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NOTES

SEQRA'S EMERGENCY PROVISION: EXEMPTION OR CIRCUMVENTION?

INTRODUCTION

New York's State Environmental Quality Review Act (SEQRA), was enacted in 1975 "to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources."¹ The Act requires that the State Department of Environmental Conservation (DEC) be notified of the environmental impact of any proposed action, where actions may include construction and development projects, passage of a local law or zoning ordinance, preparation of a master plan and a wide range of other activities.² The New York legislature articulated their intent in passing SEQRA as "the maintenance of a quality environment for the people of this state that at all times is healthful and pleasing to

1. N.Y. ENVTL. CONSERV. LAW § 8-0101 (McKinney 1984).

2. The statute provides that actions shall include:

(1) Projects or physical activities, such as construction or other activities that may affect the environment by changing the use, appearance or condition of any natural resource or structure, that:

(i) Are directly undertaken by an agency; or

(ii) Involve funding by an agency; or

(iii) Require one or more new or modified approvals from an agency or agencies;

(2) Agency planning and policy making activities that may effect the environment and commit the agency to a definite course of future decisions;

(3) Adoption of agency rules, regulations and procedures, including local laws, codes, ordinances, executive orders and resolutions that may affect the environment; and

(4) Any combinations of the above.

N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(b) (1987). See N.Y. ENVTL. CONSERV. LAW § 8-0105(4) (McKinney 1984).

the senses. . . ."³

SEQRA provides for a postponement of the review process where an "emergency" exists.⁴ However, the Act does not specifically indicate when an emergency exists and how long the exemption should last. Under close scrutiny, it is clear that the language of the Act is ambiguous and the regulations lack adequate standards. Under the present regulations, a local town or municipality seeking to avoid expensive delays resulting from the SEQRA review process might successfully argue that construction of a structure to house homeless persons or prisoners constitutes an emergency. Currently, the courts are not equipped to determine whether it should be entitled to the exemption. Because of the lack of adequate standards in the statute and accompanying regulations, the developer may qualify for the emergency exemption even though his project was probably not intended to be covered by the emergency provision. The intentions of the legislature are thus being subverted.

This Note will examine the ambiguities of the emergency exemption, analyze the judicial interpretations of its application, and suggest amendments to the Act that would clarify the emergency provision.⁵

A. History & Purpose

SEQRA is sometimes referred to as a "little NEPA" since it is modeled after the National Environmental Policy Act (NEPA)⁶ and parallels the "little NEPA" laws of California⁷ and Washington.⁸ SEQRA regulations are structured as a comprehensive information gathering process. The state has an interest in protecting the environment from activities that may cause adverse affects; *e.g.*, businesses that may pollute the air or water, construction projects that may generate excessive traffic congestion, or laws that may permit the economic decline of a neighborhood or town. To uncover potentially harmful activities such as these, the state requires developers,

3. N.Y. ENVTL. CONSERV. LAW § 8-0103(1) (McKinney 1984).

4. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(q)(4) (1987).

5. See *infra* notes 63-171 and accompanying text.

6. Robinson, *SEQRA's Siblings: Precedents from Little NEPA's in the Sister States*, 46 ALB. L. REV. 1155, 1156 (1982); 42 U.S.C. §§ 4321-68 (1982). See Orloff, *SEQRA: New York's Reformation of NEPA*, 46 ALB. L. REV. 1128, 1130 (1982).

7. CAL. PUB. RES. CODE §§ 21000-21176 (West 1986). See Robinson, *supra* note 6, at 1157.

8. WASH. REV. CODE ANN. §§ 43.21C.010-910 (1983). See Robinson, *supra* note 6, at 1157.

lawmakers and others to furnish an abundance of information about the projects they undertake.⁹ Some projects require more disclosure than others, and a project that poses even a minor threat to the environment may be substantially delayed while this information is gathered and evaluated.¹⁰

The New York legislature recognized that not all proposed actions should be subject to the full SEQRA review process and therefore gave the DEC authority¹¹ to promulgate a number of exemptions. The emergency exemption was created to provide for situations that required immediate action — those actions that could not wait for the SEQRA process to be carried out.¹² For example, where a hurricane destroys homes in a coastal community, the local authorities may wish to construct temporary shelter for the residents who have nowhere else to go. Obviously, the town will not want to ask its residents to wait out in the rain while the state reviews the environmental impact of the proposed shelter. Construction of the shelter will begin immediately and SEQRA will be postponed in the interest of protecting the dispossessed residents.

B. Procedure

New York's environmental review process is a complicated one, and some explanation is required before the weaknesses of the emergency exemption provision may be constructively analyzed. The first step in the environmental review process is to determine whether the proposed project or action¹³ is subject to SEQRA.¹⁴ This determina-

9. See *infra* note 37.

10. See *infra* notes 36-55 and accompanying text.

11. See N.Y. COMP. CODES R. & REGS. tit. 6, §617.1(a) (1987); See also N.Y. ENVTL. CONSERV. LAW § 3-0301(2)(a) (McKinney 1984) (This provision authorizes the Department of Environmental Conservation to assist the state in carrying out its policies by promulgating regulations pursuant to legislative acts).

12. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(q)(4) (1987).

13. See *supra* note 2.

14. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.5(a)(1) (1987).

A number of other states have some form of environmental review procedures. CAL. PUB. RES. CODE §§ 21000-21165 (West 1986); CONN. GEN. STAT. ANN. § 22a-1 (West 1985); DEL. CODE ANN. tit. 7, §§ 6000-6012 (1983); HAW. REV. STAT. § 343 (1985); IND. CODE ANN. §§ 13-1-10-1 - 13-1-10-8 (West 1983); MD. NAT. RES. CODE ANN. §§ 1-301-1-305 (1983); MASS. GEN. LAWS ANN. Ch. 30, § 62 (West 1979); MICH. COMP. LAWS ANN. § 691 .1201 - .1207 (West 1987); MINN. STAT. ANN. § 116D (West 1987); MONT. CODE ANN. §§ 75-1-101 - 75-1-324 (1987); N.J. STAT. ANN. § 13:19 (West 1979); N.C. GEN. STAT. § 113A (1983); S.D. CODIFIED LAWS ANN. § 34A-9 (1986); VA. CODE ANN. §§ 10-177 - 10-186 (1985); WASH. REV. CODE ANN. § 43.21C (1983); WIS. STAT. ANN. § 1.11 (West 1986); P.R. LAWS ANN. tit. 12, §§ 1121-1127 (1978).

tion should be made "[a]s early as possible in an agency's formulation of an action it proposes to undertake, or as soon as an agency receives an application for a funding or approval action. . . ."¹⁵ The "lead agency," the agency responsible for "carrying out, funding or approving an action,"¹⁶ determines whether an action may have a significant effect on the environment, and ultimately may halt an action if it is found to pose a threat to the environment.¹⁷ A lead agency might be a local planning board, a board of estimate, a department of the state,¹⁸ or even the DEC itself.

SEQRA operates through a process of elimination, whereby a proposed action may be subject to successive levels of review depending on its potential to threaten the environment. The first level of review requires that the lead agency classify a proposed action¹⁹ as either Type I,²⁰ unlisted,²¹ Type II,²² excluded,²³ or exempt.²⁴ If the

15. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.5(a).

16. *Id.* § 617.2(v). A lead agency is defined as "an involved 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." *Id.*

17. See *infra* notes 36-55 and accompanying text.

18. See, e.g., *Board of Visitors-Marcy Psychiatric Center v. Coughlin*, 119 Misc. 2d 279, 465 N.Y.S.2d 124 (1983), modified, 96 A.D.2d 760, 465 N.Y.S.2d 312 (1983), modified, 60 N.Y.2d 14, 453 N.E.2d 1085, 466 N.Y.S.2d 668 (1983).

19. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.5(a)(1), (4) (1987).

20. A Type I action is defined as "an action or class of actions listed in section 617.12 of this Part, or in any involved agency's procedures adopted pursuant to section 617.4 of this Part." *Id.* § 617.2(ii). Type I actions include: Adoption of a municipality's land use plan and zoning regulations, and construction or expansion of residential units and nonresidential facilities. *Id.* § 617.12(b). Agencies may adopt additional procedures to expand the list and "adjust the thresholds" to be more inclusive but may not be less protective of the environment. *Id.* §§ 617.4(a), (e), 617.12(a)(2).

21. An unlisted action is defined as "all actions not excluded or exempt, not listed as a Type I or Type II action in this Part, or, in the case of a particular agency action, not listed as Type I or Type II actions in the agency's own SEQRA procedures." *Id.* § 617.2(kk).

22. *Id.* § 617.13(a). Type II actions include: Replacement of a facility; individual setback and lot line variances; repairing of existing highways, installation of traffic control devices; construction or placement of garages, patios, pools and fences; landscapes maintenance; routine activities of agency administration and management as well as educational institutions; and minor temporary uses of land having negligible or no permanent effect on the environment. *Id.* § 617.13(d).

