

1. “HARD LOOK”
  2. WHEN TO REQUIRE AN EIS
  3. LEAD AGENCY DELEGATION
- 

# Three Common, Avoidable SEQRA Pitfalls

Maximilian A. Stach, AICP – Nelson, Pope & Voorhis, LLC  
[mstach@nelsonpope.com](mailto:mstach@nelsonpope.com)

# Max Stach, AICP

---

- Partner at Nelson, Pope & Voorhis, an environmental and planning services firm with offices in Suffern and Melville, NY.
- Over 25 years of experience in comprehensive planning, zoning preparation, site plan, subdivision and SEQRA.
- Advises both private clients and Planning Boards throughout the Hudson Valley on site plan, special permit subdivision review and State Environmental Quality Review.
- Project manager for Comprehensive Plans, including the award-winning Village of Haverstraw Plan, special planning studies and zoning, addressing housing needs, agricultural preservation, sustainability and environmental protection, economic development and redevelopment.
- Broad experience with SEQR and preparing and reviewing Environmental Impact Statements for Comprehensive Plans, Zoning and development projects, ranging from religious communities, resort/casino developments, traditional neighborhood development, mixed-use waterfront developments, and large industrial buildings and sites.

# Three Common Pitfalls

---

- The “Hard Look” Requirement
- Substituting an Expanded EAF Process for an EIS
- Delegating Lead Agency Responsibilities

# Resources

---



SEQR Handbook - [https://extapps.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/seqrhandbook.pdf](https://extapps.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf)



Stepping through the SEQR Process - <https://dec.ny.gov/regulatory/permits-licenses/seqr/stepping-through-process>



SEQR Cookbook - [https://extapps.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/cookbook1.pdf](https://extapps.dec.ny.gov/docs/permits_ej_operations_pdf/cookbook1.pdf)



SEQR Flowchart - [https://extapps.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/seqrflowchart.pdf](https://extapps.dec.ny.gov/docs/permits_ej_operations_pdf/seqrflowchart.pdf)



SEQR Bible – Environmental Impact Review in NY –LexisNexis – Gerard, Weinberg, Ruzow - \$\$\$\$  
<https://store.lexisnexis.com/products/environmental-impact-review-in-new-york-skuusSku10340>

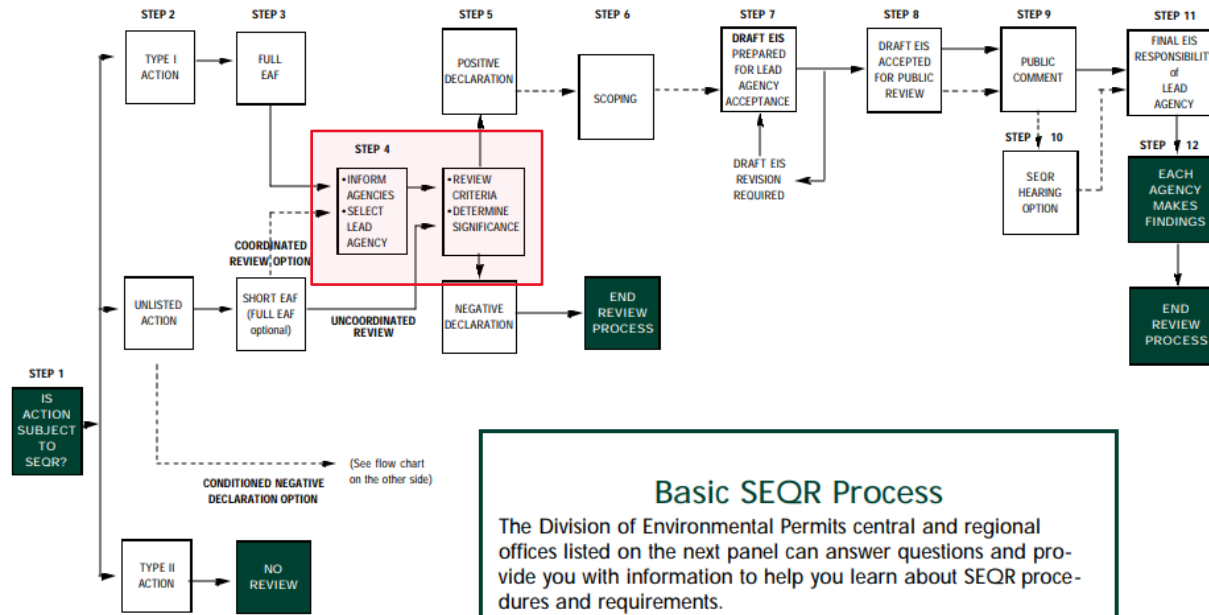
# Purpose of SEQR

---

“In adopting SEQR, it was the Legislature's intention that **all agencies conduct their affairs with an awareness that they are stewards of the air, water, land and living resources, and that they have an obligation to protect the environment** for the use and enjoyment of this and all future generations.”

