory] definition. A wetland delineation by [DEC], or a verification by [DEC] of a wetland delineation by another party, is required to identify the regulated freshwater wetland boundary in a particular location" (*id*.).

The 2022 Amendments also defined 11 categories of wetlands deemed to be of "unusual importance" (ECL § 24-0107 [9]). Wetlands falling into any of these categories are subject to regulation, regardless of size (*see id*.).

But no changes were made to the Act's definition of "freshwater wetlands" or its authorization for a buffer zone in areas adjacent to wetlands: "[A]ctivities are subject to regulation . . . if they impinge upon or otherwise substantially affect the wetlands and are located not more than one hundred feet from the boundary of such wetland. Provided, that a greater distance from any such wetland may be regulated . . . where necessary to protect and preserve the wetland" (*id*. § 24-0701 [2]).

C. The New Part 664 Regulations

"In response to the Act's 2022 amendments, DEC immediately developed and implemented a multi-phased plan to inform stakeholders of the landmark changes to the Act, conducted general and targeted outreach, and collected feedback on informal proposals. DEC used this feedback to repeal and replace the former 6 NYCRR part 664" (Case 2, NYSCEF Doc No. 25 ["Jacobson Aff."], ¶ 14). "DEC's outreach involved multiple in-person and remote meetings and webinars with more than 30 stakeholder groups representing development interests,

agriculture, environmental advocacy, energy generation and transmission, environmental consultants, municipalities, land trusts, and state agencies" (*id*., ¶ 15).

DEC then released "a written draft of regulatory text to which stakeholders could respond and give informal feedback, prior to beginning the formal rule making process" (*id*., ¶ 16). Seeking "specific feedback on how to best clarify" the 2022 Amendments in relation to "the 11 new unusual importance criteria, the extent to which DEC would extend the 'adjacent area' now that its jurisdiction was not limited to mapped wetlands, a new jurisdictional determination procedure, and a process for property owners to appeal positive jurisdictional determinations," DEC published an advance notice of proposed rulemaking on January 3, 2024 (*id*., ¶¶ 17-18).

"DEC received and carefully reviewed 2,600 written responses," many of which "expressed concerns regarding potential regulatory delay during the jurisdictional determination process, confusion over the new unusual importance criteria, the extension of the regulated wetland adjacent area, and new jurisdictional determination and appeals procedures" (*id*., ¶ 20). "DEC used this critical feedback to address these concerns in the formal notice of proposed rule making and through other regulatory tools . . . , like the development of standard operating procedures for wetland mapping and several proposed general permits" (*id*.).

DEC filed a notice of proposed rulemaking on July 10, 2024, which received over 4,900 public comments (*see id*., ¶¶ 21-22). After review, "DEC decided to further clarify the proposed rule and regulatory impact statement, adding clearer definitions, a more precise description of the jurisdictional determination process and the extension of regulated adjacent areas, and a clearer description of how DEC would identify endangered species habitat" (*id*., ¶ 25).

"On December 20, 2024, DEC filed the final rule making package (final rule) with the Department of State including the revised text, a summary of the revised text, a certificate of

adoption, a summary of the revised regulatory impact statement, an assessment of public comment, [an] Environmental Assessment Form including the negative declaration under the State Environmental Quality Review Act . . . , as well as a statement . . . why the non-substantive changes to the final rule did not necessitate changes to, and resubmission of, the regulatory flexibility analysis, rural area flexibility analysis, or the job impact statement" (*id*., ¶ 32).

The final rule was published in the State Register on December 31, 2024 (*see id*., ¶ 33), and the new Part 664 took effect on January 1, 2025.

D. This Litigation

Pending before the Court are four hybrid actions/proceedings challenging the Part 664 regulations and certain aspects of the 2022 Amendments.

In Case 1, the Chautauqua Lake Property Owners Association ("Chautauqua POA"), together with a municipality, landowner and two business associations, filed a combined petition/complaint raising five challenges: (i) the Part 664 regulations were adopted in violation of the State Administrative Procedure Act ("SAPA"); (ii) the 2022 Amendments and Part 664 regulations violate the due process rights of landowners; (iii) the Part 664 regulations are arbitrary and capricious; (iv) Part 664 improperly delegates regulatory authority to private actors; and (v) the 2022 Amendments and Part 664 violate Home Rule principles (*see* Case 1, NYSCEF Doc No. 1 ["Case 1 Petition"]).

In Case 2, brought by the Business Council of New York State Inc. ("Business Council") and other development-oriented associations, along with several companies involved in real-estate development and home construction, petitioners allege that: (i) the Part 664 regulations were not adopted in compliance with the State Environmental Quality Review Act ("SEQRA"); (ii) the Part 664 regulations were not adopted in compliance with SAPA; (iii) the 2022

Amendments and Part 664 regulations are unconstitutionally vague; and (iv) the Part 664 regulations are arbitrary and capricious (*see* Case 2, NYSCEF Doc No. 1 ["Case 2 Petition"]).[1]

The petitioners in Case 3, the Village of Kiryas Joel and Town of Palm Tree, are represented by the same counsel as the Case 2 petitioners and allege the same four claims (*see* Case 3, NYSCEF Doc No. 1 ["Case 3 Petition"]).

Finally, Case 4 is brought by Chautauqua Lake Partnership and three local landowners who allege: (i) the Part 664 regulations are arbitrary and capricious; (ii) the regulations were adopted in violation of SAPA; (iii) the 2022 Amendments and Part 664 are void for vagueness; (iv) certain aspects of the 2022 Amendments and Part 664 regulations constitute an improper delegation of authority to DEC; and (v) the Part 664 regulations were adopted in violation of SEQRA (*see* Case 4, Doc No. 16 ["Case 4 Petition"]).

DEC and the other named respondents answered the petitions through a combined memorandum of law (*see* NYSCEF Doc No. 29 ["Opp Mem"]), affidavits from three DEC employees (*see* NYSCEF Doc Nos. 25-27) and the 14-volume administrative record, consisting of more than 3,000 pages.

In addition to submissions from the parties, the Court received an amicus brief from members of the Save the Wetlands Coalition in opposition to the petitions (*see* NYSCEF Doc No. 46) and amicus submissions in support of the petitions from certain Republican members of the Legislature (*see* NYSCEF Doc No. 55), the Village of Lakewood (*see* Case 4, NYSCEF Doc No. 60) and the Bemus Point Business Association (*see* Case 1, NYSCEF Doc No. 54).

Given the substantial commonality of issues presented by the cases and DEC's combined opposition, the Court informally consolidated the four challenges for oral argument and

[1] Unless otherwise specified, citations to the NYSCEF docket shall refer to the docket in Case 2.

disposition. Argument was held on January 30, 2026 (*see* NYSCEF Doc No. 66), copies of the transcript were filed on or around March 10, 2026 (*see* NYSCEF Doc No. 67 ["Transcript"]), and this Consolidated Decision, Order & Judgment follows.

II. DUE PROCESS

A. The Elimination of Jurisdictional Mapping

The Chautauqua POA petitioners allege that the 2022 Amendments and Part 664 violate the due process rights of property owners by eliminating the procedural safeguards associated with the prior system of jurisdictional maps (*see* Case 1 Petition, ¶¶ 97-103; NYSCEF Doc No. 10 ["Case 1 MOL"] at 18). Petitioners complain that "[t]he replacement of individualized notice, public hearings, and formal mapping orders" with "an amorphous presumption of jurisdiction – rebuttable only through a costly and burdensome process" does not accord landowners with procedural due process (Case 1 MOL at 19).

1. Legal Standard

"The standard for determining whether notice is adequate under the Due Process Clauses of the Fourteenth Amendment to the United States Constitution and article I, § 6 of the New York Constitution is well settled" (*Hetelekides v County of Ontario*, 39 NY3d 222, 236 [2023]). "Due process does not require personal notice in every circumstance where a property interest may be affected by government action; instead, a balancing process is employed to determine what constitutes 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to [be heard]'" (*Matter of North Dock Tin Boat Assn., Inc. v New York State Off. of Gen. Servs.,* 96 AD3d 1186, 1189-1190 [3d Dept 2012], quoting *Matter of Zaccaro v Cahill*, 100 NY2d 884, 890 [2003]).

The Case 1 Petition and memorandum of law raise a purely facial challenge to the constitutionality of the 2022 Amendments and Part 664. "Generally, a party making a facial challenge to a [statute or] regulation has the 'extraordinary burden . . . of proving beyond a reasonable doubt that the challenged provision 'suffers wholesale constitutional impairment'" (*Matter of Owner Operator Ind. Drivers Assn., Inc. v New York State Dept. of Transp*., 40 NY3d 55, 61 [2023], quoting *Brightonian Nursing Home v Daines*, 21 NY3d 570, 577 [2013]). "Thus, a facial challenge must fail so long as there are circumstances under which the challenged provision 'could be constitutionally applied'" (*id*., quoting *Matter of Moran Towing Corp. v Urbach*, 99 NY2d 443, 445 [2003]).

Additionally, "'[l]egislative enactments are entitled to a strong presumption of constitutionality, and courts strike them down only as a last unavoidable result after every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible'" (*Sullivan v New York State Joint Commn. on Pub. Ethics*, 207 AD3d 117, 125 [3d Dept 2022], quoting *White v Cuomo*, 38 NY3d 209, 216 [2022]). "Thus, while the presumption of constitutionality is not irrefutable," petitioners "face the initial burden of demonstrating [the] invalidity of [the 2022 Amendments and Part 664] beyond a reasonable doubt" (*id*. [internal quotation marks and citation omitted]).

Accordingly, to prevail on their facial challenge, petitioners "bear the substantial burden of demonstrating that in any degree and in every conceivable application, the [2022 Amendments and Part 664 regulations] suffer[] from wholesale constitutional impairment" (*id*.).

2. Analysis

In alleging that the 2022 Amendments and Part 664 deprive them of procedural due process, the Chautauqua POA petitioners focus on ECL § 24-0301 (4), which establishes a

"rebuttable presumption that mapped and unmapped areas meeting the definition of a freshwater wetland in [Article 24] are regulated and subject to permit requirements." "This presumption may be rebutted by presenting information to [DEC] that the area does not meet the definition contained in [Article 24]" (*id*.). A "wetland delineation" by DEC or its verification of a wetland delineation by another party "is required to identify the regulated freshwater wetland boundary" (*id*.).

Under the prior map-based system, freshwater wetlands were "only those lands and waters 'shown on [DEC's final] freshwater wetlands map'" (*Drexler*, 62 NY2d at 417, quoting former ECL § 24-0107 [1]). Petitioners complain that "DEC's new reliance on informal 'jurisdictional determinations' rather than formally promulgated wetlands maps . . . allow[s] the DEC to assert jurisdiction over properties without individualized notice of any kind, much less adjudicatory hearings. All lands are now presumptively Regulated Wetlands" (Case 1 MOL at 19), which "substantially affects the landowner's rights by restricting the property's use" (*Zaccaro*, 100 NY2d at 891).

Contrary to petitioners' contention, however, ECL § 24-0301 (4) does not presume that all lands in New York State are regulated wetlands. The presumption applies only to lands "meeting the definition of a freshwater wetland in [Article 24]" (ECL § 24-0301 [4]). Thus, the presumption created by the 2022 Amendments presumes only that lands falling within Article 24's definition of "freshwater wetlands" (*id*. § 24-0107 [1]) are, in fact, regulated as freshwater wetlands.

Moreover, as respondents observe, a rebuttable presumption is constitutionally valid if there is "'a rational connection between the facts proven and the fact presumed, and . . . a fair opportunity'" for the party challenging the presumption "'to make [a] defense'" (*Overstock.com,*

Inc. v New York State Dept. of Taxation & Fin., 20 NY3d 586, 596 [2013], quoting *Matter of Casse v New York State Racing & Wagering Bd*., 70 NY2d 589, 595 [1987]; *see Matter of Sanford v Rockefeller*, 35 NY2d 547, 555 [1974]).

Here, there is a clear and rational connection between lands meeting the statutory definition of freshwater wetlands and the presumption that such lands are subject to regulation as freshwater wetlands.[2] And landowners have a fair opportunity to challenge the presumption through the jurisdictional determination process, a no-cost review that DEC must complete within ninety (90) days or potentially lose jurisdiction over the subject lands (*see* ECL § 24-0703 [5]; 6 NYCRR 664.8 [e]-[g]).

To be sure, petitioners raise legitimate concerns about burdens and uncertainties associated with the new jurisdictional determination process. They observe that "any person" can request a jurisdictional determination (*see* ECL § 24-0703 [5]), thereby enabling opponents of a development project to "file a jurisdictional determination request, . . . even if there is no reasonable chance of DEC exercising wetlands jurisdiction over the project" (Case 2, NYSCEF Doc No. 13 ["BC MOL"] at 25). Petitioners also posit practical difficulties where "a property owner would have to ask DEC to make a jurisdictional determination about a wet spot on a neighbor's property to then determine whether their own property falls within a regulated adjacent area" (*id*.).

But these concerns as to how Article 24 may be applied in particular circumstances, however legitimate and foreseeable, are insufficient to establish facial constitutional infirmities. The possibilities that the jurisdictional determination process may be abused by third parties or adjacent area determinations may prove difficult where potential wetlands span parcel

[2] Indeed, the presumption is almost tautological in nature.

boundaries are insufficient to establish that the 2022 Amendments and Part 664 "suffer[] wholesale constitutional impairment" in *all* of their possible applications (*Owner Operator*, 40 NY3d at 61 [internal quotation marks and citation omitted]).

Although framed largely as a due process challenge to the rebuttable presumption, it is apparent that petitioners' complaints about the loss of individualized notice, the lack of public hearings, and the uncertainty and expense associated with the new jurisdictional-determination process flow from the Legislature's decision to move away from jurisdictional mapping to the new definition-based system, with individualized assessments "whether or not a given parcel of land includes a freshwater wetland subject to regulation or a regulated freshwater wetland adjacent area" (ECL § 24-0703 [5]).

But the fact that the prior map-based system accorded landowners with procedural due process does not mean that a map-based system is constitutionally required or that the new definition-based approach is inherently unconstitutional. The critical inquiry is whether the new regimen provides constitutionally adequate notice to landowners, not whether it provides the same procedural protections or the same degree of certainty and predictability as a map-based system.

In this connection, the Court observes that the State's new definition-based approach to jurisdiction over wetlands is substantially similar to the federal government's implementation of the Clean Water Act ("CWA") and its prohibition on the unpermitted "discharge of any pollutant" into "navigable waters," which are defined as "the waters of the United States" (33 USC §§ 1311 [a]; 1362 [7], [12]). "It is often difficult to determine whether a particular piece of property contains waters of the United States, but there are important consequences if it does," including "substantial criminal and civil penalties" for unauthorized activities (*United States*

Army Corps of Eng'rs v Hawkes Co., 578 US 590, 594 [2016]). For this reason, the CWA established a process for the Army Corps of Engineers to render individualized jurisdictional determinations (*see id*.).

