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“Little NEPAs” and their
Environmental Impact Assessment Procedures

By

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INTRODUCTION

Fifteen states and the District of Columbia and Puerto Rico have enacted environmental policy acts which, because they are largely modeled on the federal National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 *et seq.*, are collectively referred to as "Little NEPAs." The state statutes are listed in the Appendix to these Materials. A useful list, with short synopses of each act, is also found in Mandelker, NEPA Law and Litigation, (2nd Ed.) (hereinafter "Mandelker"), § 12.02[1]. Discussions of Little NEPAs may be found in the materials listed in the endnote below.²

Little NEPAs may best be studied and analyzed by considering their treatment, and that of the court decisions which have construed and applied them, of the following principal questions:

- (1) Are they essentially procedural or do they also govern the substantive determinations of the covered agencies?
- (2) What governmental agencies and other entities, if any, are covered?
- (3) What types of actions are covered by environmental review requirements?
- (4) What are the standards for determining the "significance" which triggers the requirement of an Environmental Impact Statement ("EIS")?
- (5) What standards govern the determination of the sufficiency of an EIS?
- (6) What are the means for and standards of judicial review?

Definitive answers to any of these questions in any particular jurisdiction require, of course, study of the exact text of the statute and any administrative regulations and guidance, as well as the reported cases in that jurisdiction. Examples of the treatment of each of these issues are furnished below.

IS THE LITTLE NEPA SUBSTANTIVE AS WELL AS PROCEDURAL?

Unlike the federal NEPA, which governs only procedural matters,³ a number of Little NEPAs do affect the substantive determinations by state agencies of actions within the acts' coverage. For example, Minnesota's act provides that:

No state action significantly affecting the quality of the environment shall be allowed, nor shall any permit for natural resources management and development be granted, where such action or permit has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not justify such conduct.⁴

Similarly, New York's act, the State Environmental Quality Review Act⁵ ("SEQRA"), requires that:

Agencies shall use all practicable means to realize the policies and goals set forth in this article, and shall act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects, including effects revealed in the environmental impact statement process.⁶

New York's act has been held to be unlike NEPA, which is essentially procedural. It imposes substantive and more action-forcing requirements, particularly with regard to the obligation to consider and impose practicable mitigation measures.⁷ SEQRA requires the imposition of mitigation measures "to the maximum extent possible . . . consistent with social, economic and other essential considerations."⁸

The California Environmental Quality Act ("CEQA") provides that agencies should not approve projects as proposed if there are "feasible" alternatives. "Feasible" is defined by the act as "capable of being accomplished in a successful manner in a reasonable period of time, taking into account economic, environmental, social, and technological factors."⁹

In contrast to the foregoing statutes, Virginia's act has been held not to authorize substantive review of EISs.¹⁰ Acts without any requirement concerning the choice among alternatives include those of Washington, Massachusetts, North Carolina, Hawaii and Maryland.

A requirement of findings in the Little NEPA process allows for a challenge to the sufficiency of the findings, as well as to the adequacy of the EIS and the validity of the ultimate determination, that is akin to the challenge under NEPA of a federal Record of Decision following an EIS. For example, in Orchards Assoc. v. Planning Board of North Salem,¹¹ the findings of the lead agency, made after the issuance of a generic EIS, was the

subject of litigation by the applicant. In Gordon v. Planning Board of the Town of Bedford,¹² findings under New York's Little NEPA were set aside because the lead agency failed to accord sufficient consideration to mitigation measures proposed by the applicant. Although the same standard of judicial review would apply to the findings as to the ultimate determination, the need to prepare that separate document may allow a litigant the proverbial "second bite at the apple."

WHAT AGENCIES ARE COVERED?

Most Little NEPAs cover all state agencies or governmental units; some define the term. For example, California defines "Public agency" as including "any state agency, board, or commission, any county, city and county, city, regional agency, public district, redevelopment agency, or other political subdivision."¹³

New York's act governs all "state agencies," which are defined as "any state department, agency, board, public benefit corporation, public authority or commission."¹⁴

Wisconsin's act covers "All agencies of the state....,"¹⁵ while the Washington act includes "all branches of government of this State, including state agencies, municipal and public corporations, and counties...."¹⁶ Virginia's act covers "[a]ll state agencies, boards, authorities and commissions or any branch of the state government....,"¹⁷ and North Carolina's act regulates "[a]ny state agency...."¹⁸

Minnesota's act covers every "Governmental unit," which means:

any state agency and any general or special purpose unit of government in the state including, but not limited to, watershed districts organized under chapter 12, counties, towns, cities, port authorities, housing authorities, and economic development authorities established under sections 469.090 to 469.108, but not including courts, school districts and regional development commissions other than the metropolitan council.¹⁹

