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THE NEW YORK STATE ENVIRONMENTAL QUALITY REVIEW ACT OF 1975:
AN ANALYSIS OF THE PARTIES' RESPONSIBILITIES IN THE REVIEW/PERMIT REQUEST PROCESS

Gerald M. Levine*

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I.  Introduction

The New York State Environmental Quality Review Act (SEQRA) was passed by the 1975 Session of the Legislature and signed into law by Governor Hugh L. Carey on August 1, 1975. Its purpose is to

1. 1975 N.Y. Laws ch. 612. Codified at N.Y. ENVTL. CONSERV. LAW art. 8 (McKinney Supp. 1982-1983). Governor Carey noted in his approval memorandum that the bill was modeled after the National Environmental Policy Act (NEPA). 1975 N.Y. Laws 1761. NEPA is codified at 42 U.S.C. § 4331 (1976). Originally, SEQRA was to become effective for all levels of government on June 1, 1976. The effective date was amended in 1976, however, to provide for an implementation in stages as follows: September 1, 1976, for actions directly undertaken by the state; June 1, 1977, for actions directly undertaken by local agency or actions wholly or partially state funded; and September 1, 1977, for private actions needing state or local licenses, approval or permits and locally funded actions. 1976 N.Y. Laws ch. 228, § 3.

Pursuant to N.Y. ENVTL. CONSERV. LAW § 8-0113 (McKinney Supp. 1982-1983) SEQRA is implemented by regulations promulgated by the New York State Department of Environmental Conservation (EnCon) and codified at 6 N.Y.C.R.R. §§ 615-24. Sections 617.1-19 contain rules and regulations implementing SEQRA by establishing both procedural requirements for the review process and substantive standards that the applicant and permit issuing agency must satisfy. Sections 621.1-
declare a state policy which encourages “productive and enjoyable harmony between man and his environment.” In his message approving SEQRA, Governor Carey noted that the new law responded to a concern that agencies with the power to grant permits and approve proposed actions were not giving “sufficient consideration to environmental factors.” SEQRA remedied this condition by com-

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14 contain uniform rules and regulations relating to EnCon permit applications and requirements. Sections 624.1-.17 contain rules and regulations relating to hearing participation, proof requirements and hearing procedures.

2. N.Y. ENVTL. CONSERV. LAW § 8-0101 (McKinney Supp. 1982-1983). The purpose of the act is “to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state.” Id. Although SEQRA was enacted tardily in comparison with similar laws in other states, New York has developed a wealth of judicial and administrative opinion with respect to the procedural requirements of SEQRA, the parties’ responsibilities, tasks and burdens in the environmental review/permit request process, and the substantive dimension explicit in the law. See generally Nichols & Robinson, A Primer on New York’s Revolutionized Environmental Laws, 49 N.Y.S.B.J. 41 (Jan. 1977, Part I); 49 N.Y.S.B.J. 111 (Feb. 1977, Part II). See also 2 F. Grad, TREATISE ON ENVIRONMENTAL LAW § 9.7, at 9-156 (1980) for a discussion of “little NEPA’s.”

The bank of knowledge is further supplemented by federal court analyses of NEPA. New York courts look to the federal experience as a valuable repository of guidance for their own analyses of SEQRA. See, e.g., Rye Town/King Civic Ass’n v. Town of Rye, 82 A.D.2d 474, 481, 442 N.Y.S.2d 67, 71 (2d Dep’t 1981); H.O.M.E.S. v. New York State Urban Dev. Corp., 69 A.D.2d 222, 232, 418 N.Y.S.2d 827, 832 (4th Dep’t 1979).

3. 1975 N.Y. Laws 1761. An earlier environmental bill passed by the Legislature in 1972 was vetoed by Governor Rockefeller on the grounds that it would be wasteful, duplicative, administratively uncertain and costly. Governor’s Memorandum, reprinted in [1972] N.Y. Legis. Ann. 403-04. The legislative jacket for SEQRA contains voluminous correspondence from municipalities, unions, construction industry associations, bar associations and individual contractors urging Governor Carey to veto SEQRA. The general tenor of the opposition was that the bill would “create immeasurable damage to the [construction] industry, which already has been placed into a very precarious state”; “it will significantly increase the cost of construction in both public and private sectors”; it will “slow down, possibly to a halt, housing and other development”; “the language of the bill gives only vague and inadequate direction for developing [the procedural criteria, which] could prove to be a major weakness.” N.Y. Governor’s Bill Jacket, Laws of 1975, ch. 612. For a brief discussion of the controversy surrounding the legislative passage of SEQRA, see Sandler, State Environmental Quality Review Act, 49 N.Y.S.B.J. 110 (Feb. 1977).

In its memorandum supporting the bill, the Department of Environmental Conservation observed that in times such as these, it was necessary for government, private enterprise and the public to work together to “ensure sound and thoughtful decisions which do not sacrifice long-term social and economic and environmental objectives for short-term temporary gains.” N.Y. State Dep’t of Envtl. Conserv., Recommendation on Assembly Bill 4533-A, 5 (July 30, 1975) (available in the Fordham Law School Library). Furthermore, EnCon answered critics of the bill by
manding agencies to fulfill the policies and goals set forth therein, and by establishing a new layer of procedures to be followed as a prerequisite to permit issuance where the proposed action may have a

noting: " Appropriately, responsibility for the environmental review required will be vested with agencies themselves, where final decisions are made. . . . The law will provide a useful, important planning tool for all levels of government, which will serve to accelerate, not to delay projects." Id. at 5. See also Koppell, Environmental Protection Law at Issue, N.Y.L.J., May 6, 1976, at 1, col. 2. Assemblyman Koppell states, "[w]hile the statute does require that adverse environmental effects must be minimized, it does not mandate that any project must be abandoned because of potential harm to the environment." Id. at 4, col. 1. This may be true, but as EnCon decisions make clear, SEQRA requires agencies to impose mitigative measures. See Pyramid Crossgates Co., N.Y. State Dep't of Envtl. Conserv. Dec. 7 (June 25, 1981) (final decision) (permits issued pursuant to decision dated Dec. 3, 1982; it took applicant over two years after the first decision on Nov. 28, 1980 to satisfy EnCon that its mitigation proposals complied with all legal requirements). 4. See N.Y. Envtl. Conserv. Law § 8-0109(1) (McKinney Supp. 1982-1983). The statute also provides that "[e]very citizen has a responsibility to contribute to the preservation and enhancement of the quality of the environment." Id. § 8-0103(2). The legislative policies and goals are as follows:

(1) "to the fullest extent possible the policies, statutes, regulations, and ordinances of the state and its political subdivisions should be interpreted and administered in accordance with the policies set forth in this article," id. § 8-0103(6); (2) "the protection and enhancement of the environment, human and community resources shall be given appropriate weight with social and economic considerations in public policy," id. § 8-0103(7); (3) all agencies, whether they be state or local, shall "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," id. § 8-0103(8); (4) "all agencies which regulate activities of individuals, corporations, and public agencies [whose proposed actions may] affect the quality of the environment shall regulate such activities so that due consideration is given to preventing environmental damage," id. § 8-0103(9).

SEQRA has a simplicity and breadth which encourages judicial interpretation and, ultimately, through the creation of a body of environmental common law, regulation of the participant's conduct and delineation of its responsibility. See Kleppe v. Sierra Club, 427 U.S. 390 (1976). In his opinion dissenting in part and concurring in part, Justice Marshall noted: "this vaguely worded statute seems designed to serve as no more than a catalyst for development of a 'common law' of NEPA. To date, the courts have responded in just that manner and have created such a 'common law' . . . . Indeed, that development is the source of NEPA's success." Id. at 421 (Marshall, J., dissenting) (citation omitted). The simplicity of SEQRA, however, is deceptive. The procedure and participation requirements are laden with obstacles. Confronted by the unfamiliar procedural and participation requirements, one practitioner compared the experience of the environmental review/permit request process with Alice's experience in Wonderland. Manes, Alice in the Wonderland of S.E.Q.R.A., 52 N.Y.S.B.J. 115 (Feb. 1980). See Town of Henrietta v. Department of Envtl. Conserv., 76 A.D.2d 215, 220, 430 N.Y.S.2d 440, 445 (4th Dep't 1980) (avowed purposes of SEQRA are achieved by imposition of both procedural and substantive requirements upon agency decision-making).
significant effect on the environment. Where the environmental effect will not be significant, SEQRA does not apply.

SEQRA directed the Commissioner of Environmental Conservation (Commissioner) to adopt rules and regulations to implement its policies and goals (EnCon regulations). The EnCon regulations so promulgated constitute the basic procedural scheme with which state and local agencies must comply. Alternatively, state and local agencies may also use the EnCon regulations as a basis for incorporating SEQRA into their own existing procedures. Implementing regulations adopted by lead or state agencies, however, must be consistent with and no less protective of the environmental values than the EnCon regulations. Despite its statutory authority, EnCon does not have jurisdiction to enforce local or state agency compliance; such jurisdiction is vested exclusively with the court on judicial review.

5. The principal procedural device for achieving the substantive policies and goals of SEQRA is the preparation of draft and final environmental impact statements. N.Y. ENVTL. CONSERV. LAW § 8-0109(2) (McKinney Supp. 1982-1983). Governor Carey noted:

The information provided by the impact statement will allow state and local officials to intelligently assess and weigh environmental factors, along with social, economic and other relevant considerations in determining whether or not a project or activity should be approved or undertaken. With the information which will be provided by these impact statements, state and local officials will be in a better position to make decisions which are in the best overall interest of the people of the State.


6. [1982] 6 N.Y.C.R.R. § 617.5(a) (if action is exempt, excluded or Type II, agency shall have no further responsibilities under EnCon regulations). See § 617.2(a) for definition of excluded action; § 617.2(o) for definition of exempt action; and § 617.2(aa) for definition of Type II action.

7. N.Y. ENVTL. CONSERV. LAW § 8-0113 (McKinney Supp. 1982-1983). In the rules and regulations, the Commissioner was directed to include: “[c]ategorization of actions which are or may be primarily of statewide, regional, or local concern, with provisions for technical assistance including the preparation or review of environmental impact statements, if requested, in connection with environmental impact review by local agencies.” Id. § 8-0113(2)(e).

8. Id. § 8-0107 (McKinney Supp. 1982-1983) (agencies are directed to review their existing procedures and to harmonize them with statutory mandates).

9. Id. § 8-0113(3) (McKinney Supp. 1982-1983). Such agency procedures were required to provide for interagency working relationships in cases where actions typically involve more than one agency. Id. § 8-0113(3)(b).


While there are provisions for cooperation among agencies, each ultimately has non-delegable obligations to discharge. The responsibilities so imposed on the lead permit issuing agency (lead agency) do not authorize it to exceed its jurisdiction, but its statutory duty is enlarged to include consideration of environmental factors.

EnCon is both like and unlike other agencies. It is like other agencies in its permit issuing responsibilities. It is unlike other agencies in that it has the central role in coordinating, planning and regulating the State's environmental protection efforts. Included among its responsibilities is the promulgation of regulations. Consequently, even though EnCon does not directly control local or state agencies, it powerfully influences the review process indirectly through the EnCon regulations. As a result, the Commissioner's decisions are par-

EnCon rejected proposed sewage alternative because it would violate state groundwater standards, and despite negative orientation of other interested parties, Town approved proposed action.


14. See infra note 28 for a definition of lead agency.


19. The EnCon Regulations command agencies to make substantive decisions, not merely to process applications. [1982] 6 N.Y.C.R.R. § 617.9(c)(2). Identified adverse environmental impacts must be avoided or minimized to the maximum extent practicable. See infra notes 308-32 and accompanying text for discussion of agency obligations in the creation of an environmentally sound proposal.
particularly instructive for an understanding of SEQRA's substantive expectations for all of the participants.\textsuperscript{20}

Before a person may undertake any action which changes the use or appearance of any natural resource or structure,\textsuperscript{21} he must obtain approvals or permits from state or local agencies.\textsuperscript{22} If the project or activity is likely to have a significant effect on the environment,\textsuperscript{23} then as a condition precedent to the granting of any approval or permit, the lead agency involved in reviewing the application for the proposed action is responsible for making an affirmative finding that the requirements of SEQRA have been met.\textsuperscript{24} There are three principal stages in the SEQRA review process: (1) preparing and filing the application for permits to undertake the proposed project or activity, (2) holding a public hearing to review the proposed project or activity and (3) deciding whether the proposed project or activity is environmentally sound and is otherwise in compliance with the law.\textsuperscript{25}

The environmental review/permit request process formally begins with the person proposing the action (applicant) filing an application with an agency having jurisdiction to approve the proposed project or activity. The application must be accompanied by a substantial written analysis of the environmental impacts reasonably likely to result

\textsuperscript{20} Since 1976, the Commissioner of Environmental Conservation has produced decisions which address both procedural and substantive issues. The New York Land Report publishes substantial excerpts in its monthly bulletin. The same source has also begun publishing a SEQR Report. See Addendum of EnCon Decisions referred to in this Article; see also part V of this article.

\textsuperscript{21} See [1982] 6 N.Y.C.R.R. § 617.2(b). An action is defined as projects or physical activities, such as construction and planning activities, that commit the agency to a definite course of future decisions, such as the adoption of a land use plan. \textit{Id.} Capital projects consisting of a set of activities or steps are considered one action. \textit{Id.} If an environmental impact statement is necessary for capital projects, only one draft and one final statement need be prepared, provided that the statements address each step (for example: planning, design, contracting, construction and operation) in sufficient detail for an adequate analysis of environmental effects. \textit{Id.}

\textsuperscript{22} \textit{Id.} § 617.3(a) (no agency shall approve or fund an action until it has complied with SEQRA). For definitions of "agency", "state agency" and "local agency" see § 617.2(c), (s), (y). "State agency" is defined as "any State department, agency, board, public benefit corporation, public authority or commission." \textit{Id.} § 617.2(y). "Local agency" is defined as "any local agency, board, authority, district, commission or governing body, including any city, county and other political subdivision of the State." \textit{Id.} § 617.2(s).

\textsuperscript{23} See infra notes 60 and 124 and accompanying text for definition of "significant effect."

\textsuperscript{24} [1982] 6 N.Y.C.R.R. § 617.9(c).

\textsuperscript{25} See infra parts II, III and IV for discussion of these stages.
from the proposed action.26 It is distributed to all other agencies identified by the applicant as having jurisdiction to approve the proposed action.27 The several involved agencies then determine which of them will assume the role of lead agency.28 If the lead agency decides that a proposed action will have a significant impact on the environment the applicant must prepare and distribute a draft environmental impact statement (DEIS) if it has not already done so.29


28. Id. § 617.6(d); N.Y. ENVTL. CONSERV. LAW, § 8-0111(6) (McKinney Supp. 1982-1983). A lead agency is "an agency principally responsible for carrying out, funding or approving an action, and therefore responsible for determining whether an environmental impact statement is required in connection with an action, and for the preparation and filing of the statement if one is required." [1982] 6 N.Y.C.R.R. § 617.2(r). See infra notes 307 & 363 and accompanying text for comment on restrictions to lead agency designation. The law does not authorize the designation of an agency as lead agency unless it has permit responsibilities.

Lead agency is distinguished from "involved agency". An involved agency is any agency that has jurisdiction to fund or approve a proposed action and which is not the lead agency. [1982] 6 N.Y.C.R.R. § 617.2(q). After the applicant has filed its application, and the action is determined to be one which may have a significant effect on the environment, involved agencies decide which agency shall assume the role of lead agency. [1982] 6 N.Y.C.R.R. § 617.6(d). If the impacts are "primarily of local significance" or fall within a particular agency's jurisdiction, "all other considerations being equal, the local agency involved shall be the lead agency." Id. § 617.6(d)(i). Conversely, where the anticipated impacts are primarily state-wide or the environmental concern is significant, EnCon will probably assume the role of lead agency. See Wilmorite Inc.: Rotterdam Square, N.Y. State Dep't of Env'tl. Conserv. Dec. 1 (May 18, 1982) (interim decision) (EnCon sought lead agency status because of its concern for project's impact on Schenectady/Rotterdam aquifer). Cf.: Pyramid Crossgates Co., N.Y. State Dep't of Env'tl. Conserv. Dec. (June 25, 1981) (final decision), in which the Commissioner held that in EnCon's review of shopping center applications, "the controversial issues . . . have consistently proved to be matters of local concern and are more appropriately dealt with by local governments." Id. at 9. As a result, "absent a potential for significant environmental damage of a regional or statewide concern, the primary responsibility for review of shopping malls in the future will rest with the local municipality having direct control over the land where the shopping center will be located." Id. at 9.

New York City implemented SEQRA by Executive Order. Office of the Mayor, City of New York, Exec. Order No. 91, City Environmental Quality Review (Aug. 24, 1977) (available in Fordham Law School Library) [hereinafter cited as CEQR]. Under CEQR, lead agency means the Department of Environmental Protection and the Department of City Planning of the City of New York. Id. at 4.

29. [1982] 6 N.Y.C.R.R. § 617.10(c); [1981] 6 N.Y.C.R.R. § 621.3(5)(iii). If a project is subject to SEQRA, the application is not complete until a lead agency has been designated and it has been determined whether the action may or may not have
The DEIS is the central procedural mechanism of SEQRA. The applicant must present and evaluate in sufficient, although not encyclopedic, detail the relevant facts of environmental impact, reasonable alternatives and mitigation measures. This enables those who did not have a part in the preparation of the DEIS to understand and consider the risks involved by tracing the author's analysis. In the same way that the DEIS is central to the entire SEQRA review, the applicant's discussion both of alternatives which will achieve the same or similar objectives and measures to mitigate the foreseeable, adverse environmental impact of the proposed action is central to the DEIS.

Agencies must consider environmental factors as early as possible in the decision process. Actions likely to have a significant effect on the environment are classified in the SEQRA implementing regulations as
Type I.\textsuperscript{35} If the agency determines that a Type I or unlisted action will not have a significant effect on the environment, it must declare that fact and issue a “negative declaration.”\textsuperscript{36} A negative declaration entitles the applicant to the requested permits without further reference to SEQRA, assuming it meets their technical requirements.\textsuperscript{37} The applicant is also entitled to permits without application of SEQRA if the action is determined to be Type II, which EnCon has decided by its nature will not have a significant effect on the environment.\textsuperscript{38} Where a decision is being made for a Type I action, however, before the lead agency determines that it will not have a significant effect on the environment, it must identify the relevant areas of environmental concern, take a “hard look” at them, and make a “reasoned elaboration” of the basis for its determination.\textsuperscript{39} Accordingly, where the lead

\textsuperscript{35} [1978] 6 N.Y.C.R.R. § 617.12(b) (Type I actions). The Encon regulations enumerate eleven Type I actions, including authorizing industrial or commercial uses within a residential district, construction of new residential units which meet or exceed specifically stated thresholds, and any action occurring wholly or partially within, or contiguous to, any facility or site listed on the National Register of Historic Places. The regulation provides:

This Type I list is not exhaustive of those actions that an agency may determine have a significant effect on the environment and require the preparation of an EIS. Therefore, the fact that an action or project has not been listed as a Type I does not carry with it the presumption that it will not have a significant effect on the environment.  