“...it is the intention of this Part that a **suitable balance of social, economic and environmental factors be incorporated into the planning and decision-making processes** of State, regional and local agencies. **It is not the intention of SEQR that environmental factors be the sole consideration in decision-making.**”

# Basic SEQR Process

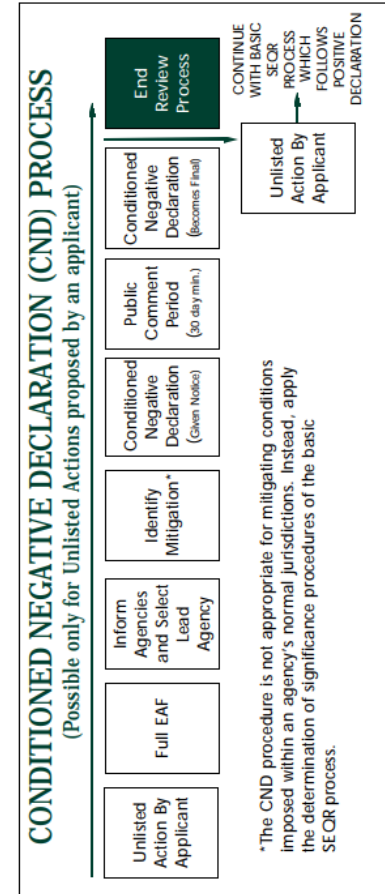


**Basic SEQR Process**

The Division of Environmental Permits central and regional offices listed on the next panel can answer questions and provide you with information to help you learn about SEQR procedures and requirements.

These references are available:

- The statewide SEQR regulations, 6 NYCRR Part 617 (the latest revision effective January 1, 2019)
- The SEQR Cookbook—a step-by-step discussion of the basic SEQR process
- SEQR Handbook—<https://www.dec.ny.gov/permits/6188.html>
- SEQR EAF Workbooks - <https://www.dec.ny.gov/permits/90125.html>
- Citizen's Guide to SEQR
- Local Official's Guide to SEQR
- DEC SEQR website: <https://www.dec.ny.gov/permits/357.html>



# What is a “Hard Look?”

---

- The term first appears in the case: H.O.M.E.S. versus New York State Urban Development Corp., 69 A.D.2d 222 (N.Y. App. Div. 1979)
  - Identify relevant areas of environmental concern
  - thoroughly analyzed them for significant adverse impact
  - supported its determination with reasoned elaboration



On Sept. 20, 1980, the Carrier Dome opened with 50,564 football fans witnessing a 36-24 Syracuse victory over Miami University. “The Dome” replaced the aging **Archbold Stadium**,



# The Process....

---

- In September 1978, the legislature granted UDC \$15 million to partner with Syracuse University to replace the old Archbold Stadium with Carrier Dome.
- On November 14, 1978 the Syracuse City Planning Commission deferred to the UDC to be lead agency.
- On November 15, 1978, the Syracuse-Onondaga County Planning Agency “expressing its concern for the ‘increased traffic flows and the need for parking’”
- On November 21, 1978, SU applied to the city planning commission for approval in the existing PID district. It estimated the total project cost at \$41 million.
- Seating capacity would be increased from 24K to 50K.
- SU was “satisfied that the increase in traffic and parking demand to arise from the new facility can be effectively resolved over the next two years.” SU “expressed confidence that with improved utilization of public transportation, a traffic plan acceptable to both the University and the community can be developed.”

# No plan for parking or transit...

---

- Court found that at the November 1978 special meeting of the City Planning Commission, “it was openly recognized that no plan to handle traffic had been devised.”
- DOT and Fire Chief gave testimony that emergency access would be inadequate.
- Attorney for SU responded that a solution is available – will develop it.
- UDC’s Planner wanted assurances from the University of their intent and financial ability to carry out recommendations from and future traffic studies.
- On December 1, 1978 UDC issued a negative declaration. UDC determined that environmental impacts would be avoided by “mitigating measures to be included in the project.”