Massachusetts covers all agencies and defines "agency" as:

[a]n agency, department, board, commission or authority of the commonwealth, and any authority of any political subdivision which is specifically created as an authority under special or general law.²⁰

Maryland's act applies to "all state agencies," which includes the "executive and administrative departments, offices, boards, commissions, and other units of the State government and any such bodies created by the State."²¹

Whether the discretionary actions of a state governor that might affect the environment are subject to a Little NEPA remains an open issue in some jurisdictions. However, in Hudson River Sloop Clearwater, Inc. v. Cuomo,²² the lower court found that the Governor's entry into a memorandum of understanding with the Mayor of New York City

was subject to New York's SEQRA. Although this decision was later reversed on other grounds, the appellate court did not address this SEQRA issue. Regulations under SEQRA were subsequently amended to exempt actions by the Governor. A challenge to this regulation was rejected in an appellate court decision, which found that such actions are not subject to SEQRA because the governor acts solely through executive agencies which are subject to SEQRA.²³

One of the most important questions with respect to agency coverage is whether local or municipal agencies are included. If they are included, the great majority of zoning and other land use decisions, including zoning amendments, local laws, zoning variances, subdivision approvals, site plan approvals, and special use permits, are subject to environmental review. Those which subject such agencies to coverage and its concomitant EIS requirements include the Little NEPAs of:

California, which requires state and local agencies to prepare impact reports on "any project they intend to carry out or approve which may have a significant effect on the environment;"²⁴

New York, which defines "local agency" as "[a]ny local agency, board, district, commission or governing body, including any city, county, and other political subdivision of the state;"²⁵

Washington;²⁶ Minnesota;²⁷ and Massachusetts.²⁸

The relationship of Little NEPAs to land-use control is discussed in Magee, "Environmental Impact Statements: Applications to Land Use Control," 10 Zoning and Planning L. Rep. 113 et seq. (1987).

North Carolina's Little NEPA applies to all state agencies.²⁹ The definition of "State agency," however, specifically excludes:

[l]ocal governmental units or bodies such as cities, towns, other municipal corporations or political subdivisions of the State, county or city boards of education, other local special-purpose public districts, units or bodies of any kind, or private corporations created by act of the General Assembly, except in those instances where programs, projects and actions of local governmental units or bodies are subject to review, approval or licensing by State agencies in accordance with existing statutory authority, in which case local governmental units or bodies are subject to review, approval or licensing by State agencies in accordance with existing statutory authority, in which case local governmental units or bodies shall supply information which may be required by such State agencies for preparation of any environmental statement required by this Article.³⁰

Indiana's act does not apply to municipalities.

WHAT TYPES OF ACTIONS ARE COVERED BY EIS REQUIREMENTS?

The term "actions" as used in the phrase "major federal actions significantly affecting the quality of the human environment" in NEPA is not defined.³¹ Very early in its history the federal act was construed to embrace each of the three principal categories of agency actions: (i) projects directly undertaken by federal agencies; (ii) projects of other governmental units or of private parties licensed or permitted by federal agencies; and (iii) subsidies or grants-in-aid by federal agencies.

What actions are covered under Little NEPAs involves the question of first, whether they must be "major,"³² and secondly, whether each of the three named categories of actions is included. Washington,³³ Indiana,³⁴ Wisconsin,³⁵ and Minnesota³⁶ require an EIS for "major" actions which significantly affect the human environment or its quality. California requires an impact report on any discretionary action which is proposed to be approved or carried out which may have a "significant effect" on the environment; the action need not be "major."³⁷

New York requires an EIS for "any action ... which may have a significant effect on the environment."³⁸ As is common to Little NEPAs, ministerial actions are not covered.³⁹ Maryland's act requires an EIS for "each proposed State action significantly affecting the quality of the environment."⁴⁰ Massachusetts does not qualify the action which requires "[a]n environmental impact report."⁴¹

Hawaii's requirement for "environmental assessment" does not require that the "actions" to which it applies be major, but otherwise limits the actions to those involving state or county lands, historic sites or other critical areas.⁴² In Citizens for the Protection of the North Kohala Coastline v. County of Hawaii,⁴³ the court held that the proposed construction of two underpasses below a highway for passage of golf carts and maintenance vehicles constitutes the "use of state land" within the meaning of the statute.