\textit{Id.} § 617.12(a).

\textsuperscript{36} [1983] 6 N.Y.C.R.R. § 617.5(c); [1982] 6 N.Y.C.R.R. § 617.10(b). The proceedings can be terminated before the second stage by the issuance of a negative declaration. \textit{Id.} If the action is a Type I action, the application must be accompanied by an EAF. \textit{Id.} § 617.6(b). A negative declaration is a determination by the lead agency that although the proposed project or activity is listed as Type I, upon review it can be affirmatively stated that it will not have any significant effect on the environment. \textit{Id.} § 617.10(b). This Article will comment briefly on the negative declaration. See infra notes 39-43. It will not otherwise examine actions having no significant effect.

\textsuperscript{37} See, e.g., Bishop v. Board of Trustees, Village of Seneca Falls, N.Y., 81 A.D.2d 1009, 440 N.Y.S.2d 98 (4th Dep’t 1981) (municipal parking area within area zoned for industrial use).

\textsuperscript{38} [1983] 6 N.Y.C.R.R. § 617.5(a). Type II actions are defined as “[a]ctions or classes of actions which have been determined not to have a significant effect on the environment . . . and do not require” SEQRA compliance. [1982] 6 N.Y.C.R.R. § 617.13(a). Twenty Type II actions are listed, including granting of individual setback and lot line variances, repaving of existing highways, street openings for the purpose of repair and maintenance of existing utility facilities, and maintenance of existing landscaping or natural growth. \textit{Id.} § 617.13(d)(2), (4), (5), (9). Agencies may adopt their own Type II list provided that each of the actions contained in it is no less protective of the environment than the list in § 617.13(d). \textit{Id.} § 617.13(b).

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agency merely adopts the applicant's conclusory statements,\textsuperscript{40} relies solely on the applicant's submissions,\textsuperscript{41} acts without reference to the anticipated adverse environmental consequences\textsuperscript{42} or rests its negative

\textsuperscript{40} See, e.g., Kravetz v. Plenge, 102 Misc. 2d 622, 631, 424 N.Y.S.2d 312, 317 (Sup. Ct. Monroe County 1979) (applicant's EAF failed to mention fact that action involved a historic district listed on the National Register of Historic Places).

\textsuperscript{41} See, e.g., Kanaley v. Brennan, 119 Misc. 2d 1003, 1009, 465 N.Y.S.2d 130, 134 (Sup. Ct. Onondaga County 1983) (Planning Board's reliance solely on submission by developer did not provide sufficient basis upon which to make required determination that project would have no significant impact on environment.)

\textsuperscript{42} Center Square Ass'n v. Corning, 105 Misc. 2d 6, 12, 430 N.Y.S.2d 953, 957 (Sup. Ct. Albany County 1980) (lead agency failed to make required analysis); Kravetz v. Plenge, 102 Misc. 2d 622, 631, 424 N.Y.S.2d 312, 317 (Sup. Ct. Monroe County 1979) (lead agency failed to identify impairment of character or quality of important historical and architectural resources as a legitimate area of environmental concern). See also Hauser v. New York State Commission on Cable Television, Unrptd. Dec. (Sup. Ct. Albany County 1983) (installation of cable in front of property listed on Historical Register is a Type I action). Historic and cultural sites are also protected by a post-SEQRA statute. See N.Y. PARKS, RECREATION & HISTORIC PRESERV. LAW, § 14.09 (McKinney Pamphlet 1982). New York courts have been steadfast in their adherence to strict compliance with procedural requirements. See infra note 325 and accompanying text for discussion of strict compliance.

Where actions threaten the physical resources of the area by posing significant traffic, population-concentration or water-supply problems, or propose the irreversible alteration of the historic attributes of rare sites, federal courts have required the preparation of an EIS. See, e.g., Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271, 277 (3d Cir. 1983) (injunction against demolition of historic building until there was appropriate statutory compliance); Ely v. Velde, 451 F.2d 1130, 1137 n.22 (4th Cir. 1971) (construction of medical center for prisoners in an historically significant community); Businessmen Affected Severely By the Yearly Action Plans, Inc. v. D.C. City Council, 339 F. Supp. 793, 795 (D.D.C. 1972) (razing of small shops to facilitate erection of high-rise office buildings); Boston Waterfront Residents Ass'n, Inc. v. Romney, 343 F. Supp. 89, 91 (D. Mass. 1972) (demolition of edifices proposed for listing on National Register of Historic Landmarks); Goose Hollow Foothills League v. Romney, 334 F. Supp. 877, 879-80 (D. Or. 1971) (construction of sixteen-story apartment complex in area containing high-rise structures). See also SCRAP v. United States, 346 F. Supp. 190, 201 (D.D.C. 1972) (statement is required whenever action may arguably have an adverse environmental impact); cf. Sisley v. San Juan City, 89 Wash. 78, 82, 569 P.2d 712, 715 (1977) (decision that construction of 94-slip marina at head of small bay would have no significant environmental impact was clearly erroneous where record showed
declaration on an incomplete record, it has not taken the hard look
required by law.43

If the lead agency determines that the proposed project or activity is
a Type I action, the second stage of the process begins.44 The applica-
tion is publicly reviewed, most likely in a legislative hearing, where
statements of position may be made without the declarant being
under oath or subject to cross-examination.45 If EnCon is the lead
agency and it determines that disputed factual issues exist which
require the more detailed review yielded by cross-examination, it will
convene an adjudicatory hearing46 to examine the facts and to resolve
those disputed issues.47 The participants in the public hearing48 are (1)
the applicant; (2) intervenors-objectants, comprising, for example,
conservation and civic organizations, adjacent property owners, com-

reasonable probability that proposed marina would have more than a moderate
effect on quality of bay environment).

43. See Save the Pine Bush, Inc. v. Planning Board of Albany, 96 A.D.2d 986,
466 N.Y.S.2d 828 (3d Dep't 1983) (lead agency ignored anticipated cumulative
impacts). Kanaley, 119 Misc. 2d at 1009, 465 N.Y.S.2d at 134 (did not look beyond
applicant's submission); H.O.M.E.S., 69 A.D.2d at 231, 418 N.Y.S.2d at 892
(agency cannot act like "the proverbial ostrich").

44. See infra notes 226-37 and accompanying text for a discussion of the hearing
procedures and participant burdens.

45. The observation about legislative hearings is made by the Commissioner in
Wilmorite, Inc.: Rotterdam Square, N.Y. State Dep't of Envtl. Conserv. Dec. 4

46. See infra note 246 and accompanying text for the definition of adjudicatory
hearing and a discussion of when it is warranted.


48. See infra notes 211-25 and accompanying text.

49. [1981] 6 N.Y.C.R.R. § 624.4(a)(2). See Concerned Citizens Against Crossga-
(distinguishing between decision-maker and staff members fulfilling "their roles as
public servants to provide assistance and information to the applicant").

50. Id. § 624.11(f). See infra notes 243-45 and accompanying text for a discussion
of the burdens of persuasion and proof.

51. Id. § 624.11(f).
participation is a matter of right, and its burden is lesser than the applicant's, the intervenor-objectant cannot fulfill his responsibilities by indiscriminate opposition to the proposed action.\textsuperscript{52}

The final stage of the review process is decision-making. The lead agency fulfills its SEQRA responsibilities by filing a final environmental impact statement (FEIS)\textsuperscript{53} and deciding whether the applicant is entitled to the requested permits.\textsuperscript{54} The lead agency has the exclusive obligation to determine whether the applicant has satisfied SEQRA requirements and complied with permit technicalities within its jurisdiction.\textsuperscript{55} If the applicant requires additional permits, it proceeds to the remaining involved agencies. Each involved agency has the responsibility of deciding whether to approve a requested permit within its jurisdiction, using the FEIS as an environmental data base to assist it in reaching a considered decision.\textsuperscript{56}

This Article examines both the procedural requirements of SEQRA for Type I actions and the substantive dimension of SEQRA explicit in

\textsuperscript{52} See \textit{infra} notes 211-20 and accompanying text for discussion of intervenor-objectant's responsibilities and burden in participating in the public hearing.


\textsuperscript{54} [1982] 6 N.Y.C.R.R. \S 617.3(a) (lead agency must comply with SEQRA before approving or issuing a permit). For the prescribed method of making the decision, see N.Y. ENVTL. CONSERV. LAW \S 8-0103(7) ("protection and enhancement of the environment, human and community resources shall be given appropriate weight with social and economic considerations in public policy"); [1983] 6 N.Y.C.R.R. \S 617.1(d) (suitable balancing of social, economic and environmental factors).

\textsuperscript{55} No agency can act in advance of the lead agency's acceptance of the FEIS. \textit{See} [1982] 6 N.Y.C.R.R. \S 617.9(c) (lead agency must certify that proposed project or activity meets requirements of SEQRA). \textit{See infra} notes 421-30 and accompanying text for discussion of the lead agency's obligation and authority to impose permit conditions to assure project soundness and compliance with statutory and regulatory requirements.

\textit{EnCon} has categorically stated that it, and not any of the participants in the review process, has the statutory obligation to "make its own decisions on the basis of the record as a whole and as supported by substantial evidence." \textit{See} Wilmorite, Inc.: Rotterdam Square, N.Y. State Dep't of Envtl. Conserv. Dec. 3 (Oct. 7, 1981) (interim decision). Whether the responsibility has been fulfilled or not can be tested by an aggrieved participant in a CPLR article 78 proceeding. \textit{Id}.

\textsuperscript{56} [1982] 6 N.Y.C.R.R. \S 617.3(a). For example, wetlands, SPDES (State Pollutant Discharge Effluent System), and impoundment permits are within the jurisdiction of EnCon; curb cut and roadway design permits are within the jurisdiction of the State Department of Transportation; use and space variances are within the jurisdiction of the appropriate local municipal agency; and building permits are granted or denied by the local building department.
the Legislature's policies and goals.\textsuperscript{57} The embodiment of these policies and goals is the declaration that all agencies have "an obligation to protect the environment for the use and enjoyment of this and all future generations."\textsuperscript{58}

The analysis is divided into three parts corresponding with the responsibilities, tasks and burdens of each of the participants in the three principal stages of the SEQRA review process. It will first explore the requirement that alternatives and mitigation measures be discussed in the EIS. It will then examine the hearing procedures, with particular emphasis on the intervenor-objectant's responsibilities and burdens. Finally, it will review the lead agency's decision-making responsibilities, its authority to ensure the environmental soundness of the proposed action and the means by which it fulfills its statutory obligations.\textsuperscript{59}

\section*{II. Alternatives and Mitigation Measures}

\subsection*{A. Statutory and Regulatory Requirements}

Where the lead agency determines that the proposed action may have a significant effect on the environment,\textsuperscript{60} the applicant must prepare and submit a DEIS that discusses alternatives and mitigation measures.\textsuperscript{61} This discussion serves a number of different and overlap-

\begin{footnotesize}
\textsuperscript{57} SEQRA policies and goals are summarized \textit{supra} note 4. The Supreme Court of the United States has stated that the National Environmental Policy Act (NEPA) is essentially procedural, even though its goals are substantive. \textit{See} Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978). EnCon and New York courts have been more explicit in stating that compliance with SEQRA is not solely a matter of procedure. Participants must also be sensitive to the protective policies the law expresses and recognize the expectations that must be fulfilled. The precise substantive results which are expected, of course, vary widely depending upon the magnitude, environmental impact and location of the proposed project.

\textsuperscript{58} N.Y. ENVTL. CONSERV. LAW § 8-0103(8) (McKinney Supp. 1982-1983).

\textsuperscript{59} According to the N.Y. State Department of Environmental Conservation, the "primary function of the environmental process under SEQRA is to fashion environmentally sound projects through public participation." Wilmorite, Inc.: Rotterdam Square, N.Y. State Dep't of Envtl. Conserv. Dec. 7 (Oct. 7, 1981) (interim decision).

\textsuperscript{60} The word "significant" is not defined in SEQRA or the EnCon Regulations. "Significant effect" means actions which cross critical thresholds necessary for the health and safety of the people. 40 C.F.R. § 1508.27 (1982) (defined by the Council for Environmental Quality in its NEPA implementing regulations). Under SEQRA the applicant must compare its proposed project or activity with the criteria contained in [1982] 6 N.Y.C.R.R. § 617.11(a), (b).

\end{footnotesize}
ping purposes. The most important are that it compels the applicant to consider environmental consequences in the planning stage and, thereafter, it requires all participants to consider conservation and mitigation measures throughout the entire review process.62

The requirement that the DEIS discuss alternatives and mitigation measures is conveyed in two different ways. First, the simple declaratory statements in SEQRA itself require that the DEIS shall include both detailed statements of alternatives to the proposed action63 and mitigation measures proposed to minimize the identified, anticipated environmental impacts.64 Second, and more subtly, the lead agency is required to make a written finding that the requirements of SEQRA and the implementing regulations have been met before a proposed action may proceed.65 The lead agency must find that (1) the proposed action is consistent with social, economic and other considerations;66 (2) reasonable alternatives have been examined;67 (3) the action to be carried out or approved is one which minimizes or avoids adverse environmental effects to the maximum extent practicable;68 and (4) adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided by incorporating as conditions to the decision those mitigative measures which have been identified during the review process as practicable.69

The requirement that the lead agency make such mandatory findings implies that the applicant has corresponding responsibilities to achieve certain substantive results.70 It does not imply that SEQRA requires any specific substantive result in particular problematic situations.71 The requirements serve both informational and result-oriented

64. Id. § 8-0109(2)(f).
65. Id. [1982] 6 N.Y.C.R.R. § 617.9(c)(2)(i), (ii).
66. Id. § 617.9(c)(2)(i).
67. Id.
68. Id.
69. Id. § 617.9(c)(2)(ii). See infra notes 421-30 and accompanying text for discussion of permit conditions.
70. See Town of Henrietta v. Department of Envtd. Conserv., 76 A.D.2d 215, 226, 430 N.Y.S.2d 440, 449 (4th Dep’t 1980) (lead agency imposed conditions which applicant sought to have set aside on grounds that EnCon exceeded its legal authority).
71. Id. at 222, 430 N.Y.S.2d at 447.
purposes,72 and cannot be considered as empty ritual.73 In essence, reasonable alternatives to the applicant's proposed action which are capable of achieving the same or similar objectives and measures which minimize the adverse environmental impacts are interdependent concepts. Each of these requirements contributes to the end sought to be achieved.74 The requirement that the applicant analyze and evaluate alternatives and mitigation measures cannot be satisfied by merely disclosing adverse impacts. The applicant has to provide information and analysis which both educates its readers and, ultimately, contributes to the creation of an environmentally sound project by stimulating inquiry and evaluation of the applicant's preferences and mitigation measures.75

B. Reasonable Alternatives

Although the directory provisions in SEQRA and the EnCon regulations are explicit in requiring a discussion of alternatives, they do not specify the degree of detail and the breadth of coverage necessary for compliance.76 The regulations state that the DEIS must evaluate “rea-

72. Id. at 220-21, 430 N.Y.S.2d at 445-46.
73. See Biek v. Town of Webster, 104 Misc. 2d 852, 864, 429 N.Y.S.2d 811, 820-21 (Sup. Ct. Monroe County 1980) (if applicant fails to comply with statutory obligations, and lead agency fails in its statutory duties, the environmental qualification process would be nothing more than an administrative ritual); Environmental Defense Fund v. Froehlke, 368 F. Supp. 231, 244 per curiam sub nom. Environmental Defense Fund v. Calloway, 497 F.2d 1340 (8th Cir. 1974) (impact statement must be more than pro forma ritual).
74. Town of Henrietta, 76 A.D.2d at 221-22, 430 N.Y.S.2d at 446 (SEQRA requires lead agency to act affirmatively).
75. Id.
76. This is true of the federal statute as well. NEPA requires the lead agency to “study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(2)(E)(1977). The declaratory mandate to discuss alternatives under NEPA is as terse as the mandate in SEQRA. See 42 U.S.C. § 4332(2)(C)(iii) (1977). However, the Council on Environmental Quality (C.E.Q.) regulations are more informative. See 40 C.F.R. § 1502.14 (1976). The C.E.Q. regulations confirm that the alternatives discussion is “the heart of the environmental impact statement.” Id. The regulations provide that sponsoring agencies shall:
   (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
   (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.
sonable” alternatives. It must contain only such detail “as is appropriate for the nature and magnitude of the proposed action and the significance of its potential impacts.” Moreover, the description and evaluation should be “sufficient to permit a comparative assessment of the alternatives.” The EnCon regulations do not define “reasonable,” but it must be construed in the light of common sense and limited to the purpose to be achieved. In attempting to define the scope and coverage of alternatives, therefore, courts look to the purpose for the requirement in the context of the particular project or activity in issue. The Supreme Court of the United States has observed that the word “alternatives” is not self-defining. Implicit in the Court’s analysis is the notion that the range and variety of alternatives must be limited or expanded according to the magnitude and kind of environmental risks involved. Implicit also is the Court’s recognition that the alternatives requirement could conceivably “encompass an almost limitless range” of possibilities, but that speculating on the

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.
(d) Include the alternative of no action.
(e) Identify the agency’s preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.
(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.


77. [1982] 6 N.Y.C.R.R. § 617.14(b) (an “EIS should assemble relevant and material facts upon which the decision is to be made . . . should evaluate all reasonable alternatives and, on the basis of these, should make recommendations”) (emphasis added). The EIS should contain “a description and evaluation of reasonable alternatives to the action which would achieve the same or similar objectives. (The description and evaluation should be at a level of detail sufficient to permit a comparative assessment of the alternative discussed).” Id. § 617.14(f)(5) (emphasis added).