23. *Id.* § 617.2(p). Excluded actions are: actions undertaken or approved prior to the effective dates set forth in SEQRA, except where it is still practicable either to modify the action to mitigate potential adverse environmental effects or where a proposed modification of an action may result in a significant adverse effect on the environment; actions requiring a certificate of environmental compatibility and public need under Article VII or VIII of the Public Service Law, and actions subject to the jurisdiction of the Adirondack Park Agency pursuant to section 809 of the Executive Law. *Id.* § 617.2(p).

24. *Id.* § 617.2(q)(1)-(5).

lead agency determines that an action is a Type II, excluded or exempt action, the review process does not need to continue.²⁵ Type II actions have been determined not to have a significant effect on the environment, and thus are not subject to any further review procedures.²⁶ The rationale behind actions not subject to environmental review is that analysis of projects, which have a minimal effect on the environment, wastes administrative resources.²⁷

1. Classification of Actions.—Actions that are undertaken or approved prior to the effective dates of SEQRA are excluded from the review process.²⁸ SEQRA's regulations sets forth five exempt actions: civil or criminal enforcement proceedings, ministerial acts, maintenance or repair of existing structures involving no substantial changes, actions of the New York legislature or any court, and emergency actions.²⁹

Actions which are not Type II, exempt, or excluded are either Type I³⁰ or unlisted.³¹ Type I actions are presumed to have a significant effect on the environment and usually require further SEQRA review.³² Unlisted actions are those not listed as Type I or Type II.³³ Unlisted actions are presumed not to have a significant effect on the environment and thus are less likely to require SEQRA review.³⁴ However, if an unlisted action is located in a "critical environmental area," it is subject to a presumption of significance and must be treated as a Type I action.³⁵

25. *Id.* § 617.5(a)(1).

26. *See supra* note 22.

27. Note, *The Application of Emergency Exemptions Under CEQA: Loopholes in Need of Amendment?*, 15 PAC. L.J. 1089, 1098 (1984).

28. *See supra* note 23.

29. *See supra* note 24.

30. *See supra* note 20.

31. *See supra* note 21.

32. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.12(a)(1) (1987).

33. *See supra* note 21.

34. Unlisted actions are treated as Type I actions for the purpose of making a determination of significance to avoid frustrating SEQRA's expansive application. *See infra* note 36 and accompanying text. However, they are not presumed to have a significant effect on the environment since this category acts as a "catch-all" for an action not covered by any other category and include actions having no significant effect on the environment. This is in contrast to Type I actions which include only those actions most likely to have a significant effect on the environment.

35. A critical environmental area (CEA) is defined as "a specific geographic area designated by a State or local agency, having exceptional or unique characteristics that make the area environmentally important. Any unlisted action located in a CEA must be treated as a Type I action by any involved agency." N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(i).

2. **Determination of Significance.**—Once a proposed action has been classified as either Type I or unlisted, the lead agency must make a determination of whether the action may have a significant effect on the environment — a determination of significance.³⁶ To make this determination, the agency must evaluate the proposal according to the criteria set out in section 617.11(a) of the regulations.³⁷ For example, a town planning board must consider the impact that a proposed shopping center may have on automobile traffic, noise, air and water pollution, and the aesthetic quality of the surrounding community. The agency must consider all aspects of the “environment” as it is defined by SEQRA.³⁸ In *Chinese Staff and Workers Association v. City of New York*,³⁹ the court stated that a lead agency is required to consider population patterns and neighborhood character in addition to impacts on the physical environment.⁴⁰ The result of the court’s interpretation is a broad and expansive definition of “environment.”⁴¹

The lead agency issues its “determination of significance” in one of three ways: by negative declaration, conditional negative declara-

36. N.Y. ENVTL. CONSERV. LAW § 8-0111(6) (McKinney 1984). See *supra* note 16. For a detailed explanation of the lead agency’s responsibilities with respect to the procedures in making a determination of significance see section 617.6(g) of the regulations.

37. Such criteria include: substantial adverse change in existing air or water quality, traffic or noise level, a substantial increase in the potential for erosion, flooding, or drainage problems; impact on a habitat area or adverse effects on an endangered species or natural resource; impairment of historical or aesthetic resources; and the creation of a hazard to human health. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.11(a) (1987).

The list provided in section 617.11(a) is illustrative, not exhaustive. Agencies can develop additional criteria in addition to those listed, but they must be adopted in accordance with the procedures in section 617.4. For an example of where an agency used criteria other than those listed in the regulations, see *H.O.M.E.S. v. New York Urban Dev. Corp.*, 69 A.D.2d 222, 230, 418 N.Y.S.2d 827, 831 (1979).

38. *Chinese Staff and Workers Ass’n v. City of New York*, 68 N.Y.2d 359, 365, 502 N.E.2d 176, 179, 509 N.Y.S.2d 499, 502, (1986). Environment is defined as “the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution or growth, existing community or neighborhood character.” N.Y. ENVTL. CONSERV. LAW § 8-0105(6) (McKinney 1984). See also N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(l) (1987) (The regulations include effects on agricultural and archaeological resources and human health within the definition of environment).

39. 68 N.Y.2d 359, 502 N.E.2d 176, 509 N.Y.S.2d 499 (1986).

40. *Chinese Staff*, 68 N.Y.2d at 365, 502 N.E.2d at 179, 509 N.Y.S.2d at 502 (quoting N.Y. ENVTL. CONSERV. LAW § 8-0105(6) (McKinney 1984)).

41. *Chinese Staff*, 68 N.Y.2d at 365, 502 N.E.2d at 180, 509 N.Y.S.2d at 503 (citing *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 414, 494 N.E.2d 429, 434, 503 N.Y.S.2d 298, 303 (1986)).

tion, or positive declaration.⁴² A determination that a proposed action will not have a significant effect on the environment is a "negative declaration."⁴³ Alternatively, the lead agency may choose to issue a "conditional negative declaration" (CND) for an unlisted action if it has identified mitigating measures which, if implemented, would result in the proposed action having no significant effect on the environment.⁴⁴ A determination that a proposed action may have a significant effect on the environment is a "positive declaration."⁴⁵ The issuance of a positive declaration is not a finding that an action *will* have a significant effect on the environment, rather, it is a determination that the action could pose a threat to the environment and further SEQRA review is required.⁴⁶

3. Preparation of an environmental impact statement.—Whenever a proposed action may have a significant effect on the environment, an environmental impact statement (EIS) must be prepared.⁴⁷ The EIS is a document that identifies and analyzes all

42. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.6(g), (h) (1987).

43. A negative declaration is defined as "a written determination by a lead agency that the implementation of the action as proposed will not result in any significant environmental effects. Negative declarations must be prepared and filed in accordance with sections 617.6(g) and 617.10(a) of this Part." *Id.* § 617.2(y).

44. A conditional negative declaration is defined as:

a negative declaration issued by a lead agency for an unlisted action, involving an applicant, in which the action as initially proposed may result in one or more significant adverse environmental effects; however, mitigation measures identified and required by the lead agency, pursuant to the procedures in section 617.6(h) of this Part, will modify the proposed action so that no significant adverse environmental impact will result.

Id. § 617.2(h).

45. A positive declaration is defined as "a written statement prepared by the lead agency indicating that implementation of the action as proposed may have significant effect on the environment and that an environmental impact statement will be required. Positive declarations must be prepared and filed in accordance with section 617.10(b) of this Part." *Id.* § 617.2(cc).

46. See *Chinese Staff*, 68 N.Y.2d 359, 364, 502 N.E.2d 176, 179, 509 N.Y.S.2d 499, 502 (emphasis added).

47. N.Y. ENVTL. CONSERV. LAW § 8-0109(2) (McKinney 1984).

A number of other states require the preparation of an EIS. Cal. PUB. RES. CODE § 21061 (West 1986); CONN. GEN. STAT. ANN. § 22a-1b (West 1985); HAW. REV. STAT. § 343 (1985); IND. CODE ANN. § 13-1-10-3 (West 1983); MD. NAT. RES. CODE ANN. § 1-304 (1983); MASS. GEN. LAWS ANN. Ch. 30, § 62B (West 1979); MINN. STAT. ANN. § 116D.04 (West 1987); MONT. CODE ANN. § 75-1-201 (1987); N.C. GEN. STAT. § 113A-4 (1983); S.D. CODIFIED LAWS ANN. § 34A-9-4 (1986); VA. CODE ANN. § 10-184.1 (1985); WASH. REV. CODE ANN. § 43.21C.030 (1983); WIS. STAT. ANN. § 1.11 (West 1986); P.R. LAWS ANN. tit. 12, § 1124 (1978). See N.J. STAT. ANN. § 13:19-7 (West 1979) (preparation of an EIS required only for proposed projects in coastal areas).

possible environmental effects of a proposed action or project.⁴⁸ For example, it is this document that a developer would have to complete and submit to the DEC before constructing a shopping center or office building. The court in *Town of Henrietta v. Department of Environmental Conservation*⁴⁹ considered the EIS to be an integral part of the review process describing it as "the heart of SEQRA[,] . . . more than a simple disclosure statement" of detailed information about the effect that a proposed action is likely to have on the environment.⁵⁰ Information contained in an EIS includes: a description of the proposed action, its environmental impact and any unavoidable adverse environmental effects, and alternatives that might minimize the environmental impact of the proposed action.⁵¹ Information contained in the EIS is used by the lead agency to realize SEQRA's policies and goals, and "to the maximum extent practicable, minimize or avoid adverse environmental effects."⁵²

The EIS is used as the basis of the third level of review in the SEQRA process (after the classification of the action and determina-

48.

