The Aftermath of Long Island Pine Barrens Society v. Planning Board of Brookhaven: The Need for Amending SEQRA

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In 1975, New York State adopted the State Environmental Quality Review Act ("SEQRA"). Modeled after the National Environmental Policy Act ("NEPA"), SEQRA was designed to enrich understanding of ecological systems, and minimize the harmful effects that human activities have on the environment.

4 See N.Y. Envtl. Conserv. Law § 8-0101 (McKinney 1984). The Legislature stated that SEQRA was designed to:
compels state and local agencies\textsuperscript{5} which approve, undertake, or fund projects,\textsuperscript{6} to prepare an environmental impact statement ("EIS")\textsuperscript{7} for proposed actions that will "significantly affect" the environment, pursuant to the SEQRA regulations.\textsuperscript{8} The essential purpose of an EIS is to ensure that agencies recognize and con-

Encourage productive and enjoyable harmony between man and his environment; to promote efforts which will eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of ecological systems, natural, human and community resources important to people of the state.

\textit{Id.}

\textsuperscript{5} \textit{See} N.Y. \textit{Envtl. Conserv. Law} \textsection 8-0105(3) (McKinney 1984). The statute defines agency as "any state or local agency." \textit{Id.}

\textsuperscript{6} \textit{See} N.Y. \textit{Envtl. Conserv. Law} \textsection 8-0109 (McKinney 1984) (discussing preparation of EIS).

\textsuperscript{7} \textit{See} N.Y. \textit{Envtl. Conserv. Law} \textsection 8-0109(2) (McKinney 1984). The statute provides in relevant part:

All agencies . . . [state or local] . . . shall prepare or cause to be prepared by contract or otherwise an environmental impact statement on any action they propose or approve which may have a significant effect on the environment. Such a statement shall include a detailed statement setting forth the following:

a) a description of the proposed action and its environmental setting;

b) the environmental impact of the proposed action including short term and long-term effects;

c) any adverse environmental effects which cannot be avoided should the proposal be implemented;

d) alternatives to the proposed action;

e) any irreversible and irrevocable commitments of resources which would be involved in the proposed action should it be implemented;

f) mitigation measures proposed to minimize the environmental impact;

g) the growth-inducing aspects of the proposed action, where applicable and significant;

h) effects of the proposed action on the use and conservation of energy resources, where applicable.

\textit{Id.}

\textsuperscript{8} \textit{See} [1987] 6 N.Y.C.R.R. 617.11(a)(1)-(11). The regulations state that the criteria for determining if a "significant effect" on the environment exists are whether:

1. a substantial adverse change in existing air quality, ground or surface water quality or quantity, traffic or noise levels; a substantial increase in solid waste production; a substantial increase in potential for erosion, flooding, leaching, or drainage problems;

2. the removal or destruction of large quantities of vegetation or fauna; substantial interference with the movement or any resident or migratory fish or wildlife species; impacts on a significant habitat area; substantial adverse effects on a threatened or endangered species of animal or plant, or the habitat of such a species; or other significant adverse effects to natural resources;

3. the encouraging or attracting of a large number of people to a place or places for more than a few days, compared to the number of people who would come to such a place absent the action;

4. the creation of a material conflict with a community's current plans or goals as officially approved or adopted;

5. the impairment of the character or quality of important historical, archaeological, architectural or aesthetic resources or of existing community or neighborhood character;

6. a major change in the use of either the quantity or type of energy;

7. the creation of a hazard to human health;

8. a substantial change in the use, or intensity of use, of land including agricultural, open space recreational resources, or in its capacity to support existing uses;
sider the possible long and short term environmental consequences of their actions. However, unlike NEPA, SEQRA imposes a substantive requirement that the agency mitigate possible adverse effects that the proposed action may have on the environment.

Sometimes the effects of two or more individual actions are "significant" only when considered cumulatively. Accordingly, the SEQRA regulations issued by the New York State Department of Environmental Conservation ("DEC") provide that the issuance of a cumulative impact statement is necessary when two or more "related" actions that are undertaken, funded, or approved by a state or local agency would have a significant effect on the environment when considered cumulatively. For example, the single burial of a toxin might not have a significant effect on the ground water of an area, but a thousand such burials could be ru-

(9) the creation of a material demand for other actions which would result in one of the above consequences;
(10) changes in two or more elements of the environment, no one of which has a significant effect on the environment, but when considered together result in a substantial adverse impact on the environment; or
(11) two or more related actions undertaken, funded or approved by an agency, none of which has or would have a significant effect on the environment, but when considered cumulatively would meet one or more of the criteria in this section.

Id. See supra note 7 (discussing preparation of EIS).

9 See supra note 8 (setting forth criteria for determining whether "significant effects" on environment exist); see also Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-28 (1980) (noting that NEPA has procedural requirements); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 558 (1978). The court stated that "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural." Id.; Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 415, 494 N.E.2d 429, 434, 503 N.Y.S.2d 298, 303 (1986). The court explained that "SEQRA is not merely a disclosure statute; it imposes far more "action-forcing" or "substantive" requirements on state and local deaccession than NEPA imposes of their federal counterparts." Id. (quoting Philip H. Gitlen, The Substantive Impact of the SEQRA, 46 Ala. L. Rev. 1241, 1248 (1982)).