78. Id. § 617.14(c).
79. Id. § 617.14(f)(5).
80. See N.Y. STATUTES § 143 (McKinney 1971).
82. See Vermont Yankee, 435 U.S. at 551 (“concept of alternatives must be bounded by some notion of feasibility,” if it is to be more than an exercise in “frivolous boiler plate”).
83. Id. The Court observed that the “concept of ‘alternatives’ is an evolving one, requiring the agency to explore more or fewer alternatives as they become better known and understood.”
84. Id.
hypothetical and infeasible is unacceptable because it does not satisfy the ends intended to be achieved by the law.\textsuperscript{85}

1. \textit{The Test of Reasonableness under NEPA}

To understand the range of alternatives which the applicant must consider under SEQRA, one must turn first to the federal courts for their interpretation of the similar requirement under the National Environmental Policy Act (NEPA).\textsuperscript{86} The degree of detail and breadth of coverage required by NEPA to satisfy the alternatives requirement is measured by a test of reasonableness.\textsuperscript{87} Agencies need not discuss every conceivable alternative in detail "too exacting to be realized,"\textsuperscript{88} "ferret out every possible alternative"\textsuperscript{89} or consider alternatives whose effect "cannot be readily ascertained" because they are remote and speculative.\textsuperscript{90} The Supreme Court has cautioned that common sense "teaches us that the detailed statement of alternatives cannot be found wanting simply because the agency failed to include every alternative device."\textsuperscript{91} The applicant, or in the case of federal projects under NEPA, the sponsoring agency, satisfies the alternatives requirement if the draft impact statement describes in sufficient detail the range of alternatives reasonably calculated to achieve the same or similar objectives, discusses consequences and risks of the proposal, and evaluates and analyzes the feasible options.\textsuperscript{92}

\textsuperscript{85} Trinity Episcopal School Corp. v. Romney, 523 F.2d 88, 93 (2d Cir. 1975).
\textsuperscript{86} After NEPA became effective on January 1, 1970, federal courts quickly established a standard by which to judge whether sponsoring agencies had fulfilled their statutory duties to discuss reasonable alternatives. See National Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 837-38 (D.C. Cir. 1972) (statute must be construed reasonably); Life of the Land v. Brinegar, 485 F.2d 460, 471 (9th Cir. 1973), \textit{cert. denied}, 416 U.S. 961 (1974) (to show inadequacy of discussion of alternatives, intervenors-objectants must prove that an important consideration regarding a given alternative was ignored).
\textsuperscript{87} \textit{Natural Resources Defense Council}, 458 F.2d at 837.
\textsuperscript{88} Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068, 1074 (1st Cir. 1980); \textit{see also} East 63rd St. Ass'n v. Coleman, 414 F. Supp. 1318, 1326 (S.D.N.Y. 1976) (EIS contained substantial and detailed discussion of north-south location of subway line; objectant's complaint, rejected by the court, was the EIS did not deal with extent of disruption that would occur during construction).
\textsuperscript{89} \textit{Vermont Yankee}, 435 U.S. at 551.
\textsuperscript{90} \textit{Natural Resources Defense Council}, 458 F.2d at 837-38.
\textsuperscript{91} \textit{Vermont Yankee}, 435 U.S. at 551.
\textsuperscript{92} Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974) (detailed analysis is required only where impacts are likely); Life of the Land v. Brinegar, 485 F.2d 460, 472 (9th Cir. 1973), \textit{cert. denied}, 416 U.S. 961 (1974) (range of alternatives that must be considered need not extend beyond those reasonably related to purposes
The test of reasonableness implies a flexibility of expectation. One court has stated that while the requirement is not "rubber, neither is it iron."93 Where the consequences of particular actions are inadequately understood because their potential risks are substantial or because their cumulative effects have not been adequately measured, the law insists that the applicant be proportionately more sensitive to environmental factors.94 This fundamental principle is well illustrated in cases dealing with large scale projects under NEPA,95 as well as lesser scale private projects under SEQRA.96 Responsible discussion in the DEIS requires the applicant to evaluate reasonable alternatives and analyze their efficacy or limitations in "objective good faith" and with candor.98 Consequently, it is insufficient as a matter of law and a breach of statutory responsibility for the sponsoring agency in a of project). The test of reasonableness is followed by New York courts. Cf.: Town of Henrietta v. Department of Envtl. Conserv., 76 A.D.2d 215, 224, 430 N.Y.S.2d 440, 447-48 (4th Dep’t 1980) (for construction of SEQRA, New York courts turn to federal decisions construing NEPA).

94. The proposition is generally illustrated by applications for which the lead agency has illegally issued a negative declaration. See, e.g., Save the Pine Bush, Inc. v. Planning Board of Albany, 96 A.D.2d 986, 466 N.Y.S.2d 828 (3d Dep’t 1983) (negative declaration was procedurally unacceptable because of the cumulative impacts on the environment). It is reasonable to conclude, therefore, that any future DEIS by applicants for permits in the Pine Bush will have to discuss alternatives and mitigation measures that take into consideration the cumulative impacts.
95. For projects under NEPA, see generally Sierra Club v. Sigler, 695 F.2d 957 (5th Cir. 1983) (permits authorizing private construction of multipurpose deepwater port and crude oil distribution system); Natural Resources Defense Council, Inc., v. Calloway, 524 F.2d 79, 92-93 (2d Cir. 1975) (permits authorizing ocean dumping of toxic wastes).
97. See Sierra Club v. Morton, 510 F.2d 813, 819 (5th Cir. 1979) (court’s task is to determine whether the EIS was compiled in objective good faith and whether resulting statement permits decision-maker to consider and balance environmental factors).
98. See Orange & Rockland Utilities, Inc., N.Y. State Dep’t of Envtl. Conserv. Dec. (Apr. 13, 1982). The Commissioner observed that “it is apparent that the application and Draft Environmental Impact Statement should have been more comprehensive at the initiation of the formal environmental review process. While the Applicant may have met the letter of the law regarding completeness, the noted shortcoming unnecessarily prolonged the proceeding.” Id. at 6. In particular, the “DEIS should have examined all of the environmental factors involved including the establishment of reliable estimates of the costs associated for implementing the [flue
federal action under NEPA and the applicant in a private action under SEQRA to perfuntorily conclude that no alternatives exist.\textsuperscript{99} The reverse side of the sponsoring federal agency/applicant's obligation to discuss reasonable alternatives is the responsibility of the intervenor-objectant to structure his criticism objectively and in good faith.\textsuperscript{100} Intervenors-objectants cannot employ the requirement to discuss reasonable alternatives as a "crutch for chronic faultfinding,"\textsuperscript{101} or to transform the review process into a "game."\textsuperscript{102} The lead agency bears the responsibility for evaluating the applicant's alternatives as well as seriously investigating alternatives raised by intervenors-objectants.\textsuperscript{103} When weighing objections, however, reviewing courts may properly consider the extent and sincerity of the intervenors-objectants' participation in the review process.\textsuperscript{104}

2. The Test of Reasonableness under SEQRA

SEQRA was expressly modeled on NEPA and much of the state statutory language is identical to the federal law.\textsuperscript{105} Consequently, New York courts have looked to federal cases interpreting NEPA and

gas desulfurization] alternative and not left that task to the ALJ and other parties in creating a record for preparing an FEIS." \textit{Id.} at 7.

99. Trinity Episcopal School Corp. v. Romney, 523 F.2d 88, 93 (2d Cir. 1975) (dismissive statements that there are no alternatives are unacceptable as matter of law). \textit{See also} Silva v. Lynn, 482 F.2d 1282, 1287 n.6 (1st Cir. 1973).

100. \textit{See} Seacoast Anti-Pollution League v. Nuclear Regulatory Agency, 598 F.2d 1221 (1st Cir. 1979). The court noted that objectants' unstructured approach to the litigation was illustrated by the fact that six months after oral argument they asked the court, without benefit of any prior agency interpretation, to explain the significance of a certain regulation. \textit{Id.} at 1231. The court observed that "even accepting petitioner's assertion that they learned of this Guide only recently, despite its publication in 1974, petitioner had an obligation to raise this matter with the agency itself." \textit{Id.} (emphasis added).


102. \textit{Vermont Yankee}, 435 U.S. at 553. The Court held:

\textit{Indeed, administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that "ought to be" considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters "forcefully presented."} \textit{Id.} at 553-54 (emphasis added).


104. \textit{Id.}

have adopted the federal statute's test of reasonableness. The En-Con regulations implicitly support the federal test by requiring the applicant to describe and evaluate reasonable alternatives, and to measure reasonableness against the objectives to be achieved. Appropriately, New York courts have held that the test of reasonableness applies equally in determining whether the applicant has satisfied its SEQRA responsibilities as well as determining whether the lead agency, in the exercise of its duties, has imposed proper permit conditions.

A project sponsored by a government agency is generally conceived on a vastly larger scale than a privately sponsored action. In most government sponsored projects, therefore, it is reasonable to insist that the sponsoring agency discuss project as well as planning alternatives in the DEIS. An applicant for permits to undertake a private action, on the other hand, may limit its discussion to planning details, which may include, for example, site selection, flood control mea-

108. Id.; Webster Assocs. v. Webster, 59 N.Y.2d 220, 228, 451 N.E.2d 189, 464 N.Y.S.2d 431 (1983) ("degree of detail with which each alternative must be discussed will, of course, vary with the circumstances and nature of each proposal").

When a governmental agency is an applicant a broader consideration of alternatives is appropriate for several reasons. Government agencies have greater financial resources, engage in projects of larger magnitude to which there are a larger range of feasible alternatives and, given their inherent power of condemnation, have a broader potential range of alternative locations for their projects. In contrast, private developers will usually have a narrower range of feasible alternatives, due both to their more limited resources and, as in this case, to the economic disadvantages of alternative sites which might be available to a developer at a given time.

asures, housing density, roadway design and numerous innovative techniques that will mitigate adverse environmental impact.

a. Site Alternatives

It is not the government's business to dictate the nature of private investment, even if government may prohibit the use of a particular site for policy reasons. In its search for site alternatives, the applicant is not required to consider potential sites not zoned for the proposed use because such a policy "could lead to the systematic attack on local zoning and land use plans." Consequently, an applicant's preference for a non-sensitive, properly zoned site may not be challenged. Indeed, even for an environmentally sensitive site, the

115. See Coalition Against Lincoln West, Inc. v. City of New York, 94 A.D.2d 483, 465 N.Y.S.2d 170 (1st Dep't), aff'd N.Y.L.J. Oct. 31, 1983, at 12, col. 4. The record showed that applicant discussed housing density, water quality, sewage, private and public transportation, parking, air quality, and the construction impact on noise and dust. Id. at 493, 465 N.Y.S.2d at 177. The appellate division reversed the lower court's judgment setting aside the lead agency's affirmative SEQRA finding and issuance of permits, and dismissed the petition. Id.
117. Consolidated Edison Co., N.Y. State Dep't of Envtl. Conserv. Dec. (Sept. 14, 1983) (flue gas desulfurization equipment). See also [1982] 6 N.Y.C.R.R. § 617.14(f)(5). The applicant must also discuss the alternative that "no action" be undertaken. The "no action" requirement has not been the specific subject of any EnCon or court decisions. It is probably more useful for public (or regulated industry) projects than for private actions. See, e.g., Consolidated Edison Co., N.Y. State Dep't Envtl. Conserv. Dec. (Sept. 14, 1983). The administrative law judge, summa-
120. The relative unimportance of site alternatives has recently been recognized in Concerned Citizens Against Crossgates v. Flacke, 89 A.D.2d 759, 453 N.Y.S.2d 939 (3d Dep't 1982), aff'd, 58 N.Y.2d 919, 447 N.E.2d 80, 460 N.Y.S.2d 531 (1983) (without opinion). Intervenor-objectant sought to set aside an EnCon decision granting permits for an enclosed mall regional shopping center on the argument that the applicant had only undertaken its environmental analysis of alternative sites after selecting its preferred site. Brief for Appellant, Concerned Citizens Against Crossga-

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issue may still be resolved in the applicant's favor if it can demonstrate the utility of appropriate mitigation measures.121

There are two kinds of sensitive sites. The first category includes those on which unregulated changes may have a direct impact on the physical environment, such as freshwater or tidal wetlands,122 or lands that are otherwise ecologically unique.123 A second group consists of those on which unregulated changes may have an indirect impact on

fair's best on some environmental measuring rod. Brief for Respondent-Intervenor, Concerned Citizens Against Crossgates v. Flacke, 58 N.Y.2d 919, 447 N.E.2d 80, 460 N.Y.S.2d 531 (1983). The intervenor-objectant argued that the applicant had the burden of proving that even though the preferred site was properly zoned it was nevertheless the one that would produce the least adverse environmental impact. Id. The Third Department held that

there is no merit to petitionor's argument that Pyramid failed to consider [site specific] alternatives as required by ECL 8-0109 (subd. 2, par. [d]).

With regard to totally different sites for the entire project, Pyramid concluded in the final environmental impact statement that the proposed site was the only feasible one in the area for the construction of a regional shopping mall, and the commissioner accepted this conclusion, finding that it was based largely on Pyramid's business judgment.

Id. at 761, 453 N.Y.S.2d at 942. The briefs filed by the parties indicated that intervenor-objectant's argument ignored the economic factors which motivate private investment and failed to distinguish between that which is reasonable for government and that which is unreasonable for the private developer. When a private applicant chooses site "X", it must be presumed that it does so on the basis of its marketing advantages over sites "Y" and "Z" and that it has rejected sites "Y" and "Z", even though less environmentally sensitive. The result would be different for a major governmental project likely to have significant but unquantifiable environmental impacts. In that event, the sponsoring federal agency cannot preselect a site and rationalize the choice in the EIS. The EIS must adequately analyze the comparative environmental merits and disadvantages of the preferred and alternative sites.


121. Wilmorite, Inc.: Rotterdam Square, N.Y. State Dep't of Envtl. Conserv. Dec. (Dec. 3, 1982). In addition to the impoundment structure it was designing, applicant was also required to provide aquatic and wildlife mitigation measures. Id. at 2.

122. Pyramid Systems, Inc., N.Y. State Dep't of Envtl. Conserv. Dec. (Mar. 17, 1978). Before an applicant is entitled to a permit to change a freshwater wetlands, EnCon must make the following findings: (1) that the alteration is consistent with the legal policy of preserving and protecting wetlands and their functions in accord with the general welfare and beneficial economic, social and agricultural development of the state; (2) that the proposed alteration is compatible with the public health and welfare; (3) that the filling in of the wetland is reasonable and necessary to construct the project; and (4) that the applicant has no reasonable alternative site which is not a freshwater wetland or an adjacent area. N.Y. ENVTL. CONSERV. LAW § 24-0703(4); [1976] 6 N.Y.C.R.R. § 662.8(c).

the quality of life, such as sites that are historically significant, or situated in a particular kind of neighborhood. In dealing with quality of life issues, environmental laws recognize that there are going to be tradeoffs. Consequently, the applicant is only required to recognize the burdens and show it can ameliorate them to the extent practicable. In dealing with impacts to the physical environment, the lead agency’s responsibilities and the applicant’s burden are proportionately greater since the long-term effects are potentially health endangering.

Before an applicant may change or alter a regulated freshwater wetlands, defined as an area of 12 and four-tenths acres or more, it must unequivocally and clearly demonstrate that the site is necessary and that no alternatives are available. The applicant’s task in meet-

124. [1982] 6 N.Y.C.R.R. § 617.11(a). Significant effect on the environment includes “the creation of a material conflict with a community’s existing plans or goals as officially approved or adopted,” id. § 617.11(a)(4); “the impairment of the character or quality of important historical, archeological, architectural or aesthetic resources or of existing community or neighborhood character.” Id. § 617.11(a)(5). See Center Square Ass’n, Inc. v. Corning, 105 Misc. 2d 6, 430 N.Y.S.2d 953 (Sup. Ct. Albany County 1980). Cf.: Preservation Coalition, Inc. v. Pierce, 667 F.2d 851 (9th Cir. 1982) (fact that project contemplated destruction or significant alteration of buildings listed on national register did not preclude finding that no EIS was required).


126. For a project sponsored by the N.Y. City Planning Commission in conjunction with the U.S. Dep’t of Housing and Urban Development on the Upper West Side of Manhattan, see Strycker’s Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980).

127. See, e.g., Goodman Group, Inc. v. Dishroom, 679 F.2d 182 (9th Cir. 1982) (rehabilitation of historic building to be used for low income housing units); Hanley, 471 F.2d 823 (prison facility in residential neighborhood).


130. See Wilmorite Inc.: Rotterdam Square, N.Y. State Dep’t of Envtl. Conserv. Dec. 6 (May 18, 1982) (administrative law judge’s conclusion that applicant had not met its burden of proving unavailability of an alternative site was overruled by Commissioner because the “findings of fact and the record indicate that the applicant has investigated other sites and provided an explanation as to why they are unreasonable from its perspective”); [1976] 6 N.Y.C.R.R. § 662.8(c). [1976] 6 N.Y.C.R.R. § 662.8(b) provides that the applicant has the burden of demonstrating that it will suffer a “hardship” in order to obtain an interim permit. The Environmental Conservation Law section 24-0703 was amended in 1977, however, to eliminate the require-
ing its burden is proportional to the significance of the wetlands. Significance is measured by the ability of the particular wetlands to carry out wetlands functions.\textsuperscript{131} The greater the significance, the more substantial the emphasis on preservation.\textsuperscript{132} Thus, in addition to showing necessity and unavailability of other sites, the applicant must show that the value of the particular wetlands is minimal\textsuperscript{133} or that the functions can be replaced.\textsuperscript{134} If the wetlands is on property zoned for the proposed commercial purposes, but the lead agency finds that the preferred site is too environmentally sensitive, the lead agency is authorized to prohibit development entirely.\textsuperscript{135} The applicant's business-judgment perspective, however, is accorded great deference in establishing need for the preferred site and determining whether there is any alternative site available for its proposed action.\textsuperscript{136}
EnCon's grant of the requested permit does not imply a license to impair wetlands functions. To protect the wetlands values, the lead agency is authorized to incorporate into the permit appropriate mitigative conditions. For example, the lead agency may require flood and erosion control measures, including impoundment structures, drainage ditches and detention ponds. It will also accept offers by the applicant to transfer adjacent wetlands property to the government for perpetual dedication for conservation or other public purposes as a substitute for the wetlands destroyed or altered. Even where a particular wetlands may not provide a significant wildlife habitat, the lead agency may incorporate into the permit a condition that the applicant plant appropriate wetland fauna on the project site to the extent practicable.

b. Design and Technological Alternatives.

