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How Environmental Review Can Generate Car-Induced Pollution: A Case Study

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HOW ENVIRONMENTAL REVIEW CAN GENERATE CAR-INDUCED POLLUTION: A CASE STUDY

By Michael Lewyn*

I. INTRODUCTION

The National Environmental Policy Act ("NEPA")¹ requires federal officials to draft an environmental impact statement ("EIS") describing the environmental impact of proposed federal actions that significantly affect the environment, as well as analyze the environmental impacts of alternatives to the proposed action.² Almost two dozen states have adopted "little NEPA" statutes imposing similar requirements upon state and/or local governments.³

This article focuses on one of the strictest little NEPA statutes: New York's State Environmental Quality Review Act ("SEQRA").⁴ While most little NEPA statutes cover only government projects,⁵ SEQRA also covers private sector projects requiring municipal permits.⁶ Furthermore, SEQRA requires the government to consider both environmental and social impacts of its actions,⁷ unlike NEPA⁸ and about half of the existing little NEPA statutes.⁹

This article contends that the stringencies of SEQRA occasionally have harmful environmental consequences because SEQRA can easily be used to delay "infill development"—that is, development in already-developed areas such as cities and older suburbs. When this occurs, development may shift from older areas to "greenfields," newer suburbs that tend to be more dependent on automobiles and thus to produce more pollution.

Part II of this article introduces readers to SEQRA. Part III shows how SEQRA discourages infill development. Part IV explains that because greenfield sites tend to be in areas with little public transit, generating more automobile traffic than infill sites, SEQRA's bias towards greenfield development is environmentally harmful. Part V suggests possible reforms to SEQRA, including borrowing from California's little NEPA law.

II. A BRIEF GUIDE TO SEQRA

The federal government enacted NEPA in 1970¹⁰ to ensure that federal agencies considered the potential environmental impact of their actions.¹¹ The White House Council on Environmental Quality ("CEQ") has promulgated regulations that implement NEPA's provisions.¹² Under these regulations, the agency proposing and/or permitting the action, known as the "lead agency,"¹³ will typically¹⁴ begin the environmental review process by preparing an Environmental Assessment ("EA"), a document which "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an environmental impact statement."¹⁵ If after drafting the EA the lead agency decides that its actions will not create a significant

environmental impact, it will issue a "Finding of No Significant Impact" ("FONSI") instead of an EIS.¹⁶

On the other hand, if the lead agency decides that its actions might create a significant impact,¹⁷ it requests comments from the public and other government agencies asking what issues it should study in the EIS.¹⁸ After reviewing these comments, the agency prepares a draft EIS¹⁹ and—after soliciting additional public comment—a final EIS.²⁰ The EIS must address not only the environmental impacts of the proposed action but also any possible alternatives to the proposal.²¹

New York state's little NEPA statute, SEQRA, is almost as old as NEPA; it was enacted in 1975 and became effective the following year.²² Just as NEPA is designed to make federal action more environmentally sensitive, SEQRA is designed to make state government more environmentally sensitive.²³ Unlike NEPA, however, SEQRA applies not only to state government action but also to actions by local governments,²⁴ including rezonings²⁵ and other land use-related permits.²⁶

Like NEPA, SEQRA creates a multi-step environmental review process. The lead agency begins the process by drafting an environmental assessment form ("EAF") to determine how its proposed action will affect the environment.²⁷ If the lead agency concludes that environmental impacts from its action are unlikely to be significant, it drafts a "negative declaration" which, like a FONSI, declares that "implementation of the action as proposed will not result in any significant environmental impacts."²⁸

But if the environmental assessment identifies potentially significant environmental impacts, the agency issues a "positive declaration" announcing that the impacts require an EIS.²⁹ The state agency then begins the "scoping process"³⁰ designed to produce an EIS. This process begins when the agency prepares a draft EIS and solicits public comments on that document.³¹

After receiving public comments on the draft EIS, the agency issues a final EIS.³² If circumstances change or if the agency alters the project, the agency may also issue a supplemental EIS.³³ The final EIS must address the adverse impacts of the proposed action, including but not limited to: growth-inducing impacts, impacts upon energy use and conservation, and impacts on solid waste management; any reasonable alternatives to the proposed action; and any commitments of environmental resources, such as land or construction materials³⁴ associated

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with the proposed action.³⁵ In addition, a final EIS must address all comments on the draft EIS, as well as any project changes, new information, and changes in circumstances since the issuance of the draft EIS.³⁶ Before proceeding with the proposed action the agency must certify that the action minimizes adverse environmental impacts to the maximum extent practicable and that the agency will use any mitigating measures identified as practicable in the EIS.³⁷ Citizens may challenge an agency decision, including either an EIS or a decision not to issue an EIS, under SEQRA.³⁸

New York's Department of Environmental Conservation ("DEC") has enacted regulations to guide state and local governments in deciding whether to issue an EIS.³⁹ These regulations provide that for "Type I"⁴⁰ government projects, a rebuttable presumption exists that the project creates environmental impacts significant enough to require the preparation of a full EIS.⁴¹ For example, Type I actions include all zoning changes affecting twenty-five or more acres.⁴²

On the other hand, the regulations categorically exclude thirty-seven types of actions, known as "Type II" actions, from SEQRA scrutiny.⁴³ For example, zoning decisions affecting just one house are usually Type II actions.⁴⁴ Government actions that are neither Type I nor Type II are labeled by the regulations as "unlisted actions"⁴⁵ and may require an EIS if they create a significant impact.⁴⁶ The overwhelming majority of government actions subject to SEQRA are unlisted.⁴⁷

In addition to creating the Type I/Type II/unlisted hierarchy, SEQRA differs from NEPA in another major⁴⁸ respect. NEPA is limited to actions affecting "the quality of the human environment"⁴⁹—a phrase that courts have limited to "effects on the natural or physical environment."⁵⁰ By contrast, SEQRA defines the relevant "environment" not just as "the physical conditions which will be affected by a proposed action [such as] land, air, water, minerals, flora [and] fauna"⁵¹ but also "objects of historic or aesthetic significance, existing patterns of population concentration, distribution or growth, and existing community or neighborhood character."⁵² For example, the New York courts have interpreted this language to mean that any government action that induces a significant change in population patterns requires an environmental impact statement.⁵³

This does not mean, however, that agencies may never engage in environmentally harmful actions. Instead, agencies must disclose the environmental impact of their actions in the EIS,⁵⁴ and must "minimize adverse environmental effects to the maximum extent practicable."⁵⁵ In determining what is "practicable," agencies may balance environmental concerns against other public policies.⁵⁶

On review, courts may not "weigh the desirability of any action or choose among alternatives"⁵⁷ but must ascertain whether the EIS and the agency's decision were arbitrary, capricious, or otherwise infected by errors of law or procedure.⁵⁸ As a practical matter, this means courts generally uphold agency decisions, especially after an EIS has been filed.⁵⁹

III. SEQRA AND INFILL DEVELOPMENT

Infill development is development that occurs in already-developed neighborhoods, often in cities or older suburbs.⁶⁰ Greenfield development, by contrast, occurs on "pristine, undeveloped land typically located in low density suburban areas."⁶¹ Both types of development sometimes require rezoning or similar legal changes⁶² and may be subject to SEQRA.⁶³ But SEQRA's broad definition of "environmental impact" means that urban infill projects will often require an EIS, even if they create no impact upon the physical environment.⁶⁴ Although the statute does not expressly favor greenfield development, greenfield projects may nevertheless be less likely to attract the kind of public controversy that forces agencies to draft an EIS.⁶⁵

A. The Environmental Impacts of Infill

As noted above, SEQRA defines the term "environment" to include "existing patterns of population concentration, distribution or growth, and existing community or neighborhood character."⁶⁶ SEQRA's broad definition of the term "environment" suggests that any infill development that adds a significant number of residences or businesses to an existing neighborhood will usually require an EIS, since such development affects "existing patterns of population" and "neighborhood character."⁶⁷