10 See supra note 8 (setting forth criteria for determining whether "significant effects" on environment exist); see also Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-28 (1980) (noting that NEPA has procedural requirements); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 558 (1978). The court stated that "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural." Id.; Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 415, 494 N.E.2d 429, 434, 503 N.Y.S.2d 298, 303 (1986). The court explained that "SEQRA is not merely a disclosure statute; it imposes far more "action-forcing" or "substantive" requirements on state and local deaccession than NEPA imposes of their federal counterparts." Id. (quoting Philip H. Gitlen, The Substantive Impact of the SEQRA, 46 Ala. L. Rev. 1241, 1248 (1982)).


12 See [1987] 6 N.Y.C.R.R. § 617.11(a)(11). This section requires that for a cumulative EIS to be mandated, there must exist "two or more related actions, undertaken funded or approved by an agency, none of which has or would have a significant effect on the environment, but when considered cumulatively . . . would constitute a significant effect, in accordance with [1987] 6 N.Y.C.R.R. § 617.11." Id. (emphasis added).

13 See Pine Barrens, 80 N.Y.2d at 513-14, 606 N.E.2d at 1378, 591 N.Y.S.2d at 987. The court held that projects are deemed to be related when "the municipality had enacted a local ordinance containing a plan to set aside a discrete development district without destroying the district's existing character." Id.

14 See supra note 5 (setting forth definition of agency).

15 See supra note 8 (stating criteria for determining whether significant effect exists).

16 See supra notes 12-13 (discussing "related" requirement).
inous to the ground water. Therefore, if such burials were deemed to be related under the regulations, a cumulative EIS would be necessary.

In furtherance of SEQRA's statement of purpose and the DEC regulations, the New York Court of Appeals ("Court of Appeals") has held on several occasions that a cumulative EIS was required of an agency because the proposed actions were sufficiently "related." However, in each of these cases, the "relatedness" requirement was found to be satisfied when the municipalities, had set forth a "comprehensive plan" for the development of the area in question. For example, in *Save the Pine Bush, Inc. v. City of Albany*, the court held that since there existed a local ordinance setting forth a plan for development of the Pine Bush area in Albany, the city's EIS concerning the building of a single office complex in the Pine Bush should have considered the cumulative impact of several proposals slated to occur in the same area. Similarly, in *Chinese Staff & Workers Ass'n v. New York City*, the Court of Appeals held that New York City, in approving several projects to occur in lower Manhattan, must consider the possible environmental impact of the developments cu-

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17 See infra note 50 (discussing SEQRA's statement of purpose).
18 See supra note 12 (regulations require that projects be "related" as prerequisite to mandating issuance of cumulative EIS).
19 See *Save the Pine Bush, Inc. v. City of Albany*, 70 N.Y.2d 193, 206, 512 N.E.2d 526, 532, 518 N.Y.S.2d 944, 948 (1987). The Court of Appeals held that the regulation's relatedness requirement is satisfied if "the project at issue . . . is . . . part of a larger plan designed to resolve conflicting . . . environmental concerns in a subsection of a municipality with special environmental significance." *Id.*; *Chinese Staff & Workers Ass'n v. New York City*, 68 N.Y.2d 359, 368, 502 N.E.2d 176, 181, 509 N.Y.S.2d 499, 504 (1986). The Court of Appeals held that a cumulative EIS was required for several projects slated to occur in a discrete development district established by New York City. *Id.*; see also *Village of Westbury v. Department of Transp.*, 75 N.Y.2d 62, 69, 549 N.E.2d 1175, 1178, 550 N.Y.S.2d 604, 607 (1989). The Court of Appeals held that the proposed widening of Northern State Parkway, and the proposed reconstruction of an interchange between the Northern State and Meadowbrook Parkways, were two projects which should be considered cumulatively in the Department of Transportation's ("DOT") EIS because both projects were working toward the accomplishment of the DOT's common plan to "alleviate traffic congestion." *Id.*
20 See supra note 5 (setting forth definition of agency).
21 See supra note 12 (discussing "related" requirement).
22 See supra note 19 (illustrating cases where "comprehensive plan for development" existed).
23 See supra note 18 and accompanying text (discussing "related" requirement).
25 Id. at 206, 512 N.E.2d at 532, 518 N.Y.S.2d at 948. The court held that because a comprehensive plan existed for development of the Pine Bush area, the city's failure to consider the "potential cumulative impact of other pending projects" along with their EIS for the project at bar constituted a violation of SEQRA. *Id.*
mullatively because the projects were all slated to occur in an area designated by the city as the "Manhattan Bridge District." This district was subject to a comprehensive building code designed to protect the aesthetic quality of the area. Therefore, projects which were proposed to occur within the designated district were "related" pursuant to the DEC regulations, and must be considered cumulatively.

