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June, 2005 No. 1 Issue 4

Published monthly by
J. Robert Folchetti & Associates, LLC

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Production

MKTworks, Inc.

Photos

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www.worldwildlife.org

www.dlia.org

In coming issues . . .

Developers and the Scoping Process

New Wetlands Bill

What Development Will Look Like in 2030

When You Need a Federal Wetlands Permit: Plan for the Indiana Bat and Bog Turtle

Not all developers may be aware of it, but in January of this year it became a little more involved to obtain the U.S. Army Corps of Engineers' nationwide #39 wetlands permit. As environmental consultants were then notified, the permit will no longer be issued until developers perform an Indiana bat survey that satisfies the requirements of the Federal Fish and Wildlife Service.



Indiana Bat -
Source: www.dlia.org

Here's how the process works: Under permit #39, allowing up to or above 1/10 of an acre of wetlands to be altered under certain conditions, the developer submits a Wetlands Delineation Report, which includes the project design and wetlands surveyed on a site map. A Corps of Engineers representative then visits the site to confirm the delineation. After making any necessary changes, the developer receives a letter of confirmation stating whether the project meets with the Corps' jurisdictional approval. If it does, the developer must then complete an Indiana bat survey.



Bog Turtle -
Source: www.worldwildlife.org

Performed by an environmental consultant or wildlife specialist, the survey can cost anywhere from \$2,000 to \$6,000, depending on the protocols that must be followed, such as trapping bats with nets or acoustically identifying species. (Software is available to compare their voices to those of the eight other species of bats in New York State.) It's not the price of the survey that is the issue, however, but the timing.

The only time a bat survey (and most wildlife surveys) can be performed is

during a few short weeks in the spring. So if you're told you must do one in January, you'll just have to wait for the snow to melt, putting your project on a potentially very expensive hold.

What's more, the Corps of Engineers may inform you that information for the site suggests it may also harbor the bog turtle, requiring you to do a

Phase I bog turtle habitat survey as a first step. If this survey, which can cost between \$2,000 and \$5,000 depending on the size of the site, confirms that there may be a habitat, you will then have to move to Phase II, hiring an expert, usually a biologist, who is regarded by the Federal Fish and Wildlife Service as being experienced in sighting and identifying the bog turtle. Nor is this necessarily the end. Surveys for bald eagle habitats are also sometimes required, depending on site conditions.

None of these requirements for surveys are new. But with the growing demand for housing construction, the Fish and Wildlife Service and the Corps of Engineers have become increasingly concerned with the fate of endangered species. Now that completing endangered species habitat surveys has become necessary to obtain the Corps of Engineers' nationwide wetlands permit, there is only one safe course of action. Be aware from the beginning of possible survey requirements, and try to plan the timing of your projects accordingly.

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The Importance of the EIS in Land Use Litigation

The desire of every developer, large or small, is to obtain approvals immediately and to be in the ground yesterday. The reality, however, is that the approval process in the State of New York can be complex and time-consuming. Obtaining any type of approval can be extended for up to several years depending on the type of environmental review of the project required under SEQRA (the New York State Environmental Quality Review Act), referring to Article 8 of the Environmental Conservation Law and its implementing regulations. Litigation over the proposal leads to an even more protracted process.

One basis upon which to challenge an approval is that the environmental review of the project was insufficient because no EIS (environmental impact statement) was prepared. A lead agency (i.e. the agency selected to be in charge of the SEQRA review) may decide that a proposed project does not impose a potential adverse impact on the environment and eliminate the need for an EIS. Even when this happens, however, it may be more judicious to prepare one, especially if the potential for litigation exists. Avoiding the EIS may be legitimate, but doing so can involve considerable risk. In the event of successful litigation challenging the environmental review, such review may be set aside, sending the developer back to the beginning, or an approval may be annulled.

The test for a legal challenge to the environmental review of a project is whether the lead agency took a hard look at the potential adverse environmental impacts of the action. In the author's experience, courts are more likely to uphold an agency's environmental review and any subsequent approval of a project where an EIS was prepared than where one was not. A conclusion that a hard look has been taken is almost inescapable when the impacts have been studied in a voluminous and "weighty" EIS.

In addition, in such litigation, commonly referred to as an "Article 78" special proceeding, the only evidence the Court can consider is that which was before the lead agency. The information in the EIS becomes the legal



Wetlands area.

record which cannot be supplemented in a subsequent court proceeding. For this reason, developers are well advised to include in an EIS any information about the project they would want to have a reviewing court consider. Depending on the potential issues, the expertise of an array of professionals, from traffic and sewage engineers to biologists, geologists and hydrologists to demographers, may be required to make the strongest record possible that a "hard look" at all the potential environmental impacts was taken and that approval of the proposed development was correct.