The New York Court of Appeals addressed this issue in the 1986 decision of *Chinese Staff and Workers Association v. City of New York* ("Chinese Staff I").⁶⁸ In that case, a developer proposed to build a high-rise condominium on a vacant lot in New York's Chinatown neighborhood.⁶⁹ The city declined to draft an EIS on the ground that the project would have no significant environmental impact.⁷⁰ Members of the Chinatown community filed suit, alleging that the city's decision was erroneous because the city failed to consider "whether the introduction of luxury housing into the Chinatown community would accelerate the displacement of local low-income residents and businesses or alter the character of the community."⁷¹ In response, the city argued that this risk was "outside the scope of the [SEQRA] definition of environment."⁷²

The court disagreed, writing that because SEQRA's definition of "environment" encompasses "existing patterns of population concentration, distribution or growth, and existing community or neighborhood character,"⁷³ any effect that a project might cause on "population patterns or existing community character . . . is a relevant concern in an environmental analysis."⁷⁴

The court admitted that because the proposed construction was on a vacant lot, it displaced no residents or businesses.⁷⁵ But the court nevertheless found that SEQRA required the city to consider the risk of "long-term secondary displacement of residents and businesses in determining whether a proposed project may have a significant effect on the environment."⁷⁶ Although the court did not define the term "secondary displacement," other commentators use the term to describe the possibility that new construction might make a neighborhood more desirable and thus increase rents, which in turn might force some current residents to move.⁷⁷ Thus, the court suggested that the proposed

new construction (combined with likely construction on other nearby sites)⁷⁸ might lead to such secondary displacement, and that this possibility could require an EIS.

At a minimum, *Chinese Staff I* suggests that whenever new development might make a neighborhood more valuable, thus creating a risk of increased rents, the lead agency must consider this fact in deciding whether to draft an EIS. More broadly, *Chinese Staff I* implies that any change in existing "population patterns" is an environmental impact under SEQRA and thus if significant, requires an EIS. It logically follows that any development that significantly increases neighborhood population requires an EIS because new housing by definition affects population patterns.

More recent New York appellate cases support this interpretation of *Chinese Staff I*. For example, in *Fisher v. Giuliani*,⁷⁹ the city allowed landowners within the city's Theater District to transfer development rights from land containing several historic theaters to nearby parcels, thus allowing the landowners to build taller buildings on the latter parcels.⁸⁰ The lead agency refused to draft an EIS, reasoning that the zoning change would merely "accommodate the projected demand for [office] space [but] would not change the overall demand,"⁸¹ and would not affect the neighborhood's traffic patterns or social composition.⁸²

The court agreed,⁸³ writing that the opponents of the city's new rules "failed to provide any meaningful evidence that the [change] . . . would be significant enough to spur development beyond that which would in any event take place."⁸⁴ This language suggests that an EIS was unnecessary precisely because the rezoning was unlikely to spur development. It logically follows that if the city's policies had increased development, the court would have required an EIS.

In *Chinese Staff I* and *Workers Association v. Burden* ("*Chinese Staff II*"),⁸⁵ the New York courts also refused to require an EIS, but emphasized that the rezoning at issue would not increase population. In that case, the city of New York rezoned a Brooklyn neighborhood and declined to draft an EIS.⁸⁶ A citizen group argued that the rezoning required an EIS because the city "underestimate[d] the opportunities for market-rate development . . . [and] the new types of businesses [caused by rezoning]."⁸⁷ The city disagreed, claiming that the rezoning would lead to a net increase of only 75 housing units and thus created no significant impact.⁸⁸

The court held that the city's finding of no significant impact was rational for two reasons. First, the rezoning "was decreasing, rather than increasing, the potential for development by imposing building height limits."⁸⁹ Second, because "the [city] projected an increase of only 75 units, it was [reasonable] to conclude that the rezoning would not have any adverse socioeconomic impacts."⁹⁰

The *Chinese Staff II* court's emphasis on the small number of added housing units and on the decreased potential for development implies that any zoning decision that *does* add a significant number of new businesses or housing units to a neighborhood is likely to create significant impact and thus to require an EIS under SEQRA—a rule consistent with *Chinese Staff I* and *Fisher*.

B. Does Greenfield Development Usually Require an EIS?

Because significant infill development by definition increases the number of housing units and businesses in a neighborhood, it is likely to require an EIS under SEQRA. By contrast, greenfield development is further removed from existing residential neighborhoods. Although the law is not clear on this point,⁹¹ it could be argued that such development is less

likely to affect population patterns or neighborhood character. Therefore, greenfield development might be less likely to require an EIS than infill development.

Even if this is not the case, in practice SEQRA may burden infill development more than greenfield development. Infill development by definition occurs in places with many neighbors. And where there are neighbors, there is often "Not in My Back Yard" ("NIMBY")⁹² resistance to development.⁹³ NIMBY

resistance occurs because residents of an existing neighborhood may suffer any perceived costs from new development (e.g., increased traffic, changes in neighborhood look and feel) while the benefits of new development, such as an increased supply of housing, are citywide or regionwide.⁹⁴ Dissatisfied neighborhood activists thus have a strong motive to use SEQRA to delay new development.⁹⁵

Of course, residents of rural and suburban areas may share such motives with urbanites. However, development in low-density areas by definition occurs in places with fewer neighbors than infill development. For example, if 1,000 people live within a mile of Rural Development X and 20,000 people live within a mile of Urban Development Y, the former development has fewer neighbors—and where there are few neighbors, there are few potential NIMBY issues.⁹⁶ And where there are few potential NIMBY issues, there are fewer people who are likely to file suit if the government refuses to file an EIS or complain that an existing EIS is inadequate. Thus, even if the law treats infill and greenfield development equally, SEQRA makes infill development more difficult because, all other factors being equal, neighborhood activists are more likely to generate SEQRA-related litigation for infill sites.

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IV. WHY SEQRA'S BIAS IS ENVIRONMENTALLY HARMFUL

It could be argued that SEQRA's bias against infill has little relevance to public policy, either because (1) SEQRA rarely prevents development that a city wants to approve or (2) infill development is no more environmentally beneficial than greenfield development. Neither argument justifies the status quo because (1) SEQRA adds costs even to development that government ultimately approves and (2) infill development produces less driving and thus less pollution than greenfield development.

A. How SEQRA Makes Infill More Difficult

Admittedly, SEQRA does not prevent a municipality from permitting development with significant environmental impact. Because SEQRA allows government agencies to balance environmental impacts against other social considerations, litigants are rarely able to persuade courts to stop a project completely, as opposed to delaying the project by requiring an EIS.⁹⁷

Nevertheless, SEQRA imposes a significant burden upon developers. For a developer, "time is money"⁹⁸ because a developer will often be paying interest on a construction loan while its project is being debated but will be unable to receive money from buyers or renters until the project is actually built.⁹⁹ Thus, a developer suffers financially by waiting for government officials to review environmental impact statements and similar documents, some of which include hundreds of pages of analysis.¹⁰⁰

Both the EIS process and related litigation may take years to complete.¹⁰¹ For example, in one recent case, a landowner requested a zoning change in August 2008; the municipality did not adopt a final EIS until November 2010; an opponent of the project challenged the EIS a month later; and the case was not decided until March 2012.¹⁰² In another more difficult case, the environmental review process began in late 2007, about a year and a half before the final EIS in 2009, and more than three years before the final decision in 2011.¹⁰³

In truly large-scale developments, the EIS project may take more than five years. In 2005, a New York City agency prepared an environmental assessment form for the Atlantic Yards project, which plans to develop a 22-acre parcel near downtown Brooklyn.¹⁰⁴ The final environmental impact statement was issued in 2006.¹⁰⁵ But after years of litigation, a New York appellate court ordered the government to prepare a supplemental EIS in 2012—seven years after the environmental review process began.¹⁰⁶

In sum, even an environmental review process that ultimately allows a project makes development more time-consuming and thus more costly. And if, as noted above, SEQRA may

disproportionately affect infill development, SEQRA may make infill especially costly.