An environmental impact statement is defined as: a written document prepared in accordance with sections 617.8 and 617.14 of this Part. An EIS may be either a "draft" or a "final." A draft EIS is the initial statement prepared by either the applicant or the lead agency and circulated for review and comment. The lead agency is responsible for the preparation of the final EIS. An EIS may also be "generic" in accordance with section 617.15 of this Part. An EIS may be a Federal draft and final EIS in accordance with section 617.16 of this Part.

N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(n) (1987). See also N.Y. ENVTL. CONSERV. LAW § 8-0105(7) (McKinney 1984).

49. 76 A.D.2d 215, 430 N.Y.S.2d 440 (1980).

50. *Town of Henrietta v. Department of Env'tl. Conservation*, 76 A.D.2d 215, 430 N.Y.S.2d 440, 445 (1980).

51. N.Y. ENVTL. CONSERV. LAW § 8-0109(2)(a)-(e). See also N.Y. COMP. CODES R. & REGS. tit. 6, § 617.14(f)(1)-(5), (7) (1987). Not every conceivable alternative or mitigating measure must be identified before an EIS will be considered acceptable. *Coalition Against Lincoln West v. City of New York*, 94 A.D.2d 483, 491, 465 N.Y.S.2d 170, 176, *aff'd*, 60 N.Y.2d 805, 457 N.E.2d 795, 469 N.Y.S.2d 689 (1983). "The degree of detail with which each alternative must be discussed will . . . vary with the circumstances . . . of each proposal." *Webster Ass'n v. Town of Webster*, 59 N.Y.2d 220, 228, 451 N.E.2d 189, 192, 464 N.Y.S.2d 431, 434 (1983).

52. *Id.* § 8-0109(1). This subdivision reads:

Agencies shall use all practicable means to realize the policies and goals set forth in this article, and shall act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects, including effects revealed in the environmental impact statement process.

See also N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(c)(3), (4) (1987) (requiring agencies to assure that the environmental effects listed in the EIS will be minimized or avoided).

tion of significance): the decision whether to approve a proposed action. Again, this decision is within the domain of the lead agency. Its decision should involve a "systematic balancing analysis," where the social and economic benefits of an action are weighed against its environmental costs.⁵³ Essentially, the EIS is a *look before leaping* mechanism⁵⁴ that acts as "an environmental 'alarm bell'" to alert public officials of environmental changes before they have reached "ecological points of no return."⁵⁵

C. Judicial Review

Courts have developed standards for reviewing agency decisions of proposed actions. The courts will not substitute their own judgment for that of the agency and will only annul a determination if it is arbitrary and capricious.⁵⁶ In *Town of Henrietta*, the court left room for a reasonable exercise of discretion by the lead agency.⁵⁷ "[I]t is not the role of the courts to weigh the desirability of any action or choose among the alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively."⁵⁸ While the courts allow some discretion regarding substantive determinations by the lead agency, they require total compliance with SEQRA's review procedures.⁵⁹ The test of compliance has three parts: the agency must (1) identify the relevant areas of environmental concern, (2) take a "hard look" at those factors, and (3) make a "reasoned elaboration" of the basis for its determination.⁶⁰

53. *Town of Henrietta v. Department of Env'tl. Conservation*, 76 A.D.2d 215, 223, 430 N.Y.S.2d 440, 447 (1980); N.Y. ENVTL. CONSERV. LAW § 8-0103(7) (McKinney 1984).

54. Weinberg, *What Every Real Estate Lawyer Should Know About New York's SEQRA*, 52 N.Y.St.B.J. 114, 120 (1980) (emphasis added).

55. *Town of Henrietta*, 76 A.D.2d at 220, 430 N.Y.S.2d at 445.

56. *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 417, 494 N.E.2d 429, 435, 503 N.Y.S.2d 298, 305 (1986); *Aldrich v. Pattison*, 107 A.D.2d 258, 267, 486 N.Y.S.2d 23, 30 (1985); *Environmental Defense Fund, Inc. v. Flacke*, 96 A.D.2d 862, 465 N.Y.S.2d 759 (1983).

The arbitrary and capricious standard is common to judicial review of administrative decisions in areas other than environmental law. *Pell v. Board of Educ.*, 31 N.Y.2d 222, 313 N.E.2d 321, 356 N.Y.S.2d 833 (1974); *City of New York v. City Civil Service Comm'n*, Misc. 2d , 532 N.Y.S.2d 626 (1988).

57. 76 A.D.2d 215, 223, 430 N.Y.S.2d 440, 447 (1980).

58. *Jackson*, 67 N.Y.2d at 416, 494 N.E.2d at 436, 503 N.Y.S.2d at 305.

59. *Aldrich*, 107 A.D.2d at 267, 486 N.Y.S.2d at 30.

60. *Chinese Staff and Workers Ass'n v. City of New York*, 68 N.Y.2d 359, 363-64, 502 N.E.2d 176, 178, 509 N.Y.S.2d 499, 502 (1987); *Jackson*, 67 N.Y.2d at 417, 494 N.E.2d at 436, 503 N.Y.S.2d at 305; *Aldrich*, 107 A.D.2d at 265, 486 N.Y.S.2d at 29 (The "hard look" standard does not authorize courts to conduct their own detailed analysis of an action's environmental impact); *See H.O.M.E.S. v. New York Dev. Corp.*, 69 A.D.2d at 233, 418

The standard for overturning a lead agency decision granting an emergency exemption is the same as that of SEQRA. Courts will not overturn emergency exemptions unless the lead agency decision was arbitrary and capricious.⁶¹ The SEQRA statute and accompanying regulations provide limited guidance for the courts to make this decision.⁶² As of now, a loose interpretation of the language is acceptable; *i.e.*, a lead agency may grant an emergency exemption for many proposed actions. This Note will propose guidelines that the legislature should adopt so that the courts can accurately determine when the granting of an emergency exemption is appropriate and when such a decision is arbitrary and capricious.

THE EMERGENCY PROVISION

SEQRA's emergency provision reads as follows:

*Exempt action means . . . [e]mergency actions which are immediately necessary on a limited and temporary basis for the protection or preservation of life, health, property or natural resources, provided that such actions are directly related to the emergency and are performed to cause the least change or disturbance, practicable under the circumstances, to the environment. Any decision to fund, approve or directly undertake other activities after the emergency has expired is fully subject to the review procedures of this Part.*⁶³

N.Y.S.2d at 832 (1979).

61. *Gerges v. Koch*, 62 N.Y.2d 84, 464 N.E.2d 441, 476 N.Y.S.2d 73 (1984). *See Board of Visitors-Marcy Psychiatric Center v. Coughlin*, 60 N.Y.2d 14, 453 N.E.2d 1085, 466 N.Y.S.2d 668, 671 (1983); *Greenpoint Renaissance Enter. Corp. v. City of New York*, 137 A.D.2d 597, 524 N.Y.S.2d 488 (1988); *Silver v. Koch*, 137 A.D.2d 467, 525 N.Y.S.2d 186 (1988); *New York State Thruway Auth. v. Dufel*, 129 A.D.2d 44, 516 N.Y.S.2d 981 (1987); *Vann v. Koch*, N.Y.L.J., Jan. 20, 1987, p. 16, col. 4.

62. Inadequate guidance is not uncommon to emergency exemptions in other areas of administrative law. For example, the Charter of New York City provides little guidance for any City administrative agency to establish rules on an emergency basis. Eric Lane, a Professor of Law at Hofstra University School of Law and counsel to the 1987-88 New York City Charter Revision Commission, indicated that the Charter Revision Commission was concerned that "existing rulemaking processes have been circumvented by non-emergency use of emergency procedures" and proposed more definite guidelines which were adopted by referendum in November, 1988. Interview with Eric Lane (Feb. 15, 1989). *See also* ch. 45, City Charter of New York, § 1043(h) (1988)).

63. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(q)(4) (1987) (emphasis added).