To be sure, the jurisdictional scope of the CWA has been the subject of extensive controversy and litigation, and the U.S. Supreme Court recently narrowed that jurisdiction in *Sackett v EPA* (598 US 651 [2023]), based in part on concerns about regulatory uncertainty. Yet, despite decades of debate and criticism over the CWA's reach and the burdens attendant to jurisdictional uncertainty and a host of legal challenges (*see Hawkes*, 578 US at 602 [Kennedy, J., concurring] [reach of CWA is "'notoriously unclear'" and "the consequences to landowners even for inadvertent violations can be crushing" (citation omitted)]), no cases have held the CWA's jurisdictional determination process to be violative of procedural due process.

Like the CWA, the 2022 Act establishes a definition-based approach to jurisdiction that may require professional consultation in some cases, provides for no-cost agency jurisdictional determinations within specified timeframes, and imposes civil and criminal penalties for violations. While *Sackett* teaches that the Legislature and DEC must ensure that the classification of freshwater wetlands remains tethered to ascertainable standards (*see* Part II [B], *infra*), it does not stand for the proposition that a definition-based approach to wetlands jurisdiction is inherently unconstitutional. And the prospect that future applications of the 2022 Amendments and Part 664 may give rise to as-applied challenges, and perhaps limiting constructions, is insufficient to demonstrate facial unconstitutionality.

Based on the foregoing, the Court concludes that petitioners have not demonstrated that the Legislature's decision to replace jurisdictional mapping with a definition-based system violates the procedural due process rights of petitioners in every conceivable application.

B. Vagueness

Relatedly, petitioners contend that the 2022 Amendments and Part 664 regulations are unconstitutionally vague, arguing that they fail to identify and give property owners reasonable notice of regulated freshwater wetlands (*see* BC MOL at 22-23). Petitioners take particular issue with Part 664's definition of "wetlands of unusual importance" (*see* Case 4, NYSCEF Doc No. 24 ["Partnership MOL"] at 16; *see also* 6 NYCRR 664.6).

The following principles govern a void-for-vagueness challenge:

> A statute, or a regulation, is unconstitutionally vague if it fails to provide a person of ordinary intelligence with a reasonable opportunity to know what is prohibited, and it is written in a manner that permits or encourages arbitrary or discriminatory enforcement. It has long been settled that civil as well as penal statutes can be tested for vagueness under the due process clause. The degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment, such that economic regulation is subject to a less strict vagueness test.
>
> Courts use a two-part test to determine whether a statute or regulation is unconstitutionally vague. First, to ensure that no person is punished for conduct not reasonably understood to be prohibited, the court must determine whether the statute in question is sufficiently definite to give a person of ordinary intelligence fair notice that the person's contemplated conduct is forbidden. Second, the court must determine whether the enactment provides officials with clear standards for enforcement so as to avoid resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. The two prongs of the test are closely related – if a statute is so vague that a potential offender cannot tell what conduct is against the law, neither can the person charged with its enforcement (*Matter of Independent Ins. Agents & Brokers of N.Y., Inc. v New York State Dept. of Fin. Servs.*, 39 NY3d 56, 63-64 [2022] [internal quotation marks, citations and alternations omitted]).

Here, violations of Article 24 expose landowners to criminal penalties, with first offenses punishable as violations (with fines of up to $5,000), and second and subsequent offenses punishable as misdemeanors (*see* ECL § 71-2303 [2]). Inasmuch as the Act's regulatory scheme

carries criminal sanctions, the Court must apply the stricter vagueness scrutiny applicable to penal statutes (*see People v Stuart*, 100 NY2d 412, 421 [2003]).

Nonetheless, the void-for-vagueness doctrine "'is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide a fair warning that certain kinds of conduct are prohibited'" (*People v Swartz*, 130 AD2d 288, 290 [3d Dept 1987], quoting *Colten v Kentucky*, 407 US 104, 110 [1972]). Criminal statutes should not be held to standards of impossible precision (*see People v Cruz*, 48 NY2d 419, 424 [1979]).

Beginning with the 2022 Act, the Court observes that Article 24's definition of "freshwater wetlands" has remained substantively unchanged since first enacted in 1975 (*see* Jacobson Aff., ¶ 11). The core definitional criteria, focusing on vegetation adapted to aquatic or semi-aquatic conditions, have been in place for more than five decades without any successful vagueness challenge, and the new system of no-cost jurisdictional determinations largely mirrors the CWA, which has consistently survived vagueness challenges (*see e.g. United States v Lucero*, 989 F3d 1098, 1101-1102 [9th Cir 1993] ["Although the (CWA's) definitions are complex, they nevertheless provide an ascertainable standard for when 'wetlands' and 'tributaries' constitute jurisdictional waters"]; Paul J. Larkin, *The Clean Water Act and the Void-for-Vagueness Doctrine*, 20 Geo JL & Pub Pol'y 639 [2022] [despite "decades" of "uncertainty" over reach of the "hopelessly vague" scope of the CWA, the Supreme Court has never held the statutory scheme void for vagueness]).

The 2022 Amendments did expand State regulatory jurisdiction over 11 categories of freshwater wetlands of "unusual importance," regardless of size (*see* ECL § 24-0107 [9] [a]-[k]). Many of the new categories are defined through external, objective standards (*see e.g. id*. [b]

[defining urban areas by reference to census data], [d] [endangered species habitats], [h] [FEMA-designated floodways], [i] [previously mapped wetlands]), but other categories are defined in more subjective and potentially problematic ways.

First, petitioners challenge the wetlands designation of "a vernal pool that is known to be productive for amphibian breeding" (*id*. [g]). Petitioners argue that this definition relies on temporary and seasonal features, and they argue persuasively that landowners cannot be expected to determine whether a wet spot on the ground is productive for amphibian breeding.

However, the statute speaks only in terms of vernal pools "known" to be productive for amphibian breeding (*id*.), and the new regulations provide that a "vernal pool is known to be productive for amphibian breeding . . . where [DEC] has determined" that egg mass counts exceed a prescribed threshold (6 NYCRR 664.6 [g]).[3] Thus, both the statute and regulations inject an element of knowledge into the definition. And to the extent that the seasonal and temporary nature of vernal pools renders jurisdiction unknowable in a particular case and the property owner is not saved by the knowledge requirement, the concerns raised by petitioners implicate a potential as-applied challenge, not a wholesale constitutional infirmity.

Next, petitioners complain about the regulation of wetlands "determined by the [DEC] commissioner to be of significant importance to protecting the state's water quality" (ECL § 24-0107 [9] [k]). Although the statutory provision is cast in broad terms, Part 664 implements this provision by requiring a written determination of the Commissioner, supported by substantial evidence, articulating the "underlying reasons why the wetland is of significant importance to

[3] As observed by DEC, the use of "minimum egg mass counts" as criteria for determining if a vernal pool is known for productive amphibian breeding is an objective measure that "other Northeastern states" have implemented successfully (Jacobson Aff., ¶ 54).

protecting the State's water quality" (6 NYCRR 664.6 [k]). Thus, for jurisdiction to attach, there must be a formal administrative determination.

Finally, petitioners complain about the category of lands "classified by [DEC] as a Class I wetland" (ECL § 24-0107 [9] [e]). According to petitioners, this category will allow DEC "to designate any geographic feature as a wetland in a potentially arbitrary way" (Partnership MOL at 19). However, Part 664 provides largely objective definitions of a Class I wetland (*see* 6 NYCRR 664.5 [a]), and the statute plainly contemplates a prior classification action prior to wetlands jurisdiction attaching.

Petitioners do express a legitimate concern that landowners of ordinary intelligence may be unable to determine the presence of freshwater wetlands without professional assistance. But they cite no authority for the proposition that the vagueness doctrine requires complex legislation to be fully self-executing by laypersons without the assistance of qualified professionals.

In any event, even assuming that petitioners satisfied the first prong of the vagueness inquiry by showing that the 2022 Amendments and Part 664 are insufficient to give a person of ordinary intelligence fair notice of freshwater wetlands on their property,[4] petitioners have not shown that the challenged provisions lack clear enforcement standards (*see Independent Ins. Agents*, 39 NY3d at 64). The vernal pool criteria are objective, albeit obscure, and injected with the requirement of knowledge; Class I wetlands are designated by DEC and defined by largely objective criteria (*see* 6 NYCRR 664.5 [a]); and any finding that a wetland is necessary to protect water quality must be embodied in a prior written determination of the DEC

[4] Petitioners also raise a vagueness challenge to 6 NYCRR 664.7 (a), which authorizes DEC to extend the regulated adjacent area beyond 100 feet for nutrient-poor wetlands and vernal pools based on "an individual analysis of environmental conditions." Given the Court's determination that Part 664 must be annulled for non-compliance with SEQRA (Part IV, *infra*), the Court need not reach this purely regulatory challenge.

Commissioner, supported by substantial evidence, stating the "underlying reasons" for the determination (6 NYCRR 664.6 [k]).

The Court recognizes petitioners' complaints about the vagueness of the underlying permitting standards for freshwater wetlands established in Part 663, which use terms like "compelling," "pressing," and "clearly outweighs," and which are said to leave DEC with "unbridled discretion to sit as a super-land use board to determine the relative priority of a proposed development project" (BC MOL at 27). Petitioners take particular issue with Part 664's blanket classification of urban wetlands as Class II, arguing that this effectively forecloses development under the stringent and ill-defined standards of Part 663 (*see* 6 NYCRR 663.5 [e] [2] [requiring proof of "a pressing economic or social need that clearly outweighs the loss of or detriment to the benefit(s) of the Class II wetland"]).

The problem for petitioners, however, is that the constitutionality of Part 663 is not before the Court. Part 663, including the flexible permitting standards to which petitioners object, has been in effect since at least 1995 (*see* Opp Mem at 45; *see also* 6 NYCRR 663.11; NYSCEF Doc No. 26, ¶ 6). Neither the 2022 Amendments nor the new Part 664 regulations amended or otherwise modified Part 663 or its permitting standards. Thus, any facial challenge to Part 663's permitting standards is decades too late and cannot be revived through a collateral attack on Part 664's classification criteria.

Additionally, none of the petitions before the Court seek invalidation of the Part 663 regulations, and petitioners cannot bootstrap their challenge to Part 664 into a facial challenge to the Part 663 permitting standards merely because the 2022 Amendments and new Part 664 subject additional lands to those standards. The vagueness inquiry focuses on whether the 2022 Amendments and Part 664 allow property owners to determine if their land is regulated as

freshwater wetlands, but the land-use consequences that flow from that jurisdictional determination under Part 663 are analytically distinct.

Based on the foregoing, the Court concludes that petitioners have not carried their heavy burden of showing that the 2022 Amendments and Part 664 regulations are impermissibly vague in all applications. At most, petitioners have shown that certain applications of Article 24 and Part 664 may prove problematic, but that is not enough to sustain a facial challenge (*see Independent Ins. Agents*, 39 NY3d at 65 ["that a statute or regulation would be unclear in hypothetical situations at its periphery does not render it facially, unconstitutionally vague"]).

III. OTHER CHALLENGES TO THE 2022 AMENDMENTS

A. Improper Delegation

Petitioners in Case 1 argue that the 2022 Amendments improperly delegate regulatory decisions to nongovernmental actors by "permit[ing] any private party – including project opponents, advocacy groups, or uninterested third parties – to initiate a binding Jurisdictional Determination request" (Case 1 MOL at 23; *see* ECL § 24-0703 [5] ["Any person may inquire of (DEC) as to whether or not a given parcel of land includes a freshwater wetland . . . ."]).

The Court does not find petitioners' argument to be persuasive. While a private party may *initiate* the jurisdictional determination process, only DEC is authorized to *render* jurisdictional determinations. The 2022 Amendments do not allow a private party to exercise regulatory jurisdiction over other landowners. There has been no proof of an impermissible delegation of governmental powers to private parties.

B. Home Rule

Petitioners in Case 1 further argue that the 2022 Amendments' elimination of "the statutory provision allowing local governments to designate freshwater wetlands of 'Unusual

Local Importance' (ULI) under former ECL § 24-0301 (1) constitutes an unconstitutional intrusion on local self-governance in violation of the New York State Constitution and the Municipal Home Rule Law" (Case 1 MOL at 23).

As DEC observes, however, the 2022 Amendments do preserve a substantial degree of local regulatory control (*see* ECL art 24, title 5), and, in any event, the 2022 Amendments constitute general laws to protect the environment, "a matter of substantial state concern" (*Empire State Ch. of Associated Bldrs. & Contrs., Inc. v Smith*, 21 NY3d 309, 317 [2013]).

The Court therefore concludes that petitioners have failed to establish a violation of the Home Rule protections of the New York State Constitution.

IV. SEQRA

Petitioners in Cases 2, 3 and 4 seek annulment of the Part 664 regulations for non-compliance with SEQRA.

A. Standing

As a threshold matter, DEC challenges the standing of petitioners in Cases 2 and 3 to maintain claims under SEQRA, arguing that their alleged injuries are purely economic and, therefore, fall outside the zone of interests protected by SEQRA.

1. Environmental Injury

"Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria" (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991] [citations omitted]). Petitioners have "the burden of establishing both an injury-in-fact and that the asserted injury is within the zone of interests sought to be protected by

[SEQRA]" (*Matter of Association for a Better Long Is., Inc. v New York State Dept. of Envtl. Conservation*, 23 NY3d 1, 6 [2014]; *see Society of Plastics*, 77 NY2d at 772-773).

Because SEQRA's core purpose is to ensure that environmental considerations are incorporated into governmental decision-making, "[e]conomic injury is not by itself within SEQRA's zone of interests" (*Society of Plastics*, 77 NY2d at 777). But an environmental injury giving rise to SEQRA standing may be established through proof that petitioners have been harmed in "'their use and enjoyment of the affected natural resources'" (*Matter of Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297, 304 [2009], quoting *Society of Plastics*, 77 NY2d at 775).

Here, one of the petitioners in Case 4, Mary Hutchings, owns property on Chautauqua Lake, and she alleges that the new Part 664 regulations have had a "direct and chilling effect on [her] ability to enjoy [her] property" (Case 4, NYSCEF Doc No. 26, ¶¶ 4-5, 11). She avers that Part 664 heavily regulates, or outright prohibits, "activities that are essential to maintaining lake useability and water quality, such as removing floating weeds, harvesting aquatic vegetation, dredging sediment from boating areas, and controlling nutrient runoff" (*id*., ¶ 10). As a result, the new regulations "cast doubt on whether [she] can continue to swim, fish, or use [her] boat freely" (*id*., ¶ 12). The alleged proliferation of aquatic weeds, degradation of water quality, and impairment of Chautauqua Lake's ecosystem fall squarely within the types of environmental harms that SEQRA was designed to address.