B. Why Making Infill More Difficult Is Environmentally Harmful

Given that all legislation has disproportionate impacts upon someone, should we care whether SEQRA penalizes infill development? Or to ask the question more precisely: is there any environmental cost to penalizing infill as opposed to greenfield development?

Already-developed areas, especially in urban cores, tend to have more mass transit riders and fewer drivers than greenfield areas.¹⁰⁷ This is because as a neighborhood becomes more developed, it becomes more compact; that is, more people live within walking distance of shops, jobs, public transit, and other neighborhood destinations.¹⁰⁸ By contrast, in areas with lower density, very few people will live within a short walk of a bus or train stop, making transit ridership low,¹⁰⁹ which in turn disinclines transit agencies to serve such areas.¹¹⁰

It follows that more greenfield development means more driving—and more driving means more pollution, since one-third of U.S. greenhouse gas emissions come from automobiles.¹¹¹ In addition, automobiles introduce a wide variety of other dangerous pollutants, such as carbon monoxide, ozone, and particulate matter.¹¹² Public transit pollutes less than cars because each additional rider on a bus or train adds no pollution, while each additional driver adds some.¹¹³ It follows that because infill development requires less driving, more infill development means less pollution.

It could be argued that the positive effects of infill-induced density are outweighed by the environmental harm caused by increased traffic congestion. According to this argument, higher density packs more people, and thus more cars, into smaller spaces making a city's roads more congested and polluted.¹¹⁴

But as American cities and suburbs have become less dense, no corresponding reduction in congestion has occurred. Between 1982 and 1997, population density in U.S. metropolitan areas decreased by 15.7%.¹¹⁵ Out of 281 metropolitan areas¹¹⁶ only 16 became more densely populated during this period.¹¹⁷ Nevertheless, the average metropolitan area lost

more than twice as many hours per person to congestion in 1997 than in 1982 (33.8 hours, up from 14.4 in 1982).¹¹⁸

Some studies support the view that on balance, compact development reduces pollution. A recent study sponsored by the U.S. Department of Energy suggests that compact, transit-oriented development reduces greenhouse gas emissions by reducing driving.¹¹⁹ In particular, the study found that:

"But as American cities and suburbs have become less dense, no corresponding reduction in congestion has occurred."

1. Doubling residential density, without more, reduces household vehicle miles traveled by five to twelve percent.¹²⁰ If increased density was accompanied by other pro-transit land use policies and by improved public transit, driving miles could be reduced by as much as twenty-five percent.¹²¹

2. These reductions in driving would, in turn, reduce greenhouse gas emissions. If increased density and improved public transit caused Americans to drive twenty-five percent fewer miles, U.S. greenhouse gas emissions could be reduced by eight to eleven percent by 2050.¹²²

Similarly, Harvard economist Edward Glaeser and UCLA

economist Matthew Kahn recently conducted a study which found that low-density, automobile-oriented places emitted more greenhouse gases from transportation than more pedestrian and transit-oriented places.¹²³ For example, New York City, the region with the highest use of public transit,¹²⁴ emitted only 19,524 pounds of carbon dioxide ("CO₂"), a major greenhouse gas,¹²⁵ per household from automobiles and transit users combined¹²⁶—the lowest amount among ten metropolitan areas studied. By contrast, several auto-oriented, lower-density regions emitted over 25,000 pounds of transportation-related CO₂ per household.¹²⁷

Moreover, suburbs, which tend to be less compact and more automobile-oriented,¹²⁸ have significantly higher per-household CO₂ emissions from transportation. For example, New York's suburban households emitted over 3,800 more pounds of transportation-related CO₂ per household than did city residents.¹²⁹ Thus, the alleged congestion-related benefits of low-density greenfield development are apparently offset by the environmental harm caused by increased driving and resulting increases in greenhouse gas emissions.

If, as suggested above, infill development reduces driving and thus reduces pollution, and SEQRA discourages infill development, it seems that SEQRA actually increases driving and the resulting pollution.

Even under SEQRA's broad definition of the "environment," SEQRA is not environmentally friendly. In *Chinese Staff I*, the court held that environmental impact includes "secondary displacement"—displacement of a neighborhood's existing residents by higher rents.¹³⁰ The court's language suggests that higher rents themselves are a harmful environmental impact.

But to the extent SEQRA discourages new residential development, it reduces housing supply. And according to the law of supply and demand, the less of something that is built, the higher

its price will be.¹³¹ Thus, SEQRA may actually increase rents and other housing prices, thus creating environmental damage by its own criteria.

V. SOLUTIONS

Of course, SEQRA is basically pro-environmental legislation and is sometimes used to delay projects with truly harmful environmental consequences.¹³² On the other hand, SEQRA may

actually discourage environmentally friendly infill development. Can New York eliminate SEQRA's negative consequences without eliminating SEQRA's desirable limits on development?

SEQRA can be made less burdensome either through reforms directly focused on the most environmentally friendly types of infill development or through reforms addressing SEQRA as a whole. Each avenue of reform will be addressed in turn.

"On the other hand, SEQRA may actually discourage environmentally friendly infill development."

A. Infill Exceptions: Learning from California

In 2008,¹³³ California amended its little NEPA statute,¹³⁴ the California Environmental Quality Act ("CEQA")¹³⁵ to streamline CEQA review for transit-oriented projects.¹³⁶ The state later issued regulations to implement these amendments.¹³⁷

CEQA defines a "transit priority project" as one that is predominantly residential, provides a minimum density of at least twenty dwelling units per acre, and is within a half mile of major transit service, such as a bus or train with service intervals of no more than fifteen minutes during peak hours.¹³⁸ Such a project is completely exempt from CEQA if it meets an extensive set of requirements. In particular, the project must: (1) be no larger than eight acres or two hundred dwelling units; (2) be served by existing utilities; (3) have buildings fifteen percent more energy-efficient than required under current law; (4) achieve twenty-five percent less water use than the average household in its region; and (5) provide one of the following: (a) five acres of open space, or (b) a significant amount of low or moderate-income housing, defined as providing 20% of its units to moderate-income housing, 10% to low-income housing, or 5% to very low-income housing.¹³⁹ This exception to CEQA is so strict that it is unlikely to be used significantly.¹⁴⁰ In particular, the requirements of low-income housing reduce developer profitability, and are thus unlikely to be used frequently by private developers.¹⁴¹ Moreover, the requirement of five acres of open space would not be feasible in many urban locations, since buildings in cities such as New York City are often surrounded by other buildings rather than by open space.¹⁴²

Transit priority projects that do not meet the requirements for a complete exception¹⁴³ still benefit from CEQA—government must review such projects under a "sustainable communities environmental assessment" ("SCEA"),¹⁴⁴ which is less

developer need not address potential growth-inducing impacts of a project, nor need it address possible car and truck traffic induced by the project.¹⁴⁶ In addition, the developer need not discuss the pros and cons of a lower-density alternative to the project.¹⁴⁷

But, the SCEA exception is highly limited; it only applies if the project includes mitigation measures already incorporated in prior environmental impact statements, such as an EIS related to the comprehensive plan of the community allowing the project.¹⁴⁸ Given the limitations that CEQA imposes upon regulatory streamlining, New York would not make SEQRA less burdensome merely by borrowing California law word-for-word.

However, New York could borrow parts of CEQA. In particular, I propose that New York: (a) borrow CEQA's definition of transit priority projects, and (b) borrow CEQA's provision that developers of such projects need not address environmental impacts related to growth, such as increased population or traffic. Thus, SEQRA as amended would, in transit-oriented areas, overrule the language of *Chinese Staff I* and *Fisher* that urban growth justifies an EIS, on the ground that growth of areas well-served by public transit is environmentally helpful rather than environmentally harmful.