Unlike the deference accorded the applicant's site selection, the applicant's preferences for design and technological alternatives may be given no more deference than the suggestions by intervenors-objejectants and agency staff. If intervenors or staff offer reasonable alternatives which are superior in achieving the substantive results of

138. Wilmorite, Inc.: Rotterdam Square, N.Y. State Dep't of Envtl. Conserv. Dec. (Dec. 3, 1982). There was initially some question as to whether the impoundment structure was properly designed. Id. at 2. The evidence was inconclusive and, in view of the significance of underestimation of the design, the Commissioner concluded that further proof and hearing would be warranted. Id. In Pyramid Company of Utica, N.Y. State Dep't of Envtl. Conserv. Dec. (June 22, 1979), the Commissioner only approved permits after the applicant demonstrated it could solve drainage and flood control problems. Id. at 1.
139. One permit set forth the following condition: "Construction of the storm water management system shall be sequenced so that any area which is to be seriously disturbed will be protected with sedimentation controls." Pyramid Crossgates Company, N.Y. State Dep't of Envtl. Conserv. Dec. 6 (September 18, 1981). Permit issued October 5, 1981 for Environmental Conservation Law Article 15 (Protection of Water) and Article 24 (Freshwater Wetlands).
140. See Wilmorite, Inc.: Rotterdam Square, N.Y. State Dep't of Envtl. Conserv. Dec. (May 18, 1982). Applicant offered to transfer ownership of a park parcel to the Town of Rotterdam as a wildlife sanctuary. The Commissioner noted that such a proposal meets specific regional public needs. Id. at 6.
141. Id.
SEQRA, the applicant must either incorporate the improved design and technology into its proposal or they will be incorporated into the permit and imposed as conditions.\textsuperscript{144}

Since the review process considers proposals rather than final plans and specifications, and because the applicant's proposed project or activity may undergo an unrecorded transformation through the review process, it is difficult to identify the applicant's modifications or compromises except where specifically referred to by EnCon or court decision. It is possible, however, to draw inferences from the factual presentations. In \textit{Coalition Against Lincoln West v. City of New York},\textsuperscript{145} for example, the court noted that the project, a residential complex located on the Upper West Side of Manhattan, was substantially modified by reducing the number of units.\textsuperscript{146} In \textit{Town of Henrietta v. Department of Environmental Conservation},\textsuperscript{147} EnCon granted the requested permits but imposed significant conditions relating to energy conservation, implying that the applicant's energy design was unacceptable.\textsuperscript{148} The applicant's raw proposals for solving particular foreseeable impact problems, such as designing adequate flood control measures,\textsuperscript{149} incorporating new residential development into existing transportation patterns\textsuperscript{150} or providing adequate potable water and sewage disposal,\textsuperscript{151} are usually accepted as the basic premise for examination. The proposals then undergo refinement through the hearing and permit compliance process.\textsuperscript{152}

\textsuperscript{144}Town of Henrietta v. Department of Envtl. Conserv., 76 A.D.2d 215, 430 N.Y.S.2d 440 (4th Dep't 1980) (only case of an applicant challenging conditions to issued permits).


\textsuperscript{146}\textit{Id.} at 489, 465 N.Y.S.2d at 175.

\textsuperscript{147}76 A.D.2d 215, 430 N.Y.S.2d 440 (4th Dep'T 1980).

\textsuperscript{148}See supra notes 425-30 and accompanying text.


\textsuperscript{150}See Marriott Corporation, Marriott/Minnewaska Project, N.Y. State Dep't of Envtl. Conserv. Decs. (May 18, 1982; Dec. 3, 1982).


\textsuperscript{152}The Commissioner observed that the record fully demonstrated that at each step of the environmental review process the applicant modified its project in an effort to mitigate adverse environmental impacts. \textit{Id.} at 6. See also \textit{Coalition Against Lincoln West}, 94 A.D.2d at 492, 465 N.Y.S.2d at 174 (significant modification to the project, included reduction in scale and commitment by applicant to provide funds to renovate subway station).
c. Project Alternatives.

The applicant is not expected to evaluate alternative projects. However, if the lead agency determines that the environmental risks of the project as proposed are unacceptable, but that the goals of the applicant's project are desirable, the lead agency may either approve the application with modification or deny the permit request and make specific recommendations for the applicant to consider on reapplication.153

Evaluation of alternative projects may be appropriate where the potential long-term environmental risks either are substantial154 or have not been adequately investigated, analyzed or described.155 This is illustrated in SCA Chemical Waste Services, Inc.,156 an Encon application in which the applicant applied for permits to construct a secure land burial facility for toxic wastes.157 The Commissioner denied the permits in part because the DEIS failed to adequately discuss alternatives, and in part because the DEIS failed to describe, evaluate and analyze future resource requirements, storage and disposal techniques and project financing.158 The Commissioner held that before an applicant may be given the "privilege to construct and operate" a secure land burial facility, it must take "concrete, affirmative, and demonstrable steps toward implementing currently recognized detoxification, incineration, or other feasible alternatives."159 The same concern is demonstrated in applications by public utilities for conversion from oil to coal160 and for waste disposal facilities.161

159. Id. at 3.
Even if a particular activity is deemed beneficial and has been undertaken in the past, it must be subjected to the SEQRA process if its effect on health cannot be judged. In *Marino v. Platt*, a local government agency approved pesticide spraying for mosquito control without complying with SEQRA. The local agency argued that it was exempt from SEQRA because EnCon had approved the pesticide. The court rejected the local agency's argument and concluded that SEQRA applied. The decision to implement programs that use such chemicals, the court held, may not be made in ignorance of its effect on health and the environment. The SEQRA mandated “pause” for studying and assessing the environmental impact must be made before the local agency undertakes such an activity.

C. Mitigation Proposals

The quest for mitigation is one of the fundamental objectives of SEQRA. If the applicant does not achieve the necessary degree of mitigation, the lead agency is authorized to implement measures designed to mitigate identified adverse environmental impacts, provided the measures are reasonable in scope and reasonably related to the impacts identified in the EIS. The applicant’s failure to provide details of mitigation, however, prohibits the lead agency from making an affirmative finding unless the applicant is prepared to accept mitigative measures offered during the review process. As a result, in anticipation of the review, the applicant must develop specific mitigative plans and be prepared to prove it has the technical resources to implement such measures for avoiding or minimizing the adverse impacts associated with the proposed project or activity. Beyond the mandatory requirement to disclose the environmental risks and impacts, therefore, is the implicit expectation that the applicant will

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163. Id. at 390, 428 N.Y.S.2d at 436.
164. Id.
165. Id. at 389, 428 N.Y.S.2d at 435.
fashion a project which is environmentally sound. Consequently, the applicant must be prepared, if necessary, to redesign its proposed project in the light of information generated through the SEQRA process.

A proposed project or activity must be assessed in terms of its cumulative environmental impact. The lead agency may not approve one aspect of a project when it knows that another aspect will result in adverse environmental impacts which have not been adequately mitigated. To adequately assess the scope and magnitude of environmental impacts, the lead agency may require the applicant to examine and evaluate not only the environmental impact of the project or activity in the immediate location, but also the existing uses and resources in the geographic area of the project or activity, as well as planned future development. As a result of such an assessment, the Commissioner has held, the cumulative effects of the impact directly related to a particular project may "raise the level of impacts from insignificant to significant." Measures that will mitigate adverse environmental impact most often include those designed to maximize energy conservation, im-

173. Pyramid Crossgates Co., N.Y. State Dep't of Envtl. Conserv. Dec. (June 25, 1981) (final decision). The Commissioner required that the "impacts associated with a proposal be assessed in terms of the entire project." Id. at 7. Further, it "would be inappropriate to approve one aspect of a project when it is known that another aspect of the project will result in adverse environmental impacts which have not been adequately mitigated." Id.
175. Onondaga Landfill Systems v. Flacke, 81 A.D.2d 1022, 440 N.Y.S.2d 788 (4th Dep't 1981). Applicant commenced an Article 78 proceeding challenging En-Con's positive declaration. The court held that the determination of significance is a matter of discretion, and that where there is a rational basis, the court should not substitute its judgment for that of the lead agency. Id. at 1023, 440 N.Y.S.2d at 790.
prove traffic patterns, improve air quality, divert and contain storm water and improve waste management. Other measures include the establishment of wildlife sanctuaries and preservation of historic ruins.

EnCon's evaluation of an applicant's mitigation measures make it clear that the lead agency does not and the applicant may not approach its task on the assumption that the discussion of mitigation measures in the DEIS is merely a procedural ritual. As with alternatives, the substantive goal is accomplished in one or both of two ways: (1) through the applicant's own planning of appropriate mitigation measures or (2) through the imposition of permit conditions. The burden for demonstrating that the proposed project or activity is one which minimizes or avoids adverse environmental effects to the maximum extent practicable is on the applicant.

180. Wilmorite, Inc.: Rotterdam Square, N.Y. State Dep't of Envtl. Conserv. Dec. (Dec. 3, 1982). The applicant's mitigation proposals included a flood control measure. Because there was insufficient evidence to determine whether the design of the impoundment structure would have sufficient storage capacity, the Commissioner remanded the issue for further technical evaluation. Id. at 1-2. The proposal had been one of three alternatives reviewed at the adjudicatory hearing. Wilmorite, Inc.: Rotterdam Square, N.Y. State Dep't of Envtl. Conserv. Dec. (May 18, 1982). To be entitled to issuance of the wetlands permit, the applicant's further submissions concerning the details of the impoundment structure must demonstrate that this structure, in conjunction with the related stream channel, will mitigate the increase in flood heights and duplicate flood retention and storage capabilities of the eliminated wetlands . . . .” Id. at 5.
182. See, e.g., Pyramid Crossgates Co., N.Y. State Dep't of Envtl. Conserv. Dec. (Sept. 18, 1981). The applicant agreed to relocate the proposed mall building to protect a colony of Karner Blue butterflies. The Commissioner noted that “this relocation, in conjunction with the proposed management plan for the conservation of the butterfly habitat on site, is a reasonable attempt to protect an endangered species on the site and still carry out the project.” Id. at 4.
187. See [1981] 6 N.Y.C.R.R. § 624.11(f). See Pyramid Crossgates Co., N.Y. State Dep't of Envtl. Conserv. Dec. (June 25, 1981) (final decision). The Commissioner stated that “SEQRA requires agencies to impose mitigative conditions that minimize adverse environmental impact, but in order to do so, the mitigation must be clearly identified and described in the FEIS.” Id. at 7.
D. Applicant Preferences

Although the applicant must discuss and evaluate reasonable alternatives and mitigation measures in the DEIS, the central focus of the review process is the applicant's expressed preference. Preferences, however, are only acceptable if the applicant carries its burden of proving that they avoid or minimize adverse environmental impacts to the maximum extent practicable. The lead agency is authorized to grant approval for a modified project, and to reject the applicant's preferences in favor of other alternatives. In one application, a public utility applied for permits to convert two of its electrical generating facilities from oil burning to low sulfur coal burning facilities. The Commissioner found the applicant's preference would result in releasing into the atmosphere an unacceptably high volume of chemicals that produce sulphuric acid and nitric acid. These acids return to the earth in the form of precipitation—popularly known as acid rain. As a result, the Commissioner approved one of the alternatives developed by intervenors-objectants in the public hearings. The approved alternative required the applicant to install and use flue gas desulfurization equipment which significantly reduces the level of unacceptable pollutants.

In another application involving a request for permits to build a shopping center on a site containing a freshwater wetlands, the appli-
cant proposed an impoundment plan as part of its flood control proposal, but had difficulty demonstrating that it could achieve its purpose. The application was approved only after the applicant submitted further information that enabled the Commissioner to make an informed decision.

Since an applicant is entitled to an affirmative SEQRA determination only after it has conclusively demonstrated compliance, a preference acceptable to the lead agency, but contingent upon approval by another municipality, is unacceptable as a matter of law. Consequently, if the applicant’s preference is not accepted, the application will not be approved in the proposed form. The lead agency may not ignore evidence that an applicant’s preferred alternative could produce unacceptable environmental consequences. In addition, the applicant must complete negotiations with third parties concerning its preferred mitigation measures before its application will be approved.

E. Intervenor-Objectant’s Burden of Going Forward

Once the applicant has either carried its burden of describing appropriate alternatives and mitigative measures or has incorporated alternatives proposed by EnCon staff or intervenor-objectants into its proposed project or activity, the burden shifts to the intervenor-objectant to prove that more feasible alternatives or mitigative measures

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196. Wilmorite, Inc.: Rotterdam Square, N.Y. State Dep’t of Envtl. Conserv. Dec. (May 18, 1982). In a final decision more than a year later, the Commissioner concluded that the applicant’s design of its impoundment structure was reasonable. Wilmorite, Inc.: Rotterdam Square, N.Y. State Dep’t of Envtl. Conserv. Dec. 1 (July 1, 1983).

197. Id.


201. Rye Town/King Civic Ass’n v. Town of Rye, 82 A.D.2d 474, 442 N.Y.S.2d 67 (2d Dep’t 1981).

202. Multi-Town Solid Waste Management Facility, N.Y. State Dep’t of Envtl. Conserv. Dec. (Nov. 19, 1982) (interim decision). The requirement that the applicant obtain such definite agreements “need not involve a delay in the proceedings.” Id. at 2. The applicant must, however, make the “disposal agreements available to all parties for review and comment.” Id. According to the Commissioner, an adjudicatory hearing would then depend upon whether the mitigative measures proposed raise substantive and significant issues. Id.
exist which the applicant failed to discuss in the DEIS or the lead agency overlooked.203

III. Responsibilities of Participants in the Public Hearing

The primary function of the environmental review process under SEQRA is to fashion environmentally sound projects through public participation.204 Public participation under SEQRA commences after the filing of the DEIS while the applicant’s plans are still preliminary205 and before any irreversible commitments have been made or irreversible damage committed to the environment.206 It consists of commenting on the permit and environmental issues raised in the application and impact statement207 and actively participating in the public hearing.208 The desire to participate implies a willingness to contribute, which in turn implies responsible participation. The intervenor-objectant’s contribution must be concrete and objective,209 rather than vague and subjective.210

203. See Wilmorite, Inc.: Rotterdam Square, N.Y. State Dep’t of Envtl. Conserv. Dec. (Oct. 7, 1981) (interim decision). Where mitigation or avoidance of adverse environmental impact is possible and practicable, SEQRA requires that it be incorporated into the project “regardless of the source of such proof.” Id. at 7. “Where mitigation is not possible, it is conceivable (regardless of the source of proof) that the degree of environmental harm, on balance with social and economic factors related to the project, may warrant denial of permits.” Id; accord Sierra Club v. Morton, 510 F.2d 813, 818-19 (5th Cir. 1975) (party challenging adequacy of EIS is required to establish by preponderance of evidence a showing of deficiencies).

204. Wilmorite Inc.: Rotterdam Square, N.Y. State Dep’t of Envtl. Conserv. Dec. 7 (Oct. 7, 1981) (interim decision). The Commissioner stated that the “process attempts to expose a project’s potential for adverse environmental harm and establish measures which will avoid or minimize such harm.” Id. at 7.


206. Id. at 221-22, 430 N.Y.2d at 446.

207. See, e.g., Halfmoon Water Improvement Area No. 1, N.Y. State Dep’t of Envtl. Conserv. Dec. 1-2 (Apr. 2, 1982) (explaining hearing participation and issues conference); see also [1978] 6 N.Y.C.R.B. § 617.8(c) (agency shall provide period for commenting on DEIS of not less than 30 days).

208. [1981] 6 N.Y.C.R.B. § 624.4(a), (b) (hearing participation); id. § 624.5 (rights of parties).

209. See infra notes 238-43 and accompanying text. The frequency with which the Commissioner discusses intervenors-objectants’ quality of proof and failure of proof in his decisions implies that intervenors-objectants are not always aware of their burden in the public hearing.

210. See infra notes 256-63 and accompanying text. The existence of subjective contributions is inferred from the Commissioner’s or Court’s frequent admonitions
ENVIRONMENTAL QUALITY REVIEW

A. Participants

The participants in the public review portion of the environmental process are the applicant, assigned agency staff and the intervenor-objectant. The applicant and agency staff each have defined statutory roles, with concomitant responsibilities and burdens; the former to prove entitlement to the requested permits and the latter to examine the proposed action for compliance with applicable law. The intervenor-objectant, however, participates on a voluntary basis. Nevertheless, the intervenor-objectant is expected to fulfill the functional role of questioning the application and the DEIS, producing facts, raising issues and offering proof. Both the agency staff and intervenor-objectant are concerned with creating an environmentally sound project regardless of cost. To that extent, they share the common goal of putting the applicant to its proof and offering additional alternatives to achieve the same or similar objectives which

that the intervenor-objectant’s proof lacked specificity, or, as in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 554 (1978), intervenor-objectant declined to focus its contentions because it had no conventional findings to offer.

111. Id. § 624.4(a)(3). If a hearing involves numerous parties, the administrative law judge has the authority to consolidate parties for purposes of avoiding repetitious testimony or argument. Id. § 624.4(h). See Wilmorite Inc.: Rotterdam Square, N.Y. State Dep’t of Envtl. Conserv. Dec. (Oct. 7, 1981). The Commissioner stated that the consolidation of parties “significantly enhances the efficiency of administrative hearings at no expense to fairness. Indeed, it affords a beneficial opportunity for the consolidated parties to concentrate and refine their concerns as well as to more efficiently pursue them by eliminating needless duplicative efforts.” Id. at 2. In the event there is a divergence of views with respect to any particular issue, intervenor-objectants are free to seek severance of their consolidated status. Long Island Lighting Company, N.Y. State Dep’t Envtl. Conserv. Dec. (Jan. 24, 1983) (interim decision).

112. See Consolidated Edison Co., N.Y. State Dep’t of Envtl. Conserv. Dec. (Sept. 14, 1983). Six different alternatives were developed in the adjudicatory hearing, four of them by intervenors. Id. at 5.