Notably, while DEC's combined opposition challenged the SEQRA standing of petitioners in Cases 2 and 3, no similar objection was made to the standing of petitioners in Case 4, who raise the same SEQRA challenge (*see* Opp Mem, Point I [B] at 16 ["The Business Council and Kiryas Joel petitioners lack standing to raise SEQRA challenges to DEC's

promulgation of the regulations."]; Transcript at 34 ["(DEC) objected specifically to just the Business Council and Kiryas Joel Petitioners . . . because those Petitioners are the ones who only raised . . . specific economic harms."]).

The Court therefore concludes that petitioner Hutchings in Case 4 has alleged an environmental injury allowing her to challenge DEC's alleged noncompliance with SEQRA under traditional standing principles (*see Save the Pine Bush*, 13 NY3d at 303-304).

2. Affected Landowners

Although SEQRA standing generally requires petitioners to allege an environmental injury, the Court of Appeals has recognized an exception for property owners whose land is directly subject to the challenged action. In *Matter of Har Enters. v Town of Brookhaven* (74 NY2d 524 [1989]), it was "evident" to the Court of Appeals "that if any party should be held to have a sufficient interest to object – without having to allege some specific harm – it is an owner of property which is the subject of [governmental regulation]" (*id*. at 529; *see also Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 687 [1996] ["the owner of property that is the subject of (governmental action) need not allege the likelihood of environmental harm"]).

The Court of Appeals reaffirmed this principle recently in *Matter of Seneca Meadows, Inc. v Town of Seneca Falls* (2025 NY Slip Op 06961 [2025]), holding that a landfill operator had SEQRA standing as an "affected property owner" to challenge a local law requiring the closure of its facility based "solely on its ownership of the land subject to the [challenged enactment]" (*id*., *1-2). "[A]s in *Har*, [the landowner] 'has a legally cognizable interest in being assured that the [government] satisfied SEQRA before" taking action to restrict the activities that can be conducted on the land (*id*., quoting *Har*, 74 NY2d at 527-528).

Here, certain of the petitioners in Cases 2 and 3 have demonstrated ownership of property subject to Part 664.

Petitioner New York Development Group/Rowland, LLC ("Rowland") received a positive jurisdictional determination from DEC on April 15, 2025, confirming that its parcels in the Town of Milton contain Class I and Class II wetlands under new Part 664 (*see* NYSCEF Doc No. 10, ¶¶ 13-15). As a result, development is restricted to approximately 55% of Rowland's project area, and the permissible number of residential units is reduced from 54 to zero (*see id*., ¶¶ 19-20).

Similarly, petitioner Barbera Homes & Development, Inc. is the contract vendee of a 63.87-acre parcel in the Town of Bethlehem (*see* NYSCEF Doc No. 50, ¶ 2). The land contains less than five acres of wetlands identified by the Army Corps of Engineers (*see id*., ¶ 16), but the addition of a 100-foot buffer zone would result in about 27 acres of regulated wetlands, a 41% increase (*see id*., ¶ 14).[5]

Petitioner New Hampton Lumber Co., Inc. owns property containing wetlands within two miles of Middletown, New York, which is identified as an urban area by the Census Bureau (*see* NYSCEF Doc No. 12, ¶¶ 2, 5, 11-12).

And in Case 3, the Village of Kiryas Joel purchased property for the construction of a municipal water treatment facility that allegedly would be adversely impacted by the new Part 664 regulations (*see* Case 3, NYCSEF Doc No. 8, ¶¶ 15-17; NYCSEF Doc No. 50, ¶¶ 4-13).

[5] ECL § 24-0701, unchanged by the 2022 Amendments, provides that "activities are subject to regulation whether or not they occur upon the wetland itself, if they impinge upon or otherwise substantially affect the wetlands and are located not more than one hundred feet from the boundary of such wetland." Notably, Part 664 adopts a blanket 100-foot buffer zone without individualized consideration of impingement or effect on actual wetlands (*see* Part IV [C], *infra*).

DEC urges the Court to limit the *Har/Gernatt/Seneca Meadows* line of authorities to site-specific governmental actions, citing the familiar principle that standing will not lie where petitioners fail to allege injuries "different in kind or degree from the public at large" (*Society of Plastics*, 77 NY2d at 777-778).

Although DEC's argument has some superficial appeal – the *Har* line of cases focuses on regulations targeting activities occurring on specific properties, and Part 664 applies broadly across the State – the rationale underlying *Har*, *Gernatt* and *Seneca Meadows* does not depend on the number of other property owners affected by a challenged action. The cases instead rest on the principle that persons whose land is subject to governmental regulation have a cognizable interest in ensuring that the government complied with the applicable legal requirements before imposing that regulation. Simply stated, a property owner "has a legally cognizable interest in being assured that the [government] satisfied SEQRA before taking action" to restrict the use of their property (*Seneca Meadows*, 2025 NY Slip Op 06961, *2 [internal quotation marks and citation omitted]). This same interest is present regardless of the number of other landowners or parcels affected by a particular action.

It also bears emphasis that the landowner-petitioners in Cases 2 and 3 are not asserting generalized grievances about environmental policy. Each petitioner owns land subject to Part 664 and claims that the new regulations will adversely affect the use and enjoyment of their particular lands. Under *Seneca Meadows*, these petitioners have standing based "solely on [their] ownership of the land subject to [Part 664]" (*id*.).

Nor is the Court persuaded by DEC's argument that petitioners' injuries are speculative because they have not exhausted their administrative remedies or received final agency determinations. Petitioners are not challenging individual permit denials or jurisdictional

determinations; they are seeking to vindicate their "legally cognizable interest in being assured that [DEC] satisfied SEQRA" (*id*. [internal quotation marks and citation omitted]).[6]

Finally, an organization may establish standing on behalf of its members, "provided that at least one of its members would have standing to sue, that it is representative of the organizational purposes it asserts and that the case would not require the participation of individual members" (*Matter of Mental Hygiene Legal Serv. v Daniels*, 33 NY3d 44, 51 [2019] [internal quotation marks and citation omitted]).

The Court is satisfied that the organization petitioners in Case 2 have individual members with standing as landowners; the purposes of the organizations include representing the interests of landowners and developers affected by environmental regulations; and the SEQRA claim presents largely legal questions that do not require the participation of individual members.

B. SEQRA Requirements

Article 8 of the ECL establishes "the procedural and substantive requirements for governmental entities to follow when reviewing the environmental consequences of proposed projects or 'actions'" (*Matter of City Council of City of Watervliet v Town Bd. of Town of Colonie*, 3 NY3d 508, 516-517 [2004]). The goal is to ensure "that agency decision-makers – enlightened by public comment where appropriate – will identify and focus attention on any environmental impact of proposed action, that they will balance those consequences against other relevant social and economic considerations, minimize adverse environmental effects to the

[6] Notably, the four-month statute of limitations for challenging the adoption of Part 664 has expired, so a property owner who exhausts their administrative remedies in the context of a jurisdictional determination or permitting proceeding would be limited to challenging the specific *application* of the new regulations, not their *adoption*. As the Court of Appeals has recognized, standing rules should not be applied "in an overly restrictive manner where the result would be to completely shield a particular action from judicial review" (*Association for a Better Long Is.*, 23 NY3d at 6, citing *Har*, 74 NY2d at 529).

maximum extent practicable, and then articulate the bases for their choices" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 414-415 [1986]).

Under ECL § 8-0109, "[a]ll agencies . . . shall prepare, or cause to be prepared . . . an environmental impact statement ['EIS'] on any action they propose or approve which may have a significant effect on the environment." The term "action" includes "policy, regulations, and procedure-making" (ECL § 8-0105 [4] [ii]; *see also* 6 NYCRR 617.2 [b] [2] ["agency planning and policy making activities that may affect the environment and commit the agency to a definite course of future decisions"]).

Actions under SEQRA are classified as either Type I, Type II or Unlisted (*see* 6 NYCRR 617.2 [b], [aj], [ak], [al]). DEC regulations provide an illustrative, but "not exhaustive," list of Type I actions (6 NYCRR 617.4 [a] [1], [b]), with the critical inquiry being whether the action may "have a significant adverse impact on the environment and requires the preparation of an EIS" (*id*. [a] [1]). Type II actions are exempt from further review because they "have been determined not to have a significant impact" (6 NYCRR 617.5), and Unlisted actions are those "not identified as a Type I or Type II" action (6 NYCRR 617.2 [al]).

"As early as possible in [the] formulation of an action," an agency must "[d]etermine whether the action is subject to SEQR[A]" (6 NYCRR 617.6 [a] [1] [i]). If the preliminary classification is Type II, "the agency has no further responsibilities" (*id*.); otherwise, the lead agency must determine the significance of the contemplated action. "For Type I actions, a full [Environmental Assessment Form ('EAF')] . . . must be used to determine significance" (*id*. [a] [2]), whereas a "short EAF" is used to assess an Unlisted action (*id*. [a] [3]).

To determine significance, the lead agency must: (i) "review the EAF, the criteria [established for determining significance] and any other supporting information to identify the

relevant areas of environmental concern"; (ii) "thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment"; and (iii) "set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation" (6 NYCRR 617.7 [b] [2]-[4]).

"To determine whether a proposed Type I or Unlisted action may have a significant adverse impact on the environment, the impacts that may be reasonably expected to result from the proposed action must be compared against" an "illustrative, not exhaustive," list of "criteria [] considered indicators of significant adverse impacts" (*id*. [c] [1]). One such indicator is whether the action is expected to work "a substantial change in the use, or intensity of use, of land . . . , or in [the land's] capacity to support existing uses" (*id*. [c] [1] [viii]).

An EIS is required where the lead agency determines that the action "may include the potential for at least one significant adverse environmental impact" (*id*. [a] [1]; *see Matter of Clean Air Action Network of Glens Falls, Inc. v Town of Moreau Planning Bd.*, 235 AD3d 1124, 1126-1127 [3d Dept 2025]). In other words, "[t]o determine that an EIS will not be required for an action, the lead agency must determine either that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant" (6 NYCRR 617.7 [a] [2]).

"Judicial review of SEQRA determinations is 'guided by standards applicable to administrative proceedings generally: 'whether [the] determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion'" (*Clean Air Action Network*, 235 AD3d at 1126, quoting *Jackson*, 67 NY2d at 416).

"An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (*id*. [internal quotation marks and citation omitted]).

C. Legislative Mandates versus Regulatory Discretion

Under ECL § 8-0105 (4) (ii), the promulgation of regulations is an action subject to SEQRA (*see Matter of Town of Copake v New York State Off. of Renewable Energy Siting*, 216 AD3d 93, 98 [3d Dept 2023], *appeal dismissed* 41 NY3d 990 [2024]).

However, an agency is not obliged to review under SEQRA the potential impacts of actions of the Legislature. "[O]fficial acts of a ministerial nature, involving no exercise of discretion," are not agency action under SEQRA (ECL § 8-0105 [5] [ii]; *see* 6 NYCRR 617.5 [c] [46]). Accordingly, an agency is under no obligation to consider the "inherent environment consequences" of "legislatively mandated" decisions (*Matter of Citizens For An Orderly Energy Policy v Cuomo*, 78 NY2d 398, 415 [1991]).

The Legislature's decisions in the 2022 Amendments to move from a system of jurisdictional mapping to a definition-based system, the reduction in acreage threshold, and the establishment of "unusual importance" criteria are all policy decisions made by the Legislature, and DEC was under no obligation to review those policy choices under SEQRA.

However, the record shows that DEC exercised substantial judgment and discretion in implementing significant aspects of the 2022 Amendments through the new Part 664 regulations, and those discretionary policy judgments and choices are subject to SEQRA review.

For example, DEC classified all wetlands in urban areas as Class II (*see* 6 NYCRR 664.5 [b] [13]), for which permits may issue only "in very limited circumstances" (6 NYCRR 663.5 [e] [2]). "A permit shall be issued [for Class II wetlands] only if it is determined that the proposed activity satisfies a *pressing economic or social need* that *clearly outweighs* the loss of or

detriment to the benefit(s) of the Class II wetland" (*id*. [emphasis added]; *see* Jacobson Aff., ¶¶ 51-53). To be sure, the 2022 Amendments required DEC to regulate wetlands "located within or adjacent to an urban area" (ECL § 24-0107 [9] [b]), but the Legislature did not require DEC to impose a blanket Class II designation on all urban wetlands without regard to individual characteristics.

The same is true of DEC's decision to authorize extended adjacent areas of up to 300 feet for nutrient-poor wetlands and up to 800 feet for vernal pools (*see* Jacobson Aff., ¶ 27). DEC initially proposed extensions of fixed distances but modified its approach to require site-specific analyses (*see id*.), a process demonstrating regulatory judgment and discretion.

Relatedly, DEC chose to mandate a fixed 100-foot buffer zone around all regulated wetlands (*see* 6 NYCRR 664.2 [ac]). But the statute itself, unchanged by the 2022 Amendments, provides that activities within 100 feet of wetlands are subject to regulation if they "impinge upon or otherwise substantially affect the wetlands" (ECL § 24-0701 [2]). Rather than requiring an individualized assessment of whether adjacent activities would impinge upon or otherwise adversely affect the wetlands, as contemplated by the statute, DEC made the policy choice of establishing a categorical 100-foot buffer around *all* freshwater wetlands.[7]

DEC also developed specific numeric criteria for implementing the 2022 Act's "unusual importance" categories, including proximity thresholds and egg-mass counts (*see* Jacobson Aff., ¶¶ 52-54). Again, these numeric criteria represent regulatory judgments subject to SEQRA review.

[7] Given that the 2022 Amendments contemplate more than one million additional acres of freshwater wetlands, the treatment of buffer zones is a highly consequential regulatory judgment.

D. DEC's SEQRA Review

DEC maintains that it "identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' for the basis of its determination of non-significance" (Opp Mem at 13 [boldface omitted]).

DEC completed a short EAF "to evaluate whether [Part 664] would have any significant adverse impacts on the environment" (Jacobson Aff., ¶ 43; *see* NYSCEF Doc No. 6 ["Short EAF"]). After analyzing 11 separate categories of potential impacts, including whether the proposed rulemaking would "result in a change in the use or intensity of land," DEC determined that the new Part 664 regulations would have either no impact or only a small impact (Short EAF, Part 2 at 1).