# Project Approved!

---

- On December 5, 1978, the Onandaga County Planning Board approved the new domed stadium, based on assurances “that the traffic problems would be solved.”
- On December 5, 1978, the City Planning Commission approved the application but added that “it expected the university and the ad hoc task force within six months to prepare a traffic and parking plan.”
- Only TWO WEEKS (incl Thanksgiving) passed from application submittal, to Lead Agency designation, issuance of a NEG DEC, and Approval!!
- Article 78 was filed on January 12, 1979.

# Court determines there was no hard look

- UDC failed to take a "hard look"
- Failed to analyze the traffic and parking problems
- Relied upon general assurances of future unspecified appropriate action."
- In "Alice-in-Wonderland" manner, respondents separated and put aside the realities



# Takeaways

---

- Mentioning that there will be no impact isn't enough. Cite the evidence reviewed.
- Don't rush. No way can a domed stadium's environmental impacts be reviewed in a month.
- You need those background studies and proposed mitigations NOW, not later.
- Don't reserve a hard look just for unpopular projects. Go through SEQRA methodically even when everyone loves the project.

# Hard Look Best Practices

---

- Invite comment from interested and involved agencies.
- Peer-review complex technical studies provided by the applicant (traffic, noise, light, remediation, etc.) and retain specialists as necessary
- Conduct environmental review at open public meetings and make studies/materials available for review and comment.
- Provide a Reasoned Elaboration of Decision
  - Use SEQR forms – prepare Part 3 if any Part 2 impacts are identified.
  - Append/reference technical studies, investigations, testimony, public meetings, applicant submissions, dates and venues in a Negative Declaration, especially where a challenge is anticipated.
  - Address in the record any impacts that were raised by the public that the lead agency found to be not pertinent and provide reasons.

# Hard Look Thresholds

---

- Look to SEQR EAF forms and workbooks to provide guidance on what constitutes a “large impact.”
  - E.g., Some level of impact will occur to land where construction is proposed over areas where water is within 3 feet, slopes are greater than 15%, more than 1,000 square feet of removal of soils.
  - E.g., a significant impact to traffic is generally an action that generates more than 100 peak hour vehicle trips – workbook describes 100 trips in terms of unit/square foot equivalents.
  - Workbook directs to other resources such as, “Assessing and Mitigating Noise Impacts.”
- Establish context to impacts – 100 peak hour vehicle trips on a rural road or residential cul-de-sac, versus 100 peak hour vehicle trips with direct access to a State Highway.



# EIS vs Negative Declaration



## Negative Declaration:

- Most Boards are comfortable with EAF Worksheets
- Applicants typically need not hire environmental specialists
- Public not closely involved in environmental review (Kittredge v PB of Liberty)
- Review concurrent with land use application
- Path of choice for most parties involved



## Positive Declaration:

- Boards typically rely on Attorneys and Planners to comply with procedural requirements
- Applicant hires environmental specialists to prep EIS and often pays for agency peer review
- Involves public earlier (scoping) in the process and more formally
- Several steps typically add time to the process and often developers view with uncertainty so will halt plan development.
- More formal input by involved agencies
- Requires alternatives, weighing of impacts against other considerations



# What the Statute Says

---

## 6 NYCRR 617.7(a)

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

### Criteria:

<p>(i) a substantial adverse change in existing air quality, ground or surface water quality or quantity, traffic or noise levels; a substantial increase in solid waste production; a substantial increase in potential for erosion, flooding, leaching or drainage problems;</p> <p>(ii) the removal or destruction of large quantities of vegetation or fauna; substantial interference with the movement of any resident or migratory fish or wildlife species; impacts on a significant habitat area; substantial adverse impacts on a threatened or endangered species of animal or plant, or the habitat of such a species; or other significant adverse impacts to natural resources;</p> <p>(iii) the impairment of the environmental characteristics of a critical environmental area as designated pursuant to section 617.14(g) of this Part;</p> <p>(iv) the creation of a material conflict with a community's current plans or goals as officially approved or adopted;</p> <p>(v) the impairment of the character or quality of important historical, archeological, architectural, or aesthetic resources or of existing community or neighborhood character;</p> <p>(vi) a major change in the use of either the quantity or type of energy;</p>	<p>(vii) the creation of a hazard to human health;</p> <p>(viii) a substantial change in the use, or intensity of use, of land including agricultural, open space or recreational resources, or in its capacity to support existing uses;</p> <p>(ix) the encouraging or attracting of a large number of people to a place or places for more than a few days, compared to the number of people who would come to such place absent the action;</p> <p>(x) the creation of a material demand for other actions that would result in one of the above consequences;</p> <p>(xi) changes in two or more elements of the environment, no one of which has a significant impact on the environment, but when considered together result in a substantial adverse impact on the environment; or</p> <p>(xii) two or more related actions undertaken, funded or approved by an agency, none of which has or would have a significant impact on the environment, but when considered cumulatively would meet one or more of the criteria in this subdivision.</p>
--	--