Byron Toma, an environmental and transit lawyer, criticizes CEQA's streamlining for transit priority projects on the ground that "[b]uilding high-density housing without adequate transit capacity and quality is a serious planning blunder."¹⁴⁹ Toma suggests that if transit agencies do not increase service as a mitigation measure, transit systems may become overloaded.¹⁵⁰ This argument should not prevent reform for two reasons. First, any area with sufficient transit service to be eligible for a transit priority project by definition has a fairly significant level of transit service. Second, if improved transit must come before density, neither the transit nor the density may ever get built. In an area where density is low and transit ridership is therefore already low,¹⁵¹ transit opponents will argue that the density is not present to support transit, and that transit should accordingly never be expanded, even if it already exists.¹⁵² And where there is weak transit service as a result of low density, compact development will be even more unpopular: Opponents to development could argue that, in the absence of transit, more density will only lead to more congestion.¹⁵³

In sum, limiting SEQRA review of transit-friendly development to truly environmental concerns as opposed to concerns related to population growth would be an environmentally friendly policy, because it would contribute to steering growth to infill sites served by public transit, thus increasing transit ridership and reducing auto-related pollution.

B. More Aggressive Reforms

Stewart Sterk, a land-use law professor, proposes to reduce the burden of SEQRA upon the housing market through two reforms. First, Sterk proposes to make SEQRA less burdensome by exempting local zoning decisions from SEQRA.¹⁵⁴ The public benefit of this proposal is that neighborhood activists would no longer be able to delay new homes and businesses on essentially

nonenvironmental grounds, and the burden of SEQRA paperwork and SEQRA-related litigation would thus be lifted from the shoulders of local governments and developers.¹⁵⁵ And because, as explained above in Part III,¹⁵⁶ SEQRA is probably more burdensome for urban developers than for rural and suburban landowners, this proposal probably would increase infill and thus decrease pollution. On the other hand, this proposal might prevent the public from discovering a few truly significant environmental impacts that are uncovered through the SEQRA process. Thus, it is unclear whether this proposal's environmental benefits outweigh its costs.

Second, Sterk proposes¹⁵⁷ amending SEQRA to exclude socio-economic impacts from the statute's definition of "environment," thus eliminating review of the social effects of projects.¹⁵⁸ Sterk reasons that disputes among socio-economic impacts are political rather than technical, and that environmental review of such issues therefore adds nothing to the decision-making process.¹⁵⁹ If this proposal were adopted, SEQRA, like NEPA, would only address a project's effects upon the physical environment.¹⁶⁰

Like Sterk's other proposal, this reform would make SEQRA less burdensome and thus facilitate development generally. And like the California statute discussed above, it would focus regulatory scrutiny on traditionally environmental impacts. But unlike the California statute, Sterk's proposal would not be targeted towards transit-oriented development or even infill development generally. Thus, the merits of Sterk's proposal may depend on the state's priorities: does the state only value transit-oriented development, or does it value regulatory relief for all landowners? From a purely environmental perspective, something resembling California law might be more desirable; however, a broader reform might make housing more affordable by facilitating both infill and greenfield development, which is also a desirable goal.

VI. CONCLUSION

The purpose of SEQRA is to protect the environment by requiring the government to consider the harmful environmental impacts of its actions. But SEQRA in fact creates its own harmful environmental impacts. Thanks to SEQRA, someone who wants to build houses or apartments in an already-developed city or inner suburb must sometimes spend years going through the EIS process.

As noted above, greenfield development in low-density rural areas and outer suburbs has fewer neighbors, and thus fewer possible opponents to development. It therefore appears that in relation to infill development, greenfield development may be less likely to require an EIS or lead to litigation over the adequacy of an EIS. Thus, SEQRA discourages infill development in New York and encourages developers to either build on greenfield sites or move to other states. Because greenfield development typically leads to more driving and thus more pollution, SEQRA may actually increase rather than decrease pollution.

SEQRA can be made more environmentally friendly in two ways. At a minimum, the New York state legislature could target

the most environmentally friendly projects for SEQRA relief by limiting environmental review for compact developments near public transit. More radical options would include encouraging

all development by exempting all zoning permits from SEQRA, or by limiting SEQRA review to a project's impacts upon the physical environment.

Endnotes: How Environmental Review Can Generate Car-Induced Pollution: A Case Study

¹ See 42 U.S.C. §§ 4321-4370h.

² See 42 U.S.C. § 4332(C).

³ See Elena Bryant, *Innovation or Degradation? An Analysis of Hawaii's Cultural Impact Assessment Process as a Vehicle for Environmental Justice for Kanaka Maoli*, 13 ASIAN-PAC. L. & POL'Y J. 230, 265, 265 n. 209 (2011) (listing states in footnote).

⁴ N.Y. ENVTL. CONSERV. LAW. § 8-0101 (McKinney 2013).

⁵ See William Fulton & Paul Shigley, *Guide to California Planning* 156 (3rd ed. 2005) ("[M]ost state [little NEPA] laws . . . apply only to public development projects.").

⁶ See Stewart E. Sterk, *Environmental Review in the Land Use Process: New York's Experience with SEQRA*, 13 CARDOZO L. REV. 2041, 2042-43 (1992) (explaining that unlike other states New York and California "require impact statements not only for government-sponsored projects, but also for projects that require government permits, and extend the EIS requirement beyond state actions to actions taken by municipalities"); Daniel P. Selmi, *Themes in the Evolution of the State Environmental Policy Acts*, 38 URB. LAW. 949, 956-57 (2006) (contrasting New York approach with that of other states). NEPA may also require an EIS for private sector projects requiring government permits. See *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1121 (9th Cir. 2005). But NEPA is far less relevant to most private sector projects because zoning is primarily a local issue rather than a federal issue. See *San Remo Hotel v. City & Cnty. of S.F.*, 545 U.S. 323, 347 (2005) (noting that state courts have more experience than federal courts in dealing with zoning issues).

⁷ See *Chinese Staff & Workers Ass'n v. N.Y.C.*, 502 N.E.2d 176, 180, (1986) [hereinafter *Chinese Staff I*] (holding that SEQRA requires consideration of "social or economic" factors as well as "physical environment").

⁸ *Id.* at 180 n.7 (explaining that the scope of NEPA is limited to "natural or physical environment").

⁹ See John Watts, *Reconciling Environmental Protection With the Need for Certainty: Significance Thresholds for CEQA*, 22 ECOLOGY L.Q. 213, 241 n.170 (1995) ("About half the states . . . require consideration of [socio-economic] impacts."); Sterk, *supra* note 6, at 2043 (Some "states define the environment to embrace only natural and historical resources.").

¹⁰ See Anne L. Hanson, *Offshore Drilling in the United States and Norway: A Comparison of Prescriptive and Performance Approaches to Safety and Environmental Regulation*, 23 GEO. INT'L ENVTL. L. REV. 555, 559 (2011).

¹¹ *Id.*

¹² See *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 757 (2004).

¹³ See Emily M. Slaten, Note, "We Don't Fish in Their Oil Wells, and They Shouldn't Drill In Our Rivers: Considering Public Opposition Under NEPA and the Highly Controversial Regulatory Factor," 43 IND. L. REV. 1319, 1324 (2010) (citing 40 C.F.R. § 1508.16).

¹⁴ Another alternative is to decide the action is covered by a "categorical exclusion." *Id.* at 1325. Categorically excluded actions are "routine agency actions with traditionally non-significant environmental impacts that are altogether exempted from the NEPA process." *Id.* An individual federal agency may designate types of agency action as categorically excluded. See 40 C.F.R. § 1508.4 ("Categorical Exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a federal agency.").

¹⁵ 40 C.F.R. § 1508.9(a)(1).

¹⁶ See 40 C.F.R. § 1501.4(e).

¹⁷ The Ninth Circuit requires an EIS even if federal action "may" degrade the environment. *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1119 (9th Cir. 2000). However, the majority of courts require an EIS only if a project will significantly affect the environment. See, e.g., *Hearwood v. U.S.*

Forest Serv., 380 F.3d 428, 430 (8th Cir. 2004); *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1274 (10th Cir. 2004).

¹⁸ See 40 C.F.R. § 1501.7.

¹⁹ See 40 C.F.R. § 1502.9(a).