In Part 3 of the Short EAF, DEC checked the box to indicate that the promulgation of Part 664 "will not result in any significant adverse environmental impacts" (*id*., Part 3 at 2). DEC offered the following narrative explanation for the determination of non-significance:

> The purpose of the Freshwater Wetlands Act is to preserve, protect, and conserve freshwater wetlands across the state and [Part 664] will substantially increase the amount of wetlands the state regulated under the Freshwater Wetlands Act. The expanded scope of regulatory jurisdiction will lead to a reduction in adverse impacts on these wetlands as more projects will be required to avoid, minimize, or mitigate impacts through the long established permitting process [under Part 663] (*id*.).

E. Classification of Action

At the outset, petitioners complain that DEC's promulgation of Part 664 should have been classified as a Type I action, which "would carry the presumption of requiring preparation of an EIS" (*Copake*, 216 AD3d at 93). Petitioners argue principally that the promulgation of Part 664 constitutes "the adoption . . . of a comprehensive resource management plan," which is identified as a Type I action under SEQRA (6 NYCRR 617.4 [b] [1]).

DEC responds that Part 664 "is nothing like a comprehensive resource management plan, because [it] identifies procedures for identifying wetlands subject to jurisdiction and wetland classification, it does not proscribe the land uses that are exempt from regulation or those that require ECL article 24 permits nor does it set permit issuance standards" (Opp Mem at 23).[8]

In arguing for a Type I classification, petitioners emphasize the scope and scale of Part 664. Together with the 2022 Amendments, Part 664 will "safeguard an estimated one million additional acres of wetland habitat" (NYSCEF Doc No. 24, ¶ 66), and the adjacent area restrictions extend that reach even further. Under DEC's SEQRA regulations, even "the physical alteration of 10 acres" (6 NYCRR 617.4 [b] [6] [i]) or "changes in the allowable uses . . . affecting 25 or more acres" (*id*. [b] [2]) are Type I actions. The scale of Part 664 dwarfs these thresholds, even without regard to incorporated legislative mandates.

Ultimately, however, the Court need not resolve the parties' classification dispute. *Copake* teaches that "a misclassification does not always lead to the annulment of the negative declaration if the lead agency conducts the equivalent of a type I review notwithstanding the misclassification" (216 AD3d at 99 [internal quotation marks and citation omitted]). Conversely, "even where the action [properly] is classified as a type I action, the lead agency can issue a negative declaration where it determines that there will be no adverse environmental impacts" (*id*.).

Even assuming that DEC properly treated the promulgation of Part 664 as an Unlisted action, despite the scope and scale of the new regulations, the Court concludes, for the reasons that follow, that the SEQRA review was deficient.

[8] As discussed previously, the discretionary policy decisions embodied in Part 664 do affect which lands in New York State are subject to regulation as wetlands (*e.g.* adjacent areas) and the permitting standards to be applied (*e.g.* subjecting all urban wetlands to Class II review under Part 663) (*see* Part IV [C], *supra*).

F. Identification of Concerns/Hard Look/Reasoned Elaboration

To evaluate SEQRA compliance, the Court must examine "whether [DEC] identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination" (*Jackson*, 67 NY2d at 417 [citation omitted]).

1. Identification of Relevant Areas of Concern/Hard Look

A lead agency under SEQRA has a threshold obligation "to identify the relevant areas of environmental concern" (6 NYCRR 617.7 [b] [2]).

In completing the Short EAF, DEC checked boxes indicating that there would be no impact, or only a small impact, across 11 different dimensions, including whether the new regulations would "result in a change in the use or intensity of use of land" (Short EAF, Part 2 at 1). The only contemporaneous explanation for the absence of potential adverse impacts was that Part 664 "will substantially increase the amount of [regulated] wetlands," which, in turn, "will lead to a reduction in adverse impacts on these wetlands as more projects will be required to avoid, minimize, or mitigate impacts through [Part 663]" (*id*., Part 3 at 2).

But the administrative record shows that DEC received public comments identifying specific areas of potential environmental concern with new Part 664, including: (i) the prospect of urban sprawl and other growth-inducing impacts (*see* NYSCEF Doc No. 38 at 2087-2092); (ii) impact to aquatic ecosystems, algae blooms and invasive species (*see id*. at 2144-2146); (iii) effect on urban communities, including sprawl (*see* NYSCEF Doc No. 39 at 2215-2216); and (iv) growth-inducing impacts (*see* NYSCEF Doc No. 40 at 2598-2599).

The areas of concern identified by the public correspond closely with DEC's own regulatory criteria for determining significance. Under 6 NYCRR 617.7 (c) (1) (viii), "a substantial change in the use, or intensity of use, of land . . . or in its capacity to support existing

uses" is an indicator of a potentially significant adverse impact. Part 664 affects millions of acres of freshwater wetlands, and DEC's discretionary regulatory choices – including the blanket Class II designation for urban wetlands, the categorical 100-foot buffer zone and extended adjacent areas of variable size – have the potential to work significant changes through alteration in development patterns, land-use intensity and/or the capacity of affected lands to support existing uses.

Nothing in the Short EAF indicates that DEC identified any of these potential environmental concerns as relevant areas warranting a hard look. The Short EAF's analysis rests entirely on the narrow premise that expanded wetland protection is inherently beneficial to wetlands, and there is no indication that DEC considered anything other than that objective when it determined that Part 664 had no potential for adverse impacts.[9]

SEQRA does not permit an agency to confine its review only to the intended benefits of a contemplated action. To the contrary, the lead agency must examine whether the proposed action "may have a significant adverse impact on the environment" (6 NYCRR 617.7 [b] [3]), a standard that encompasses all reasonably foreseeable consequences to the environment, including the consequences to non-regulated lands.

In opposition, DEC argues that "speculative environmental consequences are not sufficient to establish a SEQRA violation" (*Matter of Heights of Lansing, LLC v Village of Lansing*, 160 AD3d 1165, 1167 [3d Dept 2018] [internal quotation marks and citation omitted]). "An agency complying with SEQRA need not investigate every conceivable environmental problem; it may, within reasonable limits, use its discretion in selecting which ones are relevant"

[9] This underscores the importance of the "reasoned elaboration" requirement, as the Court has no way to know what concerns DEC may or may not have considered beyond those memorialized in the Short EAF and any other contemporaneous documentation (*see* Part IV [F] [2], *infra*).

(*Save the Pine Bush*, 13 NY3d at 307 [citation omitted]). While correct statements of the law, these principles do not relieve DEC of the obligation to identify and examine the foreseeable consequences of its discretionary regulatory choices in relation to millions of acres of land.

Moreover, the cases relied upon by DEC involved actions of vastly narrower scope. In *Heights of Lansing*, the action involved a zoning change affecting a single district (*see* 160 AD3d at 1166-1167). Similarly, in *Matter of 61 Crown St., LLC v City of Kingston Common Council* (217 AD3d 1144, 1147 [3d Dept 2023]), the zoning code amendment at issue governed the development of affordable housing in just portions of a small city.

The Court also is mindful that the SEQRA threshold is not whether adverse impacts *will* occur, but whether the action "*may include the potential* for at least one significant adverse environmental impact" (6 NYCRR 617.7 [a] [1] [emphasis added]). As the Third Department recently observed, "the threshold for a positive declaration and a subsequent EIS is relatively low," whereas "the standard for a negative declaration . . . is relatively high, requiring the lead agency to determine either that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant" (*Clean Air Action Network*, 235 AD3d at 1126-1127 [internal quotation marks, citations and emphasis omitted]).

DEC's failure to identify and examine the reasonably foreseeable environmental consequences of Part 664, including the consequences for non-wetlands, is well-illustrated by the Fourth Department's recent decision in *Matter of Seneca Meadows, Inc. v Town of Seneca Falls* (2026 NY Slip Op 01687 [4th Dept, Mar. 20, 2026]).[10]

[10] The decision was issued on remittal after the Court of Appeals determined that petitioner had standing to maintain a SEQRA challenge as an affected landowner (*see* Part IV [A] [2], *supra*).

In *Seneca Meadows*, the Fourth Department had before it a SEQRA challenge to a local law mandating the closure of the only solid waste management facility in the Town of Seneca Falls ("Town"). On appeal, respondents argued that the Town Board, as the SEQRA lead agency, "was not obligated to identify and consider that closure of the landfill could result in negative environmental impacts," despite the prospect of needing to reroute "the extensive amount of waste disposed of at [petitioner's] facility . . . to other locations, thereby increasing greenhouse gas emissions generated by hauling vehicles" (*id*., *3). Respondents argued that "such a potential environmental consequence was speculative" (*id*.).

The Fourth Department squarely rejected respondents' argument, concluding that the Town Board "erred in simply assuming that closure of the landfill would have no environmental impacts" (*id*.). "[T]he transportation of waste to other locations and the concomitant increase in greenhouse gas emissions by hauling vehicles constituted a nonspeculative impact that could be reasonably expected to result from the proposed closure of the landfill, particularly considering the size of [petitioner's] operation" (*id*.; *cf*. *Matter of Town of Waterford v New York State Dept. of Envtl. Conservation*, 187 AD3d 1437, 1443 [3d Dept 2020] ["DEC discussed the available alternatives at length in the SEQRA findings statement . . . (and) also explicitly explored what would occur if no action were taken."]).

DEC further argues that "freshwater wetlands permits under 6 NYCRR part 663 *remain subject to SEQRA*, so any site-specific adverse environmental impacts arising from those permits will be more meaningfully examined than would be possible under a broad-scale assessment of part 664" (Opp Mem at 22).

But permit-stage review is limited to assessing whether a *particular project* will have significant impacts on particular wetlands. Review on a project-by-project basis will not, and

cannot, assess the cumulative effects of the new regulatory framework on development patterns, land-use intensity and community character throughout the State.[11] And some of the potential adverse impacts may be felt on non-wetlands, which are not subject to Part 663.

Moreover, "[a] principal goal of SEQRA is to incorporate environmental considerations into the decisionmaking process at the earliest opportunity" (*City Council of City of Watervliet*, 3 NY3d at 518 [internal quotation marks and citation omitted]). Deferring analysis of statewide impacts to the permit stage is inconsistent with this objective (*see Copake*, 216 AD3d at 100).

Having concluded that DEC failed to identify the relevant areas of environmental concern, the Court further concludes that DEC did not take a "hard look" at such areas to determine whether the new Part 664 regulations may have a significant adverse impact (*see Seneca Meadows*, 2026 NY Slip Op 01687, *4).

2. Reasoned Elaboration

The record further establishes that DEC did not comply with the separate (but related) SEQRA requirement that the lead agency "set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation" (6 NYCRR 617.7 [b] [4]).

DEC's contemporaneous explanation for its negative declaration boils down to just a few sentences: the purpose of Part 664 is to protect wetlands, and expanding jurisdiction over wetlands will reduce adverse impacts through the Part 663 permitting regimen (*see* Short EAF, Part 3 at 2).

[11] As petitioners observe, this is precisely the gap that SEQRA's generic EIS provisions are intended to fill. Under 6 NYCRR 617.10 (a), a generic EIS may be used to assess the environmental impacts of "an entire program or plan having wide application or restricting the range of future alternative policies or projects, including new or significant changes to existing land use plans, development plans, zoning regulations or agency comprehensive resource management plans" (*id*. [a] [4]).

But this explanation does not address any potential adverse impacts, reference any supporting documents, acknowledge the concerns raised in public comments or analyze the concerns that were identified. There simply is no reasoned elaboration as to how the imposition of new environmental regulations governing millions of acres of wetlands across the State, viewed in light of "the scale and context of the proposed action" (*id*.), would have *no* potential for significant adverse impacts to the environment.

DEC's significance analysis, to the extent it is discernable, was confined to a single dimension: the protection of wetlands. And while DEC ultimately may be correct that only positive environmental benefits will accrue from enhanced wetlands protection, the agency has not articulated the reasoning it relied upon to rule out the potential for adverse impacts.

The Court further concludes that the Jacobson affidavit, submitted by DEC in opposition to the petitions, is not a proper substitute for a contemporaneous, reasoned elaboration. The "reasoned elaboration" serves "to focus and facilitate judicial review and, of no lesser importance, to provide affected landowners and residents with a clear, written explanation of the lead agency's reasoning at the time the negative declaration is made" (*Matter of Dawley v Whitetail 414, LLC*, 130 AD3d 1570, 1571 [4th Dept 2015]). These salutary purposes are not served by after-the-fact affidavits prepared for litigation.

Moreover, allowing an agency to cure SEQRA deficiencies through *post hoc* rationalizations is inconsistent with the longstanding rule that "a lead agency must strictly comply with SEQRA's procedural mandates, and failure to do so will result in annulment of the . . . determination of significance" (*Matter of Wir Assoc., LLC v Town of Mamakating*, 157 AD3d 1040, 1044 [3d Dept 2018] [internal quotation marks and citation omitted]; *see Matter of Troy Sand & Gravel Co., Inc. v Town of Nassau*, 82 AD3d 1377, 1379 [3d Dept 2011]).

DEC argues that it "had the discretion to determine whether there was a need to explain why any particular aspect of the adoption of the regulations would not have a significant adverse impact" (Opp Mem at 14, citing *Matter of Village of Ballston Spa v City of Saratoga Springs*, 163 AD3d 1220, 1224 [3d Dept 2018]). However, *Ballston Spa* involved an initial negative declaration that lacked reasoned elaboration, but the municipality subsequently adopted a formal resolution that "reaffirmed its determination" of non-significance and "specifically addressed each question in part 2 of the EAF" (*id*. at 1224-1225). DEC points to no similar action here.

DEC also invokes the "rule of reason" standard, observing that courts review SEQRA determinations to assess whether "the agency has made a thorough investigation of the problems involved and reasonably exercised its discretion" (*Matter of Elizabeth St. Garden, Inc. v City of New York*, 42 NY3d 992, 995 [2024] [internal quotation marks and citation omitted]). But, absent an indication that the agency identified and analyzed the relevant areas of potential environmental concern, there is no reasoned exercise of discretion to which the Court can defer. And, in any event, the rule of reason does not relieve an agency of the duty to provide a written elaboration supporting its exercise of discretion.

And unlike the respondents in *Copake*, DEC does not identify anything in the administrative record showing that it "took a thorough and hard look at the potential negative environmental impacts associated with [Part 664]" (216 AD3d at 99). In *Copake*, "review of the vast record" showed that the lead agency "took a thorough and hard look at the potential negative environmental impacts associated with the proposed regulations" and "then issued an amended short EAF . . . providing a more robust explanation of the proposed action . . . and the determination of significance" (*id*. at 100-101). In contrast, the Short EAF here remained

unchanged despite extensive public comments, and DEC has not identified any contemporaneous amended or supplemented analysis.

