

CUMULATIVE IMPACTS AND SEGMENTATION



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I. SEGMENTATION

Regulations under the State Environmental Quality Review Act (“SEQRA” or “SEQR”) recognize that “[a]ctions commonly consist of a set of activities or steps.” 6 N.Y.C.R.R. §617.3(g). Therefore, “[c]onsidering only a part or segment of an action is contrary to the intent of SEQR.” 6 N.Y.C.R.R. §617.3(g)(1). SEQRA generally prohibits “segmentation,” which is defined as “the division of the environmental review of an action such that various activities or stages are addressed under this Part as though they were independent, unrelated activities, needing individual determinations of significance.” 6 N.Y.C.R.R. §617.2(ag). *See also* DEC, *The SEQR Handbook* at 21-22; *Taxpayers Opposed to Floodmart, Ltd., v. City of Hornell Industrial Development Agency*, 212 A.D.2d 958, 624 N.Y.S.2d 689 (4th Dep’t 1995), *stay vac’d* 85 N.Y.2d 961, 628 N.Y.S.2d 48 (1995), *mot. den’d* 85 N.Y.2d 812, 631 N.Y.S.2d 289 (1995); *Kirk-Astor Drive Neighborhood Assoc. v. Town of Pittsford*, 106 A.D.2d 868, 483 N.Y.S.2d 526, 528 (4th Dep’t 1984), *app. dis’d* 66 N.Y.2d 896, 498 N.Y.S.2d 791 (1985).

The reason for this rule is that if a proposal is broken into enough pieces, each piece may not seem significant, although the impact from the sum of the pieces might be significant. Moreover, determination of an initial application may be “practically determinative” of later decision making. Accordingly, “[e]nvironmental review of the entire project is required before ‘any significant authorization is granted for a specific proposal.’” *Kirk-Astor Drive Neighborhood Ass’n. v. Town Board of Town of Pittsford*, 106 A.D.2d 868, 869, 483 N.Y.S.2d 526, 528 (4th Dep’t 1984), *app. dis’d* 66 N.Y.2d 896, 498 N.Y.S.2d 791 (1985) [*citing Matter of Programming Systems v. New York State Urban Dev. Corp.*, 61 N.Y.2d 738, 739, 472 N.Y.S.2d 912].

For example, in *Kirk-Astor Drive Neighborhood Ass’n. v. Town Board of Town of Pittsford*, 106 A.D.2d 868, 869, 483 N.Y.S.2d 526, 528 (4th Dep’t 1984), SEQRA review of a rezoning

proposal also had to consider the office park that was planned for the land. Similarly, in *Taxpayers Opposed to Floodmart, Ltd., v. City of Hornell Industrial Development Agency*, 212 A.D.2d 958, 624 N.Y.S.2d 689 (4th Dep't 1995), environmental review of a proposed annexation also had to consider a Wal-Mart proposed for the land.

In *Sun Company, Inc. v. City of Syracuse Industrial Development Agency*, 209 A.D.2d 34, 625 N.Y.S.2d 371 (4th Dep't 1995), *app. dis'd* 86 N.Y.2d 776, 631 N.Y.S.2d 603 (1995), the Appellate Division, Fourth Department held that the SEQRA review of the Carousel Landing Project could not be segmented from environmental review of the redevelopment plans for the entire Onondaga Lakefront Area. Other projects or approvals that must be linked together as one action for SEQRA review have included expansion of a hospital and construction of parking lot, *Teich v. Buchheit*, 221 A.D.2d 452, 453, 633 N.Y.S.2d 805, 806 (2d Dep't 1995), construction of a mine and residential subdivision, *Onondaga Landfill Systems, Inc. v. Flacke*, 81 A.D.2d 1022, 440 N.Y.S.2d 798 (4th Dep't 1981), and remediation of pre-existing soil contamination and a senior apartment complex. *Penfield Panorama Area Community, Inc. v. Town of Penfield Planning Bd.*, 253 A.D.2d 342, 688 N.Y.S.2d 848 (4th Dep't 1999). Likewise, in *Matter of Farrington Close Condominium, Bd. of Mgrs. v. Village of Southhampton*, 250 A.D.2d 632, 613 N.Y.S.2d 257 (2d Dep't 1994), the environmental review of a park project improperly only considered construction of a parking lot, access roads, and a baseball field, but not a football/soccer field, softball field, fitness trail, playground, tennis courts, or an administration building.