Recently, in Long Island Pine Barrens Society, Inc. v. Planning Board of Brookhaven, the petitioners claimed that 224 construction projects slated to occur in various sections of the Long Island Pine Barrens would cumulatively have a significant effect on the ecosystem of the Pine Barrens. The Pine Barrens is a tract of land which is relatively undeveloped and overlies the sole source aquifer for Nassau and Suffolk counties. Accordingly, unbridled development of the Pine Barrens threatened to drastically affect the water supply of Nassau and Suffolk counties. The petitioners therefore contended that a cumulative EIS was required from the planning boards of the townships through which the Pine Barrens

27 Id. at 362, 502 N.E.2d at 177, 509 N.Y.S.2d at 500. The controversy arose out of the proposed construction of a high-rise luxury condominium on a vacant lot in Chinatown. Id.
28 Id. The Manhattan Bridge District was defined as:

[A] special zoning district created by the City of New York designed to preserve the residential character of the Chinatown community, encourage new residential development on sites requiring minimal relocation, promote rehabilitation of existing housing stock, and protect the scale of the community.

29 Id. at 367, 502 N.E.2d at 181, 509 N.Y.S.2d at 504. The court stated that the agency "must look to more than the potential effects of this one parcel and must consider the potential impacts on the surrounding community." Id.; see also Village of Westbury v. Department of Transp., 75 N.Y.2d 62, 69, 549 N.E.2d 1175, 1178, 550 N.Y.S.2d 604, 607 (1989).

The court held that two proposed construction projects should be considered cumulatively because both projects were working toward the accomplishment of the D.O.T.'s common plan to "alleviate traffic congestion." Id.

31 Id. at 513, 606 N.E.2d at 1378, 591 N.Y.S.2d at 987. The petitioners stated that the Pine Barrens was "ecologically sensitive," implying that the cumulative impact of 224 separate development projects would be ruinous to the area's environment. Id.
32 Id. at 508, 606 N.E.2d at 1375, 591 N.Y.S.2d at 984. The Court of Appeals recognized the Pine Barrens as an "indispensable component of the aquifer system that is the sole natural source of drinking water for . . . Long Island." Id.
33 Id. at 509, 606 N.E.2d at 1375, 591 N.Y.S.2d at 984. The court noted:

[O]nce the deep recharge system in this area becomes contaminated, it would take centuries to flush it sufficiently to return it to clean groundwater quality. Thus, as a practical matter, contamination would be irreversible. Moreover, because precipitant entering through the Pine Barrens region radiates outward into the rest of the aquifer system, any contamination originating in this area would have serious consequences for the entire Long Island groundwater supply.
The Court of Appeals, however, held that the projects did not require a cumulative EIS because the projects were not sufficiently "related" pursuant to the DEC regulations. The court established its position in *Albany Pine Bush* and *Chinese Staff*, that the "relatedness" requirement, was satisfied if the projects were to occur in an area that was specifically subject to legislation constituting an overarching comprehensive plan for development of the area.

However, the *Pine Barrens* court construed this language to mean that separate projects were "related," as stated in the DEC regulations, only when an actual governmental plan for development existed. Such a development plan exists when the relevant municipality enacts a plan to set aside a discrete development district. *SEQRA* does not expressly provide for the existence of a comprehensive plan as a prerequisite to requiring a cumulative

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35 See supra note 12 (setting forth requirement of "related").


37 See Long Island Pine Barrens Soc'y, Inc. v. Planning Bd. of Brookhaven, 80 N.Y.2d 500, 513, 606 N.E.2d 1373, 1378, 591 N.Y.S.2d 982, 987 (1992). The relatedness requirement may be satisfied if "the project at issue . . . is . . . part of a larger plan designed to resolve conflicting . . . environmental concerns in a subsection of a municipality with special environmental significance." *Id*. (quoting *Save the Pine Bush*, 70 N.Y.2d at 206, 512 N.E.2d at 532, 518 N.Y.S.2d at 948).

38 See (1987) 6 N.Y.C.R.R. § 617.11 (SEQRA regulations established by DEC).

39 See Pine Barrens, 80 N.Y.2d at 514, 606 N.E.2d at 1379, 591 N.Y.S.2d at 988.

40 See *Save the Pine Bush*, 70 N.Y.2d at 205, 512 N.E.2d at 530, 518 N.Y.S.2d at 948. Although the common plan for development was set forth by the city of Albany, the court did not state that it was the local municipality that was required to set forth the common plan. *Id*.; see also *Chinese Staff & Workers Ass'n*, 68 N.Y.2d at 368, 502 N.E.2d at 181, 509 N.Y.S.2d at 504. The Court of Appeals held that in considering several construction projects slated to occur in a special zoning district, a cumulative EIS was required because, in creating the discrete development district, New York City created a special plan for development. *Id*. However, the court did not address the issue of whether it was the local municipality, as opposed to the State, that was required to set forth the plan for development. *Id*.