G. Remedy

Having concluded that DEC did not adequately identify the relevant areas of environmental concern, did not take a "hard look" at them and did not make a reasoned elaboration of the basis for its determination of non-significance, the Court concludes that the subject action – the promulgation of the new Part 664 regulations – must be annulled for noncompliance with SEQRA (*see Dawley*, 130 AD3d at 1571; *Troy Sand & Gravel*, 82 AD3d at 1379).

CONCLUSION

Based on the foregoing,[12] it is

ORDERED, **ADJUDGED** and **DECLARED** that regulations promulgated as 6 NYCRR part 664 are **ANNULED** in their entirety for non-compliance with SEQRA, and such regulations are null and void; and it is further

ORDERED that the Case 2 Petition is granted to the extent indicated in the first decretal paragraph and is otherwise denied; and it is further

ORDERED that the Case 3 Petition is granted to the extent indicated in the first decretal paragraph and is otherwise denied; and it is further

ORDERED that the Case 4 Petition is granted to the extent indicated in the first decretal paragraph and is otherwise denied; and finally it is

ORDERED that the Case 1 Petition is denied.

[12] Given the disposition ordered herein, the Court need not reach petitioners' other challenges to Part 664.

This constitutes the Consolidated Decision, Order & Judgment of the Court, the original of which is being uploaded to NYSCEF for entry by the Albany County Clerk. Upon such entry, the prevailing parties in each case shall promptly serve notice of entry on all parties entitled thereto.

Dated: Albany, New York
April 8, 2026

RICHARD PLATKIN
A.J.S.C.

Papers Considered:

Case No. 1: NYSCEF Doc Nos. 1-10, 20-39, 42, 45-55 and 68.
Case No. 2: NYSCEF Doc Nos. 1-13, 24-43, 46, 50-55, 61 and 67.
Case No. 3: NYSCEF Doc Nos. 1-14, 24-43, 46-48, 50-52 and 63.
Case No. 4: NYSCEF Doc Nos. 16-30, 33-52, 55, 60, 62-85, 87 and 99.

SEQR Workbook Update - June 12, 2026
State Environmental Quality Review Act
Environmental Justice Siting Law Amendments

SEQR Guidance

BACKGROUND

DEC provides guidance to project sponsors and agencies reviewing actions under the State Environmental Quality Review Act (SEQR) in the form workbooks posted on DEC's website: https://dec.ny.gov/regulatory/permits-licenses/seqr/eaf-workbooks/links. Workbooks are provided for each part of the Short and Full environmental assessment forms (EAFs), which guide users in a step-by-step fashion through each section and question on the forms. Workbooks are provided as guidance and not every possible circumstance and impact are covered, requiring sponsors and reviewing agencies to apply the statute and regulations to the nuances of the actions being considered. The SEQR workbooks are also subject to periodic revisions.

To implement the Environmental Justice Siting Law (EJSL or Siting Law), DEC has proposed amendments to the SEQR regulations at 6 NYCRR 617, and DEC has updated the model EAFs in accordance with those proposed amendments. This document contains draft updates to the SEQR workbooks, which are intended to assist project sponsors and SEQR agencies in implementing the amendments to SEQR and the EAFs when evaluating potential impacts on disadvantaged communities. Like DEC's existing SEQR workbooks, this guidance document provides instructions for each additional question in Parts 1 and 2 of the EAFs, with one section covering the Short EAF workbook and the other covering the Full EAF workbook. Additionally, this guidance document provides instructions for completing Part 3, which contains the negative and positive declarations and must, in all circumstances, be completed by the lead agency. The lead agency may also need to complete an additional analysis in Part 3 depending on the answers in Part 2.

DEC added questions in Parts 1 and 2 of the Short EAF to address potential impacts on disadvantaged communities. The additional questions are listed below along with guidance pertaining to each question.

Short EAF Part 1 Workbook (Project Sponsors)

Question 21:
"Is the project located within, or within ½-mile of, a disadvantaged community? Yes No
If no, could impacts from the project affect a disadvantaged community? Yes No

If the answer is Yes to either question in 21, answer the following question.

a. Identify the potential pollution impacts of the project, either direct or indirect, that may occur within the disadvantaged community (e.g., wastewater discharges, air emissions, noise, odors, solid or hazardous waste generation or management):"
_____

Background Information

This question evaluates potential pollution impacts on disadvantaged communities. Among the criteria for determining the significance of a proposed action, the SEQR regulations at 6 NYCRR 617.7(c)(xiii) include whether the action "…may cause or increase a disproportionate pollution burden on a disadvantaged community that is directly or significantly affected" by the action. In addition, SEQR regulations at 6 NYCRR 617.2(ae) define pollution broadly as "…the presence in the environment of conditions and or contaminants in quantities or characteristics which are or may be injurious to human, plant or animal life or to property or which unreasonably interfere with the comfortable enjoyment of life and property…"

Disadvantaged communities subject to evaluation include those designated pursuant to section 75-0111 of Environmental Conservation Law (ECL). The Climate Justice Working Group has posted interactive maps online showing the locations of disadvantaged communities and the criteria used to designate each community. The maps and additional information on disadvantaged communities are available at the following link: https://climate.ny.gov/Resources/Disadvantaged-Communities-Criteria. *DEC is currently working to incorporate the DAC map GIS layer into the EAF Mapper, which will automatically populate the answer to this question.*

Answering the Question

"Is the project located within, or within ½-mile of, a disadvantaged community? Yes No"

This question should be answered yes if any component of the project is located within, or within ½-mile of, a disadvantaged community. *DEC is currently working to incorporate the DAC map GIS layer into the EAF Mapper, which will automatically populate the answer to this question.*

"If No, could impacts from the project affect a disadvantaged community? Yes No"

If the project is located greater than ½-mile from a disadvantaged community, this question should be answered yes if the potential off-site impacts could reasonably be expected to occur within a disadvantaged community. The potential impacts could include, but would not be limited to, air emissions, wastewater discharges, noise, odors, and traffic.

If either question is answered yes, then proceed to Questions 21.a, and 21.b.

Question 21.a
"Identify the potential pollution impacts of the project, either direct or indirect, that may occur within the disadvantaged community (e.g., wastewater discharges, air emissions, noise, odors, solid or hazardous waste generation or management):"

All relevant potential impacts associated with the project that may occur within the disadvantaged community should be identified here. As with other questions on the Short EAF, additional pages should be attached where necessary. Where such impacts can be quantified, the available information should be provided and summarized. If there is a seasonal nature to the operations, that should also be described in response to this question. If the project involves a DEC permit that requires preparation of an Existing Burden Report, the report may serve as a supplemental source of information for the lead agency to consider potential impacts on disadvantaged communities and should be provided to the reviewing agency with the Short EAF.

Short EAF Part 2 Workbook (Reviewing Agencies)

Question 12.
"Is the potentially affected disadvantaged community identified as having comparatively higher burdens or vulnerabilities by the Disadvantaged Community Assessment Tool? Yes No."

The Disadvantaged Community Assessment Tool (Tool), https://on.ny.gov/DACAT, is a screening tool created by DEC to help lead agencies assess disproportionality and consider whether a potentially affected disadvantaged community has an increased likelihood of experiencing a moderate to large impact based on existing burdens or vulnerabilities as compared to relevant non-DACs. The Tool is based on data from the Climate Justice Working Group (CJWG) DAC map[1] and uses statistically meaningful thresholds to compare the existing burdens in a DAC with existing burdens in the following non-DAC scenarios: statewide rural, statewide urban, regional rural, and regional urban.

The Tool identifies DACs as having either 1) comparatively higher existing burdens or vulnerabilities and therefore an increased likelihood that a proposed action may have a moderate to large impact on the DAC (shown in orange, or yellow for those census tracts designated as Indigenous lands), or 2) having comparatively lower existing burdens or vulnerabilities and therefore a decreased likelihood that a proposed action may have a moderate or large impact on the DAC (shown in blue).

The Tool should not be relied upon exclusively to decide whether an impact is small or moderate to large. It is intended for use as a screening tool to help lead agencies identify DAC census tracts that may warrant further consideration, analysis, and community input based on existing information. Lead agencies should consider additional available information regarding pollution burdens and population vulnerability in the DAC. *Additional information about the Tool and methodology is in Appendices A and B to RIS. DEC expects to include this additional information as appendices to the Workbook.*

Disadvantaged communities that have been identified as having comparatively higher existing burdens or vulnerabilities have an increased likelihood that a proposed action may have a moderate to large impact on the disadvantaged community. Use the Tool to determine whether the disadvantaged community has been mapped as having comparatively higher existing burdens or vulnerabilities.

[1] [1] Climate Justice Working Group DAC map: https://climate.ny.gov/-/media/Project/Climate/Files/Disadvantaged-Communities-Criteria/2023-DAC-Maps-Version-1.pdf. Climate Justice Working Group DAC map PDFs: https://climate.ny.gov/-/media/Project/Climate/Files/Disadvantaged-Communities-Criteria/List-of-Disadvantaged-Communities.pdf.

Question 13.
“Will the proposed action cause or increase a pollution burden within a disadvantaged community?”

Background

This question evaluates potential pollution impacts on disadvantaged communities. Among the criteria for determining the significance of a proposed action, the SEQR regulations at 6 NYCRR 617.7(c)(xiii) include whether the action “…may cause or increase a disproportionate pollution burden on a disadvantaged community that is directly or significantly affected” by the action. In addition, the SEQR regulations at 6 NYCRR 617.2(ae) define pollution broadly as “…the presence in the environment of conditions and or contaminants in quantities or characteristics which are or may be injurious to human, plant or animal life or to property or which unreasonably interfere with the comfortable enjoyment of life and property…”

The degree to which a pollution burden may be caused or increased within a disadvantaged community because of the action will determine whether the response in Part 2 is identified as “No, or small impact may occur” or “Moderate to large impact may occur.”

Applicable Part 1 Information

Some of the questions that should be specifically reviewed when answering this question are:

- Question 8
- Question 11
- Question 17
- Question 18
- Question 19
- Question 20
- Question 21

Analysis

To decide if impacts will occur, the reviewing agency should look at the available information and ask the following questions:

- Will the proposed project create any new sources of pollution listed below or increase pollution listed below from existing sources? If so, how much?

    - Air emissions, including particulate matter (e.g., dust, diesel emissions, or other fossil fuel emissions), oxides of nitrogen (NOx), volatile organic compounds (VOCs), hazardous air pollutants (HAPs), or other regulated air pollutants;
    - Wastewater treatment or wastewater discharges;
    - Solid waste generation, transport, or disposal;
    - Hazardous waste generation, transport, or disposal;
    - Industrial or commercial noise from operation of stationary or mobile equipment;
    - Industrial or commercial lighting in contrast to existing lighting; or
    - Industrial or commercial odors.
- Is the proposed site an active or inactive solid or hazardous waste site, or has the site previously been exposed to pollutants or contamination?
    - If so, is it undergoing or planned to undergo remediation?
- Will there be any excavation of solid or hazardous materials?
- Do any of the impacts identified in response to Questions 8, 11, 17, 18, 19, 20, or 21 occur within a disadvantaged community?

Will there be an impact?

There is not likely to be an impact if the proposed project:

- Does not involve the creation or increase of air pollution, water pollution, solid waste generation transport or disposal, hazardous waste generation transport or disposal, industrial or commercial noise, industrial or commercial odors, or industrial or commercial lighting;
- Does not create any new sources or expand existing sources of pollution within a disadvantaged community; and
- Does not disturb or create an existing solid or hazardous waste disposal or remediation area.

If the lead agency determines that the project will not create or increase pollution burdens in these ways, there is not likely to be a moderate or large impact. In this case, check "No, or small impact may occur" on the Part 2 table. When all questions from Part 2 are completed, proceed to Part 3.

If the proposed project is likely to create or increase pollution within a disadvantaged community, the magnitude of this impact must be evaluated.

If there is an impact, how big will it be?

If there will likely be an impact, the reviewing agency must evaluate the magnitude of that impact. This will depend on the overall scale and context of the proposed project. The reviewing agency should be reasonable when conducting this review. For additional information on the concept of reasonableness as it applies to SEQR, refer to section F in the Introduction of the SEQR Handbook.

Small Impact

To decide if no impact or a small impact may occur, and whether no significant impacts to a disadvantaged community are anticipated, the reviewing agency should look at the available information and consider factors such as the following:

- Air emissions will occur at a level that does not require a state air pollution control permit;
- Solid or hazardous waste will be generated in an amount easily transported to and handled at a permitted disposal facility;
- Wastewater discharges will not occur or expand;
- All proposed operations would occur within an enclosed building;
- There will be no traffic associated with the project or the traffic generated is limited to non-truck traffic and will not increase to a level causing level of service impacts; and
- The disadvantaged community is identified by the Disadvantaged Community Assessment Tool as having comparatively lower burdens or vulnerabilities.

In these cases, check "No, or small impact may occur" on the Part 2 table. When all of Part 2 is completed, proceed to Part 3.

Moderate to Large Impact

- Air emissions will occur at a level that requires a state air pollution control permit (i.e., Air State Facility or Title V permit);
- Solid or hazardous waste will be generated in an amount requiring substantial increase in truck traffic to transport to a permitted disposal facility;
- Solid or hazardous waste will be managed or disposed on site, requiring a state solid or hazardous waste management facility permit;
- Wastewater discharges will occur or expand, requiring a State Pollutant Discharge Elimination System (SPDES) permit;
- Proposed operations would potentially result in off-site pollution impacts;
- Traffic associated with the project will increase to a level or type causing level of service or safety impacts;
- The disadvantaged community is identified by the Disadvantaged Community Assessment Tool as having comparatively higher burdens or vulnerabilities; and
- The action involves a DEC permit application that requires preparation of an “existing burden report” analyzing potential pollution impacts to a disadvantaged community.

Recording your decision

If you have determined there are no impacts, or that only a small impact may occur, no further analysis of this topic is needed. Check the box under "No, or small impact may occur" next to the question and move on to Part 3. You may choose to include an explanation in Part 3 as to why you decided there were no impacts or only small impacts, but you are not required to do so.

If you have determined that one or more moderate to large impacts may occur, additional analysis of this impact will be required in Part 3. You should note what the impacts are and the reasoning that led to your decision in Part 3.

FULL EAF– SEQR WORKBOOK GUIDANCE

DEC has added questions in Parts 1 and 2 of the Full EAF to address potential impacts on disadvantaged communities. The additional questions are listed below along with guidance pertaining to each question.

