# SEQRA Ramifications For Long-Term Phased Projects In Times of Economic Uncertainty

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- Challenge of Long-Term Projects
- Regulatory Trigger for SEIS
- Questions Presented
- Strategies

# The Challenge

- EIS Process Requires Prediction of the Future With and Without the Project
- Long-Term Projects Require Long-Term Predictions

# The Challenge

"Prediction is very difficult,
especially about the future."

-- Niels Bohr



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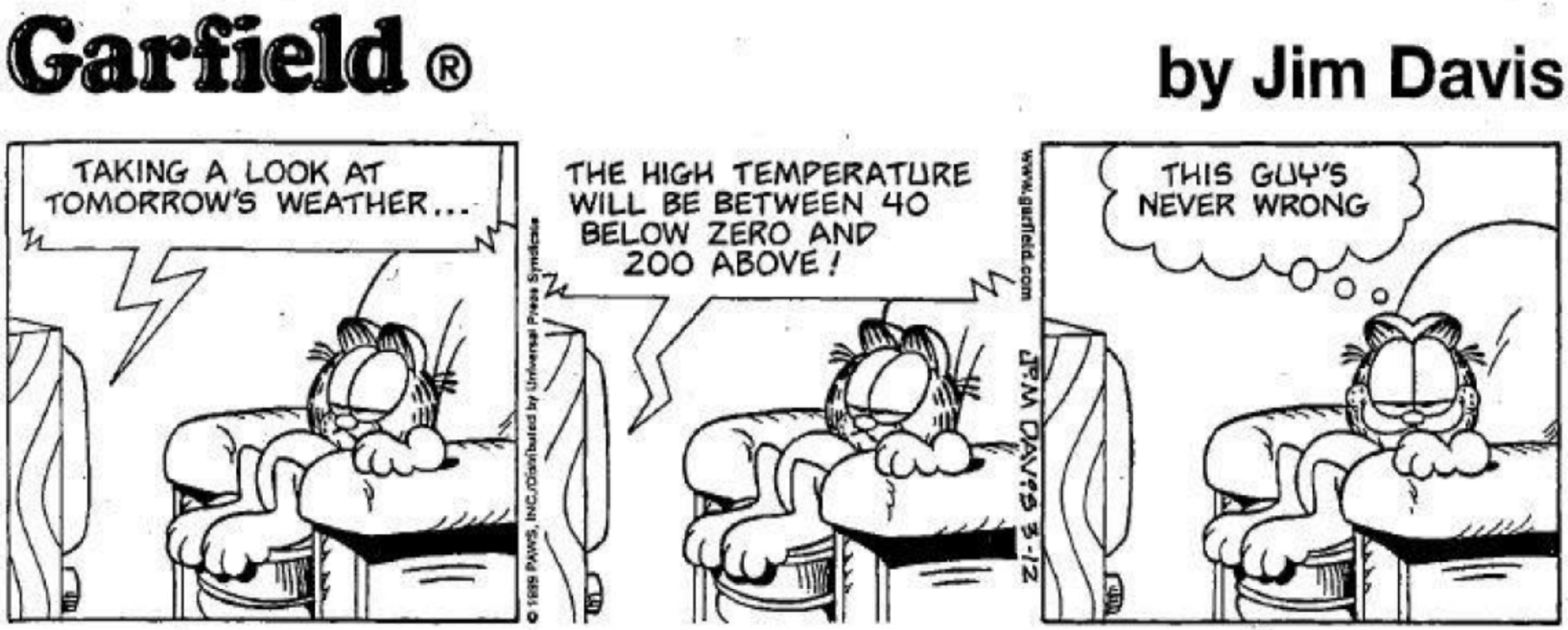
# The Challenge

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# The Challenge

- Exogenous Forces: changes in economic conditions, background conditions, regulations
- Endogenous Forces: design development, changing needs, new ideas

# Regulatory Trigger for SEIS; 6 N.Y.C.R.R. § 617.9(a)(7)

- "The lead agency may require [an SEIS], limited to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS that arise from: (a) changes proposed for the project; or (b) newly discovery information; or (c) a change in circumstances related to the project."
- "The decision to require preparation of [an SEIS], in the case of newly discovery information, must be based upon the following criteria: (a) the importance and relevance of the information; and (b) the present state of information in the EIS."



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# Questions

- How Much Discretion Does A Lead Agency Have Not To Prepare an SEIS?