In the land development arena, the lead agency is usually the local planning board, but approvals from other agencies are often required. For example, the provision of sewer and water services requires the approval from the County Health Department. If there are wetlands on the property, approvals from NYSDEC (New York State Department of Environmental Conservation) and/or the federal Army Corps of Engineers may be required. If access to the project is proposed on a state highway, approval from NYSDOT (New York State Department of Transportation) may be required. Development of property within the New York City Watershed may trigger the jurisdiction of the New York City Department of Environmental Protection. Where any of the approving agencies is hostile to the proposal, the preparation of a complete and comprehensive EIS

addressing the potential impacts and merits of an application can be extremely important in any lawsuit challenging a denial of the developer's application.

For all of these reasons, even if the lead agency finds that no EIS is required, the astute developer should assess all sectors interested in the project to determine the level of community interest, the potential source of opposition, and the likelihood of litigation. Potential sources of legal challenges to the SEQRA review include residents in the community, competitors, citizen watchdog groups, or adjoining municipalities that may be affected by the project but would not reap any tax benefits. Such challenges may also be asserted by other agencies or boards that might feel an EIS should have been required.

There is no question that preparing an EIS is both time-consuming and expensive. It may take 18 months or longer to conclude the EIS process, but in the long run this can be more economical in time and cost than the 18 to 36 month delay that can result from a protracted litigation. Further, while an EIS is a significant expenditure, litigation can be equally or more costly.

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Making Your Way Through the SEQRA Process: A Step-by-Step Guide for Developers

Although the SEQRA (State Environmental Quality Review Act) regulations found in 6NYCRR 617 can be confusing, they can be broken down into a series of logical steps which developers can follow through the SEQRA process. This is the first in a series of three articles intended to help developers understand the basics of the process. Further assistance can be obtained from professionals who work with the regulations on a regular basis, including your engineers, environmental specialists and attorneys.



Earth-moving equipment breaks ground for new development.

1. First determine if any action in your proposed project is subject to review under SEQRA. If it is, you must now:

2. Classify the action. If it's Type II, there's no need for further review. (See 6NYCRR617.5 for a list or your lead agency's locally adopted Type II list.) If the action is Type I (see section 617.4), you may need to prepare a draft EIS (Environmental Impact Statement). If the action is Unlisted (with thresholds less than Type I and not on the Type II list), it requires a determination of significance and possibly a draft EIS. The next requirement is to:

3. Complete EAF forms.

a. *If the action is Type I, you must prepare a full EAF (Environmental Assessment Form (see 617.20 Appendix 20). The applicant completes Part 1 of the form, and the lead agency Part 2 and, if required, Part 3. Or, the requirement may be waived if you complete a draft EIS.*

b. *If the action is Unlisted, you must complete at least a short EAF (see 617.20 Appendix C). Again, the applicant completes Part 1 and the lead agency Parts 2 and 3. Or, an agency may require either a full EAF or only a draft EIS submitted with your application. The agency or agencies must now:*

4. Coordinate review.

a. *This is required for all Type I actions, with the lead agency responsible for circulating Part I of the full EAF and any other information provided by the applicant to all involved agencies. If two or more agencies are involved, all must agree which one is to be lead agency within 30 calendar days.*

b. *For Unlisted actions, coordinated review is optional. You must identify involved agencies in the short or full EAF. There is also an option for uncoordinated review, in which each agency independently conducts an environmental review to determine the significance of the action. If all issue a negative declaration, you can pro-*

ceed with your project, but if any issues a positive declaration, requiring an EIS, there must be a coordinated review. An agency may also use the Conditioned Negative Declaration (CND) process, requiring a full EAF and coordinated review (see Step 5). The agency or agencies must then:

5. Make a determination of significance—within 20 days.

a. *In the case of a negative declaration regarding either a Type I or unlisted action, the agency maintains a file on the declaration that is accessible by the public. For a Type I action, the agency must also publish a negative declaration (see 617.12).*

b. *For an Unlisted action, the agency can use a CND procedure requiring the preparation of a full EAF, the completion of a coordinated review, the elimination or reduction of potentially adverse impacts to an insignificant level, and a 30-day minimum period for public comment. If you request an EIS, or comments received lead the agency to ask for one, you can proceed to the scoping process.*

c. *Any positive declaration, requiring the preparation of an EIS, must be published (as in 617.12) and state whether scoping will be conducted.*



Surveying is an intrinsic part of the SEQRA process.

Next month's issue will discuss the next step in the SEQRA process, the scoping process which identifies all issues to be addressed in a draft EIS. Though not legally required, scoping is highly recommended for all draft EIS's. (See *Q&A with John Folchetti* on p. 4 and *The Importance of the EIS for Developers* by Geraldine Tortorella on p. 2 of this issue for more information on the process.)