Full EAF Part 1 Workbook (Project Sponsors)

Question E.4.a:
"Is the project located within, or within ½-mile of, a disadvantaged community? Yes No"

This question should be answered yes if any component of the project is located within, or within ½ mile of a disadvantaged community. *DEC is currently working to incorporate the DAC map GIS layer into the EAF Mapper, which will automatically populate the answer to this question.*

"If No, could impacts from the project affect a disadvantaged community? Yes No"

If the project is located greater than ½-mile of a disadvantaged community, this question should be answered yes if the potential off-site impacts from the project could reasonably be expected to occur within a disadvantaged community. The potential impacts could include, but would not be limited to, air emissions, wastewater discharges, noise, odors, and traffic.

"If the answer is Yes to either question in E.4.a, answer the remaining questions in the section."

Question E.4.b"Will there be direct or indirect impacts that may affect a disadvantaged community, such as those listed below? Yes No

i. new noise sources or expansions/modification of existing noise sources;
   - noise from operational sources
   - noise from construction activities

ii. emissions of air pollutants including mobile emissions;
iii. wastewater discharges;
iv. generation of odors;
v. light pollution;
vi. new or modified radiation sources;
vii. new or modified sources of solid waste generation, management, or disposal.

If Yes, describe the impacts:"

If any of the impacts listed in Question E.4.b may occur, the question should be answered Yes and the type of impact(s) described. All relevant potential impacts associated with the project that may occur within the disadvantaged community should be identified here. As with other questions on the Full EAF, additional pages should be attached where necessary. Where such impacts can be quantified, the available information should be provided and summarized. If there is a seasonal nature to the operations, that should also be described in response to this question.

Question E.4.c
"Do any of the state agency approvals identified in Question B.g include any of the following DEC permits?

State Pollutant Discharge Elimination System (SPDES) Yes No
Solid Waste Management Facility Yes No
Hazardous Waste Management Facility Yes No
Air Pollution Control (Title V or Air State Facility) Yes No
Water Withdrawal over 20 MGD for Cooling Water Yes No
Waste Transporter Yes No"

In response to this question, project sponsors should indicate whether any of the listed DEC permits will be required for the proposed action. Such DEC permits are considered "applicable permits" under the Siting Law. Such permits may involve the preparation of an Existing Burden Report, which may serve as a supplemental source of information for the lead agency to consider potential impacts to disadvantaged communities. The Existing Burden Report should be provided to the reviewing agency with the Full EAF.

Full EAF Part 2 Workbook (Lead Agencies)

Question 19: Impact on Disadvantaged Communities
"The proposed project may impact a disadvantaged community. Yes No"

This question asks the reviewing agency to evaluate potential pollution impacts on disadvantaged communities. Among the criteria for determining the significance of a proposed action, SEQR regulations at 6 NYCRR 617.7(c)(xiii) include whether the action "…may cause or increase a disproportionate pollution burden on a disadvantaged community that is directly or significantly affected" by the action. In addition, SEQR regulations at 6 NYCRR 617.2(ae) define pollution broadly as "…the presence in the environment of conditions and or contaminants in quantities or characteristics which are or may be injurious to human, plant or animal life or to property or which unreasonably interfere with the comfortable enjoyment of life and property…"

To answer this question:

Review Part 1 Question E.4.a.

- Is the project located within, or within ½-mile of, a disadvantaged community?

This question can be answered by comparing the spatial limits of the project to the boundaries of mapped disadvantaged communities, available online at: https://climate.ny.gov/Resources/Disadvantaged-Communities-Criteria. *DEC is currently working to incorporate the DAC map GIS layer into the EAF Mapper, which will automatically populate the answer to this question.*

- If the project is not located within, or within ½-mile of, a disadvantaged community, could impacts from the project affect a disadvantaged community?

If the project is located greater than ½-mile of a disadvantaged community, this question should be answered yes if the potential off-site impacts from the project could reasonably be expected to occur within a disadvantaged community. The potential impacts could include, but would not be limited to, air emissions, wastewater discharges, noise, odors, and traffic.

If the answers to both of these questions are No, there would likely be no related impacts. If the answer to either question is Yes, check 'yes' and then answer sub-questions (a) through (h).

Identifying Potential Impacts

The reviewing agency should evaluate the following sub-questions and decide if there will be a potential impact. If there will be a potential impact, the reviewing agency must evaluate the magnitude of that impact and decide if the impact will be small or moderate to large. This will depend on the overall scale and context of the proposed project. The reviewing agency should be reasonable when conducting this review. For additional information on the concept of reasonableness as it applies to SEQR, refer to section F in the Introduction of the SEQR Handbook.

- If the proposed project exceeds a numeric threshold in a question, it may be presumed to have a moderate to large impact.
- If the proposed project does not exceed a numeric threshold in a question, the reviewing agency should consider the scale and context of the project in determining if an impact may be small or moderate to large.
- If the proposed project may impact a DAC, and that DAC is identified as having comparatively higher burdens or vulnerabilities by the Disadvantaged Community Assessment Tool, then there is an increased likelihood that impacts from the project may be moderate to large.
- These sub-questions are not meant to be exhaustive. The reviewing agency should use the "Other impacts" sub-question to include any additional elements that should be analyzed for potential impacts.

Applicable Part 1 Information

Review the “Relevant Part 1 Question(s)” column in the EAF when answering this question.

Analysis

Answers to sub-questions (a) through (h) offer information that will help the reviewing agency to identify potential impacts to disadvantaged communities. Most of these are 'yes' or 'no' questions.

Question 19.a

“The potentially affected disadvantaged community is identified as having comparatively higher burdens or vulnerabilities by the Disadvantaged Community Assessment Tool.”

The Disadvantaged Community Assessment Tool (Tool) is a screening tool created by DEC to help lead agencies assess disproportionality and consider whether a potentially affected disadvantaged community has an increased likelihood of experiencing a moderate to large impact based on existing burdens or vulnerabilities as compared to relevant non-DACs.

The Tool is based on data from the Climate Justice Working Group (CJWG) DAC map[2] and uses statistically meaningful thresholds to compare the existing burdens in a DAC with existing burdens in the following non-DAC scenarios: statewide rural, statewide urban, regional rural, and regional urban.

The Tool identifies DACs as having either 1) comparatively higher existing burdens or vulnerabilities and therefore an increased likelihood that a proposed action may have a moderate to large impact on the DAC (shown in orange, or yellow for those census tracts designated as Indigenous lands), or 2) having comparatively lower existing burdens or vulnerabilities and therefore a decreased likelihood that a proposed action may have a moderate or large impact on the DAC (shown in blue).

The Tool should not be relied upon exclusively to decide whether an impact is small or moderate to large. It is intended for use as a screening tool to help lead agencies identify DAC census tracts that may warrant further consideration, analysis, and community input based on existing information. Lead agencies should consider additional available information regarding pollution burdens and population vulnerability in the DAC. *Additional information about the Tool and methodology is in Appendices A and B to RIS. DEC expects to include this additional information as appendices to the Workbook.*

Disadvantaged communities that have been identified as having comparatively higher existing burdens or vulnerabilities have an increased likelihood that a proposed action may have a moderate or large impact on the disadvantaged community. Use the Tool to determine whether the disadvantaged community has been mapped as having comparatively higher existing burdens or vulnerabilities.

Question 19.b
"The proposed action may create new air emissions or increase existing air emissions within a disadvantaged community."

[2] Climate Justice Working Group DAC map: https://climate.ny.gov/-/media/Project/Climate/Files/Disadvantaged-Communities-Criteria/2023-DAC-Maps-Version-1.pdf. Climate Justice Working Group DAC map PDFs: https://climate.ny.gov/-/media/Project/Climate/Files/Disadvantaged-Communities-Criteria/List-of-Disadvantaged-Communities.pdf.

Air emissions from a project could come from many sources including, but not limited to, burning fossil fuels, diesel equipment operation (including trucks), dust, manufacturing processes (e.g., volatile organic compounds and hazardous air pollutants), chemical and petroleum bulk storage, and others. Air emissions can also be dispersed well beyond their source, so even those sources located outside of the disadvantaged community may still result in community impacts and require evaluation. Impacts identified in Question 6 should also be reviewed in answering this question. Where new air emissions or an increase in existing air emissions may occur within a disadvantaged community, the potential impacts of those emissions must be evaluated.

Some of these sources may also require a DEC air pollution control permit (e.g., air state facility or Title V permit). Where such a permit is required, generally a moderate to large impact may occur, which should be evaluated further in Part 3 of the EAF. In addition, the sponsor may have also prepared an Existing Burden Report in support of their DEC permit application. That Report may be used as a source of supplemental information for the reviewing agency's evaluation, where available.

A note about DAC indicator percentile numbers. Information in the Climate Justice Working Group (CJWG) DAC map includes percentile numbers for 45 indicators displayed in a chart/table format. These indicators are grouped under "Health Impacts & Burdens," "Housing, Mobility, Communications," "Income," "Race/Ethnicity," "Land Use & Historic Discrimination," Potential Climate Change Risk," and "Potential Pollution Exposure."

The indicator percentile scores are part of a formula used by the CJWG for the purpose of identifying DACs on a statewide basis. More information about the formula and the DAC methodology can be found in the DAC map Technical Guidance Document at https://climate.ny.gov/Resources/Disadvantaged-Communities-Criteria. The percentile scores were not generated for the purpose of assessing disproportionality in the context of a specific DAC and a particular local impact; rather, they were generated to identify DACs on these larger geographic scales. In other words, the indicators are used for DAC *identification* rather than project *analysis*.

The indicator percentile scores show how a given indicator ranks compared to the entire state, including DACs, non-DACs, and New York City. For example, a truck traffic indicator percentile score of 10% means that in that tract, when compared with all other tracts in the state (non-DACs, DACs, and NYC tracts), 10% of the census tracts have estimated lower truck traffic and 90% of the census tracts have estimated higher truck traffic.

Indicator percentile scores may not be representative of conditions across an entire census tract, as census tracts are determined by a variety of factors, such as population and local boundaries. Indicators with a "high" percentile score do not necessarily mean that a given census tract qualifies as a DAC due to a "high scoring" indicator(s) alone. For example, in a census tract that has both residential and industrial uses, truck traffic may be low in the residential area but high in the industrial area, creating a moderate truck traffic indicator score for the census whole tract. Siting a project in the high traffic industrial area of this

tract may have different impacts than the siting of a project in a low traffic residential area. Therefore, while the indicator subject titles may be useful to help guide topics for discussion, the use of indicator scores, on their own, do not address disproportionality when assessing potential impacts of a specific proposed action on a DAC.

Question 19.c
"The proposed action may create new wastewater treatment or discharges, or expand existing wastewater treatment or discharges, within a disadvantaged community."

Wastewater treatment occurring within a disadvantaged community may result in several potential adverse impacts, including lower water quality at the point of discharge, generation, and management of biosolids, and off-site odors. However, these impacts may also occur within a disadvantaged community where wastewater treatment or discharges occur outside the boundary of the community. Impacts identified in Question 3 should also be reviewed in completing this question.

Projects involving wastewater treatment may also require a new or modified SPDES permit. Where such a permit is required, generally a moderate to large impact may occur, which should be evaluated further in Part 3 of the EAF. In addition, the sponsor may have also prepared an Existing Burden Report" in support of their DEC permit application. That Report may be used as a source of supplemental information the reviewing agency's evaluation, where available.

Question 19.d
"The proposed action creates or expands a solid or hazardous waste management facility, or involves the generation of solid or hazardous waste, within or near a disadvantaged community."

The generation, transport, or disposal of solid or hazardous waste within or near a disadvantaged community may result in several adverse environmental impacts, including but not limited to noise, odors, air emissions, groundwater or surface water discharges, and others. The reviewing agency should evaluate the amount of waste involved, type of waste involved, hours and duration of operations, as well as the processes and controls being proposed to manage such wastes. Impacts identified in Question 16 may also be relevant.

Some of these activities may also require a DEC solid or hazardous waste management facility permit. Where such a permit is required, generally a moderate to large impact may occur, which should be evaluated further in Part 3 of the EAF. In addition, the sponsor may have also prepared an Existing Burden Report" in support of their DEC permit application. That Report may be used as a source of supplemental information for the reviewing agency's evaluation, where available.

Question 19.e
"The proposed action may increase traffic within a disadvantaged community."

Increases of traffic within a disadvantaged community creates potential for noise and air quality impacts, particularly where the increase is in heavy-duty vehicle traffic. The emission of fine particulate matter from diesel trucks is of particular concern given its adverse effects on individuals with asthma, heart disease, and other health conditions. Transportation impacts identified in Part 1, Question D.2.j and Part 2, Question 13 should also be reviewed in completing this question. Part 1, Question D.2.j and Part 2, Question 13 may indicate whether overall potential traffic increases are small or moderate to large. Other sources of available information on existing and proposed traffic levels may also be useful in evaluating traffic impacts (e.g., available DOT data, traffic studies, etc.).

Question 19.f
"The proposed action affects or involves one or more of the following facility types:
i. landfill;
ii. other industrial, manufacturing, or mining land use;
iii. major oil or chemical bulk storage facility;
iv. municipal waste combustor;
v. power generation facility;
vi. risk management plan site;
vii. remediation site; or
viii. scrap metal processor."

Where a project involves one or more of the land uses contained in items 19.g.i-viii, adverse impacts to the disadvantaged community may occur.

Question 19.g
"Other Impacts"

There may be potential impacts within a disadvantaged community identified by the reviewing agency that are not addressed by the above questions. If so, they should be briefly identified and described in Question 19.g.

Full EAF Part 3 Workbook (Lead Agencies)

Part 3 provides the reasoning supporting a determination of significance. The lead agency must complete Part 3 for every question in Part 2 where the impact has been identified as potentially moderate to large or where there is a need to explain why a particular element of the proposed action will not, or may, result in a significant adverse environmental impact.

The determination for each type of potential impact, including those within disadvantaged communities, involves the following basic process:

- Identify the impact based on the Part 2 responses and describe its magnitude. Magnitude considers factors such as severity, size, or extent of an impact.
- Assess the importance of the impact. Importance relates to the geographic scope, duration, probability of the impact occurring, likelihood of the proposed action disproportionately burdening a disadvantaged community(ies), number of people affected by the impact, and any additional environmental consequences if the impact were to occur.
- The assessment should take into consideration any design element or project changes.
- Provide the reason(s) why the impact may, or will not, result in a significant adverse environmental impact.