“If it is determined that an EIS is necessary for an action consisting of a set of activities or steps, only one draft and one final EIS need be prepared on the action provided that the statement addresses each part of the action at a level of detail sufficient for an adequate analysis of the significant adverse environmental impacts.” 6 N.Y.C.R.R. §617.3(g)(2). However, a supplemental EIS may still be required if there are “(a) changes proposed for the project; or (b) newly discovered information; or (c) a change in circumstances related to the project,” 6 N.Y.C.R.R. §617.9(a)(7), or if, after a generic EIS is required, “the subsequent proposed action was not addressed or was not adequately addressed in the generic EIS and the subsequent action may have one or more significant adverse environmental impacts.”

6 N.Y.C.R.R. §617.10(d).

Nonetheless, the SEQRA regulations also provide that “[i]f a lead agency believes that circumstances warrant a segmented review, it must clearly state in its determination of significance, and any subsequent EIS, the supporting reasons and must demonstrate that such review is clearly no less protective of the environment. Related actions should be identified and discussed to the fullest extent possible.” 6 N.Y.C.R.R. §617.3(g)(1). Thus, in *Concerned Citizens for the Environment v. Zagata*, 243 A.D.2d 20, 672 N.Y.S.2d 956 (3d Dep't 1998), *lv. den'd* 92 N.Y.2d 808, 678 N.Y.S.2d 594 (1998), it was not improper to segment review of a solid waste management facility from other portions of an integrated solid waste facility, including an incinerator and a resource recovery facility, since the process was “no less protective of the environment.” Where segmentation is

allowed, it is not necessary to consider the cumulative impacts of later actions, since such a requirement would “emasculat[e] any concept of segmented review.” Id.

II. CUMULATIVE IMPACTS

SEQRA generally requires the consideration of cumulative environmental impacts of separate actions. *See, e.g., Chinese Staff & Workers Assoc. v. City of New York*, 68 N.Y.2d 359, 509 N.Y.S.2d 499 (1986); *Save the Pine Bush v. City of Albany*, 70 N.Y.2d 193, 518 N.Y.S.2d 943 (1987). While “cumulative impacts” are not defined by SEQRA or its implementing regulations, DEC addresses the issue in *The SEQR Handbook* at page 41:

What are the cumulative impacts?

These are impacts on the environment that result from the incremental or increased impact of an action(s) when the impacts of that action are added to other past, present and reasonably foreseeable future actions. Cumulative impacts can result from a single action or a number of individually minor but collectively significant actions taking place over a period of time. Either the impacts or the actions themselves must be related.

When must cumulative impacts be assessed?

Cumulative impacts must be assessed when actions are proposed to or will foreseeably take place simultaneously or sequentially in a way that their combined impacts may be significant. Assessment of cumulative impacts is limited to consideration of probable impacts, not speculative ones.

According to one court, “considering the cumulative effects of related actions insures against stratagems to avoid the required environmental review by breaking up a proposed development into component parts which, individually, do not have sufficient environmental significance.” *Stewart Park and Reserve Coalition v. New York State Department of Environmental Conservation*, 157 A.D.2d 1, 10, 555 N.Y.S.2d 481, 486 (3d Dep’t 1990). Often, it is difficult to distinguish between segmentation and the failure to address cumulative impacts, and courts often muddle the concepts. In making the determination of significance, a lead agency must make a positive declaration when presented with “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 [for a positive declaration] in this subdivision.” 6 N.Y.C.R.R. §617.7(c)(1)(xii). Further, when making the determination of significance:

the lead agency must consider reasonably related long-term, short-term, direct, indirect and cumulative impacts, including other simultaneous or subsequent actions which are:

- (i) included in any long-range plan of which the action under consideration is a part;

(ii) likely to be undertaken as a result thereof; or

(iii) dependent thereon.