41 See Pine Barrens, 80 N.Y.2d at 513, 606 N.E.2d at 1378, 591 N.Y.S.2d at 987. The Court of Appeals held that in order for separate projects to be related pursuant to (1987) 6 N.Y.C.R.R. § 617.11(a)(11), the local municipality must have adopted a common plan for development. *Id*. The court further held that the state legislation designed to protect the Pine Barrens did not fulfill this requirement. *Id*.; see also 42 U.S.C. § 300h-3(e) (1988). This statute states that the Long Island aquifer is the "sole source aquifer" under the Safe Drinking Water Act. *Id*. 
EIS. This requirement results from the Court of Appeals' interpretation of the DEC regulations. Such a plan did not exist in the Pine Barrens case because the Pine Barrens spans three townships, none of which had enacted a comprehensive plan for the development of the tract. The court therefore held that since there was no common plan for development of the region, there was no cohesive framework for relating the 224 projects to one another. Hence they were not "related" pursuant to the DEC regulations, and a cumulative EIS could not be mandated. Moreover, the court stated that the common placement of the projects in the central Pine Barrens was an insufficient reason for requiring a cumulative EIS.

With rising environmental concerns as to water pollution, solid waste disposal, endangered species, and the preservation of our natural resources, the Pine Barrens court should have found that municipalities need to prepare a cumulative EIS for projects which will collectively have a "significant impact" on the environment. In fact, it was the intent of SEQRA and its accompanying regulations to compel a cumulative EIS in such cases. By nar-

42 See N.Y. ENVTL. CONSERV. LAW § 8-0109(2) (McKinney 1984). Regarding the preparation of an environmental impact statement, the Legislature stated that "all agencies . . . shall prepare, or cause to be prepared . . . an environmental impact statement on any action they propose or approve which may have a significant effect on the environment." Id.
43 See [1987] 6 N.Y.C.R.R. § 617.11(b). This section provides, as one of several alternative circumstances under which a cumulative EIS is required, the existence of a "plan" of which the proposed action is a part. Id.
44 See Long Island Pine Barrens Soc'y, Inc. v. Planning Bd. of Brookhaven, 80 N.Y.2d 500, 508, 606 N.E.2d 1373, 1375, 591 N.Y.S.2d 982, 984 (1992); The Pine Barrens once encompassed 250,000 acres. Id. It is now estimated to have been reduced to some 100,000 acres of relatively undeveloped land. Id.
45 See supra note 34 (discussing townships).
46 See Pine Barrens, 80 N.Y.2d at 514, 606 N.E.2d at 1379, 591 N.Y.S.2d at 988. The court stated that in the Pine Barrens situation "there is no plan analogous to the ordinance establishing a special . . . zoning district in Chinese Staff or the local statute creating a special light-industry district in Save the Pine Bush." Id.
47 Id. at 514-15, 606 N.E.2d at 1379, 591 N.Y.S.2d at 988.
48 Id. The court held:
[T]here is no cohesive framework for relating the 224 projects in issue to each other. The only element they share—their common placement in the Central Pine Barrens—is an insufficient predicate under the present set of administrative regulations for mandatory cumulative impact analyses.

49 See supra note 7 (discussing preparation of EIS).
50 See supra note 4 (discussing SEQRA's statement of purpose); see also N.Y. ENVTL. CONSERV. LAW § 8-0103 (McKinney 1984). The statute provides in relevant part:
The Legislature finds and declares that: 1) The maintenance of a quality environment for the people of this state that at all times is healthful and pleasing to the senses and intellect of man now and in the future is a matter of state wide concern.
narrowly interpreting the term "related" to specifically require a municipality's adoption of a plan for development, the New York Court of Appeals has chosen not to use SEQRA as its drafters intended.

This Comment will suggest that the relatedness requirement, as set forth in the DEC regulations for SEQRA, was construed in an overly narrow fashion by the New York Court of Appeals in *Long Island Pine Barrens Society, Inc. v. Planning Board of Brookhaven*. Part One examines NEPA as a basis for construing the intent of the legislature in adopting SEQRA, and notes that where a cumulative EIS is in question, NEPA does not require the existence of a common plan for development. Part Two suggests that the court's present construction of the term "related," conflicts with the legislature's intent in adopting SEQRA. Part Three examines the California Environmental Quality Review Act, a statute similar to NEPA, and notes that this legislation does not require the existence of a common plan for development as a prerequisite to requiring a cumulative EIS. Finally, this Comment suggests that the DEC's proposed amendments to the SEQRA regulations do not preclude courts from disregarding a legislative in-

2) Every citizen has a responsibility to contribute to the preservation and enhancement of the quality of the environment.

3) There is a need to understand the relationship between the maintenance of high-quality ecological systems and the general welfare of the people of the state, including their enjoyment of the natural resources of the state.

4) Enhancement of human and community resources depends on a quality physical environment.

5) The capacity of the environment is limited, and it is the intent of the legislature that the government of the state take immediate steps to identify any critical thresholds for the health and safety of the people of the state and take all coordinated actions necessary to prevent such thresholds from being reached.

6) It is the intent of the legislature that 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.

7) It is the intent of the legislature that the protection and enhancement of the environment, human and community resources shall be given appropriate weight with social and economic considerations in public policy.

8) It is the intent of the legislature that all agencies 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.

