NEW YORK STATE OF OPPORTUNITY. | Adirondack Park Agency

LEILANI CRAFTS ULRICH
Chairwoman

TERRY MARTINO
Executive Director

MEMORANDUM

TO: James Townsend, Counsel

FROM: Paul Van Cott, Associate Attorney

DATE: September 30, 2015

RE: Proposed Rule Making - SEQR Rules (9 NYCRR Part 586)

For Agency consideration, please find enclosed a staff proposal to revise APA's State Environmental Quality Review Act ("SEQR") rules in 9 NYCRR Part 586. A red-lined version of Part 586 with brief explanatory comments is also enclosed. Agency staff have consulted with DEC staff in drafting the proposed rules. Staff seek reaffirmation of the Agency's June 2014 direction to staff to proceed with a formal rule making. Prior to taking that step, staff will again seek input on the proposed rules from the Local Government Review Board, other key stakeholders and the Division of Budget, and will advise you of any material comments that we receive.

Goals of proposed rule making: *(1) To eliminate APA's SEQR rules that duplicate or cross-reference DEC's SEQR rules; (2) To update and clarify APA's lists of Type 1 and Type 2 projects; and (3) To add rules necessary for APA-specific implementation of SEQR.*

Statutory/Regulatory Context: SEQR is set forth in Article 8 of the Environmental Conservation Law ("ECL"). The statute empowers the New York Department of Environmental Conservation ("DEC") to adopt rules governing the law's implementation, which it has done in 6 NYCRR Part 617.

Other agencies and local governments, including APA, are authorized by SEQR to adopt rules providing "additional procedures as may be necessary" for them to implement SEQR. Those rules must be consistent with DEC's rules.

SEQR applies to all "actions" that APA proposes or approves.[1] DEC's rules list some common types of governmental actions as Type I or Type II. Under DEC's rules, all other actions are "Unlisted" actions. Type I actions are those which are likely to require

[1] Per 6 NYCRR § 617.2(b), *Actions* include: "(1) projects or physical activities, such as construction or other activities that may affect the environment by changing the use, appearance or condition of any natural resource or structure, that: (i) are directly undertaken by an agency; or (ii) involve funding by an agency; or (iii) require one or more new or modified approvals from an agency or agencies;(2) agency planning and policy making activities that may affect the environment and commit the agency to a definite

preparation of an environmental impact statement. DEC's rules provide that Type II actions are not subject to review under 6 NYCRR Part 617 because they will not have "a significant impact on the environment or are otherwise precluded from environmental review" under SEQR.[2]

Draft Proposal

This proposal seeks to repeal and replace existing Part 586 to achieve the three goals described above:

Goal #1 – DEC's rules are intended by ECL Article 8 to govern SEQR implementation, except for "additional" rules that are specific to an agency's own implementation of SEQR. As currently written, much of Part 586 is either duplicative of DEC's rules, or cross-references to them. Using Part 586 is confusing, because it requires the reader to go back and forth between Part 586 and DEC's rules. Also, as demonstrated by the Agency's 2013 consensus rule making, the cross-references to DEC's rules must be periodically updated to keep pace with changes made to them by DEC. The proposed rule making simply refers to DEC's rules as governing SEQR implementation and definitions, and eliminates all other rules except for "additional" rules specifically necessary for APA's implementation of SEQR. *See,* §§ 586.1 and 586.2 of the proposed rule making.

Goal #2 – The Type I/Type II lists in Part 586 are proposed to be edited, clarified and amended so that they more closely follow applicable law and are more internally consistent. *See,* §§ 586.3 and 586.4 of the proposed rule making. One proposed amendment would delete from the Type I list specific types of rivers projects and make the approval of all rivers projects Type II actions. This is appropriate because all APA-reviewed projects, including all rivers projects, are reviewed against the SEQR-like "undue adverse impact" standard that provides the rationale for not requiring an environmental impact statement for APA-reviewed projects. Another amendment would eliminate rule makings as Type I or Type II actions, making them Unlisted actions. This approach is consistent with DEC's SEQR rules and makes sense given the wide range of the types and substance of rule makings that may occur.[3] Finally, the approval of general permits would be added to the Type I list of actions in Part 586, replacing 9 NYCRR § 572.23(d) of APA's general permit process rules.

Goal #3 – Section 586.5 of the proposed rule making provides "additional" procedures that apply to APA's implementation of SEQR. Proposed § 586.5(a) tracks the SEQR requirement that all APA actions select alternatives which, consistent with social, economic

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course of future decisions; (3) adoption of agency rules, regulations and procedures, including local laws, codes, ordinances, executive orders and resolutions that may affect the environment; and (4) any combinations of the above."