113. Id. Even though the approved alternative involved substantially higher capital construction and associated long-term operational costs, it could be financed out of reduced savings to applicant’s ratepayers. The Commissioner stated that the associated employment opportunities in undertaking the capital project should be regarded as a positive economic benefit. Id. at 11.
avoid or minimize anticipated adverse environmental impacts to the maximum extent practicable.\textsuperscript{215}

The intervenor-objectant has the right to participate in a public hearing either in a full or limited capacity.\textsuperscript{216} If he desires full party status, however, he must demonstrate entitlement by identifying his grounds of opposition to the proposed action and the nature of the arguments and evidence he intends to present.\textsuperscript{217} Alternatively, if the intervenor-objectant merely seeks to register a position, he may make a limited appearance.\textsuperscript{218} An intervenor-objectant’s standing to question an EnCon application is determined by the Commissioner’s representative, the administrative law judge, either before the legislative hearing or at a preadjudication issues conference.\textsuperscript{219} The decision to grant or deny participation is subject to interagency appeal to the Commissioner.\textsuperscript{220}

Other involved agencies are strongly encouraged to participate in the lead agency’s public hearing review. In their role either as a party or in a consultative capacity, the agencies contribute knowledge and experience in their respective areas of expertise and jurisdiction.\textsuperscript{221}

\textsuperscript{215} Id. Agency staff recommended disapproval of the application because applicant did not have a definite solid waste disposal plan. Consolidated Edison Co., N.Y. State Dep’t of Envtl. Conserv., FEIS/Hearing Report 25 (Sept. 14, 1983).
\textsuperscript{216} [1981] 6 N.Y.C.R.R. § 624.4(b), (g).
\textsuperscript{217} Id. § 624.4(b)(1), (2) (prospective intervenor-objectant must also identify his social, economic or environmental interests which are likely to be affected by proposed action). See also Wilmorite Inc.: Rotterdam Square, N.Y. State Dep’t of Envtl. Conserv. Dec. (Oct. 7, 1983). Qualified persons are given the opportunity to insure that the record contains all the environmental impacts, alternatives and mitigation measures that the Commissioner must consider in making his final decision. Id. at 3.
\textsuperscript{218} [1981] 6 N.Y.C.R.R. § 624.4(f).
\textsuperscript{219} Id. § 624.6(a). When possible, an issues conference will be scheduled in advance of the public hearing. See infra note 246 and accompanying text for further discussion of the issues conference. The Commissioner has stated that it is not the intention of the regulations to raise a “set of procedural hurdles” to prevent public participation. Halfmoon Water Improvement Area No. 1, N.Y. State Dep’t of Envtl. Conserv. Dec. (Apr. 2, 1982). Such an interpretation would contravene the clear legislative mandate for meaningful public participation by “focusing form over substance.” Id. at 2. The Commissioner emphasized that the regulations provide broad discretion to the administrative law judge which must be exercised to facilitate public input. Id. The threshold is similarly low for judicial review of agency decision making. See New York State Builders Ass’n v. New York, 98 Misc. 2d 1045, 414 N.Y.S.2d 956 (Sup. Ct. Albany County 1979). In order to show standing, however, a party must allege injuries within the zone of interests protected by SEQRA. Id. at 1050, 414 N.Y.S.2d at 959. Economic injury alone is not within the zone of interests and cannot serve as a basis for standing under SEQRA. Id. See also infra notes 369-72 and accompanying text for further discussion of economic considerations.
This consultation and participation contributes to narrowing issues of significance and identifying areas of controversy. The public hearing also gives the involved agency an opportunity to obtain a data base for its own decision making process. Although an agency’s participation in the lead agency’s public hearing is voluntary, its failure to participate when its presence would aid decision making violates the clear mandate of SEQRA for “expedited proceedings, prompt comprehensive review and coordinated actions between agencies.” In addition, such absence precludes the agency from subsequently challenging the lead agency’s findings.

B. Public Hearings

If staff evaluation or comments by the intervenor-objectant on the application and DEIS raise “substantive and significant issues,” a record is developed which adequately reflects zoning policies and practices in affected locale).

222. Id. § 617.3(f).


224. Wilmorite Inc.: Rotterdam Square, N.Y. Dep’t of Envtl. Consrv. Dec. 5 (Oct. 7, 1981); see also Pyramid Crossgates Co., N.Y. State Dep’t of Envtl. Consrv. Dec. (Nov. 28, 1980), the Commissioner stated that the “success of the review process is dependent upon the willingness of involved agencies to contribute their special areas of expertise throughout the process.” Id. at 1. Further, it “is not an opportunity for involved agencies to avoid controversial subject matter within their specific official authority by deferring the solution of a controversy to the lead agency.” Id.

225. Wilmorite, Inc.: Rotterdam Square, N.Y. State Dep’t of Envtl. Consrv. Dec. (Oct. 7, 1980). The acceptance of the FEIS by the lead agency binds all decision makers to the information contained therein. Id. at 5. Cf. CAL. PUB, RES. CODE § 21080.1 (West 1977). “The lead agency shall have the responsibility for determining whether an environmental impact report or a negative declaration shall be required for any project . . . . Such determination shall be final and conclusive on all persons, including responsible agencies. . . .” Id.

226. EnCon uses both legislative hearings, [1981] 6 N.Y.C.R.R. § 624.7(a)(3), and issues conferences, [1981] 6 N.Y.C.R.R. § 624.6, to fulfill its obligations. The two devices are not mutually exclusive, but complementary. This section of the Article deals principally with EnCon as the designated lead agency. Except for the legislative-type hearing referred to in the EnCon regulations as an “issues conference”, hearing procedures for other agencies and proof burdens on the participants are identical to EnCon’s. See, e.g., Concerned Citizens Against Crossgates v. Town of Guilderland, 91 A.D.2d 763, 458 N.Y.S.2d 13 (3d Dep’t 1982). In Concerned Citizens, there was substantial opposition to the proposed action on the local level. At issue was a special use permit. Before making its final decision, the zoning board of appeals had conducted 10 public hearings and had held three special meetings. The court found that

approximately 100 witnesses were heard and thousands of pages of exhibits and written testimony were received. Petitioners were granted full party status by the zoning board and vigorously participated throughout
public hearing is mandatory. A "substantive and significant" issue is one that is likely to affect the decision to issue the permit. Otherwise, the lead agency's decision to hold a public hearing on environmental issues is discretionary. Whether the lead agency has properly exercised discretion depends in part on the degree of public interest, as reflected in the comments it receives, and in part on the extent to which a public hearing will aid the agency decision making processes by providing a forum for soliciting additional public comment.

There are two types of public hearings: the legislative hearing and the adjudicatory hearing. The legislative hearing is a limited forum in which participants are given the opportunity to voice positions and present arguments. The adjudicatory hearing is a more formal, evidentiary type proceeding presided over by an administrative law judge in which participants may proffer evidence and examine and cross-examine witnesses. While a legislative hearing may not be necessary for all environmental issues, it is mandatory for particular types of permits. Most combined SEQRA/permit hearings are legis-

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228. Id. (hearing required where there is reasonable likelihood that permit will be denied or can be granted only with major modifications).
230. Under the EnCon regulations, intervenors-objectants have the opportunity, in advance of any hearing, to file written comments on the application and DEIS and to raise permit and environmental issues. The lead agency is required to consider these comments in deciding whether to convene a hearing. The commenting period on the DEIS may not be less than 30 days. The applicant and agency staff may, but are not required to, respond. They may prefer to wait until the issues conference. [1978] 6 N.Y.C.R.R. § 617.8(c). Regarding EnCon permits, see [1981] 6 N.Y.C.R.R. § 621.7(a) (EnCon shall evaluate application and any comments received on it to determine whether public hearing must be held).
233. The adjudicatory hearing is governed by the N.Y. State Administrative Procedures Act (McKinney Pamphlet 1982).
lative. There is no statutory requirement for convening an adjudicatory hearing to resolve issues raised in the DEIS. EnCon's decision to convene an adjudicatory hearing for resolution of issues affecting permit issuance is a matter of policy rather than of right.

1. Function of the Hearing

There are three principal functions of the public hearing: to resolve disputed issues of fact, to ensure to the extent practicable that projects avoid creating unacceptable environmental consequences after they are constructed and to create a record for the lead agency to support its environmental determination. A disputed issue of fact is one which is significant enough to affect permit issuance. A fact

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237. Wilmorite, Inc.: Rotterdam Square, N.Y. State Dep't of Envtl. Conserv. Dec. 4 (Oct. 7, 1981) (interim decision) (nothing in article 8 of Environmental Conservation Law, EnCon regulations or Uniform Procedures Act requires lead agency to utilize adjudicatory hearing forum for purpose of resolving or responding to comments on DEIS). See also infra note 246 (Wilmorite quotation).


It is the policy of the department to ensure that the public hearings it conducts provide a fair and efficient mechanism for the development of a factual record for the decision on a permit and, to that end, that all statements and testimony be relevant and directed toward achieving that goal. The process . . . may involve a legislative hearing session on a draft environmental impact statement, [or] an adjudicatory hearing session with sworn testimony and cross-examination . . .

Id.


240. [1982] 6 N.Y.C.R.R. § 624.15(b). A record is created in several different ways: comments on the DEIS and application received from interested persons who may subsequently qualify as intervenors in the public hearing, [1978] 6 N.Y.C.R.R. § 617.8(c); substantive responses of applicant and agency staff to the comments, [1982] 6 N.Y.C.R.R. §617.14(h); and the testimonial transcript and exhibits in the adjudicatory hearing, [1981] 6 N.Y.C.R.R. § 624.7(d). The lead agency has no authority to vary the regulatory procedures by lightening the burdens and responsibilities of applicant and agency. See Glen Head v. Oyster Bay, 88 A.D.2d 484, 495, 453 N.Y.S.2d 732, 739 (2d Dep't 1982) (lead agency failed to consider negative information from other involved agencies or to forward DEIS to person requesting copy); Rye Town/King Civic Ass'n v. Town of Rye, 82 A.D.2d 474, 442 N.Y.S.2d 67 (2d Dep't 1981) (lead agency failed to prepare EIS).

which does not affect permit issuance is by definition not material or relevant.\textsuperscript{242}

To raise a disputed issue of fact, a party must offer competent testimony which runs counter to the applicant's assertions in its application and in the DEIS and affirmatively identify specific grounds to support the lead agency in denying the application or imposing significant conditions on the requested permit.\textsuperscript{243} The party seeking to show that an issue is substantive and significant has the burden of persuasion on that issue.\textsuperscript{244} If agency staff has evaluated the issues in an application submitted to EnCon and not objected to the issuance of the requested permit, the subsequent review and acceptance of the application is comparable to that which is given to uncontroverted applications not subject to a hearing.\textsuperscript{245}

2. The Issues Conference

The issues conference, although not a mandatory procedure for all lead agencies, is utilized by EnCon as a means of ensuring a fair and efficient preliminary review of issues identified by agency staff and intervenors-objectants.\textsuperscript{246} The purpose of the issues conference is to

\textsuperscript{242} See infra notes 249-53 and accompanying text.
\textsuperscript{243} Halfmoon Water Improvement Area No. 1, N.Y. State Dep't of Env'tl. Conserv. Dec. 2 (Apr. 2, 1982).
\textsuperscript{244} Id.
\textsuperscript{246} Wilmorite Inc.: Rotterdam Square N.Y. Dep't of Env'tl. Conserv. Dec. (Oct. 7, 1981) (interim decision). In Wilmorite, the Commissioner stated:

To meet the dual requirements of SEQR[A] and SAPA in a fair and efficient manner, the Department has chosen to bifurcate or separate its treatment of EIS-related issues between those that are likely to affect permit issuance and those that are not. The former will be subjected to the rigors of the adjudicatory process to develop responses for the FEIS, the latter will not. The bifurcation is accomplished . . . by a legislative hearing upon the DEIS coupled with an opportunity for the parties to assert what issues they contend should be in the former category, followed by a determination by the ALJ.

\textit{Id.} at 4. \textit{See also} Letter from EnCon to counsel representing Miracle Mile, Inc., (July 12, 1979). The letter states:

While it can be argued that a legislative-type hearing on SEQR[A] issues could be useful in determining the adequacy of a draft [environmental] impact statement, nevertheless for this Department the issues of substantive importance within that EIS, together with those in the related [permit] application, generally require the more detailed review which cross examination yields, especially in view of the need for a sufficient basis for making the findings required by 6 NYCRR 617.9 and for fully uncovering the "state of the art" within the technical disciplines involved.

\textit{Id.} at 2.
narrow and define the scope of the issues as subjects for the adjudicatory hearing. Before an adjudicatory hearing may be commenced, however, the party that seeks the hearing has the burden of persuading EnCon that the identified issues are substantive and significant. To raise substantive and significant issues, a party must be able to show contested facts significant enough to step over a "threshold requirement of materiality." The assertions must be based on fact and supported by proof. The existence of such a requirement means that the intervenor-objectant must be able to distinguish subjective from objective factors and to recognize quality of proof as it relates to particular issues. Even if the administrative law judge is not as rigorous in excluding evidence as a judge in a plenary trial, there is no essential difference as to what constitutes relevance and materiality. In order to carry its burden, the party must make a showing sufficient to require "reasonable minds to inquire further." While such a burden of persuasion is more easily carried than the applicant's substantially greater burden of proof in establishing its entitlement to a permit, it is by no means negligible. An adjudicatory hearing on a particular issue will be warranted where the intervenor-objectant

247. Oneida County's Energy Recovery Facility, N.Y. State Dep't of Envtl. Conserv. Dec. 1 (July 27, 1982) (interim decision) (intervenor-objectant should not have to definitively decide upon particular expert to substantiate allegations made at conference, but assertion should arise from opinions offered by qualified witnesses).


251. Vermont Yankee, 435 U.S. at 554 (quoting administrative decision of Nuclear Regulatory Commission to the effect that such a burden is not to be equated with civil litigation concept of a prima facie case). The Supreme Court concluded that such a standard does not place an unduly heavy substantive burden on intervenors-objectants. Id.; accord Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269, 271 (8th Cir.), cert. denied, 449 U.S. 836 (1980) (to establish substantial environmental issue, intervenor-objectant must allege facts ignored by agency which, if true, would constitute significant impact on environment).

252. Vermont Yankee, 435 U.S. at 553 (intervenor-objectant cannot, for example, merely point out that a possibly significant effect may result without showing how or why).
offers specific and affirmative proof which could result in either permit denials or significant modifications to the proposed action.\textsuperscript{253}

Cross-examination is not available as of right in the issues conference.\textsuperscript{254} The lead agency may permit it, however, where the intervenor-objectant is able to make a credible showing that a defect exists in the application which is likely to affect permit issuance in a substantial way.\textsuperscript{255}

In ruling upon whether the intervenor-objectant has met its burden of persuasion, the administrative law judge will consider its arguments and offers of proof as well as the application documents and EnCon's expertise in the matter.\textsuperscript{256} The burden of persuasion cannot be met by merely presenting immaterial and irrelevant testimony\textsuperscript{257} such as: general opposition to a proposed action,\textsuperscript{258} opposition to the proposed action on aesthetic and economic grounds,\textsuperscript{259} disagreement with the technical analyses and conclusions independently made by experts for the applicant and agency staff,\textsuperscript{260} identification of important information without showing its relevance to the ultimate issues before the decision-makers,\textsuperscript{261} reliance upon scientific articles without establishing the relevance of the article to environmental or permit issues,\textsuperscript{262} and disagreement with applicant's preferred alternative

\textsuperscript{253} See, e.g., Halfmoon Water Improvement Area No. 1, N.Y. State Dep't of Envtl. Conserv. Dec. 2 (Apr. 2, 1982) ("[i]n situations where the Department Staff have reviewed an application and offer no objection to the issuance of a permit, the burden of persuasion that substantive and significant issues exist is on the intervening parties"). See also, N.Y. ENVTL. CONSERV. LAW. § 70-0119(1) (McKinney Supp. 1982-1983)(determination to convene a public hearing based in part on "reasonable likelihood that a permit applied for will be denied or can be granted only with major modifications to the project . . . ").

\textsuperscript{254} Id; Wilmorite Inc.: Rotterdam Square, N.Y. State Dep't of Envtl. Conserv. Dec. 3 (Oct. 7, 1981) (interim decision) (intervenors have right to cross-examine on those issues in their particular areas of concern which have been identified for adjudication).

\textsuperscript{255} Halfmoon Water Improvement Area No. 1, N.Y. State Dep't of Envtl. Conserv. Dec. 2 (Apr. 2, 1982).

\textsuperscript{256} Id.

\textsuperscript{257} [1981] 6 N.Y.C.R.R. § 624.7(b)(9).

\textsuperscript{258} [1981] 6 N.Y.C.R.R. § 621.7(b).


without producing affirmative evidence to support the viability of another alternative.\textsuperscript{263}

The consequence of failing to prove the existence of disputed facts sufficient to induce reasonable minds to inquire further is that the lead agency will proceed immediately to decision-making. The existence of substantive and significant issues, however, delays decision-making. As a practical matter, the applicant wants to accelerate approval, whereas intervenors-objectants frequently seek to retard the review process. This is illustrated by two recent EnCon applications. In \textit{Pyramid Crossgates Company},\textsuperscript{264} the Commissioner concluded that he needed additional information relating to certain mitigation measures. He invited the applicant to submit further information after the public adjudicatory hearing\textsuperscript{265} and stated that he would only reconvene the hearing if the submissions raised substantive and significant issues.\textsuperscript{266} The submissions did not raise any qualifying issues. On judicial review, intervenors-objectants argued that the decision not to reconvene the adjudicatory hearing was illegal, arbitrary and capricious and an abuse of discretion because it constituted a mid-review change of procedure.\textsuperscript{267} In dismissing the petition, the court observed that there could be no basis for disturbing the Commissioner's practical construction of the regulatory procedures.\textsuperscript{268}

In the second application, the applicant sought an EnCon permit after the lead agency had already issued an FEIS.\textsuperscript{269} Over the applicant's objection, the administrative law judge ruled that an alternative proposed by intervenor-objectant warranted review in an adjudicatory hearing.\textsuperscript{270} The applicant, supported by agency staff, argued that it would be improper for EnCon to convene an adjudicatory hearing to reconsider SEQRA-related issues, although it was conceded that EnCon was authorized to convene a hearing on permit-related issues.\textsuperscript{271} The applicant further argued that to reconsider such issues

\begin{itemize}
\item \textsuperscript{263} See Halfmoon Water Improvement Area, No. 1, N.Y. State Dep't of Envt'l Conserv. Dec. 3 (Apr. 2, 1982).
\item \textsuperscript{264} N.Y. State Dep't of Envt'l Conserv. Dec. (Nov. 28, 1980).
\item \textsuperscript{265} Id. at 4.
\item \textsuperscript{266} Id. at 5.
\item \textsuperscript{268} Id. at 941.
\item \textsuperscript{269} Town of Marbletown, N.Y. State Dep't of Envtl. Conserv. Dec. (Oct. 21, 1982) (interim decision).
\item \textsuperscript{270} Id. at 1.
\item \textsuperscript{271} Id.
\end{itemize}
would be duplicative and would undermine the integrity of the lead agency.\textsuperscript{272} The Commissioner disagreed with these arguments and held that SEQRA imposes a substantive obligation on EnCon to review even those projects which have been the subject of an FEIS.\textsuperscript{273} EnCon is obligated as a matter of law to develop an adjudicatory record for its decision-making processes where intervenors-objectants to an EnCon permit hearing raise substantive and significant issues with respect to alternatives in the FEIS that may represent a less environmentally damaging alternative while achieving the purpose of the action.\textsuperscript{274}

Permits will be issued if there are no staff objections and the intervenor-objectant is unable to offer sufficient and reasonable proof to support its contention that the applicant is not entitled to permits.\textsuperscript{275} Where, for example, participants raise questions about health problems associated with the proposed project or activity but are unable to offer supporting proof of their generalized concerns, the lead agency must make its decision on the basis of the credible scientific testimony presented.\textsuperscript{276}

3. Agency Review Procedures

The administrative law judge's decision concerning the necessity of an adjudicatory hearing is subject to interagency review upon appropriate application and submission of argument to the Commissioner.\textsuperscript{277} Whether an issue is substantive and significant does not depend on its characterization by the participants. For example, the potential impact of a project on traffic depends upon the magnitude of risk and location of the project and not upon traffic as a subject matter.\textsuperscript{278} In Kozy Hollow Camp Ground-Marina,\textsuperscript{279} the administra-

\textsuperscript{272} Id.
\textsuperscript{273} Id. at 2.
\textsuperscript{274} Id.
\textsuperscript{276} See Consolidated Edison Co., N.Y. State Dep't of Envtl. Conserv. Dec. (Sept. 14, 1983). Referring to health effects from emission of sulfur dioxide (SO\textsubscript{2}), the Commissioner stated that the question is the subject of ongoing scientific studies which have not resulted in definitive thresholds. If and when the scientific community reaches a consensus, the existing national air quality standards will likely be amended and SO\textsubscript{2} emissions will have to be adjusted accordingly. Id. at 9 n.1.
\textsuperscript{277} [1981] 6 N.Y.C.R.R. § 624.6(d).
\textsuperscript{278} See Pyramid Crossgates Co., N.Y. State Dep't of Envtl. Conserv. Dec. (Sept. 18, 1981) (Town of Guilderland, outside the City of Albany; traffic issues referred to
ative law judge ruled that the disturbance to neighbors created by cars and trailers would not be a significant issue. In contrast, in *Pyramid Crossgates Company*, traffic and related considerations for a project located in a suburban community and near major arterial roadways were critical to approval and therefore subject to the adjudicatory process.