9) It is the intent of the legislature that all agencies which regulate activities of individuals, corporations, and public agencies which are found to affect the quality of the environment shall regulate such activities so that due consideration is given to preventing environmental damage.

*Id.*
tent to require a cumulative EIS whenever there exist actions which, when considered cumulatively, may significantly affect the environment.

I. INTERPRETING SEQRA'S LEGISLATIVE INTENT WITH THE ASSISTANCE OF NEPA

Since SEQRA was modeled after NEPA, NEPA and its accompanying regulations are entitled to substantial deference when interpreting SEQRA. Accordingly, in interpreting SEQRA, New York courts have looked to federal decisions interpreting NEPA. Federal courts have recognized NEPA as a statute of broad applicability, that sets forth a low threshold requirement for a cumulative EIS. In fact, NEPA, like SEQRA, does not require a common plan for development where a cumulative EIS is

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51 See supra note 2 (discussing SEQRA's relationship with NEPA); see also 42 U.S.C. § 4321 (1987). The congressional declaration of purpose provides: The purpose of this act... [is to] declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the nation. Id.

52 See supra note 3 (citing NEPA).

53 See Andrus v. Sierra Club, 442 U.S. 347, 357 (1979). In 1977, President Jimmy Carter directed the Council for Environmental Quality ("C.E.Q.") to effect mandatory regulations corresponding to the procedural provisions of NEPA, and to issue them to federal agencies. Id.

54 See Andrus, 442 U.S. at 358. The Court stated that "CEQ's interpretation of NEPA was entitled to substantial deference." Id.; see also Warm Springs Dam Task Force v. Gribble, 417 U.S. 1301, 1309-10 (1974). The Court stated that: [T]he [C.E.Q.] was created by NEPA and charged in that statute with the responsibility to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in... this act... and to make recommendations to the President with respect thereto. Id.


56 See Glen Head-Glenwood Landing Civic Council, Inc. v. Town of Oyster Bay, 88 A.D.2d 484, 486, 453 N.Y.S.2d 732, 734 n.2 (2d Dep't 1982). The court noted that NEPA was a statute of broad applicability, as are the environmental statutes of thirteen other states. Id.

57 See infra notes 59, 62, 65 (discussing federal cases interpreting NEPA).
concerned. It is in the Pine Barrens court's interpretation of the term "related" that NEPA and SEQRA diverge.

The leading case on cumulative impact assessment in accordance with NEPA is Kleppe v. Sierra Club. In Kleppe, the Supreme Court held that regardless of whether a regional development plan or policy existed, when an action is pending before a federal agency, the agency must consider the aggregate impact of separate actions that will have a cumulative impact upon the region in question. In Natural Resources Defense Council, Inc. v. Callaway, the United States Navy prepared an EIS for the dumping of dredge spoil into Long Island Sound. The United States Court of Appeals for the Second Circuit held that the EIS was invalid because it failed to consider the possible cumulative effects of the particular dumping project in question, with several other such projects pending before other agencies. More recently, in Portland Audubon Society v. Lujan, the United States District Court for the District of Oregon held that NEPA required a cumulative EIS where the habitat of an endangered species was

58 See 40 C.F.R. § 1508.7 (1993). NEPA defines cumulative impact as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonable foreseeable future actions regardless of what agency . . . or person undertakes such other actions." Id.


60 Id. at 410. The Court stated that when "several . . . actions that will have a synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together." Id.

61 Id. A cumulative EIS is required for separate actions "that will have cumulative or synergistic environmental impact on the region." Id.

62 524 F.2d 79 (2d Cir. 1975).

63 Id. at 81. In order to accommodate new boats requiring a greater depth of water for operation, the Navy proposed widening and deepening the Thames River channel in Groton, Connecticut and dumping the dredge spoil into Long Island Sound. Id.

64 Id. at 88. The court stated:

An agency may not . . . [treat] a project as an isolated "single-shot" venture in the face of persuasive evidence that it is but one of several substantially similar operations, each of which will have the same polluting effect in the same area. To ignore the prospective cumulative harm under such circumstances could be to risk ecological disaster. As was recognized by Congress at the time of passage of NEPA, a good deal of our present air and water pollution has resulted from the accumulation of small amounts of pollutants added to the air and water by a great number of individual, unrelated sources . . . . NEPA was, in large measure, an attempt by Congress to instill in the environmental decision making process a more comprehensive approach so that long term and cumulative effects of small and unrelated decisions could be recognized, evaluated and either avoided, mitigated, or accepted as the price to be paid for the major federal action under consideration.

65 712 F. Supp. 1456, 1489 (D. Ore.), aff'd in part, rev'd in part, 884 F.2d 1233, 1239 (9th Cir. 1989). The district court held that the lack of an "overall plan" does not justify the failure to file a cumulative EIS. Id.
fragmented over a wide area. Such a possibility also existed in the *Pine Barrens* scenario. In accordance with *Callaway, Kleppe*, and *Lujan*, federal courts have consistently held that a cumulative EIS is required of federal agencies approving separate projects that cumulatively present a possible hazard to the environment.