- *Compare* Riverkeeper v. Planning Board, 9 N.Y.3d 219 (2007) (agency decision whether to prepare SEIS is discretionary because the "SEQRA regulations provide that: '[t]he lead agency may require a supplemental EIS, limited to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS'" (quoting 6 N.Y.C.R.R. § 617.9[a][7][i])) *with* Bronx Committee for Toxic Free Schools v. NYC SCA, 2012 WL 5199403 (Oct. 23, 2012) (requiring SEIS), and Development Don't Destroy (Brooklyn), Inc. v. ESDC, 94 A.D.3d 508 (1st Dep't 2012) (requiring SEIS for Phase II of project).



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# Questions

- What Role, If Any, Can Non-Environmental Concerns Play?

- *Compare* Riverkeeper, 9 N.Y.3d at 231 (an agency may weigh "environmental concerns in conjunction with other economic and social planning goals") *and* Wilder v. N.Y.S. Urb. Dev. Corp., 154 A.D.2d 261, 263 (1st Dep't 1989) (considering the effect that SEIS-related delays would have on progress of a complex project in upholding ESDC's determination not to prepare an SEIS to study the effect of project delays) *with* Bronx Committee for Toxic Free Schools (requiring SEIS) and Development Don't Destroy (Brooklyn), Inc. (requiring SEIS for Phase II of project, but not Phase I).



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# Questions

- What Level of Analysis Is Needed For The "Hard Look" Required Where An Agency Decides Not To Prepare an SEIS Before Approving A Discretionary Change In A Long-Term Project?

- *Compare* Riverkeeper (agency's "hard look" and determination whether to prepare an SEIS may rely on "material already in its file") *with* Development Don't Destroy (Brooklyn), Inc. (criticizing agency for failing to prepare unspecified new "technical studies").
- *Cf.* Bronx Committee for Toxic Free Schools (SCA failed to document rationale for not requiring SEIS for site management plan).



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# Questions

- How To Address Different Timelines For Decision-Making Among Different Agencies?

- Bronx Committee for Toxic Free Schools (requiring SEIS for "Site Management Plan" developed and approved by NYSDEC under the BCP).



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# Questions

- How to apply the rule that a "project sponsor may not commence any physical alteration related to an action until the provisions of SEQRA have been complied with," 6 N.Y.C.R.R. § 617.3(a)?
- *See* E.F.S. Ventures Corp. v. Foster, 71 N.Y.2d 359 (1988) (actions barred from review by statute of limitations are "protected from further challenge" in the event that SEQRA litigation is initiated with respect to a subsequent phase of the project) *and* Development Don't Destroy (Brooklyn), Inc. (requiring SEIS for Phase II during Phase I construction)
- *Cf.* 6 N.Y.C.R.R. § 617.9(a)(7) (SEIS "limited to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS").



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# Questions

- What deference is given to the lead agency's assessment of the RWCDS?
- *Compare* Fisher v. Giuliani, 280 A.D.2d 13 (1st Dep't 2001) (deferring to lead agency's assessment of the RWCDS) *with* Development Don't Destroy (Brooklyn), Inc. (holding that the agency had failed to substantiate its choice of scenarios with a "comparison of the environmental impacts" of each scenario ).

# Strategies

- An SEIS should be required only where the EIS fails to adequately address project impacts.
- A robust EIS that thorough analyzes and mitigates environmental impacts is the best approach for addressing project challenges.
- The EIS should document the basis for the lead agency's decision-making as to the RWCDS.

# Strategies

- The construction impacts of a project is a key issue that has been assessed in detail in recent EIS's for major projects.
- The EIS's often assess one or more "interim build years" in addition to the impacts as of the date of the final build year.
- The assessment of construction impacts may require that assumptions be made as to the "micro-phasing" of the project, with respect to the order of construction of individual project buildings and whether multiple buildings may be under construction simultaneously, requiring assessment of the cumulative impacts from such concurrent construction.

# Strategies

- The uncertainty resulting from future project changes and the potential for changes in economic conditions can often be addressed by ensuring that project changes would not result in new adverse environmental impacts not disclosed in the EIS.
- Robust mitigation and enforcement mechanisms.
- Mitigation may address interim conditions resulting from delay.

# Strategies

- A decision not to conduct an SEIS for a material project change should be documented and substantiated by an environmental assessment.
- If an SEIS is required, it may be permissible to target the SEIS to specific features of the project, or specific new information received, to allow other aspects of the project to proceed without any new SEQRA-created delay.

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