Five other states permit exemption from the EIS requirement for emergencies. CAL. PUB. RES. CODE § 21060.3 (West 1986); CONN. GEN. STAT. ANN. § 22a-1 (West 1985); MASS. GEN. LAWS ANN. Ch. 30, § 62F (West 1979); S.D. CODIFIED LAWS ANN. § 34A-9-3.3 (1986) (By state common law, Washington permits exemption from the preparation of an EIS. *Jablonske v. Snohomish County* 626 P.2d 543, 546, 28 Wash. App. 848 (1981)).

Scrutiny of the provision reveals its vagueness with regard to what an emergency is, when it permits exemption from SEQRA and the period of time for which an action is exempt. Courts have been forced to anticipate when an emergency exemption is appropriate because the statute does not provide clear guidance. Such uncertainty allows for exemption of actions that should be fully subject to SEQRA review. Consequently, the integrity of SEQRA's goals and policies may be frustrated.

A. *Immediately Necessary*

SEQRA requires that an emergency action be "immediately necessary" to qualify for the emergency exemption.⁶⁴ In *Board of Visitors-Marcy Psychiatric Center v. Coughlin*,⁶⁵ plaintiffs brought an action to permanently enjoin the defendants from converting all but two of the Marcy Psychiatric Center's thirty buildings into a medium security prison. The New York State Department of Correctional Services (DOCS), the lead agency, determined that the proposed conversion required preparation of an EIS.⁶⁶ The conversion was scheduled in two phases. During Phase One, five buildings used to house mental patients were to be converted to house 300 inmates. Implementation of this phase included restoring masonry, painting, and improving fire safety apparatus in the existing buildings. Completion of Phase One was scheduled for the end of 1983. Phase Two, scheduled for implementation in 1985-86, proposed that the remaining twenty-five buildings be converted to house an additional 900 inmates. This phase, unlike the first, caused displacement of the mental patients requiring them to be transferred to other mental health facilities.⁶⁷

The New York Supreme Court determined that an action is immediately necessary when "the proposed action cannot be delayed without substantial and definite negative consequences to the project."⁶⁸ Accordingly, the court concluded that since the proposed conversion was only part of a statewide plan to ease a psychiatric hospital bed shortage, any delay in refurbishing the facilities would

64. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(q)(4) (1987).

65. 119 Misc. 2d 279, 465 N.Y.S.2d 124, *modified*, 96 A.D.2d 760, 465 N.Y.S.2d 312, *modified*, 60 N.Y.2d 14, 453 N.E.2d 1085, 466 N.Y.S.2d 668 (1983).

66. *Id.* at 284, 465 N.Y.S.2d at 128.

67. *Id.* at 280, 465 N.Y.S.2d at 126 (In Phase One, no displacement of mental patients occurred since other buildings on the Marcy campus were being restored to house them. *Id.*).

68. *Id.* at 285, 465 N.Y.S.2d at 129.

not have resulted in "[substantial] negative consequences."⁶⁹ The DOC'S is Commissioner filed a positive declaration,⁷⁰ but he claimed that the Department could proceed with Phase One without preparing an EIS, arguing that an emergency situation existed.⁷¹ The DOCS argued that the emergency situation was a result of overcrowded prisons compounded by a federal court order requiring them to house persons sentenced to state prison within 48 hours.⁷² However, the court rejected the DOCS's argument on the basis that it failed to demonstrate that the described condition created a need to undertake immediate action.⁷³

The Appellate Division agreed with the Supreme Court that implementation of Phase One did not constitute an exempt action on the basis of the emergency provision.⁷⁴ However, the Appellate Division overlooked the lower court's definition of "immediately necessary" and instead focused on the "limited emergency" language contained in the emergency provision.⁷⁵ In modifying the lower court's decision, the Appellate Division concluded that the emergency provision was inapplicable because the proposed conversion was a permanent measure, rather than "an action immediately necessary on a limited emergency basis," and that the requirements of SEQRA must therefore be met.⁷⁶ Although the length of time the proposed action was to continue would have been an important consideration if the state was seeking complete exemption from the SEQRA process, it was irrelevant in *Marcy* because the state had filed a positive declaration and recognized their obligation to prepare an EIS.⁷⁷

69. *Id.* at 286, 465 N.Y.S.2d at 129.

70. *Id.* at 284, 465 N.Y.S.2d at 129. *See supra* note 45 and accompanying text.

71. *Marcy*, 119 Misc. 2d at 284, 465 N.Y.S.2d at 128.

72. *Id.* at 284, 465 N.Y.S.2d at 128 (For a discussion of the federal court order mandating 48-hour housing, see *Benjamin v. Malcolm*, 495 F. Supp. 1357 (1980)).

73. *Id.* at 285, 465 N.Y.S.2d at 129. Compare *Cohalan v. Carey*, 88 A.D.2d 77, 452 N.Y.S.2d 639 (1982) (holding that conversion of a psychiatric center to a medium security prison would not have a significant effect on the environment) with *Board of Visitors - Marcy Psychiatric Center v. Coughlin*, 119 Misc. 2d 279, 465 N.Y.S. 2d 124, *modified*, 96 A.D. 2d 760, 465 N.Y.S. 2d 312, *modified*, 60 N.Y. 2d 14, 435 N.E. 2d 1085, 466 NYS. 2d 668 (1983) (where there was no dispute that the conversion would have a significant effect on the environment).

74. *Board of Visitors-Marcy Psychiatric Center v. Coughlin*, 96 A.D.2d 760, 761, 465 N.Y.S.2d 312, 313-14 (1983).

75. *Id.* at 761, 465 N.Y.S.2d at 314.

76. *Id.*

77. *Board of Visitors-Marcy Psychiatric Center v. Coughlin*, 60 N.Y.2d 14, 21, 453 N.E.2d 1085, 1089, 466 N.Y.S.2d 668, 672 (1983). *But see Marcy*, 96 A.D.2d at 761, 465 N.Y.S.2d at 314 (The Appellate Division decided this case based on the permanency of pro-

The New York Court of Appeals modified the Appellate Division on the basis that the actions which the DOCS had proposed were "steps immediately necessary to cope with the emergency."⁷⁸ The DOCS proposed only to refurbish the detention facilities and house its inmates in compliance with the Federal Court Order.⁷⁹ The treatment of the emergency provision by the three courts in *Marcy* demonstrates the difficulties courts have encountered in applying the exemption: the lower court articulated one test (*i.e.*, an emergency exemption applies if the proposed action cannot be delayed without "substantial and negative consequences" occurring to the project); the Appellate Division completely ignored the immediately necessary issue, focusing instead on the "limited emergency" language; and the Court of Appeals reiterated the lower court's test (*i.e.*, the exemption applies when the proposed action represents "steps immediately necessary to cope with the emergency" presented). Furthermore, even after the Court of Appeals finally settled on the "immediately necessary" test, it simply reiterated the language in the statute without providing further guidance for its application.⁸⁰

Interpretation of the emergency provision should be consistent with the goals and policies of SEQRA. The Court of Appeals in *Marcy* frustrates those policies with its loose construction of the statutory language. While the *Marcy* court suggested that "immediately necessary" should not be strictly construed,⁸¹ such a construction is inconsistent with the legislature's goals. The legislature could not have intended the regulations to apply "to the maximum extent

posed conversion regardless of whether Phase One stood alone or was the first step in a two-step process).

78. *Marcy*, 60 N.Y.2d at 21, 453 N.E.2d at 1089, 466 N.Y.S.2d at 672.

79. *Marcy*, 119 Misc. 2d at 283, 465 N.Y.S.2d at 128. For a discussion of the activities undertaken during Phase One, see *supra* notes 65-66 and accompanying text.

80. *Marcy*, 60 N.Y.2d at 19, 453 N.E.2d at 1088, 466 N.Y.S.2d at 671 ("Thus the only actions [proposed by DOCS] at issue on this appeal are limited to steps immediately necessary to cope with the emergency and therefore permissible under the regulation (6 NYCRR 617.2[o][6]).").

81. *Marcy*, 60 N.Y.2d at 20, 453 N.E.2d at 1088, 466 N.Y.S.2d at 671. The court stated:

Concededly, the case now before us does not present the classic example where immediate action is required to meet an emergency in which the effect of the action may be immediately realized. There is apparently no quick solution which will immediately eliminate the problems of overcrowded jails. But that does not mean that there is no crisis or that there is no need to take immediate action to lay the foundation for a program which may provide relief in the near future.