EnCon does not have to justify denying an adjudicatory hearing. Rather, the intervenor-objectant must demonstrate it is warranted by making an affirmative showing that specific adverse effects are likely to occur despite technical compliance with the law. In *Multi-Town Solid Waste Management*, intervenors-objectants challenged the size of the project by offering to produce named experts to testify that the proposed facility was overdesigned and would, therefore, be uneconomical. An adjudicatory hearing appeared to be warranted under those circumstances, because adverse environmental impacts had been identified and optimal mitigation measures could still result in loss of natural resources. The Commissioner reversed the administrative law judge and ruled that the facility size issue did warrant adjudication. The fact that intervenors-objectants failed to allege non-compliance with permit criteria was not dispositive on the issue of

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Department of Transportation for resolution); H.O.M.E.S. v. Urban Develop. Corp., 69 A.D.2d 222, 418 N.Y.S.2d 827 (4th Dep't 1979) (downtown Syracuse; parking and traffic issues).


280. Id. The project was located in Port Bay, Lake Ontario, Wayne County, New York.


282. Id; see also Pyramid Crossgates Co., N.Y. State Dep't of Envtl. Conserv. Dec 3 (Nov. 28, 1980) ("[w]hile it has been demonstrated that many of the impacts ... can be mitigated ... air quality and traffic" have not).


284. Id.


287. Id. Although intervenor-objectant identified a number of project alternatives, it proffered proof of only one. On interagency appeal, the Commissioner affirmed the administrative law judge in limiting the suggested alternatives to the one for which proof was offered. Id. at 3.

288. Id. at 4-5.
compliance, since that determination rests exclusively with the lead agency.

C. The Adjudicatory Hearing

The applicant for permits from EnCon is entitled to an adjudicatory hearing where issues have been raised which, if unresolved, may result in permit denial or the imposition of significant permit conditions. To satisfy its burden of proof that it is entitled to the requested permits, the applicant must support its position with appropriate expert opinion, scientific authorities, empirical or experimental data and explanatory material. The hearing is intended to satisfy due process requirements and not as a forum for the adjudication of

289. Id. at 5.
290. Cf.: Wilmorite, Inc.: Rotterdam Square, N.Y. State Dep’t of Envtl. Conserv. Dec. 3 (Oct. 7, 1981) (interim decision) (under its statutory obligations, EnCon “cannot and will not turn over these ultimate regulatory responsibilities to an intervenor, and must proceed to make its own decisions on the basis of the record as a whole and as supported by substantial evidence”).
291. Id. The Commissioner has stated that EnCon must conduct an adjudicatory hearing under such circumstances in accordance with § 70-0119 of the Environmental Conservation Law and the State Administrative Procedure Act, articles 3 and 4. Id. at 2.
293. Wilmorite, Inc.: Rotterdam Square, N.Y. State Dep’t of Envtl. Conserv. Dec. 3 (Oct. 7, 1981) (interim decision) (adjudicatory hearing procedure is necessary because it is applicant who is primarily affected by prospect of permit denial or imposition of significant permit conditions); see Buttrey v. United States Corps of Engineers, 690 F.2d 1170 (5th Cir. 1982), cert. denied, 103 S.Ct. 2087 (1983)—(applicant applied for permit from Army Corps of Engineers under 404(a) of Clean Water Act, 33 U.S.C. 1344(a)(1976)). The Corps denied the application at the initial scoping stage. The applicant argued that he was denied his constitutional and statutory rights because the Corps refused to grant him an adjudicatory hearing and that the administrative record was incomplete. The court held that the 404 permit did not require such a hearing. Where the decision is discretionary with the agency “absent fairly unusual circumstances . . . the Corps should not be required . . . to grant requests for trial-type hearings.” Buttrey, 690 F.2d at 1178. This analysis, however, was not intended to answer the issue of arbitrary and capricious decision-making. See also Hanley v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973). If the administrative record is truly incomplete, not because of the failure to convene a trial-type hearing but because there has been insufficient input on an issue which if unresolved could lead to permit denial, the matter should be remanded for further consideration, but not necessarily for an adjudicatory hearing. Id. at 835. See also [1981] 6 N.Y.C.R.R. § 624.5 (rights of parties). Section 624.5(b) provides that a party to an adjudicatory hearing shall have the right to present relevant written and oral argument on issues of law and fact, to present relevant evidence and to cross-
The decision to convene an adjudicatory hearing is neither a prejudgment of the outcome of the review process nor a punishment of the applicant for filing the permit request. The purpose of the adjudicatory hearing is to ensure that the applicant has a "clear picture of what its burden is so that the ultimate decision is environmentally sound, fair and legally defensible." The scope of the adjudicatory hearing is limited to the resolution of the substantive and significant issues identified in the issues conference.

The applicant's burden of proof does not relieve the intervenor-objectant from demonstrating that the existence of facts which it raised in the issues conference actually warrants permit denial or project modification by incorporating conditions to any permit approval. Thus, while the Uniform Procedure Act requires convening a public hearing to resolve substantial and significant issues, it is still "incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, [and] so that it alerts the agency to the intervenor's positions and contentions."

D. Substantial Evidence

The EnCon regulations require the lead agency to make its decision on the basis of the record as a whole and supported by substantial evidence of other parties. See also Izaak Walton League of America v. Marsh, 655 F.2d 346, 361 (D.C. Cir., 1981). cert. denied, 102 S.Ct. 657 (1982). In Izaak Walton, the court held that a party does not have a constitutional right to an adjudicatory hearing because the protections of the Due Process Clause are extended only when a 'property' or 'liberty' interest has been threatened, and that generalized environmental concerns do not constitute a property or liberty interest. Id. at 361.

296. Id.
297. See Costle v. Pacific Legal Fund, 445 U.S. 198, 214 (1980) (party seeking a hearing required to meet threshold burden of tendering evidence suggesting need for such hearing). Having raised a triable issue, the party must offer specific evidence to support its position. Seacoast Anti-Pollution League v. Nuclear Regulatory Comm'n, 598 F.2d 1221 (1st Cir. 1979). See also [1981] 6 N.Y.C.R.R. § 624.7(a)(6) (evidence will be confined to that which is relevant to the issues); Id. § 624.7(b)(9) (irrelevant, unduly repetitious, tangential or speculative testimony or argument will be precluded).
The record is the totality of evidence offered by all of the participants. In satisfying its burden of proof, applicant has no obligation to convince any intervenor-objectant of its entitlement to permits, nor must it demonstrate such entitlement on the basis of its proof alone. The applicant is entitled to the issuance of permits where, based on the totality of the evidence and regardless of the source of proof, the proposed project or activity is or can be made environmentally sound.

IV. The Decision-Making Process

A. Statutory/Regulatory Requirements

Decision-making on environmental issues in connection with the proposed project or activity is vested exclusively in the lead agency. Involving agencies may act only after the lead agency has made an affirmative finding. In addition, only a permit-issuing agency may act as a lead agency. This section will introduce the basic procedural requirements for lead agency decision-making and the statutory/regulatory commands of SEQRA which impose on the lead agency a duty to approve only projects which are environmentally sound. The opening sections review the requirements for the lead agency to file an adequate FEIS, make affirmative findings and undertake a balancing analysis of environmental, social and economic considerations. The closing sections examine the ways in which the lead agency exercises its statutory authority.

301. The N.Y. STATE ADMINISTRATIVE PROC. ACT § 306 (McKinney Pamphlet 1982) requires all decisions and determinations to be made upon consideration of the record as a whole and “as supported by and in accordance with substantial evidence.” See 5 B. Mezines, J. Stein, & J. Gruff, Administrative Law § 51.02 (1983).
303. Id. at 7.
304. Id. See also Consolidated Edison Co., Dep’t of Envtl. Consrv. Dec. (Sept. 14, 1983) (project approved, but not in form proposed).
305. N.Y. ENVTL. CONSERV. LAW § 8-0111(8) (McKinney Supp. 1982-1983); [1982] 6 N.Y.C.R.R. § 617.6(d) (designation of lead agency); id. § 617.9 (decision-making and finding requirements).
1. Explicit Findings that the Requirements of SEQRA Have Been Met

At the conclusion of the environmental review/permit request process the lead agency must decide whether the proposed project or activity is environmentally sound. If the lead agency determines that the proposed project or activity is unsound as proposed, the lead agency may either deny the permits requested by the applicant or disapprove the applicant’s preferences. Where the lead agency approves the applicant’s project or activity it must make explicit findings that the requirements of SEQRA have been met. Its finding must state that the adverse environmental effects revealed during the review will be minimized or avoided to the maximum extent practicable. Moreover, this result must be attained by utilizing reasonable alternatives and be consistent with economic and social consider-

308. See Wilmorite, Inc.: Rotterdam Square, N.Y. State Dep’t of Envtl. Conserv. Dec. 7 (Oct. 7, 1981) (interim decision) (“[t]he primary function of the environmental review process under SEQRA is to fashion environmentally sound projects through public participation”).

309. Although not specifically authorized by SEQRA, an aggrieved participant in the environmental review process has the right to challenge the lead agency decision by judicial review under CPLR Article 78. Dairylea Coop. v. Walkley, 38 N.Y.2d 6, 10, 339 N.E.2d 865, 868, 377 N.Y.S.2d 451, 455 (1975) (fundamental tenet of our system of remedies is that when government agency seeks to act in manner adversely affecting a party, judicial review of that action may be had).


312. Id. The applicant cannot avoid SEQRA by proposing a project or activity which will be constructed in stages, in which any one stage may have no significant effect on the environment, but cumulatively the effect will be consequential. See Kozy Hollow Campground-Marina, N.Y. State Dep’t of Envtl. Conserv. Dec. 2 (July 18, 1983) (cumulative impacts of proposed action must be addressed in record in order to reach informed decision on whether or not project should be approved); Save the Pine Bush, Inc. v. Planning Board of Albany, 96 A.D.2d 986, 466 N.Y.S.2d 828 (3d Dep’t 1983) (failed to address the cumulative impacts). In Save the Pine Bush, the “lead agency” issued a negative declaration and the decision maker approved the project even though the project met Type I requirements in the following ways: it was substantially a 250-unit residential development (the application was for 246 units) ([1978] 6 N.Y.C.R.R. § 617.12[b][5][iii]); was substantially contiguous to a publicly designated open space and exceeded the 25% threshold ([1978] 6 N.Y.C.R.R. § 617.12[b][10]); was part of a multiphase project with cumulative impacts ([1982] 6 N.Y.C.R.R. § 617.11[a][11],[b][1]); and was one of several separate projects with cumulative impacts ([1982] 6 N.Y.C.R.R. § 617.11[a][11],[b][1]). Id. at 987, 466 N.Y.S.2d at 831. See also Onondaga Landfill Systems, Inc. v. Flacke, 81 A.D.2d 1022, 440 N.Y.S.2d 788 (4th Dep’t 1981) (in issuing positive declaration, EnCon properly took into account potential effect of proposed subdivision as part of its consideration of environmental impact of mining operation).
If necessary, it may achieve SEQRA's goals by "incorporating as conditions . . . those mitigative measures identified as practicable during the review process." Although the statutory language may sound ritualistic, it imposes on the lead agency the affirmative duty to ensure that the project is environmentally sound. The lead agency has the authority to discharge its duty in one of several ways: applications for permits may be denied or granted, granted in part or granted with significant conditions. There is no statutory requirement that the lead agency approve the action in the proposed form. Further, the courts have not been hospitable to lead agency decisions based on incomplete knowledge of environmental risks or scientifically suspect analysis of likely impacts. Even

313. [1982] 6 N.Y.C.R.R. § 617.9(c)(2).
314. Id.§ 617.9(c)(2)(ii).
315. See, e.g., Save the Pine Bush, Inc., 96 A.D.2d 986, 987, 466 N.Y.S.2d 828, 831 (court has set standard to prevent SEQRA from becoming one more step in "bureaucratic maze" wherein fundamental impact requirements are circumvented).
316. See Town of Henrietta v. Department of Envtl. Conserv., 76 A.D.2d 215, 430 N.Y.S.2d 440 (4th Dep't 1980). The policies and goals of SEQRA are achieved by the imposition of both procedural and substantive requirements upon agency decision-making. Id. at 220, 430 N.Y.S.2d at 445. The law does not require “particular substantive results in particular problematic instances”. Id. at 222, 430 N.Y.S.2d 447.
317. See infra notes 389-92 and accompanying text. See also Power Authority of New York v. Flacke, 94 A.D.2d 69, 464 N.Y.S.2d 252 (3d Dep't), rev'd, N.Y.L.J. Dec. 8, 1983, at 24, col. 5 (Commissioner's denial of certification for proposed hydroelectric plant, based solely on water quality standards affirmed; did not need to consider social or economic factors or need for new power plants).
318. See infra notes 405-20 and accompanying text.
319. See infra notes 421-32 and accompanying text. The authority of the lead agency to impose permit conditions which meet the test of reasonableness was established in Town of Henrietta v. Department of Envtl. Conserv., 76 A.D.2d 215, 430 N.Y.S.2d 440 (4th Dep't 1980).
320. Consolidated Edison Co., N.Y. State Dep't of Envtl. Conserv. Dec. (Sept. 14, 1983). The Commissioner approved the applicant's request to convert two plants to coal burning, however, in a manner different from that proposed in the application. Id. at 18. Moreover, the approvals were conditioned upon the applicant identifying a landfill facility for disposal of solid wastes. Id. at 15.
321. See, e.g., Centre Square Ass'n v. Corning, 105 Misc.2d 6, 430 N.Y.S.2d 953 (Sup. Ct. Albany County 1980) (although lead agency had no evidence to support its determination, it issued a negative declaration relying only upon applicant's submission and ignored public input).
322. See, e.g., Action for Rational Transit v. Westside Highway Project, 536 F. Supp. 1225 (S.D.N.Y. 1982). Action for Rational Transit involved the "Westway" project in Manhattan, which was intended to replace the southern portion of the deteriorating Westside Highway. A biological survey prepared in connection with the DEIS initially concluded that the inter-pier area was a "biological wasteland" and that the project would have no impact on fisheries in the Hudson River. A subsequent study reached the conclusion that the inter-pier area was a highly signifi-
though the courts may not second-guess an agency decision supported by substantial evidence, they have insisted that lead agencies comply literally with the procedural requirements of SEQRA. As a result, lead agency decisions have been set aside even where there was some evidence of substantial compliance. The lead agency acts not

cant and productive habitat for fish, including striped bass. The Army Corps of Engineers suppressed the study and approved the requested permit. The district court made the following observations:

The Corps had no right to swallow up these issues in the privacy of its bosom. It was required to make fair and open disclosure not only of the available facts, but of the responsible scientific views as to the risks involved in the loss of this habitat.

Id. 536 F. Supp. at 1253.


324. Glen Head-Glenwood Civic Council v. Town of Oyster Bay, 109 Misc.2d 376, 438 N.Y.S.2d 715 (Sup. Ct. Nassau County 1981), aff’d, 88 A.D.2d 484, 453 N.Y.S.2d 732 (2d Dep’t 1982) (rezoning for highest density residential use granted on erroneous assumption that neighboring community had approved use of its sewage treatment plant by proposed condominium project). The court stated:

[I]t is apparent that the outside public agencies involved relied heavily on the assurance in the impact statement that a sewer hook-up commitment had been received from Glen Cove. It is equally obvious that review of the alternative sewage disposal plans by other agencies was muted because of the desirability of the Glen Cove hook-up. We agree, then, with Special Term’s conclusion that as a result of this failure to communicate the vital issue of the sewage was passed over as having been fully satisfied and the attention of the concerned agencies [was] diverted elsewhere.

Id. at 495, 453 N.Y.S.2d at 739 (citations omitted); see also H.O.M.E.S., 69 A.D.2d at 232, 418 N.Y.S.2d at 832 (applicant omitted discussion of parking and traffic flow).

325. Matter of Rye Town/King Civic Ass’n v. Town of Rye, 82 A.D.2d 474, 442 N.Y.S.2d 67 (2d Dep’t 1981). In Rye Town, the lead agency issued a negative declaration, although the project met the statutory criteria for a Type I action. The court held that agencies must comply with both the letter and spirit of SEQRA before they will be found to have discharged their responsibilities. Id. at 480-81, 442 N.Y.S.2d at 71. See also Schenectady Chemicals v. Flacke, 83 A.D.2d 460, 463, 446 N.Y.S.2d 418, 420 (3d Dep’t 1981) (substance of SEQRA cannot be achieved without
only for itself; it also has the special responsibility of overseeing the adequate identification of impacts and development of associated mitigation through the EIS process for the benefit of all other decision makers.\textsuperscript{326}

If the applicant’s proposal meets the requirements of SEQRA, it is entitled to an affirmative finding by the lead agency.\textsuperscript{327} The mere fact that the proposed action is controversial is not sufficient grounds for disapproval.\textsuperscript{328} If, on the other hand, the lead agency finds that the applicant has not met the SEQRA requirements, the applicant is not entitled to permits for the proposed action from any agency.\textsuperscript{329} The applicant is, however, entitled to know the shortcomings of its application.\textsuperscript{330} If the lead agency makes an affirmative finding, it must also

its procedure; therefore, attempts by agencies to vary procedural prerequisites are not permitted since such deviations undermine the law’s express purposes); Glen Head-Glenwood Civic Council v. Town of Oyster Bay, 88 A.D.2d 484, 490-91, 453 N.Y.S.2d 732, 737 (SEQRA requires literal compliance; substantial compliance will not do); cf. Salmon v. Flack, 113 Misc.2d 640, 449 N.Y.S.2d 610 (Sup. Ct. Erie County 1982) (court vacated EnCon’s decision granting requested variance because application was incomplete).