[2] *See,* 6 NYCRR §§ 617.5(a) and 617.5(c)(36). However, pursuant to ECL § 8-0111(5), Class A and B regional projects subject to APA review under Executive Law § 809 are only excluded from the requirements of SEQR pertaining to the preparation of environmental impact statements.

[3] Following this logic, APA's 2009 rule making to revise the regulatory definitions of "boathouse" and "dock" was classified as an Unlisted action.

and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental impacts. *See*, ECL § 8-0109(1). Thus, even when an environmental impact statement is not required, SEQR still imposes the responsibility on APA to review and choose alternatives that meet the policies and goals of SEQR. Proposed §§ 586.5(b) and (c) provide for coordination of SEQR notice and hearing requirements with those set forth in the APA Act or APA's regulations. Proposed subdivision § 586.5(d) authorizes APA to direct the Executive Director to issue its findings statement and decision not less than 10 days after the publication of a final environmental impact statement. This is consistent with the approach taken by APA in the Finch classification proceedings, and provides a more efficient process that still complies with the requirements of SEQR.

Enclosures

Part 586 is repealed and a new Part 586 is adopted to read as follows:

§ 586.1 Purpose of this Part.

The regulations set forth in 6 NYCRR Part 617 govern the Agency's implementation of the State Environmental Quality Review Act (SEQR). This Part provides regulations in addition to those set forth in 6 NYCRR Part 617 which are necessary for the Agency's implementation of SEQR.

§ 586.2 Definitions.

The terms used in this Part have the meanings given them in 6 NYCRR Part 617 or in this Subtitle, as applicable.

§ 586.3 Type I Actions.

(a) The Type I actions listed in this section are in addition to those listed in 6 NYCRR Part 617 and are more likely to require the preparation of an environmental impact statement than Unlisted actions .

(b) The following are Type I actions:

(1) Amendments to the official Adirondack Park Land Use and Development Plan Map pursuant to subdivisions (1) – (3) of Executive Law section 805(2)(c).

(2) Recommendations to the Governor and Legislature of amendments to the official Adirondack Park Land Use and Development Plan Map pursuant to Executive Law section 805(2)(d) .

(3) Additions to the classification of compatible use lists, or recommendations to the Governor and Legislature of subtractions therefrom, pursuant to Executive Law section 805(3)(b).

(4) Approval of local land use programs, components thereof or industrial site plan review laws or ordinances pursuant to subdivisions (1) – (5) of Executive Law section 807.

(5) Amendments to and recommendations of amendments to the Governor for the master plan for the management of State lands pursuant to Executive Law section 816(2), except for the correction of mapping errors, the more precise definition of boundaries and minor technical changes to the master plan.

(6) Transfer to a town or village of any or all jurisdiction over regulated activities in freshwater wetlands in the Adirondack Park pursuant to section 24-0803 of the Environmental Conservation Law.

(7) The approval of a rivers system land management plan pursuant to section 577.9 of this Subtitle.

(8) The issuance of a general permit pursuant to section 572.23 of this Subtile.

§ 586.4 Type II Actions.

(a) The Type II actions listed in this section are in addition to those listed in 6 NYCRR Part 617.

(b) The following are Type II actions:

(1) Contracting, including the contracting for or acceptance of professional and technical assistance or advice, or any funding or planning activities not in respect to type I actions listed in 6 NYCRR section 617.4 or in section 586.3 of this Subtitle.

(2) Amendments to the master plan for the management of State lands pursuant to Executive Law section 816(2) for the correction of mapping errors, the more precise definition of boundaries and minor technical changes to the master plan.

(3) The approval of any rivers project or variance pursuant to Part 577 of this Subtitle.

(4) The approval of any regulated activity in wetlands that is jurisdictional pursuant to Environmental Conservation Law Article 24, but not Executive Law section 810.

(5) The preparation and distribution of any report required by section Executive Law section 804(10).

(6) The granting of individual variances and shoreline clustering permits pursuant to Executive Law section 806.

(7) The reversal of variances pursuant to Executive Law section 808(3).

586.5 Additional procedures applicable to Agency actions.

(a) For all actions that it proposes or approves, the Agency shall comply with Environmental Conservation Law section 8-0109(1) to realize the policies and goals of SEQR, and to select alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable minimize or avoid adverse environmental effects.