²⁰ See 40 C.F.R. § 1502.9(b) (noting that in final EISs agencies "shall respond to comments" and "discuss . . . any reasonable opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised"). See also *id.* at § 1503.4(a) (stating that a lead agency "shall assess and consider comments . . . and shall respond by one or more of the means listed below, stating its response in the final statement").

²¹ 42 U.S.C. § 4332(2). In addition, the EIS shall address any possible relationship between the action's environmental impacts and long-term productivity, and any irreversible commitment of resources the action may cause. *Id.*

²² See *Vill. of Chestnut Ridge v. Town of Ramapo*, 841 N.Y.S.2d 321, 332 (App. Div. 2007).

²³ See *Town of Amsterdam v. Amsterdam Ind. Dev. Agency*, 945 N.Y.S.2d 434, 440 (App. Div. 2012) (explaining that the "primary purpose" of SEQRA is "to ensure that the agency gives appropriate respect and due consideration to the environment in deciding whether a proposed project should proceed").

²⁴ See Mark A. Chertok & Ashley S. Miller, *Environmental Law: Developments in the Law of SEQRA*, 2009, 60 SYRACUSE L. REV. 925, 925-26 (2010) (clarifying that the statute "applies to discretionary actions by the State of New York, its subdivisions or local agencies" including "direct agency actions, funding determinations, promulgation of regulations, zoning amendments, and the granting of permits and similar approvals").

²⁵ *Id.* (SEQRA governs "zoning amendments"); *Matter of Neville v. Koch*, 79 N.Y.2d 416, 426, (1992) ("[R]ezoning is an 'action' subject to SEQRA.").

²⁶ See Paul D. Selver, *The Public Review Process: Land Use Due Diligence and Comments on Structuring the Deal to Shift Land Use and Environmental Risks*, in 12 COMMERCIAL REAL ESTATE INSTITUTE 903, 906-10 (2010) (noting that subdivision approval, variances, and numerous other land use procedures are subject to SEQRA).

²⁷ See Edna Sussman et. al., *Climate Change Adaptation: Fostering Progress Through Law and Regulation*, 18 N.Y.U. ENVTL. L. J. 55, 79 (2010); Sterk, *supra* note 6, at 2045. Although the lead agency is technically responsible for drafting the EAF, EIS, and similar documents, as a practical matter a developer often drafts such documents, which in turn are used by the lead agency. See Carolyn A. Zenk, *New York State Environmental Quality Review Act*, <http://www.carolynzenk.com/new-york-state-environmental-quality-review-act.html> (last visited Aug. 20, 2012).

²⁸ *Citizens Against Retail Sprawl v. Giza*, 722 N.Y.S.2d 645, 648 (App. Div. 2001) (emphasis deleted) (quoting N.Y. COMP. CODES R. & REGS. 6, § 617.2(y)).

²⁹ See N.Y. COMP. CODES R. & REGS. 6, § 617.2(a)-(c). See also *Chinese Staff I*, 502 N.E.2d at 364 ("[W]hether an EIS is required . . . depends on whether an action may or will not have a significant effect on the environment."). If the agency foresees significant environmental impacts but has an enforceable commitment to mitigate those impacts, it may avoid an EIS by creating a "conditioned negative declaration." N.Y. COMP. CODES R. & REGS. 6, § 617.2(h). See also Chertok & Miller, *supra* note 24, at 926.

³⁰ Chertok & Miller, *supra* note 24, at 927.

³¹ Chertok & Miller, *supra* note 24, at 927. See also *Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 415, 494 N.E.2d 429, 435 (1986) (describing the draft EIS process in more detail).

³² See Selver, *supra* note 26, at 904.

³³ See Sterk, *supra* note 6, at 2045-46.

³⁴ Sterk, *supra* note 6, at 2078 (providing examples of such "commitments" which include "the use of construction materials or the occupation of land area").

generally, John Sanbrailo, *Public-Private Partnerships: A Win-Win Solution*, Huffington Post (Sep. 25, 2013), http://www.huffingtonpost.com/john-sanbrailo/public-private-partnership_4_b_3990605.html. If the company fails to provide a benefit to the state, the state will revoke its charter. The organizational documents and bylaws would state a business purpose that is state-specific. If the company acts outside of its stated state-specific purpose, it loses its charter in that state and the contract to provide the public service. To incentivize companies to form for state-specific public service provider purposes, states would have to allow these corporations to generate a profit, a substantial portion of which would be reinvested in the corporation to the benefit of the community it serves. The profit would be key to generating revenue for continued maintenance. To avoid profit generation and immediate dissolution to redistribute profits, state policy should also consider a provision in the law regarding the remaining revenues distribution should private-public service providers dissolve. Any profits generated should be protected much like the cy pres doctrine

protects charitable gifts. See generally Benefits Corporation Information Center, <http://benefitcorp.net/> (last accessed Dec. 28, 2013).

²² See BENEFIT CORP. 2013 STATE BY STATE SUMMARY CHART, *supra* note 7 (providing a summary of both model statutory and state by state statutory language that either follows or modifies the model statutory language).

²³ For a discussion and examples, see Arnold, *supra* note 3, at 792-793.

²⁴ Arnold, *supra* note 3, at 792-793; Varghese, *supra* note 8, at 2.

²⁵ Arnold, *supra* note 3, at 792-793; see *supra* note 7 and accompanying text.

²⁶ See generally, JOHNSON ET AL., *supra* note 7, at 9; Arnold, *supra* note 3, at 792-793.

²⁷ Murthy, *supra* note 1; see also Varghese, *supra* note 8, at 3 (referring to national and multinational water companies: "Tracking these national and multinational corporations is also a challenge because they are continually making changes to their structure such as adding and dropping cities and subsidiaries, trading divisions of their operations, and changing the name of their corporation completely. They also frequently alter contracts.").

Endnotes: HOW ENVIRONMENTAL REVIEW CAN GENERATE CLIMATE-INDUCED POLLUTION: A CASE STUDY continued from page 22

³⁵ See Chertok & Miller, *supra* note 24, at 927.

³⁶ Chertok & Miller, *supra* note 24, at 927.

³⁷ Chertok & Miller, *supra* note 24, at 927-28.

³⁸ See Gregory D. Eriksen, Note, *Breaking Wind: Facilitating Wind Energy Development in New York State*, 60 SYRACUSE L. REV. 189, 196 (2009) (stating that challenges to decisions of SEQRA lead agencies usually take form of a petition under Article 78 of the New York Civil Practice Law and Rules); N.Y. C.P.L.R. art. 78 (McKinney 2006). New York courts usually uphold agencies' SEQRA decisions unless they are "arbitrary and capricious" or otherwise legally erroneous. *H.H. Warner, LLC v. Rochester Genesee Reg'l Transp. Auth.*, 87 A.D. 3d 1388, 1390, 930 N.Y.S.2d 131, 132 (App. Div. 2011).

³⁹ See Chertok & Miller, *supra* note 24, at 926 (DEC drafted relevant regulations).

⁴⁰ See N.Y. COMP. CODES R. & REGS. 6, § 617.4.

⁴¹ The lead agency can rebut this presumption if its environmental assessment identifies "potential adverse environmental impacts, take[s] a 'hard look' at them, and '[makes] a reasoned elaboration of the basis for its determination' that there would be no adverse impacts." *Chinese Staff & Workers Ass'n v. Burden*, 932 N.Y.S.2d 1, 2 (App. Div. 2011) [hereinafter *Chinese Staff II*].

⁴² See Sterk, *supra* note 6, at 2044-45.

⁴³ N.Y. COMP. CODES R. & REGS. 6, § 617.5(c).

⁴⁴ *Id.* at § 617.5(c)(1) (maintenance of existing facility), (2) (replacement or repair of structure or facility), (9) (construction of single-family, two-family or three-family residence), (10) (construction of accessory residential structures), (12) (granting of individual setback and lot line variances), (13) (other variances for single-family, two-family and three-family residences). Cf. Sterk, *supra* note 6, at 2044 (Type II actions include "replacement of existing facilities on the same site, granting of setback and lot size variances, construction of minor accessory structures ... and mapping of existing roads."); Patricia Salkin, *The Historical Development of SEQRA*, 65 ALB. L. REV. 323, 340-44 (2001) (listing numerous other exclusions).