# Iterative Review of EAF

- Boards (esp. Planning Boards) are familiar with iterative processes whereby an initial action is improved over time (e.g. site plans and subdivisions);
- Boards engaging in iterative processes naturally tend to oversee projects that become less environmentally impactful during course of review.
- Applicants and Boards may also be tempted to intentionally incorporate project changes to avoid an EIS.
  - Statute only permits this approach for Conditioned Negative Declarations for Unlisted Actions
- SEQR has low threshold for preparation of an EIS “may have a significant adverse impact.”
- Type 1 actions are “more likely to require the preparation of an EIS.”





# What the Courts Have Found

---

## Shawangunk Mountain Environmental Assoc. v. Planning Board of Town of Gardiner - 1990

- Type 1 Action
- Coordinated review involving multiple agencies, some having expressed concerns.
- Applicant submitted in March 1988 a 17-lot subdivision application in the environmentally-sensitive Shawangunk Mountain Region
- PB consultant identified 7 large potential impacts in an EAF Part 2 dated September 5, 1988.
- Applicant submitted revised plans on October 18, 1988 and PB Approved Project same day.

### Key Findings:

- The project changes were clearly concessions made in response to identified impacts for the purpose of securing a Negative Declaration. Therefore, the Planning Board improperly adopted a Conditional Negative Declaration, which is not allowed for Type 1 actions.
- The concessions constituted a bilateral negotiation between the PB and the Applicant, which circumvented:
  - Public Involvement
  - Consideration of Alternatives including No-Action
- Environmental risks were pervasive and mitigations in response to the EAF Part 2 did not substantially reduce the scope of the project.



# What the Courts Have Found

---

## Merson v. McNally – NY Court of Appeals

- Type 1 Action
- Coordinated review involving multiple agencies
- Applicant submitted special use application for mining in September 1991
- PB required EAF identified several large impacts, and applicant continuously revised application in response to PB and public comment over the course of year and a half finally submitting a revised project proposal in May 1993 (including an updated EAF of the revised project).
- Also in May 1993 DEC advised PB that is supported a Neg Dec.
- Application approved in May 2023.

### Key Findings:

- Applicant continuously amended plans in reaction to public and agency concerns, but not at the specific direction of the agencies.
- Applicant continuously met with the lead agency in publicly-accessible meetings to discuss concerns and plan changes.
- PB sought input from other agencies after project had been revised.

# What the Courts Recommend

---

## Two-Prong Test

### First Prong

- Might the originally proposed project result in one or more “significant adverse impacts.”
- Were mitigating measures “identified and required” by the lead agency as a prerequisite to a Negative Declaration

### Second Prong

- Were mitigative measures incorporated as part of an open and deliberative process.
- Were adverse effects clearly mitigated.

### Other Disqualifiers

- Conditions must not be imposed by Negative Declaration itself, nor rely on conditions to be imposed on some future approval.
- The lead agency may not impose specific conditions and approve it based on those conditions being met.
- With regard to clear mitigation, the more numerous and significant the original identified impacts, the greater the chance a Negative Declaration would be found in appropriate.

# Lead Agency – Delegation

---



# Delegation: SEQRA Handbook, pg. 62

---

- Can a lead agency delegate its responsibilities to any other agency?
- **No.** A lead agency cannot delegate its lead agency determinations to another agency. .
- However, it may delegate activities such as the gathering of data or the review of material prepared for determinations of significance or EISs to other involved or interested agencies or staffs or consultants.
- The lead agency may rely on the specific expertise of another involved or interested agency – ie. SHPO consultation on historic resource impacts.