To assess the significance of potential impacts on disadvantaged communities, the information provided in Part 1 and 2 of the EAF, the project application or proposal documents, input available from the community, available information on the pollution burden and population vulnerability of the community, and the Disadvantaged Community Assessment Tool, are all important sources of information to consider. Such information will help determine how the community may already be impacted by existing pollution burdens and the health stressors already present in the community. This information may include the disadvantaged community indicators used to designate the community (for example, if the truck traffic is an issue, the lead agency should evaluate the relative level of existing diesel truck traffic), existing New York State Department of Health data, environmental data generated from community air monitoring (e.g., air, wastewater, etc.), available traffic studies, and other sources, for example.[3] See also above “A note about DAC indicator percentile numbers,” Question 19.b. In addition, available community input can also be an important source of information on potential impacts and the importance of those impacts in determining significance. As a result, opportunities for public input are encouraged.

Next, information in Parts 1 and 2 of the EAF and the project application or proposal documents should be used to determine the action’s potential contribution to the existing pollution burdens in the community. Such contributions may be temporary or long-term and should be evaluated accordingly. For example, the magnitude and importance of truck traffic associated with a project may be small where it is temporary and associated only

[3] Any data source listed here should be used in accordance with the instructions and limitations provided by the agency or entity that has generated and made the data available.

with construction. Conversely, if truck traffic is expected to increase and will be ongoing once the project is completed, the magnitude and importance of the project may be large. The fuel type to be used may also impact the magnitude and importance.

Using the information about existing pollution burdens, existing population vulnerability, and the project's expected contribution to the potential pollution burden, the magnitude and importance of the impact can be assessed. The Disadvantaged Community Assessment Tool is designed to help understand those existing burdens. Because disadvantaged communities are already identified as burdened based on a number of criteria, the importance assessment should contextualize potential project impacts through these identified existing burdens and evaluate their importance by taking them into consideration. For example, the magnitude and importance of a project may be small where there are no new sources of air emissions or wastewater discharges occurring in a sparsely populated area on the border of a disadvantaged community. By contrast, the magnitude and importance of a project may be large where a new wastewater discharge would occur in a densely populated area of a disadvantaged community that already experiences high environmental burdens or population vulnerabilities.

Project sponsors may also identify project elements designed to avoid or minimize the identified pollution contribution. In those cases, it is possible that the reviewing agency may determine that the magnitude and importance of an impact may be large, but the project includes features that mitigate those effects to the point where the impact is no longer significant. For example, an applicant may agree to alternative traffic routes or hours of operation that mitigate the impact of increased traffic levels. Such measures must be taken into consideration when determining significance of an impact.

Full EAF Part 3 Workbook Examples – Disadvantaged Communities

Part 3 – Determination of Significance

Example 1

Proposed Activity: A new regional operations center for a major electric utility company is proposed on 15-acre vacant lot in an industrially zoned portion of the municipality. The census tract in which the facility would be located is designated as a disadvantaged community. The site will employ about 75 full-time employees and include a 40,000-square-foot office space, a 20,000-square-foot vehicle maintenance garage, and an outdoor storage yard for fleet vehicles, heavy trucks (e.g., "bucket" trucks), electrical cables, transformers, poles, and substation equipment. It will also include a 20,000-gallon underground storage tank for diesel fuel for fleet vehicles and a small emergency back-up generator to power essential system operation equipment during power outages. Water and sewer are available at the site. The total land disturbance will be 10 acres, 5 of which is forested and 5 of which is cultivated agricultural land. There are no streams or wetlands on the site, and it is not located in a floodplain. The site is located on a local town road that connects to a state highway ¼-mile from the site. Surrounding land uses include agriculture, low density single family residential, and multi-family apartments. The nearest residence is 500 feet from the site.

- Using information from Part 1 of the Full EAF, the Planning Board answered Questions 1 through 19 on Part 2.

- Using the Full EAF Part 2 tools, the Planning Board decided that there would be no impact to the environmental resources evaluated in Questions 2, 3, 5, 6, 7, 9, 10, 11, 12, 14, 16, 17, and 18. These were all checked as "No or small impact may occur" on Part 2.

- However, the Planning Board determined that Questions 1, 4, 8, 13, 15, and 19 would need further evaluation in Part 3 because they identified the following impacts that could potentially be moderate to large. The project may:

    - Result in increased erosion from grading and excavation activities on 10 acres of land;
    - Result in bulk storage of diesel fuel over a shallow groundwater aquifer;
    - Result in a loss of approximately 5 acres of farmland;
    - Result in an increase in traffic on ¼-mile of a local town road;
    - Result in additional commercial or industrial lighting that shines on adjoining properties; and
    - Result in increased industrial land use and traffic within a disadvantaged community that is identified by the Disadvantaged Community Assessment

Tool (Tool) as having an increased likelihood of moderate or large impacts due to existing burdens or vulnerabilities.

After further review, the Planning Board found:

The Planning Board evaluated the magnitude, duration, likelihood, and importance of those potential impacts within the context of the community. They decided:

1. Even though the site will result in the disturbance of 10 acres of land, there is a low likelihood that erosion and impacts to land will occur because the site is relatively level and well-drained. Stormwater runoff will be adequately controlled through implementation of erosion control measures and long-term stormwater management measures included in the sponsor's stormwater pollution prevention plan.

2. Although potential groundwater contamination would be an important impact, the Board determined there is a low likelihood of groundwater contamination because the project design includes state-of-the art underground storage tank technology and perimeter groundwater monitoring wells. The fueling area will also be located adjacent to the fleet maintenance garage on a concrete, impervious area. The sponsor also prepared a spill prevention and countermeasures plan which will be implemented at the facility.

3. The loss of 5 acres of farmland will be an irreversible and certain impact of the project. However, the site did not contain soils classified as prime farmland, and the Board determined the importance of the impact to be low given the abundance of agricultural land uses on prime farmlands in other nearby areas.

4. The project will increase traffic on the ¼-mile section of town road before it reaches the New York State highway, which carries an average of approximately 3,000 vehicles per day. Traffic will include approximately 150 employee traffic trips per day (75 arriving and 75 leaving) and approximately 50 operational vehicle traffic trips per day (e.g., a combination of fleet vehicles and heavy-duty trucks). The Planning Board decided the likelihood and importance of traffic impacts were low based on the low-density of residences along the ¼-mile section of town road (10 homes) and the relatively large volume of traffic already carried on the New York State highway where multi-family apartments are located.

5. The site will require security lighting for the equipment storage yard, which has the potential to create a nuisance in residential areas near the site. The Board determined the impacts would be adequately minimized by the sponsor's dark-sky compliant lighting plan and landscaping plan, which provided visual screening around the perimeter of the site.

6. The project will increase light industrial land use within a portion of the town designated as a disadvantaged community. Taking into account potential air, water,

groundwater, noise, and visual impacts, the Board determined the proposed project would not likely result in any substantial increase in pollution within the disadvantaged community.

An appropriate Part 3 statement for this example, specific to potential impacts on the disadvantaged community, would be:

The Planning Board determined that potential moderate to large impacts could occur related to land disturbance, groundwater, farmland, traffic, and an increase in commercial/industrial land uses.

After analysis, the Planning Board determined no significant adverse air quality, water quality, groundwater quality, noise, or visual impacts will occur because of the project. Each of the potential impacts to these resources will either be unlikely to occur or avoided by project design. There are no surface waters on or near the site that could be impacted by facility operations. Operations will also be designed to avoid and minimize the potential for groundwater contamination through the use of modern fuel storage tank technology, groundwater monitoring wells, and a spill prevention and countermeasures plan. No significant adverse visual impacts will occur because site lighting will be dark-sky compliant (i.e., use of downward facing and shrouded lighting) and landscaping will provide visual screening around the perimeter of the site.

Impacts to air quality will not be significant. There is no equipment proposed on site that will generate air emissions requiring a DEC air pollution control permit or registration. The emergency back-up generator will require weekly testing to maintain its function and to ensure readiness but will otherwise only operate on an emergency basis. Traffic generated by the facility will result in a small increase in vehicle emissions, mostly associated with passenger vehicles of commuting employees. However, the nearest residences are more than 500 feet from the site in a low-density area, and the overall vehicle emissions are relatively small compared to existing traffic volumes on the New York State highway.

For the reasons discussed above, none of the potential impacts to air, water, groundwater, noise, visual, or traffic are significant. As a result, there will also be no significant adverse increase in the pollution burden within, or impacts to, the disadvantaged community.

Based on the Planning Board’s analysis, they check box A on the last page of the Full EAF, Part 3, indicating a negative declaration is issued.

Example 2

Proposed Activity: A new automobile transmission manufacturing facility and parts distribution warehouse is planned on a 20-acre, waterfront site and will employ approximately 300 workers. Most of the site has completed remediation from its prior use as a major oil storage facility, but about 3 acres will be remediated as part of the proposed project. The proposal includes 200,000 square feet of manufacturing space, 200,000 square feet of warehouse distribution space, 50,000 square feet of office space, and associated parking, truck delivery, and rail delivery infrastructure. The site is served by water and sewer for potable and sanitary service but will withdraw approximately 500,000 gallons of water per day from the adjacent river for cooling and manufacturing purposes. Approximately 450,000 gallons of non-contact cooling water and process wastewater will be treated and discharged to the adjacent river under a DEC State Pollutant Discharge Elimination System (SPDES) Permit. A central boiler fired on natural gas will provide steam heat and generate approximately 0.5 MW of electricity for the facility operations, requiring a DEC air pollution control permit. When completed, the facility will generate 600 commuter trips per day (300 arriving and 300 leaving) and about 150 heavy truck trips per day (75 arriving and 75 leaving). The site is located within the city limits of a large city, and within a census tract designated as a disadvantaged community. The Disadvantaged Community Assessment Tool identified the disadvantaged community as having an increased likelihood of experiencing a moderate to large impact based on existing burdens or vulnerabilities. Surrounding land uses are industrial, commercial, and high-density residential. The nearest residence is 100 feet from the site and a school is located 200 feet from the site.

- Using information from Part 1 of the Full EAF, the Planning Board answered Questions 1 through 19 on Part 2.

- Using the Full EAF Part 2 tools, the Planning Board decided that there would be no impact to the environmental resources evaluated in Questions 2, 4, 7, 8, 9, 10, 11, 12, 17, and 18. These were checked as “No or small impact may occur” on Part 2.
- However, the Planning Board determined that Questions 1, 3, 5, 6, 13, 14, 15, 16, and 19 would need further evaluation in Part 3 because they identified the following impacts that could potentially be moderate to large. The project may:

    - Result in construction that would last for 1.5 years;
    - Result in a new water withdrawal of 500,000 gallons per day and discharge of 450,000 gallons of treated wastewater per day using a nearby river;
    - Involve construction within a 100-year floodplain;
    - Result in air emission from burning natural gas for energy and steam generation and emissions of hazardous air pollutants from manufacturing processes;
    - Result in large increases in traffic from worker vehicles and truck delivery;
    - Result in the generation and use of up to 0.5 MW of electricity per day;
    - Result in industrial noise and light extending into neighboring properties;

- Involve the remediation of approximately 3 acres of land and construction on a former remediation site; and
- Result in increased industrial land use, new air emissions, new wastewater discharges, and traffic within a disadvantaged community.

After further review, the Planning Board found:

The Planning Board evaluated the magnitude, duration, likelihood, and importance of those potential impacts within the context of the community and decided:

1. The duration of construction would exceed one year, involving generation of noise, traffic, and fugitive dust. Although these impacts would be temporary, the Board decided they were potentially significant given the duration and proximity to residential areas and a school within a disadvantaged community.

2. A new water withdrawal and wastewater discharge involving the river for cooling and process water could create potential water quality impacts in an area already used by the community for fishing and some recreational access. The Board decided that water quality impacts were potentially significant, particularly in light of the environmental burdens already faced by the disadvantaged community.

3. Although the site is located within a 100-year floodplain, the Board decided that potential impacts to flooding were not potentially significant, based on the sponsor's plan to provide additional flood storage on a portion of the site and construction of stormwater infrastructure improvements at a city-owned property within the same watershed.

4. The addition of a natural gas-fired heat and power plant on the site was consistent with other uses currently located within that part of the city. A utility-scale power plant (150 MW) was already located within ½-mile of the site, and the additional plant would add a relatively small amount of additional air emissions within the community. However, the Board decided that the additional emissions, when combined with manufacturing emissions and potential traffic-related emissions, could significantly and adversely impact the disadvantaged community given the existing sources of air pollution in the area and identified environmental burden of the disadvantaged community.

5. Noise and light generated from the site would be consistent with other industrial sources in the area, but given its proximity to residential areas and a school, noise and light glare were potentially significant impacts, particularly since the plant would run in three shifts over 24 hours at peak production.

6. Remediation of 3 acres of the site would be necessary to complete the development, but the work represents a continuation of remediation already completed on the

majority of the site. Although the removal of contaminated soil and cleanup on 3 acres was identified as a moderate to large impact, the Board determined it was not significant since the controls and requirements already implemented would continue.

7. Given the designation by the Tool of the area as a disadvantaged community with high existing burdens and vulnerabilities compared to non-disadvantaged communities, the Board determined that the potential air quality, water quality, noise, traffic, and light impacts identified above were important and significant.

An appropriate Part 3 statement for this example would be:

The Planning Board determined that potential moderate to large impacts could occur related to land disturbance, surface water, flooding, air quality, traffic, noise/odor/light, human health, and an increase in commercial/industrial land uses.

After analysis, the Board decided that the potential impacts to flooding and site remediation were not significant. They recognized that development would occur within the floodplain, but the sponsor's plan also includes elements to improve flood storage capacity and stormwater management, both of which more than offset the decrease in floodplain capacity on the site. In addition, remediation of 3 acres of the site would complete a larger remediation project that had already been undertaken, removing a potential source of pollution exposure within the area and disadvantaged community. Therefore, impacts related to site remediation were also not significant.

The Planning Board determined that other impacts would be moderate to large, likely to occur, and important given the designation of the community as a disadvantaged community, the Tool's identification of the community as having an increased likelihood of experiencing a moderate to large impact based on existing burdens and vulnerabilities as compared to relevant non-DACs , the proximity of residential land uses, and a school in close proximity to the site. As a result of this analysis, topics 1, 2, 4, 5, and 7 have been determined to be potentially significant. There is not adequate information or analysis of those impacts or how they could be mitigated.

Therefore, the Planning Board has determined there are potential significant adverse construction impacts and impacts to water quality, air quality, noise and light, traffic, and the disadvantaged community and an environmental impact statement evaluating these impacts is necessary.

The Planning Board then checks and completes section C on the last page of the Full EAF.