Id.

practicable"⁸² and, at the same time, have enacted an exemption that would frequently render those regulations inapplicable.⁸³

A more recent case involving SEQRA's emergency provision is *Spring-Gar Community Civic Association, Inc. v. Homes for the Homeless, Inc.*⁸⁴ Spring-Gar, a homeowners' association representing the community of Springfield Gardens, sued to enjoin Homes for the Homeless from placing 715 homeless people in an area one-half mile from Springfield Gardens. Spring-Gar claimed the proposed move had a significant adverse effect on the population distribution, concentration and character of the community. It argued that the community did not have adequate hospital, educational or police facilities to handle the new residents. Homes for the Homeless argued that its purpose was to temporarily house the homeless and to make them as independent as possible (through social service programs and assistance in locating permanent residences and jobs).⁸⁵

The New York Supreme Court, although acknowledging that the proposed action did not truly constitute an emergency, held that failing to shelter homeless people was indisputably life threatening and therefore constituted an emergency action within the meaning of the statute.⁸⁶ The court noted that its motivation in granting the exception was sympathy for the plight of the homeless.⁸⁷ After reaching its holding in *Spring-Gar*, the New York court appealed to the legislature to establish laws that would prevent situations such as these, where the emergency exemption works a hardship on the community.⁸⁸

A different approach to these emergency exemption issues was taken by the California Legislature. The California Environmental

82. See *supra* note 52 and accompanying text.

83. See *Western Mun. Water Dist. v. Superior Court*, 187 Cal. App. 3d 1104, 1112, 232 Cal. Rptr. 359, 363 (1986) (regarding similar problems in California's CEQA statute).

84. 135 Misc. 2d 689, 516 N.Y.S.2d 399 (1987).

85. *Id.* at 692, 516 N.Y.S.2d at 401.

86. *Id.* at 699, 516 N.Y.S.2d at 405.

87. The court noted that it reached its decision with "a heavy heart" because they felt it was unjust to overburden a community by requiring it to provide for the homeless. *Id.* at 699, 516 N.Y.S.2d at 405.

Although there has been no declaration of emergency as regards the use of the Saratoga Inn, it is beyond dispute that the plight of the homeless in New York City is so life threatening and of such proportions as to come within the meaning of the applicable emergency provisions . . . , so as to provide some dispensation from the requirements generally governing environmental standards.

Id. at 698, 516 N.Y.S.2d at 404-05.

88. *Id.* at 699, 516 N.Y.S.2d at 405.

Quality Act (CEQA)⁸⁹ defines "emergency" as "a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services."⁹⁰ The California Court of Appeal strictly construed this provision in *Western Municipal Water District of Riverside v. Superior Court*,⁹¹ stating that the language was "expressly included by the Legislature and [any contrary interpretation] would be in derogation of the canon that a construction should give meaning to each word of the statute."⁹² In *Western Municipal*, the Western Municipal and East Valley Water districts along with the City of Riverside and the San Bernardino Valley Conservation District sued to enjoin the San Bernardino Valley Municipal Water District from operating two "de-watering" wells. These wells were operated to relieve the saturated pressure in the aquifer beneath San Bernardino by pumping groundwater into the Santa Ana River channel. This process was necessary to prevent liquefaction, which is a quicksand-like condition resulting from water-saturated soil.⁹³ Plaintiffs alleged that these wells had the adverse effect of contaminating the domestic water supply.⁹⁴

The San Bernardino Water District sought to avoid preparation of an Environmental Information Report (EIR) pursuant to CEQA's "emergency" provision.⁹⁵ It argued that if an earthquake were to occur where "liquefaction" existed, the resulting destruction would be greatly intensified.

The California Court of Appeal held that no emergency was present because there was no substantial evidence of a clear and imminent danger demanding immediate action.⁹⁶ The court found there was only a chance that a catastrophic earthquake would take place at the area in question, and thus no evidence of immediate danger existed.⁹⁷ CEQA's emergency exemption explicitly limits an emer-

89. CAL. PUB. RES. CODE §§ 21000-21176 (West 1986).

90. *Id.* § 21060.3.

91. 187 Cal. App. 3d 1104, 232 Cal. Rptr. 359 (1987).

92. *Id.* at 1112, 232 Cal. Rptr. at 363.

93. *Id.* at 1107, 232 Cal. Rptr. at 360. (Liquefaction increases the potential danger posed by earthquakes).

94. *Id.* at 1107, 232 Cal. Rptr. at 361.

95. CAL. PUB. RES. CODE § 21061 (West 1986). The EIR is California's counterpart to SEQRA's EIS.

96. *Western Mun. Water Dist. v. Superior Court*, 187 Cal. App. 3d 1104, 232 Cal. Rptr. 359 (1987).

97. *Id.* at 1115, 232 Cal. Rptr. at 365.

gency to a "sudden unexpected occurrence."⁹⁸ Liquefaction was a condition that *had not yet occurred* and thus does not fall within the scope of the emergency exemption.⁹⁹ Since there was no occurrence involving a clear and imminent danger, exemption from preparing an EIR was not justified.¹⁰⁰

California's emergency provision limits the types of situations that qualify for exemption.¹⁰¹ However in some cases, the provision's limiting language may produce undesirable results. For example, the limiting language precludes a condition such as liquefaction from being considered an emergency. Whether liquefaction is defined as a condition or an occurrence, the potential for serious destruction in the event of an earthquake remains. This threat of destruction clearly merits immediate attention by the authorities and should not be delayed by the environmental review process.

While California's narrowly drafted emergency exemption may delay some actions that are immediately necessary and legitimate emergencies, a broad exemption is even more troublesome. Where the exemption is broadly construed, too many non-emergency actions will escape environmental review. Anything other than a strict interpretation "would create a hole in CEQA of fathomless depth and spectacular breath . . . and is unmistakably opposed to the policy of construing CEQA to afford the maximum possible protection of the environment."¹⁰²

New York's emergency exemption is less specific than CEQA's and a loose construction is thereby permitted. However, such a construction will frustrate the policies and goals of SEQRA, which require that the exemption be applied "to the maximum extent possible."¹⁰³ Exacerbating the ambiguities in the New York statute, the New York courts have failed to provide explicit and detailed standards for interpreting "immediately necessary."¹⁰⁴

98. CAL. PUB. RES. CODE §21060.3 (West 1986) (emphasis added).

99. *Western Mun. Water District* 187 Cal. App. 3d at 1111, 232 Cal. Rptr. at 362 (emphasis added).

100. *Id.* at 1113, 232 Cal. Rptr. at 364.

101. CAL. PUB. RES. CODE § 21060.3 (West 1986).

102. *Western Mun. Water Dist.*, 187 Cal. App. 3d at 1112, 232 Cal. Rptr. at 363.

103. See *supra* note 52 and accompanying text.

104. Three other states have emergency exemption statutes. Examination of these exemptions is not helpful since they are as vague as New York's exemption. Those exemptions require only that there be an immediate threat to public health or safety. "[E]mergency measures undertaken in response to an immediate threat to public health or safety," CONN. GEN. STAT. ANN. § 22a-1c.1 (West 1985); "[E]mergency action by a person or agency is essential to avoid or eliminate a threat to public health or safety or a threat to any natural resources,"

B. Limited and Temporary

In 1987, the DEC added the word, "temporary," to the emergency exemption provision of SEQRA. The statute now provides that SEQRA review will be postponed for an emergency action that is undertaken on a "limited and temporary basis."¹⁰⁵ Prior to this amendment, cases were decided under the old provision, which required only that an action be a "limited emergency."

In *Board of Visitors-Marcy Psychiatric Center v. Coughlin*,¹⁰⁶ the New York Supreme Court stated that, in addition to satisfying the "immediately necessary" requirement, "the proposed action must be the minimum required to meet the emergency given the circumstances ('limited emergency')."¹⁰⁷ The New York Court of Appeals agreed that this bifurcated test is proper for determining whether a proposed action satisfies the emergency exemption.¹⁰⁸ The Appellate Division in *Marcy* held that whether implementation of Phase One was part of a two-step process, conversion of the Marcy Psychiatric Center to a medium security prison was undertaken as a permanent measure, and, therefore, it would not satisfy the "limited emergency" test.¹⁰⁹ The Appellate Division recognized that the statute should limit the duration of allowable emergency exemptions; at a certain point in time, an emergency will discontinue and attention can then be refocused on the SEQRA process.¹¹⁰

MASS. GEN. LAWS. ANN. ch. 30, § 62F (West 1979); "Emergency actions responding to an immediate threat to public health or safety," S.D. CODIFIED LAWS ANN. § 34A-9-3 (1986).

Although Connecticut requires a narrow construction of its exemptions, they have not developed a standard for determining what constitutes an immediate threat. *Town of Westport v. State*, 204 Conn. 212, 222, 527 A.2d 1177, 1183 (1987).

The Washington Legislature did not create a statutory exemption to the State Environmental Policy Act (SEPA). However, an exemption was established for "emergency interim measures." Again, standards for interpretation were not articulated. *Jablinske v. Snohomish County*, 28 Wash. App. 848, 626 P.2d 543 (1981). The emergency exemption has not yet been litigated in Massachusetts or South Dakota.

105. New York State Department of Environmental Conservation, revisions to N.Y. COMP. CODES R. & REGS. tit. 6, Part 617 (1987) (emphasis added).

106. 119 Misc. 2d 279, 465 N.Y.S.2d 124, modified, 96 A.D.2d 760, 465 N.Y.S.2d 312, modified, 60 N.Y.2d 14, 453 N.E.2d 1085, 466 N.Y.S.2d 668 (1983).