6 N.Y.C.R.R. §617.7(c)(2). ECL §8-0109(2) specifically requires that all potential environmental impacts of a project subject to an EIS be considered, including the long-term and short-term effects of the project. Likewise, the SEQRA regulations require that an EIS assess all “reasonably related short-term and long-term impacts, cumulative impacts and other associated environmental impacts.” 6 N.Y.C.R.R. §617.9(b)(5)(iii)(a).

In *Chinese Staff & Workers Assoc. v. City of New York*, 68 N.Y.2d 359, 509 N.Y.S.2d 499 (1986), the Court of Appeals required a consolidated environmental review of seven separate luxury apartment buildings which would have a cumulative impact on the displacement of low-income residents, since they were all part of a common plan. Similarly, in *Save the Pine Bush v. City of Albany*, 70 N.Y.2d 193, 518 N.Y.S.2d 943 (1987), the court held that the cumulative impact of ten separate projects in the Pine Bush area on habitat of an endangered butterfly had to be considered together. In *Segal v. Town of Thompson*, 182 A.D.2d 1043, 583 N.Y.S.2d 50 (3d Dep’t 1992), the SEQRA review of sewer and water districts could not be segmented from review of the resulting development likely to follow from 800 new homes that could be built in the service area.

In *Village of Westbury v. Department of Transportation*, 75 N.Y.2d 62, 67, 550 N.Y.S.2d 604, 609 (1989), the Court of Appeals ruled that an interchange reconstruction project and a proposed road widening were part of the same overall plan to alleviate traffic congestion on a parkway, since they were “complementary components of the remedy for the [parkway’s] traffic flow problems, sharing a common purpose, integrated and scheduled for consecutive construction.” Thus, environmental review of the two projects had to be considered cumulatively.

However, in *Long Island Pine Barrens Society, Inc. v. Planning Board of the Town of Brookhaven*, 80 N.Y.2d 500, 591 N.Y.S.2d 982 (1993), the Court of Appeals held that it is not necessary to consider cumulative impacts of independent actions that are not part of the same plan. *Id.* Nonetheless, the lead agency may opt to require an analysis of cumulative impacts of separate actions. *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630 (2d Cir. 1999) (lead agency could use discretion to decide whether to consider cumulative impacts of applications for separate cell towers in the same town).

The requirement to assess cumulative impacts is quite controversial, and the Department of Environmental Conservation ducked the issue when it revised the SEQRA regulations in 1996. The Cumulative Impact Working Group has proposed changes to the regulations to enhance and better define assessment of cumulative impacts.

A generic environmental impact statement (“GEIS”) can be a practical solution to review the environmental impacts of separate actions in order to avoid segmentation and/or address cumulative impacts. Typically, a GEIS is used to review projects which will cover a broad geographic area and may affect a wide range of people. *Gerrard, Environmental Impact Review in New York* §5.03[2] at 5-24-5-25. A GEIS is appropriate to consider:

(1) a number of separate actions in a given geographic area which, if considered singly, may have minor impacts, but if considered together may have significant impacts; or

(2) a sequence of actions, contemplated by a single agency or individual; or

(3) separate actions having generic or common impacts; or

(4) 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.

6 N.Y.C.R.R. §617.10(a). If a GEIS is prepared “[i]n connection with projects that are to be developed in phases or stages, agencies should address not only the site specific impacts of the individual project under consideration, but also, in more general or conceptual terms, the cumulative impacts on the environment and the existing natural resource base of subsequent phases of a larger project or series of projects that may be developed in the future.” 6 N.Y.C.R.R. §617.10(a).