(b) The Agency shall include a reference to SEQR notices for an action in other public notices required by this Subtitle with respect to the same action.

(c) Public hearings the Agency determines to hold pursuant to 6 NYCRR Part 617 shall follow the process and timeframes provided for such hearings in the Adirondack Park Agency Act or this Subtitle, as applicable.

(d) The Agency may direct the executive director to issue its findings statement and a decision for an action that has been the subject of a final environmental impact statement ("FEIS") after affording agencies and the public not less than 10 calendar days in which to consider the FEIS following publication of the notice of completion of the FEIS in the Environmental Notice Bulletin pursuant to 6 NYCRR Part 617.

Subdivision (d) of section 572.23 is repealed and subdivisions (e), (f), (g) and (h) of section 572.23 are renumbered (d), (e), (f) and (g).

CHAPTER VI
Relation of Agency Activities to Other Laws

PART

586 Implementation of State Environmental Quality Review Act
587 Access to Agency Records; Open Meetings; Conflicts of Interest
588 Rule Making; Miscellaneous Provisions

PART 586
IMPLEMENTATION OF STATE ENVIRONMENTAL QUALITY REVIEW ACT

(Statutory authority: Environmental Conservation Law, art. 8)

Sec.

586.1 Purpose of this Part
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586.3 General rule
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586.12 Public hearing
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586.14 Approval or disapproval of action; required findings
586.15 Applicability of regulations of the Commissioner of Environmental Conservation

§ 586.1 Purpose of this Part.

~~This Part implements the State Environmental Quality Review Act (SEQR) and establishes criteria for determining whether actions under consideration by the agency will have a significant effect on the environment.~~

Comment [PTV1]: This section is proposed to be rewritten to be consistent with SEQR and 6 NYCRR Part 617. See 617.1.

§ 586.2 Definitions.

~~The definitions contained in section 8-0105 of SEQR and 6 NYCRR 617.2 apply to this Part. The definitions in section 570.3 of these regulations also apply, except when in direct conflict with the definitions governing this Part.~~

Comment [PTV2]: This section is proposed to be rewritten to refer to definitions in 6 NYCRR Part 617 and all Agency regulations.

~~**§ 586.3 General rule.**~~

~~The agency will not carry out, fund, approve or issue a final decision on any action until there has been full compliance with SEQR, this Part, and 6 NYCRR Part 617.~~

Comment [PTV3]: This section is proposed to be deleted as duplicative of 6 NYCRR Part 617. See 617.3

~~**§ 586.4 Certain agency and local actions exempt.**~~

~~An environmental impact statement is not required for review and action upon class A regional projects or class B regional projects by the agency or by local governments acting pursuant to an agency approved local land use program.~~

Comment [PTV4]: This section is proposed to be deleted as duplicative of 6 NYCRR 617.5(c)(36)

~~**§ 586.5 Lists of actions.**~~

~~(a) *Type I.* The following actions are likely to require preparation of environmental impact statements (EIS's) because they are likely to have a significant effect on the environment:~~

Comment [PTV5]: This is proposed to be a new 586.3 to provide a list of Type I actions that has been clarified, edited and amended.

~~(1) Review and action upon requests to amend the official Adirondack Park Land Use and Development Plan Map which would permit the construction of 50 or more principal buildings than presently allowed by the official map, or approval of any application or series of related applications to amend the map where the amendments would cumulatively exceed such threshold, except amendments pursuant to section 805(2)(c)(4) of the Adirondack Park Agency Act. A generic statement has been prepared upon the process by which the agency amends the official map.~~

~~(2) Recommendations to the Governor and Legislature of amendments to the official Adirondack Park Land Use and Development Plan Map.~~

~~(3) Additions to the classification of compatible use lists, or recommendations to the Governor and Legislature of subtractions therefrom, pursuant to section 805(3)(b) of the Adirondack Park Agency Act.~~

~~(4) Approval of local land use programs.~~

~~(5) The approval of any rivers project which involves the construction of a boathouse, bridge, public road, trail for motorized open space recreational use, river area utility use that will be located within the applicable setback distance in section 577.6(b) of these regulations, or habitable structure (except a single family dwelling or mobile home), except:~~

~~(i) projects which are also subject to the jurisdiction of the agency or local government pursuant to sections 809 or 808 of the Adirondack Park Agency Act, respectively;~~

~~(ii) projects which require a certificate of environmental compatibility and public need under article seven or eight of the Public Service Law; or~~

~~(iii) subdivisions of less than five lots, parcels or sites.~~

~~(6) The preparation and submission to the Governor of proposed major amendments of the master plan for the management of State lands pursuant to section 816(2) of the Adirondack~~

Park Agency Act, including:

(i) any proposed reclassification of land from a more restrictive to a less restrictive category;

(ii) the designation of a new travel corridor;

(iii) material changes in the guidelines applicable to each classification;

(iv) any periodic review of the entire plan, as called for therein. A generic statement has been prepared on the process by which the agency proposes amendments to the plan.