## II. Interpreting SEQRA’s Legislative Findings

In adopting SEQRA, the legislature noted that all citizens have a duty to act responsibly in enhancing the quality of the environment. In furtherance of this goal, the New York Legislature ("Legislature") indicated that SEQRA encouraged harmony between people and the environment by calling for an EIS which functions to expose and minimize the possible adverse effects of

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66 *Id.* at 1477-78, 1485. The court held that the EIS in question did not adequately address the effects of habitat fragmentation of the spotted owl. *Id.*

67 *See* Long Island Pine Barrens Soc'y, Inc. v. Planning Bd. of Brookhaven, 80 N.Y.2d 500, 509, 606 N.E.2d 1373, 1376, 591 N.Y.S.2d 982, 985. The Court of Appeals noted that "development in one part of [the Pine Barrens] could have unforeseen consequences in another, as migratory routes are disrupted, food supplies are destroyed, alien species are given berth to develop and environmentally crucial wetlands ... dry up." *Id.*

68 *See* Town of Huntington v. Marsh, 859 F.2d 1134, 1141 (2d Cir. 1988). The court invalidated an EIS due to its failure to consider cumulative impact, and stated that "[t]he purpose of an EIS is to 'compel the decision maker to give serious weight to environmental factors' in making choices, and to enable the public to 'understand and consider meaningfully the factors involved.'" *Id.* (quoting County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1375 (2d Cir. 1977)). *Id.;* Bob Marshall Alliance v. Watt, 685 F. Supp. 1514, 1519 (D. Mont. 1986). The court held that NEPA was violated because the agency that prepared the EIS failed to consider the cumulative impact of several proposals. *Id.* The court stated that the agency was obligated to prepare a cumulative EIS when the effects of several projects in the area were "significantly different," as defined by 40 C.F.R. § 1508.27(b)(7) (1993), from those of the single project. *Id.* 40 C.F.R. § 1508.27(b)(7) (1993) states that "[s]ignificance exists if it is reasonable to anticipate a cumulatively significant impact on the environment". *Id.;* Akers v. Resor, 443 F. Supp. 1355, 1360 (W.D. Tenn. 1978). The court invalidated an EIS prepared for a flood and drainage project on the grounds that the lead agency failed to consider the cumulative impact of the project in question along with other, separate projects slated for the area. *Id.* The court based its decision on the C.E.Q. regulations and specifically noted that 40 C.F.R. § 1500.8 recognized that "the full environmental impact of a proposed ... action cannot be gauged in a vacuum. The standards of practicability and reasonableness ... dictate that ... cumulative impacts must not be ignored." *Id.*

69 *See* Fritiofson v. Alexander, 772 F.2d 1225, 1244 (5th Cir. 1985). Pursuant to *Kleppe*, the *Fritiofson* court stated that a cumulative EIS was necessary where the effects of several separate projects might have a significant effect on the environment. *Id.*

70 *See* N.Y. ENVTL. CONSERV. LAW § 8-0103(6) (McKinney 1984). The Legislature found that "to the fullest extent possible the policies, statutes, regulations, and ordinances of the state and its political subdivisions shall be interpreted and administered in accordance with the policies set forth in [SEQRA]." *Id.;* see also N.Y. ENVTL. CONSERV. LAW § 8-0103(2) (McKinney 1984). The Legislature found that "[e]very citizen has a responsibility to contribute to the preservation and enhancement of the quality of the environment." *Id.*
human actions on the environment. In enacting SEQRA, the Legislature stated an intent to compel all state and local agencies to conduct their affairs with an awareness for protecting the environment.

In light of NEPA, the statute upon which SEQRA is modeled, it is evident that the Legislature intended to require a cumulative impact statement from agencies where the cumulative impact of several projects, would have a "significant effect" on a geographic area. The Legislature also intended SEQRA to have a broad scope, similar to that of NEPA. Hence, in interpreting the ambiguous term "related" in the DEC regulations, New York courts, following the traditional rules of statutory construction, should find a legislative intent to require a cumulative EIS from agencies that propose or approve projects which may significantly effect the environment. Moreover, commentators have noted that in interpreting ambiguous terms, courts should take notice of current public policy considerations, such as the need to mini-

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71 See N.Y. ENVTL. CONSERV. LAW § 8-0101 (McKinney 1984). The Legislature stated: It is the purpose of this act to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhance community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state.

Id.; see also N.Y. ENVTL. CONSERV. LAW § 8-0103(3) (McKinney 1984). The statute recognized:
A need to understand the relationship between the maintenance of high-quality ecological systems and the general welfare of the people of the state, including their enjoyment of the natural resources of the state.

Id.

72 See N.Y. ENVTL. CONSERV. LAW § 8-0103(8) (McKinney 1984). The Legislature stated: All agencies [must] 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.

73 See supra note 2 (discussing SEQRA's relationship with NEPA).

74 See supra note 50 (statement of purpose and legislative findings).

75 See supra note 5 (setting forth definition of agency).

76 See infra note 79 (discussing criteria for determining "significant effect").

77 See Town of Henrietta v. New York State Dep't of Envtl. Conserv., 76 A.D.2d 215, 221, 430 N.Y.S.2d 440, 446 (4th Dep't 1980). Referring to NEPA's broad scope, the court noted "a reasonable interpretation of the New York statute [SEQRA] indicates that the Legislature intended . . . SEQRA to have a similar broad scope." Id.