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Q & A with John Folchetti

The SEQRA process has been around since the 1970s and, while it has become a fact of life, developers should not take their understanding of it for granted.

Q: What is the most important thing developers need to understand about SEQRA?

A: Besides the fact that they must comply with it, that the lead agency has the final say. The local municipali-

ty or other regulatory body that declares itself lead agency is the one that decides what the developer must evaluate in order to ensure proper mitigation of any possible environmental impacts of a project.

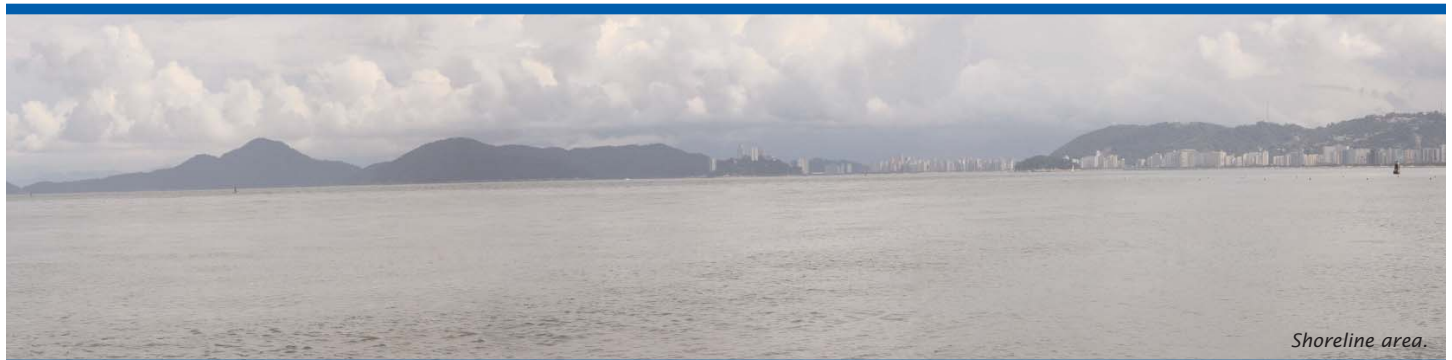
Q: When is the lead agency's say most critical?

A: Generally, during the scoping process. Although the agency has the legal authority to write the scope, typically they ask the developer to do it, then modify the scope based on local conditions. The scoping process is interactive with the applicant, but the agency makes the final decision whether to accept the proposed scope, which has a direct impact on costs.

Q: What should be the developer's greatest concern with the entire process?

A: Budgeting for it. Developers should budget at the very start for the period up to the scoping session. At that point, they must budget again, based on what comes out of the scoping session. Budgets should always be conservative. Although the SEQRA process can take less than a year, we have seen projects that have taken well over five years to reach final approval.

Please give us your suggestions for future Q & A topics and future articles, by emailing them to john.folchetti@jrfa.com.



Shoreline area.

THE FUNDING CALENDAR

Grant Name	Funding Agency	Eligible	Deadline	Goals
2005 Heritage Areas System Grant Program	Environmental Protection Fund	Municipalities	June 30, 2005	The Project Must Fall Within a NYS Designated Heritage Area – To Preserve, Restore or Rehabilitate Lands, Waters or Structures.
2005 Parks Grant Program	New York State Office of Parks, Recreation and Historic Preservation:	Municipalities	June 30, 2005	1- Acquisition/Development of Parks 2- Restore Lands, Water or Structures for Parks
2005 Brownfield Opportunity Areas Program	New York State Department of State	Municipalities and Not-for-Profit	June 30, 2005	1- Pre-Nomination Study 2- Nomination 3- Site Assessments/Implementation Strategy
2005 Local Waterfront Revitalization Program	Environmental Protection Fund	Municipalities Located Within a State Coastal Area or Along a Major Inland Waterway	June 30, 2005	1- Planning and/or Redevelop Urban Waterfronts 2- Provide New or Upgraded Access Points to the Hudson River 3- Preparing or Implementing a Water Body/Watershed Management Plan 4- Completing or Implementing a Local Waterfront Revitalization Program 5- Creating a Blueway Trail
2005 Hudson River Estuary Program	New York Department of Environmental Conservation	Municipalities and Not-For-Profit	June 30, 2005	1- Interpretive Centers & Education Projects 2- Open Space Planning and Acquisition 3- Watershed Planning and Implementation 4- River Access for Boating, Fishing & Swimming
2005 Strategic Planning Technical Assistance Grant Program	New York State Governor's Office for Small Cities	Municipalities	July 11, 2005	Strategic Planning

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