⁴⁵ N.Y. COMP. CODES R. & REGS. 6, § 617.2(ak) (defining "unlisted" actions).

⁴⁶ *Id.* at § 617.7 (agency must determine significance of environmental impact as to both Type I and unlisted actions).

⁴⁷ See Chertok & Miller, *supra* note 24, at 926.

⁴⁸ SEQRA's broad definition of "environment" is not the only difference between SEQRA and NEPA; however, it is the difference most relevant to this article. Two other differences are important but less relevant to the issues discussed below. First, SEQRA is a substantive statute (requiring agencies to actually avoid adverse environmental impacts to the maximum extent possible), while NEPA is merely a procedural statute, requiring agencies to disclose rather than avoiding environmental impacts. See Chertok & Miller, *supra* note 24, at 927-28 (SEQRA requires lead agency to certify that its action "avoids or minimizes adverse environmental impacts to the maximum extent practicable" through mitigation measures); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1195 n.291 (2012) (noting that because NEPA is "procedural", it "requires only that action agencies disclose environmental impacts, not that they alter their plans in light of what they learn"); *Robertson v. Methow Valley Citizens Council*, 490 U.S.

332, 351 (1989) (NEPA "prohibits uninformed—rather than unwise—agency action"). Second, SEQRA requires an EIS whenever agency action "may" significantly affect the environment. N.Y. ENVTL. CONSERV. § 8-0109(2) (McKinney 2013). By contrast, NEPA requires an EIS only for actions that "will" create such an impact. See *Robertson*, 490 U.S. at 356, n.17.

⁴⁹ 42 USC § 4332(2)(C).

⁵⁰ *Chinese Staff I*, 502 N.E.2d at 503.

⁵¹ N.Y. ENVTL. CONSERV. § 8-0105(6).

⁵² *Id.*

⁵³ *Id.* ("long-term effects" must be considered under SEQRA).

⁵⁴ See *supra* notes 34-35 and accompanying text.

⁵⁵ *Jackson*, N.E.2d at 434.

⁵⁶ *Id.*

⁵⁷ *Id.* at 436.

⁵⁸ *Id.* at 435.

⁵⁹ See *infra* note 96.

⁶⁰ See George Lefcoe, *Finding the Blight That's Right for California Redevelopment Law*, 52 HASTINGS L.J. 991, 1033 (2001) (describing "infill" as "re-use of developed urban parcels"); Hubble Smith, *Finding the Will to Infill*, LAS VEGAS BUS. PRESS, Jan. 16, 2012, at 6 (Infill development, "broadly defined [is] new construction on vacant parcels with utility and infrastructure already in place and surrounded by existing homes and businesses.").

⁶¹ Anne Marie Pippin, *Community Involvement in Brownfield Redevelopment Makes Cents: A Study of Brownfield Redevelopment Initiatives in the United States and Central and Eastern Europe*, 37 GA. J. INT'L. & COMP. L. 589, 596 (2009).

⁶² See Bill Lurz, *Don't Give Up on Developing Land*, HOUSING GIANTS (Nov. 24, 2008) at 7, http://www.nxtbook.com/nxtbooks/reed/hg_20081124/index.php?startid=5#6 ("[M]any of the best infill sites will require ... rezoning."); *Your Right to Know*, ATLANTA J. & CONSTITUTION, March 3, 2005, at 1 ("Usually ... developments require rezoning.").

⁶³ See Chertok & Miller, *supra* note 24 and accompanying text.

⁶⁴ See *infra* Part III A.

⁶⁵ See *infra* Part III B.

⁶⁶ N.Y. ENVTL. CONSERV. § 8-0105(6).

⁶⁷ *Id.*

⁶⁸ *Chinese Staff I*, 502 N.E.2d at 176.

⁶⁹ *Id.* at 177.

⁷⁰ *Id.* at 178 (More precisely, the city issued a "conditional negative declaration," which means that the project would "not have any significant effect on the environment if certain modifications were adopted by the developer.").

⁷¹ *Id.*

⁷² *Id.* at 179.

⁷³ *Id.* at 180.

⁷⁴ *Id.*

⁷⁵ *Id.* at 181.

⁷⁶ *Id.*

⁷⁷ See Diane K. Levy, Jennifer Comey & Sandra Padilla, *In the Face of Gentrification: Case Studies of Local Efforts to Mitigate Displacement*, 16 J.

AFFORDABLE HOUSING & COMMUNITY DEV. L. 238, 240 (Spring 2007) (describing how "secondary displacement" occurs when gentrification leads to higher rents, and existing residents cannot remain in neighborhood); James A. Kushner, *Affordable Housing as Infrastructure in the Era of Global Warming*, 42/43 URB. LAW. 179, 206 (2010/2011) (noting that if a neighborhood is "attractive . . . a side effect can be secondary displacement" as rents rise); *Chinese Staff I*, 509 N.E.2d at 181 (using the term "secondary displacement").

⁷⁸ *Chinese Staff I*, 509 N.E.2d at 181 ("The fact that the actual construction on the proposed site will not cause the displacement of any residents or businesses is not dispositive for displacement can occur in the community surrounding a project as well as on the site of a project. Indeed, this project is to be constructed on one of seven sites available for development in the area and three of these sites are within one square block of the site of Henry Street Tower.").

⁷⁹ *Fisher v. Giuliani*, 720 N.Y.S.2d 50 (App. Div. 2001).

⁸⁰ *Id.* at 51-52 (describing city's plan in detail). See also Phillip Weinberg, *Environmental Law*, 52 SYRACUSE L. REV. 353, 360 (2002) (describing the plan more concisely).

⁸¹ *Fisher*, 720 N.Y.S.2d at 53.

⁸² *Id.*

⁸³ However, the court did require further review of a "discretionary mechanism" allowing additional development at the city's discretion. *Id.* at 52, 55 (describing discretionary mechanism and explaining reversal of city's decision on this point). As to this issue, the court rejected the city's contention that environmental review was premature. *Id.* at 55. Thus, the "discretionary mechanism" discussion did not reach the merits of whether SEQRA required an EIS.

⁸⁴ *Id.* at 55.

⁸⁵ *Chinese Staff II*, 932 N.Y.S.2d at 1.

⁸⁶ *Id.* at 2.

⁸⁷ *Id.*

⁸⁸ *Id.* at 4.

⁸⁹ *Id.*

⁹⁰ *Id.* at 6.

⁹¹ *Cf. East Coast Dev. Co. v. Kay*, 667 N.Y.S.2d 182, 184 (Sup. Ct. 1996) (stating in dicta that city could not rely on SEQRA to justify rejection of commercial building on outskirts of city, partially because project "would not alter the physical character of any coherent cultural enclave or neighborhood").

⁹² Roderick M. Hills, Jr. & David N. Schleicher, *Balancing the "Zoning Budget"*, 62 CASE W. RES. L. REV. 81, 90 (2012) (using term).

⁹³ See Greg Greenway, *Getting the Green Light for Senate Bill 375: Public Engagement for Climate-Friendly Land Use in California*, 10 PEPP. DISP. RESOL. L.J. 433, 442 (2010) (noting that infill development is not as common as professional planners would like because when one landowner proposes such development, other neighborhood "residents frequently organize to oppose such development"); Mary Lynne Vellinga, *Activists Trumpet Growth Defeat: This Week's Turnout Shows Their Rising Clout*, *Environmentalists Say*, SACRAMENTO BEE, Mar. 17, 2007, at B1 (quoting statement by local official that environmental community would be more politically powerful if they fought "to counteract the NIMBY stuff [local officials] deal with all the time on good infill projects"); Steven Anderson, *Fill 'Er In? Developers, Officials Seek To Avoid Battles Like Crescent Rim*, IDAHO BUS. REV., Sept. 26, 2005 (questioning whether "the prospect of concerted neighborhood opposition make infill projects more trouble than they're worth").

⁹⁴ See Hills & Schleicher, *supra* note 92, at 90.