79 See [1987] 6 N.Y.C.R.R. 617.11(a) (stating criteria for determining whether "significant effect" exists).

80 See generally G. CABRISH, A COMMON LAW FOR THE AGE OF STATUTES passim (1982). The author argued that courts should interpret statutes pursuant to their stated purpose, and when necessary, in consideration of changes in public policy.
mize adverse effects on the natural environment. However, in construing the term "related" to require a plan for development set forth by the local municipalities, the Pine Barrens court did not provide any policy reason for disregarding the traditional rules of statutory construction, and ignoring the legislative intent to require a cumulative EIS when separate projects may in their aggregate have a significant effect on the environment.

III. The California Environmental Quality Act

In Kings County Farm Bureau v. Hanford, the California Court of Appeals for the Fifth District was called upon to determine the sufficiency of an environmental impact report for a proposed coal-fired cogeneration plant. The appellants challenged the adequacy of the report's discussion of the cumulative impact that the cogeneration plant and similar projects would have. The court held that the state legislature, in enacting the California Environmental Quality Act, determined that preservation of the environment is a statewide concern and that all state agencies should consider ways to mitigate damage to the environment. In light of these legislative findings, the court required a cumulative EIS to be issued without requiring a "common plan" for development set forth by a local municipal government.

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82 See supra note 50 (stating SEQRA's declaration of purpose and legislative findings).
83 See supra note 79 (criteria for determining if "significant effects" exist).
85 Id. at 653.
86 Id.
87 Id. at 656.
88 Id.
89 See Kings County Farm Bureau v. Hanford, 221 Cal. App. 3d 692, 711 (Cal. Ct. App. 1990); see also Citizens to Preserve the Ojai v. County of Ventura, 176 Cal. App. 3d 421, 431 (Cal. Dist. Ct. App. 1985). The court found an environmental impact review statement to be inadequate because it failed to consider the cumulative impact of air pollution. Id.; San Franciscans for Reasonable Growth v. City of San Francisco, 151 Cal. App. 3d 61, 75 (Cal. Ct. App. 1984). The court stated that the county's environmental impact review did not adequately address the cumulative impact of several projects in accordance with the California Environmental Quality Act. Id. The court's decision was grounded in California Environmental Quality Act section 15,023.5 and made no mention of a "common plan." Id.; Witman v. Board of Supervisors of Ventura County, 88 Cal. App. 3d 397, 405 (Cal. Ct. App. 1979). The court addressed the degree to which an environmental impact review must discuss possible cumulative impact. Id.
The California court interpreted the environmental protection statute in accordance with its legislative intent and federal courts' interpretation of NEPA. In New York, the Appellate Division, Second Department has held that pursuant to the uniformity among environmental protection legislation, court decisions from other states are worthy of consideration when interpreting such legislation. New York courts have relied on court decisions from other states when interpreting SEQRA. However, the Court of Appeals in Pine Barrens did not consider the California district court's interpretation of the term "related" in Kings County. Unlike California, New York courts have interpreted SEQRA to require a common plan for development as a prerequisite for a cumulative EIS. Instead, the Pine Barrens court should have relied on the Kings County court and applied SEQRA with the force intended by the legislature.

IV. THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION'S PROPOSED AMENDMENTS TO THE SEQRA REGULATIONS

In February of 1994, the DEC's Department of Regulatory Affairs drafted several proposed amendments to the SEQRA regula-

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90 See supra notes 59, 62 (federal cases interpreting NEPA not to require common plan).
92 Id. at 373, 469 N.Y.S.2d at 969. The court stated "the holdings of our sister States are entitled to respect in view of the essential uniformity of environmental legislation." Id.; see also Nicholas A. Robinson, SEQRA's Siblings: Precedents From Little NEPA's in the Sister States, 46 ALB. L. REV. 1155, 1157 (1982). The author noted that due to the substantial similarity between NEPA and state environmental protection legislation, "there is considerable borrowing of case law and interpretation from one state to another." Id.
93 See Sun Beach, 98 A.D.2d at 372, 469 N.Y.S.2d at 968. The court cited a California case in discussing preparation of a draft environmental impact statement. Id.; Glen Head-Glenwood Landing Civic Council, Inc., v. Town of Oyster Bay, 88 A.D.2d 484, 492, 453 N.Y.S.2d 732, 738 (2d Dep't 1982). The court cited to Northern Oil v. City of Los Angeles, 13 Cal. 3d 68 (1976), in discussing the findings that a lead agency is required to make in preparing an EIS. Id.; Henrietta v. New York State Dep't of Envtl. Conserv., 76 A.D.2d 215, 221, 226, 430 N.Y.S.2d 440, 445, 449 (4th Dep't 1980). The court cited to Natural Resources Defense Council v. Arcata Nat'l Corp., 59 Cal. App. 3d 959, 966 (Cal. Ct. App. 1974), and stated: EIS, the heart of SEQRA, clearly is meant to be more than a simple disclosure statement . . . it is to be viewed as an environmental "alarm bell" whose purpose is to alert responsible public officials to environmental changes before they have reached ecological points of no return. Id.
94 See supra note 84 (discussing federal case interpreting NEPA).
95 See supra note 39 (discussing Pine Barrens holding).
96 See supra note 50 (discussing SEQRA's statement of purpose and legislative findings).
The draft contained several proposals pertaining to the requirement of a cumulative EIS when a lead agency proposed or approved an action. The proposed amendments would define "cumulative impact" as the alteration of the environment resulting from the proposed action's impact in conjunction with existing environmental conditions, the impacts of other approved actions, and probable future actions. Furthermore, the requirement that actions be "related" in order to warrant a cumulative EIS would be deleted from section 617.11(a)(11) of the New York Code of Rules and Regulations. Such an amendment would be a strong indication of the legislative intent behind SEQRA. Presumably, in subsequent cases similar to Pine Barrens, a cumulative EIS would be required. However such might not be the case due to two problems with the proposed amendments.