After the fact compliance with the requirements of SEQRA will not cure an initial failure to comply. Tri-County Taxpayers Assoc., Inc. v. Town Board of Queensbury, 55 N.Y.2d 41, 46, 432 N.E.2d 592, 594, 447 N.Y.S.2d 699, 701 (1982); Webster Assocs. v. Webster, 59 N.Y.2d 220, 228, 451 N.E.2d 189, 192, 464 N.Y.S.2d 431, 434 (1983) (omission of required item from DEIS cannot be cured by simply including item in FEIS).


327. See, e.g., Ass’n for the Dev. of a Healthy Oneonta Community, Inc. v. Kirkpatrick, 87 A.D.2d 934, 450 N.Y.S.2d 78 (3d Dep’t 1982) (reasonable determination made in accordance with regulatory criteria); Town of Poughkeepsie v. Flack, 105 Misc.2d 149, 431 N.Y.S.2d 951, (Sup. Ct. Dutchess County 1980), aff’d, 84 A.D.2d 1, 445 N.Y.S.2d 233 (2d Dep’t 1981) (EnCon’s issuance of permit does not relieve applicant from local zoning requirements); Heritage Hills Waterworks Corp., N.Y. State Dep’t of Envtl. Conserv. Dec., Report by administrative law judge (Jan. 28, 1980). In Heritage Hills, the administrative law judge concluded that the modifications and conditions will ensure that the applicant’s plans will provide the proper and safe construction of all work, proper protection of the supply and watershed from contamination and the proper treatment of such additional water supplies as may be required. Id. at 10.


329. [1978] 6 N.Y.C.R.R. § 617.3(a) (no agency shall approve an action until it is shown to comply with SEQRA).

address the corollary issue of permits. Where the affirmative finding can only be made by modifying the project either through the imposition of significant conditions or by approving alternatives to the applicant's preference, the lead agency must specifically state its reasons for imposing the conditions or approving alternatives.

2. The Final Environmental Impact Statement

To be adequate and sufficient, the FEIS must contain an appropriately detailed review of the relevant and material facts developed during the review process. The FEIS is used by the lead agency initially, and thereafter by each involved agency, as a basis for fulfilling its statutory decision-making obligations. Although the FEIS need not be prepared by the lead agency, it is always prepared for the lead agency. If it is prepared under contract or by the applicant, both the form and adequacy of the submission must be approved by the lead agency before it is acceptable for filing. An EnCon FEIS includes the hearing report prepared by the administrative law judge. The hearing report summarizes the positions of each participant and
makes findings of fact and conclusions based on the record.\textsuperscript{337} Alternatively, the FEIS may also be an assembly of the DEIS, suitably revised to include any other reasonable alternatives and mitigation measures developed during the course of the review, together with summaries of significant comments by intervenors-objectants and responses by the applicant and lead agency.\textsuperscript{338}

Whether the author is a lead agency, a contractor or the applicant, the FEIS must address the environmental concerns of intervenors-objectants, identify essential issues raised by participants and evaluate reasonable alternatives.\textsuperscript{339} An FEIS must consider the proposed alternatives and mitigation measures and evaluate their comparative merits in a coherent and understandable presentation.\textsuperscript{340} It will be deficient if it omits significant information developed during the course of the review.\textsuperscript{341} A deficient FEIS cannot be made adequate by showing that the information relied upon by the lead agency is in the record.\textsuperscript{342} Since the FEIS is intended to serve other decision-makers, it must provide them with sufficient discussion and analysis of the environmental effects of both the proposed action and alternatives to assist their decision-making processes.\textsuperscript{343}

The FEIS has been called the "teeth" of SEQRA.\textsuperscript{344} While it nominally serves an educational purpose\textsuperscript{345} and is intended to be a repository of information,\textsuperscript{346} it is more than a mere disclosure document.\textsuperscript{347}

\begin{footnotes}
\begin{itemize}
\item \textsuperscript{337} [1981] 6 N.Y.C.R.R. § 624.7(d) (where EnCon is lead agency, DEIS and ALJ's report shall constitute FEIS).
\item \textsuperscript{338} \textit{Id}. § 617.14(h).
\item \textsuperscript{339} \textit{Id}. § 617.14(f).
\item \textsuperscript{340} \textit{Id}. § 617.14(c).
\item \textsuperscript{341} National Resources Defense Council, Inc. v. Callaway, 524 F.2d 79, 92-94 (2d Cir. 1975) (conclusory statements are generally inadequate for decision-making purposes).
\item \textsuperscript{342} Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068, 1072-74 (1st Cir. 1980).
\item \textsuperscript{343} \textit{Id}. at 1073-74.
\item \textsuperscript{344} See Biek v. Town of Webster, 104 Misc.2d 852, 864, 429 N.Y.S.2d 811, 820 (Sup. Ct. Monroe County 1980).
\item \textsuperscript{345} See Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974) (EIS is in compliance with NEPA when its form, content and preparation provide decision-makers with disclosure sufficiently detailed to aid in substantive decision whether to proceed with action in light of its environmental consequences); Environmental Defense Fund v. Froehlke, 473 F.2d 346, 351 (8th Cir. 1972) (EIS should be sufficiently detailed to enable those who did not have a part in its preparation to critically evaluate agency's process of decision-making).
\item \textsuperscript{346} See [1982] 6 N.Y.C.R.R. § 617.14(f).
\end{itemize}
\end{footnotes}
The court's insistence that SEQRA mandates literal compliance emphasizes that both the DEIS and the FEIS are regarded as action-forcing devices.\(^{348}\) It fulfills its substantive purpose by focusing attention on the benefits and burdens of the proposed action, its environmental impacts and the mitigation measures that will be incorporated into the applicant's final design for project approval.\(^{349}\)

An involved agency is not authorized to approve a proposed action until it has considered the FEIS.\(^{350}\) Moreover, neither the lead agency nor an involved agency may approve an application for a permit outside its jurisdiction.\(^{351}\) On the other hand, an involved agency may review the application or undertake feasibility studies during the review process to determine whether the applicant has or can comply with technical requirements, provided that such action does not commit the involved agency to approval.\(^{352}\)

3. **The Balancing Analysis**

The lead agency must give appropriate weight to both environmental and nonenvironmental values in reaching its decision.\(^{353}\) The EnCon regulations require the lead agency to make its decision based on a "suitable balance of social, economic and environmental factors."\(^{354}\)

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\(^{348}\) Id. at 221, 440 N.Y.S.2d at 445; accord Council on Environmental Quality regulations, 40 C.F.R. § 1500.1(a)(1982).

\(^{349}\) [1982] 6 N.Y.C.R.R. § 617.9(c)(2)(i), (ii).

\(^{350}\) [1982] 6 N.Y.C.R.R. § 617.9(c)(1).

\(^{351}\) Webster Assocs. v. Webster, 85 A.D.2d 882, 446 N.Y.S.2d 955 (4th Dep't 1981), rev'd, 59 N.Y.2d 220, 445 N.Y.S.2d 918, 431 N.Y.S.2d 431 (1983). The Court of Appeals found that the lead agency's action was taken in violation of the town's zoning ordinance. The Planning Board had already disapproved the application and that determination foreclosed further consideration of the proposal by the Town Board. See also Town of Poughkeepsie v. Flacke, 105 Misc.2d 149, 431 N.Y.S.2d 951 (Sup. Ct. Dutchess County 1980), aff'd, 84 A.D.2d 1, 445 N.Y.S.2d 233 (2d Dep't 1981). The Town of Poughkeepsie contended that the Commissioner had exceeded his jurisdiction, because EnCon issued permits for a solid waste management facility with knowledge that the Town's zoning was incompatible with such a facility. In his decision, however, the Commissioner emphasized that SEQRA authorized him to issue permits where the applicant demonstrated compliance with the law. He stated that he was not adjudicating the legality of a proposed use under laws not administered by EnCon, and concluded that his decision did not preempt the Town from enforcing its local zoning ordinance when it received the application. Id. at 5, 445 N.Y.S.2d at 235.

\(^{352}\) [1982] 6 N.Y.C.R.R. § 617.3(c).


Furthermore, the EnCon regulations emphasize that environmental factors are not intended to be the sole consideration. One court has stated that SEQRA requires a "rather finely tuned and systematic balancing analysis in every instance." These interpretations of SEQRA, however, do not mean that consideration of social and economic values can result in the disapproval of a proposed action which is found to be environmentally sound. Conversely, the applicant may not achieve approval by promoting possible public benefits while ignoring their environmental costs. To balance environmental and nonenvironmental values, a sound pragmatic rule is that the more valuable the affected environmental resources, or the greater the potential adverse environmental effect of the proposed project or activity, the more the lead agency must scrutinize the social and economic factors.

A decision based on a record with conflicting testimony does not inherently warrant denial of the permit or modification of the project. Scientists and experts may, and do, disagree in their analyses and conclusions. Moreover, although the concept may be contradictory when measured against the requirements in a plenary trial, the applicant's statutory burden of proof in the review process does not

that "economic or social effects are not intended by themselves to require preparation of an environmental impact statement").

356. Town of Henrietta, 76 A.D.2d at 223, 430 N.Y.S.2d at 447.
357. See infra notes 374-81 and accompanying text for discussion of cultural values.
358. Power Auth. of N.Y. v. Flacke, 94 A.D.2d 69, 464 N.Y.S.2d 252 (3d Dep't), rev'd, N.Y.L.J. Dec. 8, 1983, p. 24, col. 5, p. 25, col. 3 (Commissioner's concern is limited to compliance with water quality standards; he has "neither authority nor responsibility to engage in balancing economic, energy, environmental or other factors or to reflect public interest"); see also Sierra Club v. Sigler, 695 F.2d 957, 979 (5th Cir. 1983).
361. See Life of the Land v. Brinegar, 485 F.2d 460, 472 (9th Cir. 1973) (disagreement among experts will not serve to invalidate an EIS); Rella v. Berle, 59 A.D.2d 56, 60, 397 N.Y.S.2d 227, 230 (3d Dep't 1977) (while there was conflict of expert opinion on contested issue, there was substantial evidence in record to support administrative determination that, subject to conditions imposed, proposed project would not have adverse effect feared).
362. See supra notes 302-04 and accompanying text for discussion of proof requirements.
require it to establish entitlement to the requested permits on its own evidence alone.\textsuperscript{363}

\textbf{a. Land Use Considerations}

The lead agency may not assume burdens properly within the jurisdiction of other agencies.\textsuperscript{364} For example, EnCon cannot mediate land use issues raised by local interest groups\textsuperscript{365} or interfere with the determination of water districts.\textsuperscript{366} Decisions concerning non-environmental factors which are local in nature, including zoning configurations and long-term municipal planning, must be made in the community affected by the proposed project or activity.\textsuperscript{367} Where the applicant proves the proposed action complies with local zoning, however, and shows that the proposed action even represents a land use within the existing zoning category that is potentially far less damaging to the environment than other permitted uses, it is entitled

\textsuperscript{363} Wilmorite Inc.: Rotterdam Square, N.Y. State Dep't of Envtl. Conserv. Dec. 3 (Oct. 7, 1981) (interim decision). The applicant has no obligation to convince its critics that it is entitled to the issuance of permits. Moreover, the legislature entrusted to the lead agency the responsibility for determining whether an applicant is entitled to a permit. \textit{Id.} at 3. The law also prohibits the lead agency from delegating its responsibility. See, e.g., Glen Head-Glenwood Landing Civic Council, Inc. v. Town of Oyster Bay, 88 A.D.2d 484, 453 N.Y.S.2d 732 (2d Dep't 1982) (responsibility for SEQRA determination was improperly delegated to non-permit issuing agency especially established for that purpose). In \textit{Glen Head}, the Court held that the "delegation of lead agency decision-making obligations is inconsistent with the SEQRA review and consideration functions." \textit{Id.} at 492, 453 N.Y.S.2d at 738. See also Kleist v. City of Glendale, 56 Cal. App.3d 770, 128 Cal. Rptr. 781 (1976). The court of appeals rejected the Glendale City Counsel's delegation of duties to its Environmental and Planning Board on the ground that it "insulates the members of the council from public awareness and possible reaction to the individual members' environmental and economic values." \textit{Id.} at 779, 128 Cal. Rptr. at 787.

\textsuperscript{364} \[1982\] 6 N.Y.C.R.R. § 617.3(b). See Pyramid Crossgates Co., N.Y. State Dep't of Envtl. Conserv. Dec. (June 25, 1981) (final decision). The Commissioner stated that, "[w]hile it is true that SEQRA mandates agencies to avoid or minimize adverse environmental impacts before approving a project, efficiency in government mandates that agencies must recognize jurisdictional claims and defer to a specific jurisdictional claim of another agency." \textit{Id.} at 3.

\textsuperscript{365} Pyramid Crossgates Co., N.Y. State Dep't of Envtl. Conserv. Dec. 8 (June 25, 1981) (it is not EnCon's role to mediate local land issues).

\textsuperscript{366} Halfmoon Water Improvement Area No. 1, N.Y. State Dep't. of Envtl. Conserv. Dec. 3 (Apr. 2, 1982).

\textsuperscript{367} Miracle Mile Assocs., N.Y. State Dep't of Envtl. Conserv. Dec. 3 (Dec. 6, 1979) (EnCon will not "intrude its judgment . . . in matters which have properly been the subject of definitive local government determinations of patterns of land use through comprehensive planning and resulting in implementation of local development goals").
to an affirmative SEQRA determination by the lead agency absent proof of environmental damage.\textsuperscript{368}

b. Economic Values

There are two aspects to economic values: first, the issue of economic injury, and second, the issue of cost. As to the former, SEQRA is not intended to protect persons from economic injury due to competition.\textsuperscript{369} The effect of competition is not within the legitimate scope of inquiry in an adjudicatory proceeding, even though the proposed activity may have a foreseeably detrimental economic impact.\textsuperscript{370} The

\textsuperscript{368} See Concerned Citizens Against Crossgates v. Town of Guilderland Zoning Board of Appeals, 91 A.D.2d 763, 458 N.Y.S.2d 13 (3d Dep't 1982); Preservation Coalition, Inc. v. Pierce, 667 F.2d 851, 861 (9th Cir. 1982) (where federal project conforms to existing land use patterns, zoning or local plans, such conformity is evidence supporting finding of no significant impact).


\begin{quote}
Plaintiffs attack these conclusions arguing that the assessments should have and did not include considerations of socio-economic factors. Plaintiffs' primary concerns are economic; to wit, the increased unemployment in the Pueblo, Colorado area as a result of job losses . . . and the resultant negative effect on the economy as a whole in the community.

\textit{Such considerations, however, are not the primary concern of NEPA. The primary concern is the physical environmental resources of the nation.}
\end{quote}

\textit{Id.} at 1229 (emphasis added). In Multi-Town Solid Waste Management Facility, N.Y. State Dep't of Envtl. Conserv. Dec. 4 (Nov. 19, 1982), the Commissioner noted: "Economic considerations, such as cost, become a relevant factor in the decision-making process where optimum mitigation of environmental impacts still results in the loss of natural resources." Moreover, it "is at this point that social and/or economic considerations must be balanced against this degradation of the environment in order to fulfill the informed decision-making required by the SEQRA." \textit{Id.}

\textit{See} Pyramid Crossgates Co., N.Y. State Dep't of Envtl. Conserv. Dec. 5 (Sept. 18, 1981) (phased opening of the mall can work to benefit of existing retail operations by giving them time to observe and adjust their marketing strategies to offset economic impact of new facility).

\textsuperscript{370} City of Plattsburgh v. Mannix, Unrptd. Dec. (Sup. Ct. Clinton County 1979), \textit{aff'd on other grounds}, 77 A.D.2d 114, 432 N.Y.S.2d 910 (3d Dep't 1980). In rejecting the objectant's argument, the lower court observed that its decision is "painful because it is believed that most people fear urban decay more than they do the loss of an endangered species of wildlife." \textit{Id.} at 8. The court continued, "our nation has prospered under a free enterprise, competitive system. That system would become completely impotent if a building permit were to be denied upon the basis that the applicant's competitors might sustain an economic reversal or a particular geographical area might become less popular." \textit{Id. See also} City of Kingston v. Town
lead agency is not authorized to "intrude its judgment in matters which involve open competition in the free enterprise system of [the state's] economy."^371 On the other hand, where there are unacceptable environmental risks, promises of significant social and economic benefits will not result in a project's approval in the absence of practicable mitigation measures.^372 Cost considerations only become a relevant factor in the decision-making process where optimum mitigation of environmental impacts would still result in the loss of natural resources.^373

c. Cultural, Neighborhood and Community Values

Unless the threat to cultural values directly impacts on the physical environment, it will not be a basis for denial of a permit.^374 Such a rule is based on sound reasons. First, physical effects on the environment are more readily ascertainable and definable than cultural values.^375 Second, quality of life considerations are often too complex and

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of Ulster, Unrptd. Dec. (Sup. Ct. Ulster County 1980) (economic injury due to competition not protected under SEQRA). The Kingston Court summarized petitioner's argument as follows:

Petitioner's prime argument is that economic injury does give rise to standing, relying upon the direction in the Environmental Quality Review Act that 'social, economic, and environmental factors shall be considered together in reaching decisions on proposed activities'. . . . The fact that a reviewing agency or public corporation is to consider economic concerns in reaching a determination does not confer standing upon a municipal corporation whose only contact with the proposed project, and environmental review thereof, is economic competition.

Id. at 6.


372. See, e.g., Bio-Tech Mills, Inc., N.Y. State Dep't. of Envtl. Conserv., Rulings of the Administrative Law Judge 3 (Nov. 15, 1982) (loss of employment if plant has to close to comply with permit conditions).


374. Compare Goodman Group, Inc. v. Dishroom, 679 F.2d 182 (9th Cir. 1982) (permit to rehabilitate historic building granted) with Chelsea Neighborhood Ass'ns v. United States Postal Serv., 516 F.2d 378, 388 (2d Cir. 1975) (postal service enjoined from entering into contract for construction of vehicle maintenance facility for failure of EIS to consider neighborhood and community factors).