107. *Board of Visitors-Marcy Psychiatric Center*, 119 Misc. 2d 279, 285, 465 N.Y.S.2d 124, 129 (1983).

108. *Marcy*, 60 N.Y.2d 14, 453 N.E.2d 1085, 466 N.Y.S.2d 668 (1983). See also *Salmon v. Flacke*, 113 Misc. 2d 640, 449 N.Y.S.2d 610 (1982); *New York State Thruway Auth. v. Dufel*, 129 A.D.2d 44, 516 N.Y.S.2d 981 (1987).

109. *Marcy*, 96 A.D.2d at 761, 465 N.Y.S.2d at 314 (1983).

110. *Id.* at 761, 465 N.Y.S.2d at 314. The Court of Appeals, in modifying, acknowledged the attention which the Appellate Division gave to the temporal issue of the emergency exemption, "[t]he Appellate Division apparently was more concerned with the fact that the

In *Salmon v. Flacke*,¹¹¹ the Department of Environmental Conservation issued a permit to a landfill company to operate a solid waste management facility. In addition, it issued a variance permitting the disposal of 200,000 pounds of sewer sludge per day, six days a week, for four months.¹¹² The DEC issued the permit and variance without preparing an EIS, claiming it was an exempt action under SEQRA's emergency provision. The court rejected the DEC's position, enjoining the landfill company from receiving and disposing of the sewer sludge.¹¹³ They held that the variance was not "immediately necessary" and that the six day, four month period could not be considered "limited" within the meaning of the statute.¹¹⁴

In *New York State Thruway Authority v. Dufel*,¹¹⁵ extreme flood conditions contributed to the collapse of a bridge, which necessitated the rerouting of thruway traffic. Traffic was detoured via two-lane, undivided highways that ran through a rural area surrounding the bridge.¹¹⁶ Since the detour caused substantial traffic problems, an alternate route was considered. This alternate route would have decreased travel on local highways and shortened the detour, but required the use of 21 acres of the Dufel's 110-acre farm. The detour was to last for about one year while a new bridge was being built.¹¹⁷

The Dufels challenged the detour across their property, claiming that the State had failed to comply with the requirements of SEQRA. The Appellate Division rejected this challenge and held that the alternate detour was an exempt action under the emergency provision.¹¹⁸ The court reasoned that the detour was a short and safe route and was "immediately necessary" to cope with the traffic problems resulting from the collapsed bridge.¹¹⁹

Initially, *Dufel* and *Salmon* appear inconsistent: in *Dufel*, one year constituted a "limited" emergency, but, in *Salmon*, four months

Marcy project appears to be a permanent measure and not the type of temporary response typically associated with emergencies." *Marcy*, 60 N.Y.2d at 18, 453 N.E.2d at 1089, 486 N.Y.S.2d at 672.

111. 113 Misc. 2d 640, 449 N.Y.S.2d 610 (1982).

112. *Id.*

113. *Id.*

114. *Id.* at 646, 449 N.Y.S.2d at 614.

115. 129 A.D.2d 44, 516 N.Y.S.2d 981 (1987).

116. *Id.* at 45, 516 N.Y.S.2d at 982. Actually, two separate detours were established — one, approximately 6 miles in length, for the eastbound traffic, and the other, about 35 miles long, for the westbound traffic.

117. *Id.* at 45, 516 N.Y.S.2d at 983.

118. *Id.* at 46, 516 N.Y.S.2d at 984.

119. *Id.*

was not "limited" enough. One way of reconciling these cases is to conclude that the duration of the emergency action is irrelevant provided the action taken is the "minimum required to meet the emergency."¹²⁰ However, since the word "temporary" was added to the statute in 1987, the duration of the emergency action appears to be significant.¹²¹ Thus, under the current provision, if a proposed action is *both* "limited" *and* "temporary," it will be deemed the minimum required to meet the emergency given the circumstances.¹²²

Although the word, "temporary," serves to further define the circumstances under which the emergency provision applies, it leaves an open question: *how long* is "temporary"? In *Spring-Gar*, housing homeless people in a hotel was the "minimum required to meet the emergency" and was therefore deemed to be "limited."¹²³ The goal there was to "make homeless families as independent as possible and to re-establish them in the community."¹²⁴ However, the court did not discuss the amount of time needed to accomplish this. Thus, it may be inferred that a proposed action can constitute an emergency within the meaning of SEQRA even if it exists for a long period of time.¹²⁵

Therefore, the most meaningful interpretation of "limited and temporary" requires application of the same standard to both words while giving separate and distinct meaning to each. The standard for determining when to grant an emergency exemption is whether the proposed activity constitutes "the minimum required to meet the emergency."¹²⁶ Thus, "limited" refers to the minimum amount of activity required, while "temporary" refers to the period of time during which the activity may continue without the preparation of an

120. *Board of Visitors-Marcy Psychiatric Center v. Coughlin*, 119 Misc. 2d 279, 285, 465 N.Y.S.2d 124, 129 (1983).

121. New York State Department of Environmental Conservation, revisions to N.Y. COMP. CODES R. & REGS. tit. 6, Part 617 (1987).

122. *See* N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(q)(4) (1987) "any decision to fund, approve or directly undertake other activities after the emergency has expired is fully subject to the review procedure of this Part."

123. *See Spring-Gar Community Civic Ass'n, Inc. v. Homes for the Homeless, Inc.* 135 Misc. 2d 689, 516 N.Y.S.2d 399 (1987).

124. *See id.* at 692, 516 N.Y.S.2d at 401.

125. *See Midtown South Preservation and Dev. Comm. v. City of New York*, 130 A.D.2d 385, 515 N.Y.S.2d 248 (1987) (The Court held that housing homeless people was an exempt action under the emergency provision, even where the emergency has existed for a significant period to time). *See also Marcy*, 60 N.Y.2d 14, 20, 453 N.E.2d 1085, 1088, 466 N.Y.S.2d 668, 671 (1983). *But see Salmon v. Flacke*, 113 Misc. 2d 640, 449 N.Y.S.2d 610 (1982).

126. *Marcy*, 119 Misc. 2d at 285, 465 N.Y.S.2d at 129.

EIS. Thus, once an action is deemed "immediately necessary," it may be undertaken without the preparation of an EIS if it is *both* "limited" in scope and "temporary" in duration.

C. *Emergencies Defined*

New York's emergency provision does not specify those occurrences that qualify for exemption from the preparation of an EIS.¹²⁷ Since the statute was enacted, New York courts have found emergencies to include floods and other natural disasters.¹²⁸ However, unnatural or manmade conditions, such as prison overcrowding and homelessness, have also qualified for the emergency exemption.¹²⁹ Even where the emergency "does not present the classic example where immediate action is required[,] an exemption may apply."¹³⁰ Because the courts have not limited their findings to the "classic" scenario, it is clear that they are able to extend the emergency exemption beyond where it might otherwise have been intended to apply.

The New York Court of Appeals has held that exemptions are justified where a crisis exists and immediate action is required, and whether they are brought about by natural disaster or some man-made occurrence is irrelevant.¹³¹ It has even permitted exemption where emergencies are "precipitated by the failure to take needed action in the past despite adequate warning."¹³² In *Gerges v. Koch*,¹³³ where the City of New York claimed that prison overcrowding constituted an emergency, the Court of Appeals stated:

That this emergency might have been foreseen and that municipal officials may have been derelict in not earlier having made appro-

127. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(q)(4) (1987).

128. *New York State Thruway Auth. v. Dufel*, 129 A.D.2d 44, 516 N.Y.S.2d 981 (1987).

129. *Gerges v. Koch* 62 N.Y.2d 84, 464 N.E.2d 441, 476 N.Y.S.2d 73 (1984); *Board of Visitors-Marcy Psychiatric Center v. Coughlin*, 60 N.Y.2d 14, 453 N.E.2d 1085, 466 N.Y.S.2d 668 (1983); *Silver v. Koch*, 137 A.D.2d 467, 525 N.Y.S.2d 186 (1988); *Greenpoint Renaissance Enter. Corp. v. City of New York*, 137 A.D.2d 197, 524 N.Y.S.2d 488 (1988); *Midtown South Preservation and Dev. Comm. v. City of New York*, 130 A.D.2d 385, 515 N.Y.S.2d 248 (1987); *Hart Island Comm. v. Koch*, 137 Misc.2d 521, 520 N.Y.S.2d 977 (1987); *Spring-Gar Community Civic Ass'n, Inc. v. Homes for the Homeless, Inc.*, 155 Misc.2d 689, 516 N.Y.S.2d 399 (1987); *Vann v. Koch*, N.Y.L.J., Jan. 20, 1987, p. 16, col. 4.

130. *Marcy*, at 20, 453 N.E.2d at 1088, 466 N.Y.S.2d at 671.