# Lead Agency Must Address “Whole Action”.

---

- Often a complex action may involve two or more related components that may not be presented or applied for at the same time.
- Zone change, Site Plan Review, Subdivision Approval, Phases.
- Separate project sites (for example, a resource recovery facility with bypass disposal at another location).
- 6 NYCRR 617.3(g) The entire set of activities or steps must be considered the action, whether the agency decision-making relates to the action as a whole or to only a part of it. Considering only a part or segment of an action **is contrary to the intent of SEQR**.
- Generally, the courts uphold approval of a Type 2 action apart from a larger set of actions - not necessarily segmentation (Rodgers v City of North Tonawanda). However, DEC clarifies that while a Type 2 action may occur (issuance of an area variance) the actual physical work cannot occur prior to SEQR completion.
- Permissible segmentation – Allowed where further phases are speculative, functionally independent or may occur, but can be no less protective of the environment and must establish the reasons for segmentation on the record in advance (not after the fact).



# Trouble with competing agencies...There can be only one “Lead”

---

- Augustinian Recollects N.J. v. Planning Board of the Village of Montebello 66 Misc. 3d 1214 (N.Y. Sup. Ct. 2020)
- Montebello Crossing - mixed use facility with 200-bed assisted living; 14,600 sf Pharmacy; and 10,000 sf office building.
- Landing of Overlay District, Site Plan, Special Permit and Subdivision Review
- Application to the Village Trustees. The Trustees passed application to CDRC and Planning Board. “An internal debate arose about how to conduct SEQR review”
- Local code specified that Board of Trustees would serve as lead agency.
- A two track system: Village Board reviewed overall layout while Planning Board delved into detailed engineering, environmental impact and mitigation issues.

# Who's the boss?

---

- The Village Board declared Lead Agency. Planning Board and Village Board began to have parallel meetings.
- The Planning Board prepared a Part II form for the Village Board to use.
- Notice of the Village Board hearing said that “the Village Board has declared Lead Agency status...it being expressly understood that the Planning Board is acting as the consultative arm of the Village Board”
- As time passed and both Boards met, it became muddled as to whether the site plan was concurrently being considered before the new zoning overlay was adopted, or whether the Planning Board was just helping the Village Board in its SEQRA review, which necessarily needed to include full consideration of site plan to avoid segmentation.

# Who's the boss?

---

- The Village Board of Trustees accepted the recommendations of the Planning Board for a Part 2 and Part 3 EAF, granted a negative declaration, and granted its approvals (zoning and special permit) August 2017.
- The Planning Board continued to review the plans which were amended to respond to agency comments - granted final approval December 2017.
- A neighboring property owner brought an Article 78 challenge arguing that the review of Montebello Crossing's application for a zoning amendment before the Board of Trustees concurrently with Planning Board review of site plan was "improper and unlawful," because the local code required that the Board of Trustees authorize uses prior to the Planning Board conducting site plan review.

# What was actually wrong under SEQR?

---

- The Village Board delegated its SEQR responsibilities including preparing a Part 2 FEAF, Part 3 FEAF, Negative Declaration and circulating notices to the Planning Board. Village Board maintained only a rubber stamp authority.
- The local legislation pre-designated the Board of Trustees as Lead Agency, circumventing the processes contained within the SEQR law for uncoordinated review and designation of Lead Agency.

# What did the Court get wrong

---

- The court mistakenly determined that the action should have been a Type 1 action despite that the project did not exceed any Type 1 thresholds (conflated Assisted Living Residential Floor area as nonresidential floor area).
- The court mistakenly determined that the Board of Trustees serving as lead agency for site plan approval meant it was the responsibility of the Board of Trustees to approve the site plan (SEQR specifically states that it does not change jurisdiction of agencies).
- The court mistakenly determined that since the Planning Board approved the site plan separately from the BOT, that it should have done its own SEQR review (not permitted under coordinated review.)

# What else did the Court get wrong?

---

- The Court mistakenly conflated identifying a potential “large or moderate” impact on the Part 2 FEAF with identifying a “significant adverse environmental impact,” requiring an EIS.

# Takeaways

---

- Don't over-delegate. Lead agency can get help but should not hand over the reins!
- The Lead Agency must take the HARD LOOK.
- Local zoning should not pre-designate Lead Agency
- Supreme Courts (lowest appeals courts) often have limited understanding of SEQR and any departure from standard procedures increase the risk of a mistaken vacating of local action.

# Questions?

---