375. See Metropolitan Edison v. People Against Nuclear Energy, 75 L.Ed.2d 534 (1983) (psychological health only cognizable under NEPA where there is closeness of relationship between change in environment and effect at issue); Breckinridge v. Rumsfeld, 537 F.2d 864, 866 (6th Cir. 1976), cert. denied, 429 U.S. 1061 (1977) (non-environmental factors are to be considered only when there exists primary impact on physical environment; court found no such impact).
subtle for SEQRA's decision-making processes. In a conflict between cultural values and economic growth, therefore, the decision maker is not required to decide in favor of cultural values or favor historic preservation over commercial development. Property listed on the National Register of Historic Places is not ipso facto protected, although it is entitled to greater consideration than unlisted property. An unlisted property, on the other hand, cannot, in itself, affect the issuance of a permit.

Where the conflict is between the staging or creation of an artistic or cultural event and preservation of natural resources, the applicant must demonstrate that the proposal will not result in any substantial adverse effect on the environment. Even the risk of such an alteration will result in denial of a permit.

d. Public Need

Although public need is one factor the lead agency must consider, in practice, its importance for a private action diminishes in proportion to the applicant's proof of avoidance or mitigation of adverse impacts. In the absence of adverse environmental impacts, need carries little weight. Where adverse environmental impacts have

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377. Id.


381. See Christo, N.Y. City Dep't of Parks Dec. (Feb. 1981) (application to construct 108 miles of steel "gates" in Central Park denied because, for among other reasons, there would be risk of permanent alteration).

382. Wilmorite Inc.: Rotterdam Square, N.Y. State Dep't of Envtl. Conserv. Dec. 6 (May 18, 1982); Multi-Town Solid Waste Management Facility, N.Y. State Dep't of Envtl. Conserv. Dec. (Nov. 19, 1982). In Multi-Town, the Commissioner held that the issue of need is more likely to rise to a level of importance where adverse environmental affects have been identified. In that event, a showing of need for the purpose of balancing considerations must go beyond private financial endeavors and demonstrate the filling of a void to the betterment of the general public. Id. at 5. See supra note 358 (even where there is demonstrable public need, unless applicant can demonstrate compliance with environmental standards, denial of permit is warranted).

been identified which cannot be adequately mitigated, however, the applicant must be able to demonstrate unequivocal benefits to the general public above and beyond the usual benefits of increased employment opportunities and expansion of the sales and real estate tax base before it is entitled to the issuance of a permit. 385

The applicant’s failure to show public need, however, is not a basis for denying a permit where it complies with SEQRA requirements. 386 Rarely will a privately sponsored project satisfy public need even though local decision makers may conclude otherwise. 388


385. Pyramid Crossgates Co., N.Y. State Dep’t of Envtl. Conserv. Dec. 3 (Nov. 28, 1980). See also Town of Hempstead, N.Y. State Dep’t of Envtl. Conserv. Dec. (May 1, 1981), aff’d on judicial review, Town of Hempstead v. Flacke, 82 A.D.2d 183, 441 N.Y.S.2d 487 (2d Dep’t 1981). In Hempstead, the applicant applied to EnCon for a permit to deepen two wells in the northwest corner of a shopping center on Long Island. The administrative law judge found that although the availability of uncontaminated potable water on Long Island was not unlimited or certain, he recommended the issuance of the requested permit on the ground that it was justified by “public necessity.” Id. at 1. In rejecting the administrative law judge’s recommendation, the Commissioner held that a “proper reading of public necessity must address a broader context including the (1) nature of the uses (potable vs. non-potable); and (2) relative importance of the water supply source.” Id. Analyzing the issue in this “broader context,” the Commissioner found that the use of potable water for cooling purposes in a shopping center at the site would not be deemed a public necessity, and he therefore denied the permit. Id. See also City of Long Beach v. Flacke, 77 A.D.2d 638, 430 N.Y.S.2d 131 (2d Dep’t 1980) (anteceendent to Hempstead) (petition to set aside permit granted and matter remanded to EnCon).

386. Town of Candor v. Flacke, 82 A.D.2d 951, 440 N.Y.S.2d 769 (3d Dep’t 1981). In Town of Candor, the court held that “there is no necessity, as petitioners seem to suggest, that an EIS make a determination that a project is needed. It is sufficient that an EIS, as here, make only a statement regarding the need for the action.” Id. at 952, 440 N.Y.S.2d at 770-71. See also Oneida County Energy Recovery Facility, N.Y. State Dep’t of Envtl. Conserv. Dec. 2 (April 5, 1983). In Oneida, the Commissioner noted that the facility would benefit both region and state by satisfying a public need to dispose of waste materials through conversion into steam energy. The project also eliminated and therefore mitigated adverse consequences of landfilling at three sites which were in violation of the law or the subject of enforcement proceedings. Id.

387. Pyramid Crossgates Co., N.Y. State Dep’t of Envtl. Conserv. Dec. 6 (Sept 18, 1981) (Commissioner’s observation that a private project will rarely satisfy public need was made in reference to development of shopping centers). There are private projects, however, that do fulfill a public need, as for example, the construction of residential housing in a community desperately short of such housing. See Coalition Against Lincoln West, Inc. v. City of New York, 94 A.D.2d 483, 465 N.Y.S.2d 170 (1st Dep’t), aff’d, N.Y.L.J. Oct. 31, 1983, p. 12, col. 4. In Lincoln West, the applicant applied to rezone a substantial parcel of property on the West Side of Manhattan from manufacturing to residential use. The property was occupied by an inactive railroad yard cluttered with obsolete and abandoned equipment, dilapidated structures and a large accumulation of refuse. Id. at 489, 465 N.Y.S.2d at 175.
B. Making the Decision

SEQRA and the implementing regulations grant significant power to the lead agency to achieve the law's policies and goals. The lead agency cannot discharge its responsibilities merely by noting the consequences and risks associated with any particular proposed action. It must affirmatively state that the adverse environmental effects revealed in the FEIS will be minimized or avoided by incorporating appropriate mitigation measures as conditions to the decision. The authority granted to the lead agency implies that it has the power to deny approval of a proposed action where the applicant fails to demonstrate that mitigation measures will prevent a significant adverse environmental impact.

The only limitation on the lead agency's authority is that conditions imposed on the permit must be reasonable in view of the objectives to be achieved. The subject of agency disapproval and permit conditions is pivotal. Regardless of the magnitude of the private investment, a poorly conceived action may be either disapproved as proposed or modified with such conditions as may be appropriate to create an environmentally sound project.

The New York City Planning Commission concluded that the creation of a major waterfront park on land that is currently an environmental wasteland would be an optimum land use and have a significant public purpose. It also concluded that the provision of new housing on the remainder of the site would be both an appropriate land use and a significant addition to the housing stock of New York City. At the public hearings, the intervenors-objectants argued that the project would result in overcrowding and traffic congestion, and would also reduce demographic diversity within the upper West Side of Manhattan. The court found that the lead agency had adequately considered the environmental impact on the community and that it had fully complied with SEQRA, with the City Environmental Quality Review and with the City's Uniform Land Use Review Procedure.
1. Permit Denial

If the applicant fails to prove by a preponderance of the evidence that its proposal meets SEQRA and other legal requirements, the permit must be denied. Unlike an action in law, however, where an adverse decision bars relitigation of the disputed issue, an applicant may successfully reapply for a permit, assuming it can overcome the defects and deficiencies of its prior application. In *Pyramid Systems, Inc.*, an application for permits to develop a shopping mall in the Town of New Hartford, Oneida County, EnCon denied permits based on a finding by the administrative law judge that the applicant had failed to prove it could mitigate or avoid adverse effects on the freshwater wetlands located on the proposed site. Upon reapplication, however, the freshwater wetlands permit was granted on the grounds that the new proposal was significantly different and that the environmental and related factors which led to rejection of the first application were not present in the reapplication.

A permit will also be denied where the applicant shows lack of concern for protection of environmental qualities. In *Bio-Tech Mills, Inc.*, an application for modification of a State Pollutant Discharge Elimination System (SPDES) permit, the Commissioner denied the application because the administrative law judge found that the applicant had an unbroken continuous record of abusing its permits. The evidence was overwhelming that the applicant had been unable or unwilling to operate its plant in a manner consistent with environmental laws.

In addition, the lead agency is authorized to deny a permit if the agency staff has concluded that expensive and time consuming tests...
are required to assess and evaluate environmental risk and that the applicant has refused to make such tests. 404

2. Approval by Phase

The lead agency may approve a major project or activity in phases. Two applications to EnCon illustrate this approach. The first application requested permits to develop a resort hotel and conference center,405 and the second application requested a permit to convert electrical generating facilities from oil to low sulphur burning coal.406 In the first, the applicant proved through hydrological and geologic testing that it could provide sufficient quantities of water for a first phase of development.407 In order to proceed with each of the successive phases, however, the Commissioner held that the applicant would have to conclusively demonstrate that the total supply of water from its permanent wells would be sufficient to meet the total yearly water demands for the entire project.408

In the second application, the Commissioner approved the applicant’s request to convert two of its plants to allow the burning of low sulphur coal, but in a manner different from that anticipated in the applicant’s petition.409 As a result, the applicant would have to apply for further permits to implement the design requirements approved by the Commissioner and submit an acceptable solid waste management plan for the disposal of ash and sludge waste produced by the proposed activity.410 The first applicant was allowed to undertake the

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404. See, e.g., Town of Marbletown, N.Y. State Dep’t of Envtl. Conserv. Dec. 4 (Oct. 21, 1982) (interim decision). On the basis of conflicting geological reports EnCon staff requested that the applicant perform certain geologic testing which the applicant acknowledged “could greatly simplify or resolve the most important remaining concerns.” Id. The Commissioner noted that, while this matter was not specifically raised by the parties, “it would be administratively inefficient to conclude the hearing in the absence of such tests.” Id. The Commissioner concluded that failure by the applicant to provide such information as would be derived from the tests “will be considered grounds for denial of the application.” Id.


408. Id.


410. Id.
first phase while planning for subsequent phases. In the second application, however, the phase-by-phase approval required the applicant to fully complete all of its submissions before undertaking capital construction of any part of the proposed action.

3. Conditional Disapproval

In an application for multiple permits, an applicant may be able to satisfy the environmental and technical requirements for some of the permits but not for others. The lead agency is not authorized, however, to issue any permits until it has made an affirmative SEQRA finding for the entire project. Therefore, even the permits for which the applicant has proved its entitlement may not be issued. The lead agency, however, may request the applicant to submit additional information to demonstrate that it does have the ability to achieve SEQRA and technical compliance.

If the lead agency concludes that, although there is substantial evidence to support the issuance of a permit, the proposed project or activity requires approval from an involved agency which could affect the applicant's ability to undertake the project, the lead agency is authorized to grant the permits but to stay their issuance. In Pyramid Crossgates Company, an application for permits in connection with the construction of a regional shopping mall, the Commissioner concluded that the applicant had successfully resolved issues relating to the elimination of a freshwater wetlands, the impoundment of certain bodies of water, storm water runoff discharges, a change in certain community characteristics, the potential for unacceptable concentrations of carbon monoxide and adverse effects on procreation of

412. See supra notes 308-32 for discussion of requirements concerning findings.
413. [1981] 6 N.Y.C.R.R. § 624.17(b) (further submissions can be requested to secure additional information or data, or to consider significant new evidence or major permit application alterations).
414. See Pyramid Crossgates Co., N.Y. Dep’t of Env’tl. Conserv. Dec. (Sept. 18, 1981). The mitigation measures submitted by the applicant on its reapplication satisfactorily demonstrated that safe levels of carbon monoxide would be maintained. Id. at 1. The Commissioner denied intervenors-objectants’ application to reopen the adjudicatory hearing on the grounds that there was no purpose to debating over variables about which reasonable men could interminably disagree. Id. at 2.
an endangered species. Because of the complex character of environmental issues, however, significant conditions were imposed on the permits. Foremost among them was the condition that no construction of any kind would be permitted to commence until the Department of Transportation, in the exercise of its jurisdiction over affected roadways, determined final roadway design for the proposed project and made its correlative affirmative SEQRA findings. Upon satisfaction of the conditions, the agency's stay dissolves and the applicant is entitled to the issuance of the requested permits.

C. Imposing Conditions

EnCon regulations expressly authorize the imposition of conditions that are necessary to create an environmentally sound project or activity. Moreover, in view of the "clear legislative mandate" that the FEIS be given a broad construction, it "follows that it applies to the entire project and is not limited to the specific pending permit applications." The imposition of conditions on the permit is not intended to infringe upon the authority of any other level of government, but rather to fulfill EnCon's "responsibility under the [Environmental Conservation Law] to insure that the proposal is carried out in the least environmentally-damaging manner." This does not preclude any other unit of government having jurisdiction from making its own independent determinations and from imposing additional or different requirements or conditions of approval based upon the FEIS if

417. Id. at 1.
418. Id.
419. Id.
420. Id.
422. Id. at 222-23, 430 N.Y.S.2d at 446-47. The court reached its decision through an analysis of federal cases which support the conclusion that the impact statement is not merely procedural and informative and that NEPA requires full consideration by federal decision makers of the environmental consequences and project alternatives indicated in the EIS. Id. at 220-21, 430 N.Y.S.2d at 445-46. The imposition of conditions is a necessary corollary of this analysis; i.e., decision-makers must also be prospectively oriented when they consider environmentally sensitive projects. Id. at 223, 430 N.Y.S.2d at 447. See also San Diego Co., Archaeological Society v. Compadres, 81 Cal. App. 3d 923, 146 Cal. Rptr. 786 (1978) (after agency has approved a project, it can enforce mitigating conditions necessary to protect environmental and aesthetic interests by making them requirements for actual development).
423. Town of Henrietta, 76 A.D.2d at 219, 430 N.Y.S.2d at 444.
such requirements or conditions are consistent with each agency’s independent authority.\textsuperscript{424} In \textit{Town of Henrietta v. Department of Environmental Conservation},\textsuperscript{425} the applicant sought to set aside the conditions imposed by EnCon. The court held that decision-makers are not “precluded from forecasting future needs; indeed, they are encouraged to make reasonable forecasts in the preparation of the [final] EIS.”\textsuperscript{426} The imposition of conditions necessary to minimize or avoid all adverse environmental impacts revealed in the EIS has a clear legislative mandate.\textsuperscript{427} Because SEQRA was intended to grant decision-makers broad power to achieve the directory policies and goals of the statute, the imposition of conditions is an approved means of balancing the various competing factors that an agency must take into account.\textsuperscript{428} For example, the court has held that the imposition of energy conservation conditions is not an improper interjection into the exclusive domain of the State Energy Commission.\textsuperscript{429} The lead agency has a statutory obligation under SEQRA to analyze the project’s effect on the use and conservation of energy resources and to insure that the applicant fulfills the objectives of the state’s energy policy.\textsuperscript{430}

In addition, the lead agency may further condition its decision by requiring the applicant to post a bond or letter of credit prior to the commencement of work for the purpose of ensuring faithful compliance with the terms of the permit and indemnifying the State for any costs resulting from applicant’s failure to comply.\textsuperscript{431} The required bond usually remains effective until the applicant has completed the work to the lead agency’s satisfaction.\textsuperscript{432}

\textbf{V. Recommendations}

In order for counsel to effectively advise its clients on SEQRA compliance and opposition to permit applications, it must appreciate both the interrelationship between the procedural requirements and the substantive expectations each of the participants must satisfy in

\begin{itemize}
  \item \textsuperscript{424} Pyramid Crossgates Co., N.Y. State Dep’t of Envtl. Conserv. Dec. 6 (Sept. 18, 1981).
  \item \textsuperscript{425} 76 A.D.2d at 223, 430 N.Y.S.2d at 447. The court cautioned, however, that SEQRA must be construed in the light of reason. \textit{Id.} at 224, 430 N.Y.S.2d at 447.
  \item \textsuperscript{426} \textit{Id.}
  \item \textsuperscript{427} \textit{Id.} at 225, 430 N.Y.S.2d at 448.
  \item \textsuperscript{428} \textit{Id.}
  \item \textsuperscript{429} \textit{Id.}
  \item \textsuperscript{430} \textit{Id.}
  \item \textsuperscript{431} [1981] 6 N.Y.C.R.R. § 621.14(e).
\end{itemize}
the review process. The available educational resources do not generally focus the practitioner's attention on agency and court expectations, yet such knowledge is critical to the decisions a party has to make in prosecuting or objecting to an application. Because EnCon decisions deal with both the merits of an application and the substance of procedure, they are a valuable, but under-utilized resource. They can be obtained from EnCon, or, for subscribers to the New York Land Report, which provides substantial excerpts in its monthly bulletin, from the New York Land Substitute. The decisions, together with any ALJ reports, however, should be more freely available. The Commissioner should remedy this situation by filing all EnCon decisions in selected libraries throughout the state. This process can be aided by the Environmental Law Section of the New York State Bar Association, which should include in its Newsletter a section summarizing recent EnCon decisions.

VI. Conclusion

This Article has examined the distribution of responsibilities, tasks and burdens among the participants in the New York State environmental review/permit request process. The purpose of the environmental review is to expose a project's “potential for adverse environmental harm and establish measures which will avoid or minimize such harm.” Although SEQRA spells out a process for obtaining project approval, it also expressly addresses substantive concerns. SEQRA requires that the statutes, regulations and ordinances be administered and interpreted “to the fullest extent possible” in accordance with the policies set forth in SEQRA. Those policies include the declaration by the Legislature that all agencies have “an obligation to protect the environment for the use and enjoyment of this and all future generations.” Since SEQRA’s purpose is to ensure well-planned projects which, when completed, will properly serve the communities in which they are built, those proposals which fulfill

432. See Town of Candor, 82 A.D.2d 951, 440 N.Y.S.2d 769 (in application to construct and operate sanitary landfill, EnCon imposed $250,000 performance bond to ensure development of alternative water system for neighboring residents and other remedial measures should need arise).
437. Id.
the statutory expectations are most favored. The imposition of responsibilities, tasks and burdens, therefore, is directed toward achieving a particular aim: to create an environmentally sound project.\footnote{See, e.g., Pyramid Crossgates Co., N.Y. State Dep't of Envtl. Conserv. Dec. 2 (Sept. 18, 1981) (the commissioner noted that public's participation had been extremely beneficial to development of full record and to molding of environmentally sound project).}
# ADDENDUM OF ENCON DECISIONS

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* See Flacke v. Bio-Tech Mills, Inc., 95 A.D.2d 916, N.Y.S.2d 718 (3d Dep’t 1983) (penalty of $2,500 per day for each day of violation affirmed).
Multi-town Solid Waste management Facility Interim Decision Nov. 19, 1982


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**Pyramid Systems, Inc.** Decision Mar. 17, 1978

**SCA Chemical Waste** Decision Apr. 21, 1981

**Town of Hempstead,** applicant aff'd, Town of Hempstead v. Flacke, 82 A.D.2d 183, 441 N.Y.S.2d 487 (2d Dep't 1981)

**Town of Marbletown's** Application for a Permit to Construct Landfill Decision Oct. 21, 1982