131. *Gerges*, 62 N.Y.2d 84, 464 N.E.2d 441, 476 N.Y.S.2d 73; *Marcy*, at 20, 453 N.E.2d at 1089, 466 N.Y.S.2d at 671.

132. *Marcy*, 60 N.Y.2d at 20, 453 N.E.2d at 1089, 466 N.Y.S.2d at 672.

133. 62 N.Y.2d 84, 464 N.E.2d 441, 476 N.Y.S.2d 73 (1984).

priate provisions for its resolution and having assured the availability of adequate detention facilities does not negate the existence of the present crisis. Inaction of the past may have been justifiable or at least explainable; in any event the calendar cannot be turned back.¹³⁴

Lower courts have followed the lead of the Court of Appeals in the cases involving housing for the homeless¹³⁵ and development of prison space.¹³⁶ The New York Supreme Court in *Spring-Gar* held "that the plight of the homeless in New York City is so life threatening and of such proportions as to come within the meaning of the applicable emergency provisions."¹³⁷ The court was sympathetic to the community's concerns about ecological, sociological, and economic problems, but held that "to deny access to homeless families to the Saratoga Inn would present a far more serious harm than that which could result to the community."¹³⁸ The court appealed to the legislature to promulgate laws that would prevent large numbers of homeless from being placed into any one community.¹³⁹ This indicates that SEQRA's emergency provision was not designed to exempt action taken in response to an emergency caused by local governments' failure to prevent a crisis.

Exemption of actions taken in response to overcrowded prisons and the homeless would not qualify under California's emergency provision.¹⁴⁰ The provision in California explicitly states that emergencies include "such occurrences as fire, flood, earthquake, or other soil or geological movements, as well as such occurrences as riot, accident or sabotage."¹⁴¹ California's emergency provision was intended to exempt only those actions that are the result of a sudden

134. *Gerges*, 62 N.Y.2d at 95, 464 N.E.2d at 446, 476 N.Y.S.2d at 78.

135. *Greenpoint Renaissance Enter. Corp. v. City of New York*, 137 A.D.2d 524, 597 N.Y.S.2d 488 (1988); *Midtown South Preservation and Dev. Comm. v. City of New York*, 130 A.D.2d 135, 515 N.Y.S.2d 248 (1987); *Vann v. Koch*, N.Y.L.J., Jan. 20, 1987, p. 16, col. 4; *Spring-Gar Community Civic Ass'n, Inc. v. Homes for the Homeless, Inc.*, 135 Misc. 2d 689, 516 N.Y.S.2d 399.

136. See *Silver v. Koch*, 137 A.D.2d 467, 525 N.Y.S.2d 186 (1988); *Hart Island Comm. v. Koch*, 137 Misc. 2d 521, 520 N.Y.S.2d 977 (1987).

137. *Spring-Gar*, 135 Misc. 2d at 698, 516 N.Y.S.2d at 405.

138. *Id.*

139. "Though this court is constrained to decide the case as it did, the court does so with a heavy heart. The court does not believe that overburdening a community, as will be done here, is just. Accordingly, it asks the legislature to address the issue." *Id.*

140. CAL. PUB. RES. CODE § 21060.3 (West 1986).

141. *Id.*

unexpected occurrence posing imminent danger.¹⁴²

The theory behind these exemptions is that if a project arises for which the lead agency simply *cannot* complete the requisite paperwork within the time constraints of CEQA, then pursuing the project without complying with the EIR requirement is justifiable. For example, if a dam is ready to burst or a fire is raging out of control and human life is threatened as a result of delaying a project decision, the application of the emergency exemption would be proper.¹⁴³

While New York revised the SEQRA regulations in 1987 to limit application of the emergency provision in a manner similar to California's statute, the amendments were simplistic and did little to resolve fundamental ambiguities. The New York Department of Environmental Conservation, in its comments to the 1987 revisions, indicated that "[t]he proposed revisions add restrictions to the definition and clarify what is meant by an emergency, thereby reducing the chance of non-emergency situations being exempted from SEQR[A]."¹⁴⁴ However, the essence of the 1987 revisions was that the word "temporary" was added to the definition of emergency.¹⁴⁵ The addition of this word in the statute has done very little to reduce the possibility that non-emergency situations will be exempt from SEQRA.¹⁴⁶ The Environmental Law Committee of the New York City Bar Association reviewed the SEQRA regulations and expressed concern over the open-ended nature of the emergency provision. Professor William R. Ginsberg, a committee member, made the following comment about the committee's opinion of the application of the provision:

[The committee] suggested the regulations make clear that a situation which evolved over a period of time because of governmental

142. *Id.*

143. *Western Mun. Water Dist. v. Superior court*, 187 Cal. App. 3d 1104, 1105, 232 Cal. Rptr. 362, 363 (1987).

144. New York State Department of Environmental Conservation, revisions to N.Y. COMP. CODES R. & REGS. tit. 6, part 617 (1987).

145. Before the revisions, the emergency exemption applied to "actions which are immediately necessary on a limited emergency basis;" after the revisions, the exemption applied to "actions immediately necessary on a limited *and temporary* basis." *Id.* (emphasis added).

146. See *Silver v. Koch*, 137 A.D.2d 467, 525 N.Y.S.2d 186 (1988); *Greenpoint Renaissance Enter. Corp. v. City of New York*, 137 A.D.2d 197, 524 N.Y.S.2d 488 (1988); *Hart Island Comm. v. Koch*, 137 Misc.2d 521, 520 N.Y.S.2d 977 (1987); *Spring-Gar Community Civic Ass'n, Inc. v. Homes for the Homeless, Inc.*, 155 Misc. 2d 689, 516 N.Y.S.2d 399 (1987); *Vann v. Koch*, N.Y.L.J., Jan. 20, 1987, p. 16, col.4.

inaction should not be considered an emergency for purposes of the statute. There were two reasons for this conclusion. First, in effect, SEQRA's goals and policies were undermined because the agency had not done its job and created an inducement to let a situation fester until it is so bad they could call it an emergency. But I'm not suggesting that agencies are failing to act to purposely avoid SEQRA, but compound governmental failure by failing to protect the environment after already failing to carry out agency responsibility. Second, in most circumstances, there is sufficient time to implement SEQRA and use the SEQRA process. Emergencies should be limited to situations that are beyond the control of government. They are what we would classically call Acts of God; strike, flood, earthquake, fire, explosion. An emergency can be caused by either natural forces or human accidents that require immediate responses and could not have been foreseen. By and large, any true emergency is not readily foreseeable, as differentiated from an emergency that occurs because of inaction.¹⁴⁷

The committee recommended to the DEC that the emergency provision incorporate explicit language to reflect this position.¹⁴⁸

New York courts have continued to hold that overcrowded prisons and the homeless situation constitutes emergencies justifying exemption from the preparation of an EIS.¹⁴⁹ Although these courts have established precedent, they have not yet developed objective standards for applying the emergency provision. In *Hart Island Committee v. Koch*,¹⁵⁰ the Hart Island Committee claimed that the emergency exemption should be declared invalid since the provision does not state a clear basis upon which to assess whether an emergency exists.¹⁵¹ It argued that the emergency provision provides:

147. Interview with William R. Ginsberg, Professor of Law at Hofstra University School of Law, (Oct. 19, 1988). Professor Ginsberg indicated that the Environmental Law Committee of the Association of the Bar of the City of New York established a sub-committee to review the SEQRA regulations and make recommendations for the 1986 revisions. One of the committee's recommendations concerned the emergency provision. Professor Ginsberg was a member of that sub-committee.

148. *Id.*

149. See *Gerges v. Koch*, 62 N.Y.2d 84, 464 N.E.2d 441, 476 N.Y.S.2d 73 (1984); *Board of Visitors-Marcy Psychiatric Center v. Coughlin*, 60 N.Y.2d 14, 453 N.E.2d 1085, 466 N.Y.S.2d 668 (1983). *Silver v. Koch*, 137 A.D.2d 467, 525 N.Y.S.2d 186 (1988); *Greenpoint Renaissance Enter Corp. v. City of New York*, 137 A.D.2d 197, 524 N.Y.S.2d 488 (1988); *Midtown South Preservation and Dev. Comm. v. City of New York*, 130 A.D.2d 385, 515 N.Y.S.2d 248 (1987); *Hart Island Comm. v. Koch*, 137 Misc.2d 521, 520 N.Y.S.2d 977 (1987); *Spring-Gar Community Civic Ass'n, Inc. v. Homes for the Homeless, Inc.*, 155 Misc.2d 689, 516 N.Y.S.2d 399 (1987); *Vann v. Koch*, N.Y.L.J., Jan. 20, 1987, p. 16, col. 4.

150. 137 Misc. 2d 521, 520 N.Y.S.2d 977 (1987).