(7) Preparation of minimum land use regulations, approval of local land use regulations, and framing of land use regulations pursuant to section 24-0805 of the Environmental Conservation Law.

(8) The transfer of agency jurisdiction over freshwater wetlands pursuant to section 24-0803 of the Environmental Conservation Law, including the determination of wetlands subject to the transfer.

(9) The approval of a land management plan pursuant to section 577.9 of these regulations.

(10) Revision to the rules and regulations of the agency which effects substantive changes in agency jurisdiction, or in the project review or map amendment functions, or in the local planning assistance program.

(b) *Type II.* The following actions do not have a significant effect on the environment and do not require an environmental impact statement:

Comment [PTV6]: This is proposed to be a new 586.4 to provide a list of Type II actions that has been clarified, edited and amended.

(1) Contracting, including the contracting for or acceptance of professional and technical assistance or advice, or any funding or planning activities not in respect to type I actions listed in 6 NYCRR section 617.4 or in subdivision (a) of this section.

(2) The preparation and submission to the Governor of any amendments to the master plan for the management of State land not listed as a type I action in paragraph (a)(6) of this section.

(3) The adoption, amendment or repeal of rules and regulations, except for a revision listed in paragraph (a)(10) of this section.

(4) The approval of any rivers project not listed as a type I action in paragraph (a)(5) of this section.

(5) The approval of any wetlands project not subject to the jurisdiction of the agency pursuant to section 809 of the Adirondack Park Agency Act.

(6) The preparation and distribution of any report required by section 804(10) of the

Adirondack Park Agency Act.

(7) The granting of individual variances and shoreline clustering permits pursuant to section 806 of the Adirondack Park Agency Act, the reversal of variances pursuant to section 808(3) of the Act, and the granting of individual variances pursuant to Part 577 of these regulations.

§ 586.6 Information required of applicants.

(a) The agency may require an applicant to include as a part of any application or other required filing such reasonable information, including a completed environmental assessment form, as is necessary to assist it in:

(1) determining whether an action is exempt or excluded;

(2) determining whether an action may have a significant effect on the environment;

(3) determining whether other agencies, including Federal agencies, have jurisdiction over the action or any portion of it; or

(4) preparation of an environmental impact statement, if required, and if prepared by the agency.

(b) No application or submission pursuant to section 814 of the Adirondack Park Agency Act, or any other statute or regulation, shall be considered complete until such information is submitted.

Comment [PTV7]: Subdivision (a) of this section is proposed to be deleted as duplicative of 6 NYCRR Part 617. Subdivision (b) is proposed to be deleted as it is already sufficiently covered by 579.3(a)(3) of the Agency's regulations.

§ 586.7 Threshold determination.

As early as possible in its formulation of an action it proposes to undertake, or upon receipt of any application, notice or filing which involves an action, the agency will determine whether the action:

(a) is subject to SEQR;

(b) is an exempt or type II action, in which case it shall have no further obligation under SEQR or 6 NYCRR Part 617;

(c) is an excluded action pursuant to ECL section 8-0111(5);

(d) involves a Federal agency, in which case it shall act pursuant to ECL section 8-0111(1) or (2) and 6 NYCRR section 617.15;

(e) involves one or more other agencies, in which case it shall act pursuant to section ECL

8-0111(6) and 6 NYCRR section 617.6 to establish a lead agency.

§ 586.8 Negative declarations.

(a) If the agency determines that an action is a type I action or unlisted action subject to SEQR and will not have a significant effect upon the environment, it shall prepare, maintain and file a notice of determination that an EIS will not be prepared ("negative declaration") and written analyses and findings supporting such determination in accordance with 6 NYCRR sections 617.7 and 617.12 and in the file referred to in subdivision (b) of this section.

(b) In order to afford the opportunity for public notice and response, the agency will keep a separate file, updated monthly, containing a brief description of determinations made pursuant to this section, and will incorporate reference to the negative declaration in other notices required by law in connection with the action.

§ 586.9 Positive declarations.