⁹⁵ See John W. Caffry, *The Substantive Reach of SEQRA: Aesthetics, Findings and Non-Enforcement of SEQRA's Substantive Mandate*, 65 ALB. L. REV. 393, 414 (2002) (listing persons most likely to be dissatisfied with agency action to include "concerned citizens who live near project sites" as well as environmental groups).

⁹⁶ *Cf. Sarah Townsend, Ministers to Study New Airport*, PLANNING RESOURCE (Jan. 28, 2011), <http://www.planningresource.co.uk/article/1051537/ministers-study-new-airport> (describing how British officials are building new London airport on a "greenfield" site to "get around the NIMBY problem").

⁹⁷ See Sterk, *supra* note 6, at 2069-71 (explaining that "litigants rarely succeed when they complain that decisions made by municipalities or state agencies paid inadequate attention to date included in the EIS" and listing numerous examples); Caffry, *supra* note 95, at 412 (describing how during the 1990s, court challenges to agency SEQRA determination prevailed in 28% of the cases where no EIS was prepared, and 10% of cases where a final EIS was prepared).

⁹⁸ Sterk, *supra* note 6, at 2084.

⁹⁹ See Chad Lamer, *Why Government Policies Encourage Urban Sprawl, and the Alternatives Offered by New Urbanism*, 13 KAN. J.L. & PUB. POL'Y 391, 402 (2004).

¹⁰⁰ See Sterk, *supra* note 6, at 2081-82 (citing one example of a 196-page impact statement, and another EIS that included 174 pages on traffic and transportation alone, as well as 57 pages on mitigation of such problems).

¹⁰¹ See Patrick Gallagher, *Reviewing the Environmental Review*, 47 FAIRFAX COUNTY BUS. J. 19 (Sept. 26, 2011) ("[T]he review process of any development moves ahead at [lead agencies'] discretion, sometimes taking as many as four o[r] five years before a decision is rendered.").

¹⁰² See *Tuxedo Land Trust, Inc. v. Town of Tuxedo*, 950 N.Y.S.2d 611 (Sup. Ct. 2012).

¹⁰³ See *Save Coney Island, Inc. v. N.Y.C.*, 910 N.Y.S.2d 765 (Sup. Ct. 2010).

¹⁰⁴ Empire State Dev. Corp., *SEQRA Findings Statement* 5-6, http://www.esd.ny.gov/Subsidiaries_Projects/AYP/AtlanticYards/AdditionalResources/SEQRAFindingsStatement.pdf (last visited August 16, 2012).

¹⁰⁵ *Id.* at 6.

¹⁰⁶ See *Develop Don't Destroy v. Empire State Dev. Corp.*, 942 N.Y.S.2d 477 (App. Div. 2012).

¹⁰⁷ See Thomas Merrill & David M. Schizer, *Energy Policy for an Economic Downturn: A Proposed Petroleum Fuel Price Stabilization Plan*, 27 YALE J. REG. 1, 20 (2010) ("[A]lternative modes of transportation, such as walking, bicycling or public transportation, are impossible or inconvenient in suburbs and exurbs."); Michael Lewyn, *Sprawl in Canada and the United States*, 44 URB. LAW. 85, 96-97 (2012) (comparing transit ridership in a variety of North America cities and metropolitan areas, and showing that central cities consistently have more transit ridership than region as a whole; for example, 52.8% of New York City residents use public transit to get to work, as opposed to 24.9% of region-wide commuters).

¹⁰⁸ Lewyn, *supra* note 107, at 111, 119-20.

¹⁰⁹ See PAMELA BLAIS, *PERVERSE CITIES* 60-61 (2010) (citing numerous studies).

¹¹⁰ *Id.* at 61 (A "minimum threshold density is needed to support a rudimentary level of transit service (say, about every half hour). As densities increase, so, too, does the economic viability of higher levels of service.").

¹¹¹ Merrill & Schizer, *supra* note 107, at 17.

¹¹² Merrill & Schizer, *supra* note 107, at 18.

¹¹³ See *infra* notes 114-28 and accompanying text (discussing evidence that transit-oriented places pollute less). It could be argued that this reality is not relevant to infill development as a whole, because not all infill areas are equally compact or transit-oriented. For example, an inner-ring suburb such as Long Island's Nassau County may be developed enough for most development to be infill development, yet highly automobile-dependent. Yet even these suburbs are less automobile-dependent than outer suburbs. For example, in Nassau County seventy-seven percent of commuters drove to work—a higher percentage than in New York City, but still lower than outer-ring Suffolk County where over eighty-seven percent did so. See U.S. Census Bureau, *State & County Quickfacts*, <http://quickfacts.census.gov/qfd/states/36000.html> (last visited Dec. 16, 2013) (click on links for individual New York counties, then go to "Browse Data Sets" for county, then click link for "Economic Characteristics"). And in semi-suburban Queens, located between Manhattan and Long Island, only a minority of commuters drove to work. *Id.*

¹¹⁴ See OLIVER GILLHAM, *THE LIMITLESS CITY* 114 (2002) (describing the argument that density breeds congestion).

¹¹⁵ See BLAIS, *supra* note 109, at 65.

¹¹⁶ BLAIS, *supra* note 109, at 65.

¹¹⁷ BLAIS, *supra* note 109, at 65. See also WILLIAM FULTON, ET AL., *WHO SPRAWLS MOST? HOW GROWTH PATTERNS DIFFER ACROSS THE U.S.* 8 (2001), available at <http://www.brookings.edu/~media/research/files/reports/2001/77/metroplitanpolicy%20fulton/fulton.pdf>.

¹¹⁸ See David SCHRANK, ET AL., *TTI's 2010 URBAN MOBILITY REPORT 3* (2010), available at http://tti.tamu.edu/documents/mobility_report_2010.pdf.

¹¹⁹ See TRANSP. RESEARCH BD., *DRIVING AND THE BUILT ENVIRONMENT ix-x* (2009) [hereinafter TRB], available at http://www.nap.edu/catalog.php?record_id=12747#toc (describing authors and sponsorship).

¹²⁰ *Id.* at 4. See also ABT ASSOCIATES, *RESEARCH ON FACTORS RELATING TO DENSITY AND CLIMATE CHANGE 5* (2010), available at http://www.nahb.org/fileUpload_details.aspx?contentID=139993&fromGSA=1 (noting that this view is supported by "weight of the evidence").

¹²¹ TRB, *supra* note 119, at 4. See also TRB, *supra* note 119, at 31-66 (describing the relationship between density and vehicle miles traveled in more detail).

¹²² TRB, *supra* note 119, at 4.

¹²³ See EDWARD L. GLAESER & MATTHEW KAHN, *THE GREENNESS OF CITIES 1* (2008), available at http://www.hks.harvard.edu/var/ezp_site/storage/ckeditor/files/pdfs/centers-programs/centers/taubman/policybriefs/greencities_final.pdf (“[L]ow-density development . . . is associated with far more carbon dioxide emissions than higher-density construction.”). See also SIERRA CLUB, *SPRAWL REPORT 2001: A SUMMARY* (2001), available at <http://www.sierraclub.org/sprawl/report01/summary.asp> (suggesting that most auto-oriented regions have more smog).

¹²⁴ GLAESER & KAHN, *supra* note 123, at 5.

¹²⁵ *Mass. v. EPA*, 549 US 497, 504 (2007) (holding that carbon dioxide is a major greenhouse gas).

¹²⁶ GLAESER & KAHN, *supra* note 123, at 5.

¹²⁷ GLAESER & KAHN, *supra* note 123, at 5.

¹²⁸ See *supra* note 107; BROOKINGS INST., *WHERE THE JOBS ARE: EMPLOYER ACCESS TO LABOR BY TRANSIT, NEW YORK-NORTHERN NEW JERSEY-LONG ISLAND NY, NJ-PA METRO AREA* (2012), available at http://www.brookings.edu/research/papers/2012/07/11-transit-jobs-tomer/~media/Research/Files/Papers/2012/7/transit%20labor%20tomer/pdf/New_York.pdf (presenting a table showing that in New York City, 58.1% of residents can reach typical job in 90 minutes via public transit; only 14.4% of suburban jobs equally accessible).