151. Brief for Hart Island Committee at 21; *Hart Island Comm. v. Koch*, 137 Misc. 2d

an administrator with unfettered discretion in determining when the mandate of the Legislature will be avoided Absent some legislatively prescribed standard against which these 'emergency provisions' may be judged, they are invalid on their face because it is impossible to determine when an emergency has validly been declared.¹⁵²

Unfortunately, the court never addressed these arguments.¹⁵³

D. *Challenges to the Legitimacy of the Emergency Exemption*

Recently, the legitimacy of SEQRA's emergency exemption provision has been challenged. In *Hart Island*, the Hart Island Committee argued that, when SEQRA was originally enacted, the New York legislature never intended to create an "emergency exemption," and the DEC acted improperly in creating one.¹⁵⁴ When SEQRA was enacted, the legislature did not provide for an emergency exemption to the EIS requirement.¹⁵⁵ The Hart Island Committee argued that, had the legislature intended to create an emergency exemption, it could have easily done so.¹⁵⁶ The court in *Hart Island* rejected this argument, distinguishing the emergency exemption in the regulations of SEQRA from the statutory exclusions.¹⁵⁷ It indicated that if an action is "excluded," an EIS is never prepared; whereas, the emergency provision only temporarily defers the EIS requirement. The court added that the emergency provision has existed since 1978 and the legislature has not sought to change it. The legislature is presumed to be aware of the existence of regulations promulgated pursuant to its authority, and failure to abolish the emergency exemption indicates that it is not contrary to its intent.¹⁵⁸

The plaintiff in *Hart Island* also argued that there is no authority permitting the Commissioner of the DEC to adopt an emergency provision.¹⁵⁹ However, the court there held that "a regulation adopted by an agency empowered to promulgate regulations and ad-

521, 520 N.Y.S.2d 977 (1987) (No. 16245/87).

152. Brief for Hart Island Committee at 23 (No. 16245/87).

153. *Hart Island Comm. v. Koch*, 137 Misc. 2d 521, 520 N.Y.S.2d 977 (1987).

154. Brief for Hart Island Committee, at 16, *Hart Island Comm. v. Koch*, 137 Misc. 2d 521, 520 N.Y.S.2d 977 (1987) (No. 16245/87).

155. N.Y. ENVTL. CONSERV. LAW § 8-0109 (McKinney 1984).

156. Brief for Hart Island Committee at 16 (No. 16245/87).

157. *Hart Island Comm.*, 137 Misc. 2d at 526, 520 N.Y.S.2d at 981.

158. *Id.*

159. Brief for Hart Island Committee at 16 (No. 16245/87).

minister a body of law is not to be disturbed by a court."¹⁶⁰ The exception is if a regulation was arbitrarily promulgated or an agency's interpretation was irrational.¹⁶¹

Finally, the Hart Island Committee argued that the emergency provision is inconsistent with the legislative mandate requiring preparation of an EIS.¹⁶² However, the court rejected this argument, holding that the emergency provision was "reasonable considering the goals of SEQRA."¹⁶³

The holding in *Hart Island* reflects the tension between the emergency provision and the policies and goals of SEQRA. The court there held that "[the] government [should] be able to act promptly when faced with a condition that cannot await the completion of the SEQRA process."¹⁶⁴ While governmental bodies are not presumed to intentionally create an emergency situation in order to qualify for the exemption, the goals and policies of SEQRA are subverted when the government's own inaction creates the emergency condition. SEQRA is not intended to make things easier for a government that has not done its job.

CONCLUSION

This Note has identified fundamental ambiguities in SEQRA's emergency exemption and has analyzed how judicial interpretation of the provision has perpetuated its ambiguities. The statute should be clarified. A three-step process for applying the emergency provision should be adopted.

First, a proposed action would qualify for the emergency exemption if the "emergency" is caused by either a natural force or human accident. However, if the "emergency" was a foreseeable product of governmental inaction over time, then a proposed action would not qualify for exemption. Examples of "emergencies" should include, but not be limited to, fires, floods, hurricanes, explosions, strikes, riots, oil spills, gas leaks and collapsed bridges.

Second, assuming an "emergency" exists, it would be considered "immediately necessary" only if a clear and present danger is presented, requiring action "for the protection or preservation of life,

160. *Hart Island Comm.*, 137 Misc. 2d at 526, 520 N.Y.S.2d at 981.

161. *Id.* See *supra* notes 56-62 and accompanying text.

162. Brief for Hart Island Committee at 16 (No. 16245/87).

163. *Hart Island Comm.*, 137 Misc. 2d at 527, 520 N.Y.S.2d at 981. (At the time of this writing, the plaintiff did not plan to appeal).

164. *Id.*

health, property or natural resources.”¹⁶⁵ Finally, an action that is “limited and temporary” could be taken only if two conditions are satisfied: First, a proposed action must be the minimum activity necessary to cope with the emergency. Second, the activity may continue only for the period of time needed to prepare an EIS or make a negative declaration.

The case most consistent with this approach to applying the emergency provision is *New York State Thruway Authority v. Dufel*.¹⁶⁶ In *Dufel*, the flood which contributed to the bridge collapse was a natural force not readily foreseeable.¹⁶⁷ The emergency created by the collapsed bridge did not evolve over a period of time and was not the product of governmental inaction.¹⁶⁸ In addition, the severe traffic problems caused by the original detour constituted a clear and present danger since human life was threatened.¹⁶⁹ Thus, an action to establish an alternate detour route could be considered “immediately necessary.” The alternate detour route could also satisfy the “limited and temporary” conditions. The route was the minimum activity required since it accomplished no more than to reroute traffic while the bridge was being rebuilt. Assuming the alternate route would otherwise be subject to the EIS requirement, the detour could be undertaken without preparing an EIS since the amount of time needed for its preparation might have exceeded the time needed to rebuild the bridge.

The author proposes that the current emergency provision be revised to read:

§ 617.2(q) *Exempt action* means . . .

(4) Emergency actions which are taken:

(i) In response to a sudden, unexpected occurrence or condition caused by an Act of G-d, accident or sabotage. Examples of emergency actions include but are not limited to: fires, floods, hurricanes, explosions, strikes, riots, oil spills, gas leaks and collapsed bridges;

165. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(q)(4) (1987).

166. 129 A.D.2d 44, 516 N.Y.S.2d 981 (1987).

167. See *id.* at 45, 516 N.Y.S.2d at 982.

168. In the analysis of this case, “governmental inaction” does not account for any possible defects in the bridge that may have existed prior to its collapse. For the purpose of the *Dufel* decision, pre-existing defects caused by the state’s failure to properly maintain the bridge is irrelevant. Rather, in reaching its determination that the action qualified for an emergency exemption, the court focused on the fact that the flood was not a product of governmental inaction.

169. *Id.*

(ii) where a clear and present danger exists that requires immediate action for the protection or preservation of life, health, property or natural resources;

(iii) where such action is the minimum activity necessary to cope with the emergency and continues only for the period of time needed to prepare an EIS or make a negative declaration (or CND); and

(iv) if the action taken is directly related to the emergency and performed to cause the least change or disturbance to the environment. Any decision to fund, approve or directly undertake other activities after the emergency has expired is fully subject to the review procedures of this Part.

The provision suggested here would encourage the government to act timely, rather than procrastinating until an "emergency" has developed. Additionally, the provision furthers the underlying purpose of SEQRA which is, "to the maximum extent practicable, [to] minimize or avoid adverse environmental effects."¹⁷⁰ Since the EIS is at the heart of the SEQRA process, excessive and unjustified exemption from its preparation can undermine the purpose of the statute.¹⁷¹

The proposed emergency provision carves out a limited exception for those emergency situations where quick action is absolutely necessary while furthering the purpose of SEQRA. For example, if a hurricane were to destroy coastal area homes, the local municipality could construct a temporary shelter to house the dispossessed residents without preparing an EIS. The requisite elements of the proposed exemption would be satisfied; construction of a shelter would be in response to the sudden hurricane, which presented a clear danger for the protection of life and property. Since nothing less than a temporary shelter would protect the persons left homeless, construction of a shelter would be the minimum action necessary to cope with the destroyed homes.

In this situation, it is impracticable to require an EIS because the dispossessed residents would be without a shelter until one is prepared. However, an EIS should be required if the local municipality were to undertake any action unrelated to the construction of the shelter. An EIS should also be prepared if, the temporary shelter would be used on a permanent basis.

In contrast, the current approach to the application of the emer-

170. See *supra* note 52 and accompanying text.

171. See *supra* notes 47-55 and accompanying text.

agency provision frustrates the underlying purpose of SEQRA. The trend thus far appears to forgive governmental inaction and permits the emergency provision to be used when the "emergency" is a result of an agency's ineptitude rather than unforeseeable circumstances. Furthermore, its vague construction promotes a broad interpretation since there are limited guidelines or standards for determining when an "emergency" exists. Exemption from the requirements of SEQRA under these circumstances does not serve to minimize or avoid adverse environmental effects "to the maximum extent practicable." Such exemption is, in essence, circumvention, and the statute should be revised to prevent this abuse.

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