DEP 24-1 / Permitting and Disadvantaged Communities

New York State Department of Environmental Conservation

DEC Program Policy

Issuing Authority: Daniel Whitehead, Director Environmental Permits **Signature:** **Date: May 8, 2024**	**Title: Permitting and Disadvantaged Communities under the Climate Leadership and Community Protection Act**
Date Issued: May 8, 2024	**Latest Date Revised: NEW**

I. Summary:

This policy document, issued by the New York State Department of Environmental Conservation (DEC) Division of Environmental Permits (Environmental Permits), outlines the requirements for analyses developed pursuant to Section 7(3) of the Climate Leadership and Community Protection Act (CLCPA; Laws of 2019, Chapter 106). This policy applies to permit applications subject to the Uniform Procedures Act (UPA), Article 70 of the Environmental Conservation Law (ECL). [1]

II. Policy:

This policy is written to provide guidance for DEC staff when reviewing permit applications associated with sources and activities, in or likely to affect a disadvantaged community, that result in greenhouse gas (GHG), or co-pollutant emissions regulated pursuant to Article 75 of the Environmental Conservation Law (ECL). This policy does not apply to permit applications that are not located in or likely to affect a disadvantaged community.

III. Purpose and Background

The CLCPA went into effect January 1, 2020, and includes economy-wide requirements to reduce GHG emissions in New York State by 40% below 1990 levels by 2030, and 85% below 1990 levels by 2050. Section 7(3) of CLCPA requires the following of all state agencies:

> In considering and issuing permits, licenses, and other administrative approvals and decisions, including but not limited to the execution of grants, loans, and contracts, pursuant to article 75 of the environmental conservation law, all state agencies,

[1] On December 31, 2022, New York Governor Kathy Hochul signed a cumulative impacts bill into law, amending the State Environmental Quality Review Act (SEQR) and the Uniform Procedures Act (UPA) to require consideration of the effects of disproportionate pollution impacts on a disadvantaged community (DAC). The law takes effect on December 30, 2024, and will cover impacts beyond GHG and co-pollutants, to include all forms of pollution as defined in ECL 1-0303. Environmental Permits staff expect to modify this policy to take into consideration the new law plus any regulations DEC implements pursuant to that law.

offices, authorities, and divisions shall not disproportionately burden disadvantaged communities as identified pursuant to subdivision 5 of section 75-0101 of the environmental conservation law. All state agencies, offices, authorities, and divisions shall also prioritize reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities as identified pursuant to such subdivision 5 of section 75-0101 of the environmental conservation law.

The CLCPA also created a Climate Justice Working Group (CJWG) comprised of representatives from environmental justice communities and organizations, DEC, the Department of Health (DOH), the New York State Energy and Research Development Authority (NYSERDA), and the Department of Labor (DOL).

The CJWG established criteria to identify disadvantaged communities for the purposes of co-pollutant reductions, greenhouse gas emissions reductions, regulatory impact statements, and the allocation of investments.[2]

IV. Responsibility

Environmental Permits is responsible for implementing the review and permitting procedures described in this policy, in consultation with the Office of Environmental Justice, Office of the General Counsel, and applicable DEC permit program areas. Environmental Permits is also responsible for updating this program policy.

V. Procedure

1. Applicability.

The permit application review process described in this policy applies to permit applications identified below that involve sources and activities that result in direct or indirect GHG or co-pollutant emissions pursuant to Article 75 of the ECL:

a. All major permit applications made pursuant to the following sections of the ECL received by DEC, after the issuance date of this policy, and all pending incomplete permit applications, including incomplete modifications or renewals to existing permits:

   - Article 15, Title 15, and Article 17 for facilities withdrawing and using over 20 MGD of water for cooling purposes
   - Article 19, Air Pollution Control
   - Article 23, Title 17, Liquefied Natural Gas and Petroleum Gas
   - Article 27, Title 7, Solid Waste Management
   - Article 27, Title 9, Industrial Hazardous Waste Management

b. In addition to the permit applications listed above under V.1.a, these procedures apply to any permit administered under the Uniform Procedures Act (UPA) for:

[2] On March 27, 2023, the Climate Justice Working Group identified criteria for disadvantaged communities pursuant to ECL 75-0111(see the internet link in footnote 3).

- projects involving construction of energy production, generation, transmission, or storage facilities; and
- projects with sources and activities that may result in GHG emissions or co-pollutants, directly or indirectly, including those from mobile emissions.

2. Determining Scope of Covered Projects

DEC staff may require an applicant to ensure the requirements of Section 7(3) are met and prioritize emission reductions in the impacted disadvantaged communities, as required by CLCPA Section 7(3). Projects subject to this policy include sources and activities of a continuing nature associated with any new emission sources, permit renewals, or permit modifications that would result in actual increases of GHG and co-pollutants. This includes emissions from stationary and mobile sources directly related to and essential to the proposed action, and those from existing equipment or facilities. Essential operating functions are those functions critical to the operation of a facility or project without which the facility could not operate.

3. Preliminary Screening.

a. Upon receipt of a permit application subject to this policy, Environmental Permits staff will conduct a preliminary screen to identify whether the proposed action is a covered project and is in, or likely to affect, a disadvantaged community (*e.g.*, where the permit involves a facility that is not located in the disadvantaged community but involves off-site GHG or co-pollutant impacts within a disadvantaged community in close proximity to the proposed action). DEP may request that the applicant provide additional information to indicate whether the project is in, or likely to affect, a disadvantaged community.

b. Spatial data[3] will be used to determine whether the proposed action is in, or likely to affect, a disadvantaged community.

c. A project is likely to affect a disadvantaged community if there would be an increase in GHGs or co-pollutants within a disadvantaged community, even if the source of the GHGs or co-pollutants is located outside the disadvantaged community. At a minimum, the impact study area should be the area within a one-half mile of the facility.[4]

d. The affected area of the proposed action includes the facility itself and areas reasonably expected to experience off-site impacts from GHGs, and co-pollutants associated with operation of the facility. Off-site impacts are those that a proposed action may have at a distance from the site based upon modeling. For example, a natural gas fired power plant may impact the air quality of an adjacent or nearby disadvantaged community.

e. If no disadvantaged community is identified within the affected area, the proposed action is not likely to affect a disadvantaged community and the permit review process may continue independent of this policy.

[3] A map of identified disadvantaged communities is available on the Climate.ny.gov website: Disadvantaged Communities Map (https://climate.ny.gov/en/Resources/Disadvantaged-Communities-Criteria)

[4] Distances beyond ½ mile may be appropriate where modeling of air impacts indicates a wider impact from the facility.

f. If a disadvantaged community is identified and is located within the affected area as determined above, the proposed action is considered likely to affect the disadvantaged community and the remainder of these procedures will be incorporated into the review process.

4. Analysis of Disproportionate Burden and Project Design Measures

CLCPA Section 7(3) states that agencies' permit decisions "shall not disproportionately burden disadvantaged communities." Increases in GHG emissions or co-pollutants resulting from a project associated with any new, modified, or renewed emission sources, including those from stationary or mobile sources directly related to and essential to the proposed action, will require the preparation of a disproportionate burden analysis to meet the completeness requirements of 6 NYCRR 621.3(a)(13).

The disproportionate burden analysis must identify and address disproportionate burdens on the disadvantaged community. As part of a disproportionate burden analysis, an applicant may propose conditions on the project that would serve to address any disproportionate burden by prioritizing reduction of emissions in that community. Likewise, DEC may impose conditions on the project or other measures that would serve to address any disproportionate burden in that community, including through DEC's obligation in Section 7(3) to prioritize reductions in GHGs and co-pollutants in disadvantaged communities. Any such project conditions or other measures proposed by an applicant or imposed by DEC, along with any input from members of the community regarding the proposed project, may be considered in the ultimate determination of whether the project imposes a disproportionate burden on disadvantaged communities.

5. Enhanced Public Participation

Permit applications subject to this policy require enhanced public participation pursuant to 6 NYCRR 621.3(a)(13), following the procedural guidance for an enhanced public participation plan under CP-29. As part of the enhanced public participation plan, the applicant must solicit input from members of the disadvantaged community regarding the proposed project design considerations.

6. Guidance to Permit Applicants

Where an action likely to affect a disadvantaged community is identified by the preliminary screen, Environmental Permits staff will provide notice to the applicant of the information required to satisfy the requirements of Section 7(3). This may include notice that the applicant's project falls within or is likely to affect a disadvantaged community, guidance to comply with CP-29, and any other information relevant to the proposed action in preparing a disproportionate burden analysis.

a. Disproportionate Burden Analysis

The applicant shall submit a written analysis to DEC pursuant to 6 NYCRR 621.3 (a) (13) (ii) before an application is determined to be complete. The analysis shall include the following:

- an identification of GHG and co-pollutant emissions from the project affecting the disadvantaged community;

- identification of relevant baseline data on existing burdens, including the DAC Indicators used to designate the disadvantaged community that are related to air quality and air-related health effects[5];

- an evaluation of how project GHG and co-pollutant emissions would impact the disadvantaged community. The evaluation should qualitatively, and to the extent possible quantitatively, explain whether the project's GHG and co-pollutant emissions could positively or negatively impact air quality and air-related health effects, or other relevant DAC Indicators, resulting from an increase in GHG or co-pollutants from the proposed action;

- where an increase to the existing burden to the disadvantaged community is identified, proposed project design considerations including a description of actions to be taken to reduce or eliminate disproportionate burdens associated with GHG or co-pollutant emissions, including any proposed permit conditions (see below); and

- confirmation that an enhanced public participation plan has been completed, including any proposed changes to the project resulting from community outreach and participation.

b. Project Design Considerations

Where a proposed project results in a determination of disproportionate burden on a disadvantaged community, the disproportionate burden analysis must include project design measures that ensure that the project will not disproportionately burden the disadvantaged community. The availability of the disproportionate burden analysis will be an element of completeness under UPA.

Any project design measures that are used to support a final determination regarding disproportionate burden should result in measurable GHG emissions reduction, co-pollutant emission reduction that is in addition to actions already required by law or regulation and that lessen the burden on the community that has been initially identified to be disproportionately burdened. Further, project design measures must be real, quantifiable, permanent, verifiable, and enforceable. Project design considerations should result in a reduction in GHG and co-pollutant emissions that is at least equivalent to the increases from the project. Accordingly, it may be necessary for the applicant to consider implementation of more than one design consideration.

[5] Tables 2 and 3 of the New York State Climate Justice Working Group Draft Disadvantaged Communities Criteria and List Technical Documentation (March 9, 2022) identify various potential pollution exposures, land use and facilities associated with historical discrimination or disinvestment, and health outcomes & sensitivities that relate to air quality or air-related health effects.

Some projects subject to Section 7(3) of the CLCPA will also be subject to Section 7(2). Information provided as part of the Section 7(2) analysis can be similarly used to identify project design measures, that also address Section 7(3), as part of the disproportionate burden analysis.

In no specific order, examples of potential project design measures include, but are not limited to:

- Use of electric powered equipment instead of fossil fuel powered equipment, including electric vehicles;
- Use of lower emission technologies;
- Use of alternative process technologies that would reduce or eliminate GHG emissions or co-pollutants;
- Financial mitigation, such as providing funds for GHG or co-pollutant emissions reduction projects in the local disadvantaged community;
- Operational mitigation, such as limitations on the amount of fossil fuel combusted at the project or the allowable hours of operation for the project;
- Designing truck travel routes that avoid, or minimize impact to, disadvantaged communities;
- Adding electric vehicle charging stations at the facility or in the local disadvantaged community; and
- Physical mitigation, such as the planting and upkeep of trees, green infrastructure, or other means of carbon sequestration.

c. Public Review and Comment

In addition to the permit application materials, the disproportionate burden analysis, and any additional materials provided by the applicant to satisfy the requirements of Section 7(3) of the CLCPA, will be made available for public review and comment as per 6 NYCRR Part 621.7 of UPA. Relevant public comments, the permit application, supporting materials, including information provided to satisfy the requirements of Section 7(3) of the CLCPA, must be considered when making a final decision on a permit application.

VI. Definitions[6]

Baseline: existing data against which change is measured

Burden: something that affects health or quality of life. An overburdened community is one with multiple stressors including both environmental and socioeconomic. A community burden affects quality of life, and a pollution burden has the potential to affect health.

Co-pollutants are hazardous air pollutants produced by greenhouse gas emissions sources, including those contaminants defined as regulated air pollutants in 6 NYCRR 200.1(bu) and other air pollutants as identified by the Department on a case-by-case basis that are known to produce adverse human health effects.

DAC Indicator: the 45 variables created from raw data to represent the presence, direction, or magnitude of a characteristic or circumstance of interest. Indicators are designed to adjust for the size of the census tract (area or population) to enable relative scoring (comparisons) of census tracts. The 45 Indicators are grouped into seven sets, referred to as Factors.

Direct Emissions: include the applicable portions of the project owned or controlled by the project sponsor that include any new or modified emission sources that have the potential to emit GHG and co-pollutants, including increases and decreases in emissions of GHG and co-pollutants from existing equipment.

Disproportionate Burden: a burden within an affected disadvantaged community that is, or would be, significantly greater than that same burden in comparable non-disadvantaged communities, as a result of the proposed action.

Indirect Emissions: are reasonably foreseeable emissions that are a consequence of the activities of the proposed facility not owned or controlled by the project sponsor. For example, a project that will increase truck traffic associated with the facility would have indirect GHG and co-pollutant emissions associated with that increase. Indirect emissions are generally emitted from sources owned or controlled by other entities, not the facility itself, for example waste haulers utilizing a transfer station.

Mobile Emissions: pollutants released by vehicles, non-stationary engines, or other non-stationary equipment.

[6] Definitions are for the purpose of this policy only.

VII. Related References

Climate Leadership and Community Protection Act (Chapter 106 of the Laws of 2019)

Disadvantaged Communities - NYSERDA

Commissioner Policy 49, Climate Change and DEC Action

DEC Program Policy DAR-21, Climate Leadership and Community Protection Act and Air Permit Applications

Commissioner Policy 29, Environmental Justice and Permitting

Environmental Conservation Law Article 75, Climate Change

Environmental Conservation Law Article 15, Water Resources, Title 15 and Article 17, Water Pollution Control for facilities withdrawing and using over 20 MGD of water for cooling purposes

Environmental Conservation Law Article 19, Air Pollution Control

Environmental Conservation Law Article 23, Title 17, Liquefied Natural Gas and Petroleum Gas

Environmental Conservation Law Article 27, Title 7, Solid Waste Management

Environmental Conservation Law Article 27, Title 9, Industrial Hazardous Waste Management

Environmental Conservation Law Article 70, Uniform Procedures

Environmental Assessment Form Workbooks (EAF)

SEQR Handbook

Cumulative Impact Bill

Potential Environmental Justice Areas (PEJA)

New York State Climate Justice Working Group Draft Disadvantaged Communities Criteria and List Technical Documentation (March 9, 2022)