¹²⁹ See GLAESER & KAHN, *supra* note 123, at 8 (noting that suburbanites emitted 6,172 more pounds of automobile-related emissions per household than city residents; however, this gap was partially offset by city residents’ generation of 2,367 more pounds of public transit-related emissions per household). New York suburbanites emitted more home heating emissions than city residents as well; however, this was not the case in all metropolitan areas studied. *Id.*

¹³⁰ See *supra* notes 75–76 and accompanying text.

¹³¹ See EDWARD L. GLAESER & JOSEPH GYOURKO, *THE IMPACT OF ZONING UPON HOUSING AFFORDABILITY* 19–20 (2002), available at <http://www.nber.org/papers/w8835.pdf> (noting that delayed issuance of building permits correlated with high housing costs).

¹³² See, e.g., *E. Coast Dev. Co.*, 667 N.Y.S.2d at 184–86 (holding that the “visual impact” of proposed commercial development for users of nearby hiking trail justified city’s rejection of project).

¹³³ See John Darakjian, *SB 375: Promise, Compromise, and the New Urban Landscape*, 27 UCLA J. ENVT. L. & POL’Y 371, 372 (2009) (describing amendments part of SB 375, enacted in 2008).

¹³⁴ Katherine M. Baldwin, *NEPA and CEQA: Effective Legal Frameworks for Compelling Consideration of Adaptation to Climate Change*, 82 S. CAL. L. REV. 769, 771 (2009) (describing CEQA, one of the “little NEPA” statutes).

¹³⁵ CAL. PUB. RES. CODE § 21000 et seq. (West 2013).

¹³⁶ And for some other residential development as well. See *infra* note 145 and accompanying text.

¹³⁷ See Byron K. Toma, *The Error of Streamlining CEQA for Transit Priority Projects: Why California Transit Agencies May Share the Same Future as Polar Bears*, 18 U. BAL. J. ENVT. L. 171, 173 (2011).

¹³⁸ See CAL. PUB. RES. CODE § 21155.

¹³⁹ See Darakjian, *supra* note 133, at 393 (citing CAL. PUB. RES. CODE §§ 21155.1(b), (c)).

¹⁴⁰ See Darakjian, *supra* note 133, at 393.

¹⁴¹ Darakjian, *supra* note 133, at 393 n.95 (citing conversation with private developer who stated that the “low-income requirement is a big deterrent to builders, because you’re giving these units away”).

¹⁴² This statement can be easily verified by a look at Google Street View, <http://maps.google.com> (search for “New York, NY”).

¹⁴³ See Darakjian, *supra* note 133, at 393.

¹⁴⁴ CAL. PUB. RES. CODE § 21155.2(b).

¹⁴⁵ See Darakjian, *supra* note 133, at 393 (describing SCEA as a “truncated” form of review).

¹⁴⁶ See Toma, *supra* note 137, at 191–92. In addition, a statute enacted in 2012, SB 226, creates additional protections for a wide variety of infill projects. See STATE OF CAL., GOVERNOR’S OFFICE OF PLANNING & RESEARCH, *NARRATIVE EXPLANATION OF THE PROPOSED ADDITION TO THE CEQA GUIDELINES IMPLEMENTING SB 226* at 10–11 (2012), http://opr.ca.gov/docs/Narrative_Explanation_%20of_Guidelines_and_Performance%20Standards.pdf (listing types of infill projects covered in Table 3). If a project’s effects have already been analyzed in a prior environmental impact statement or document addressed in such a statement, a government agency need not analyze those effects under SB 226. *Id.* at 11–12. Even state legislators are uncertain about the long-term effect of this statute. See Noreen Evans and Das Williams, *CEQA A Fundamental Safeguard For California*, *States News Service* (Jan. 29, 2013), <http://sd02.senate.ca.gov/news/2013-01-29-ceqa-fundamental-safeguard-california> (quoting a statement

by two state legislators that “until we see how well SB 226 and SB 375 succeed at streamlining the approval process for new development, we hesitate to add additional requirements”). Cf. William Fulton, *SB 226: Complicated or Simple?*, 27 CAL. PLANNING & DEV. REP., Nov. 1, 2012, at 13 (describing SB 226 as “too complex”). Thus, it seems premature to speculate about the impact of SB 226 upon infill development.

¹⁴⁷ See Matthew D. Francois, *An Update on Climate Change Regulations and How the California Model Might be Replicated Elsewhere*, ASPATORE, 2012 WL 1200516, *5 (explaining that an environmental impact statement “is not required to reference, describe, or discuss a reduced-density alternative to address the impacts of car and light-duty truck trips generated by the project.”).

¹⁴⁸ See Toma, *supra* note 137, at 191 (Streamlining allowed only if project “has incorporated all feasible mitigation measures, performance standards, or criteria articulated in the prior applicable [environmental review]” such as review “related to a General Plan.”). In addition, streamlining applies only if a project is consistent with a “sustainable communities strategy” that will propose a regional development pattern and will be created by a regional planning organization. See Annika E. Leerssen, *Smart Growth and Green Building: An Effective Partnership to Significantly Reduce Greenhouse Gas Emissions*, 26 J. ENVT. L. & LITIG. 287, 309–10 (2011); Darakjian, *supra* note 133, at 387–89 (describing sustainable communities strategy). It is unclear whether this requirement will significantly affect transit priority projects.

¹⁴⁹ Toma, *supra* note 137, at 175.

¹⁵⁰ Toma, *supra* note 137, at 194 (expressing concern over “time delays and commuter frustration.”).

¹⁵¹ See *supra* notes 109–10 and accompanying text.

¹⁵² See, e.g., Steve Harrison, *November Ballot Spot Likely: Signatures Clear The Way For Revote on Transit Tax*, CHARLOTTE OBSERVER, June 1, 2007, at 1A (noting that opponents of Charlotte light rail expansion argue that “plan to build additional light-rail lines doesn’t make sense for a low-density city such as Charlotte”); Jim Beamgard, *Bus Line Wants to Carry Riders Farther; Faster—A Conversation with Ray Miller*, TAMPA TRIBUNE, Aug. 7, 2005, at 1 (quoting opponents of rail in Tampa who say “we’ll never have the densities here needed . . . [so] it really doesn’t take cars off the road”).

¹⁵³ See, e.g., Editorial, *SOUTH FLA. SUN-SENTINEL*, May 28, 2006, at 4H (“[H]igh-density developments will only worsen traffic congestion if mass transit is not available to replace the automobile for significant numbers of people.”).

¹⁵⁴ See Sterk, *supra* note 6, at 2090.

¹⁵⁵ Sterk, *supra* note 6, at 2089 (noting that in 1988, out of over 3,000 environmental impact statements and environmental assessment decisions, more than 80 percent filed by local government units; by contrast, federal government filed only 430 environmental impact statements under NEPA).

¹⁵⁶ See *supra* Part III.

¹⁵⁷ In addition, Sterk also proposes two other reforms less specifically targeted towards rezoning and other decisions related to private land use and thus less relevant to this article. He proposes eliminating private causes of action by barring private citizens from seeking judicial review of an EIS. See Sterk, *supra* note 6, at 2086–87. This proposal would certainly make SEQRA less burdensome for landowners by reducing SEQRA-related litigation, albeit perhaps at a heavy environmental cost (insofar as it presumably reduces citizens’ ability to delay environmentally harmful decisions). He also proposes expanding judges’ role by requiring de novo review of decisions with significant environmental impact, on the basis that this reform would eliminate squabbling over standing and other procedural issues. Sterk, *supra* note 6, at 2088. The question of whether judges are qualified to wrestle with environmental tradeoffs is beyond the scope of this article.

¹⁵⁸ Sterk, *supra* note 6, at 2085–86.

¹⁵⁹ Sterk, *supra* note 6, at 2085–86.

¹⁶⁰ See *supra* notes 49–53 and accompanying text.