First, in section 617.11(b) the proposed amendments state that lead agencies, in determining whether an action may result in a significant impact, must consider "reasonably related and relevant ... cumulative impacts." If the proposed amendments are adopted as such, the inclusion of the "relatedness" language will

98 Id. § 617(j). The proposal defines "cumulative impact" as:
The change in the environment that results from the incremental impact of the proposed action when added to existing environmental conditions and the impacts of approved actions and probable future actions, regardless of what agency or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over time.

Id.; see also § 617.11(b). The regulation provides:
For the purpose of determining whether an action may cause one of the significant impacts listed in subdivision (a) of [1987] 6 N.Y.C.R.R. § 617.11, the lead agency must review the whole action and consider reasonably related and relevant:
(1) short and long term impacts;
(2) direct and indirect impacts;
(3) cumulative impacts.
Actions considered together in cumulative impact analysis must be:
(i) sufficiently close geographically so as to change or impact the same elements of the environment such as a wetland or roadway intersection; and
(ii) proposed to or by a state or local agency, or so likely to be proposed as to warrant inclusion, such as actions affecting a limited number of remaining vacant parcels in an area where impacts to open space are identified as relevant.

Id.
99 See id.
100 See [1987] 6 N.Y.C.R.R. § 617.11(a)(11) (present regulations incorporating term "related").
101 See supra note 67 (discussing potential environmental impact of developing Pine Barrens region).
102 See [1987] 6 N.Y.C.R.R. § 617.11(a) (setting forth criteria for determining significance).
103 See supra note 98 (discussing DEC's proposed amendments to [1987] 6 N.Y.C.R.R. § 617.11(b)).
allow courts to interpret the amendments as an endorsement of the *Pine Barrens* decision, rather than an attempt to prevent such a result from being reached by New York courts in future decisions.

Second, the proposed amendments state that actions considered cumulatively “must be sufficiently close geographically. . . .”\textsuperscript{104} This language does not definitively state when actions must be considered cumulatively; it merely sets forth one requirement. This could allow the court to construe other prerequisites for mandating a cumulative EIS.\textsuperscript{105}

Since the proposed amendments to the DEC regulations neither clarify, nor eliminate the term “related,”\textsuperscript{106} it is possible that the Legislature’s intent will not be fulfilled, should the amendments be enacted. Specifically, the court could effectively maintain that the existence of a comprehensive plan is still necessary to requiring a cumulative EIS.

**CONCLUSION**

In interpreting legislation, courts should review the plain meaning of the statute and the drafter’s intentions.\textsuperscript{107} In its interpretation of SEQRA, the New York Court of Appeals has construed the term “related” in an overly narrow manner, thereby disregarding legislative intent. By insisting on the existence of a common plan for development as a prerequisite to requiring a cumulative EIS, the *Pine Barrens* court narrowed the intended scope of SEQRA. Too often it is the case that once an error in statutory construction occurs, a court is hesitant to reverse itself due to considerations of stare decisis. Unfortunately, courts in later cases are compelled to promulgate an interpretation that violates legislative intent.\textsuperscript{108}

\textsuperscript{104} See supra note 98 (discussing proposed amendments to SEQRA regulations).

\textsuperscript{105} See supra note 41 (discussing Court of Appeals’ construction of “related” to require comprehensive plan).

\textsuperscript{106} See supra note 103 and accompanying text (discussing proposed amendments to SEQRA regulations).


\textsuperscript{108} See Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L. J. 281, 314 (1989). The author discussed how “considerations of stare decisis . . . make the court reluctant to reverse itself. The result may be that the court in later cases will continue to interpret a statute in violation of the legislature’s . . . [intent].” Id.
Given the Court of Appeals' reluctance to apply the Legislature's express intent in enacting SEQRA, the DEC should amend its regulations to clarify or eliminate the term "related," and require a cumulative EIS whenever the foreseeable effects of an action might substantially effect the environment when considered in light of existing environmental conditions and probable future actions.

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