(a) If the agency determines that a type I or unlisted action is subject to SEQR and may have a significant effect on the environment, it shall prepare, maintain and file a notice of determination that an EIS will be prepared ("positive declaration") and maintain written analyses and findings supporting such determination in accordance with 6 NYCRR sections 617.7 and 617.12 and in the file referred to in section 586.8(b) of this Part.

(b) In order to provide an opportunity for public notice and response, the agency will file positive declarations monthly in the file referred to in section 586.8(b) of this Part and will incorporate reference to the positive declaration in other notices required by law in connection with the action.

§ 586.10 Form and contents of draft and final environmental impact statements.

Environmental impact statements shall conform to the requirements of 6 NYCRR section 617.9 as to form and content.

§ 586.11 Notice of completion of draft environmental impact statement; filing of draft environmental impact statement.

(a) Upon completion of a draft environmental impact statement, or upon acceptance of a draft environmental impact statement from an applicant pursuant to 6 NYCRR section 617.9, the agency shall prepare and file a notice of completion in accordance with 6 NYCRR section 617.12.

(b) In order to provide an opportunity for public response the agency shall, in addition to the filing required by 6 NYCRR section 617.12, file its notices of completion and draft environmental impact statements in the file referred to in section 586.8(b) of this Part and will

Comment [PTV8]: This section is proposed to be deleted as duplicative of 6 NYCRR 617.6

Comment [PTV9]: Subdivision (a) of this section has been deleted as duplicative of 6 NYCRR 617.12 Subdivision (b) is proposed to be deleted since SEQR documentation is kept in the specific file involved, rather than a general Agency SEQR file The requirement that all Agency notices for the action include a reference has been moved and clarified.

Comment [PTV10]: The reference to an Agency SEQR file is proposed to be deleted for the reason discussed above. The requirement that all Agency notices for the action include a reference is proposed to be moved and clarified.

Comment [PTV11]: This section has been deleted as duplicative of 6 NYCRR Part 617

incorporate reference to them in notices required by law in connection with the action.

§ 586.12 Public hearing.

(a) Upon completion of the draft environmental impact statement, or upon acceptance of a draft environmental impact statement from an applicant pursuant to 6 NYCRR section 617.9, the agency shall determine whether to conduct a public hearing thereon, based upon:

(1) the degree of interest shown by other persons in the action;

(2) the extent to which a public hearing can aid its decision making process by providing a forum for, or an efficient method for the collection of, public comment; and

(3) the criteria set forth in section 580.2 of these regulations.

(b) Unless a different time period is provided by statute or regulation for the holding of a public hearing:

(1) the notice of hearing shall be published at least 14 calendar days in advance thereof, in a newspaper of general circulation in the area of potential impacts and effects of the action; and

(2) the hearing shall commence not less than 15 nor more than 60 calendar days after the filing of the draft environmental impact statement.

(c) If the public hearing is one for which the agency otherwise has authority to conduct, the public hearing shall be conducted according to the procedures governing such hearing. If the public hearing is not otherwise authorized, it may be conducted in the manner provided in Part 580 of these regulations, or in such other manner as the agency shall direct.

Comment [PTV12]: Subdivision (a) of this section has been deleted as duplicative of 6 NYCRR 617.12. Subdivision (b) is proposed to be deleted since SEQR documentation is kept in the specific file involved, rather than a general Agency SEQR file. The requirement that all Agency notices for the action include a reference has been moved and clarified.

§ 586.13 Final environmental impact statement.

(a) The final environmental impact statement shall be prepared within 45 calendar days after the close of any hearing, or within 60 calendar days after the filing of the draft environmental impact statement, whichever occurs last; the last date for preparation may be extended pursuant to 6 NYCRR section 617.9(a)(5)(ii).

(b) If the action has been withdrawn, or if, on the basis of the draft environmental impact statement or hearing, the agency determines that the action will not have a significant effect on the environment, it will not prepare a final environmental impact statement but will prepare and file its determination in accordance with 6 NYCRR section 617.9(a)(5)(i).

(c) The filing of a notice of completion of a final environmental impact statement and the filing of the statement itself shall take place in the same manner as a draft environmental impact statement in accordance with 6 NYCRR section 617.12. Final environmental impact statements and notices of completion shall also be filed in the file referred to in section 586.8(b) of this Part.

Comment [PTV13]: Subdivision (a) is proposed to be deleted as duplicative of 6 NYCRR 617.9(a)(4). Subdivisions (b) and (c) are proposed to be moved and clarified.