As to the categories of actions -- state projects, permits and subsidies -- most Little NEPAs include all such categories. New York's definition of "actions" is all-inclusive except for stated exceptions; the definition of "State Agency" excludes the state legislature, but it includes municipal legislative bodies. More specifically, "actions" include:

- (i) projects or activities directly undertaken by any agency; or projects or activities supported in whole or part through contracts, grants, subsidies, loans, or other forms of funding assistance from one or more agencies; or projects or activities involving the issuance to a person of a lease, permit, license, certificate or other entitlements for use or permission to act by one or more agencies; and
- (ii) policy, regulations, and procedure-making.⁴⁴

But do not include:

- (i) enforcement proceedings or the exercise of prosecutorial discretion in determining whether or not to institute such proceedings; or

- (ii) maintenance or repair involving no substantial changes in existing structure or facility.⁴⁵

Washington's EIS requirement for proposals for legislation and other "major actions"⁴⁶ extends to state agency grants and permits.⁴⁷ Massachusetts specifically includes any "permit" or act of "financial assistance for a project."⁴⁸

Minnesota's definition of "[g]overnmental action" is all inclusive:

Governmental action means activities, including projects wholly or partially conducted, permitted, assisted, financed, regulated or approved by units of government including the federal government.⁴⁹

Maryland defines "Proposed State action" as follows:

"Proposed State action" means requests for legislative appropriations or other legislative actions that will alter the quality of the air, land, or water resources. It does not include a request for an appropriation or other action with respect to the rehabilitation or maintenance of existing secondary roads.⁵⁰

The Connecticut Environmental Policy Act includes a definition of "actions which may significantly affect the environment" that is more limited. It applies only to actions funded by state agencies, and does not include the granting of permits and other approvals by an agency:

"[A]ctions which may significantly affect the environment" means individual activities or a sequence of planned activities proposed to be undertaken by state departments, institutions or agencies, or funded in whole or in part by the state, which could have a major impact on the state's land, water, air, historic structures and landmarks as defined in section 10-410, existing housing, or other environmental resources, or could serve short term to the disadvantage of long term environmental goals.⁵¹

An important aspect of the "actions" coverage of Little NEPAs is the exemptions. The "functional equivalent" doctrine under NEPA may be treated expressly or by case law. An example of the former is the New York act's exemption of enforcement actions and of some other actions by specific agencies whose regular procedures require the equivalent of an EIS.⁵² Similarly, California's act has a functional-equivalence doctrine written into it for environmental regulatory programs.⁵³

By implication, Indiana's act rejects a general functional-equivalence doctrine but provides specifically that the state's three environmental boards, "[t]he air pollution control board, water pollution control board, and solid waste management board shall by rule define which actions constitute a major state action significantly affecting the quality of the human environment."⁵⁴

Washington's Little NEPA provides a parallel approach to functional equivalence in

certain limited circumstances. That act allows a municipality, when reviewing a Growth Management Act project, to determine that the requirements for environmental analysis, protection and mitigation measures in the municipality's regulations and comprehensive plan, or in other applicable laws or regulations, provide adequate analysis and mitigation of the specific adverse environmental impacts and, therefore, an EIS or further project mitigation measures are not needed.⁵⁵

WHEN IS AN ACTION SO "SIGNIFICANT" THAT AN EIS IS REQUIRED?

As under the federal NEPA, the great bulk of litigation under state Little NEPAs involves challenges to decisions not to prepare an EIS, or to the sufficiency of an EIS that was prepared. The former challenge is frequently characterized as a claim that an EIS should have been prepared, though as a technical matter the decision that is challenged is the "negative declaration" (or "Finding of No Significant Impact" in NEPA parlance). This is the agency decision that the proposed action will not have an adverse environmental impact and that, as a consequence, no EIS is necessary. This characterization occurs because the courts often discuss the challenged administrative decision in the context of its environmental significance. Guidance as to the determination of the significance necessary to trigger the EIS requirement requires, of course, study of the decisions, scores in some states, under each Little NEPA. However, a few general principles may be gleaned from the cases.

Under a number of the Little NEPAs, it has been held that the threshold for requirement of an EIS is lower than the federal threshold.⁵⁶ Statutory underpinning for such a ruling is found in the use by several Little NEPAs of the term, "may," with respect to the impact of an action. For example, New York's act uses the clause "may have a significant effect on the environment"⁵⁷ in providing for actions which require an EIS. The same clause is used in California's act,⁵⁸ which also defines the clause itself as "a substantially or potentially substantial adverse change in the environment."⁵⁹ Minnesota's act requires an EIS "[w]here there is a potential for significant environmental effects from any major governmental action..."⁶⁰ Under Washington's act, "significantly" has been construed to mean "whenever more than a moderate effect on the quality of the environment is a reasonable probability."⁶¹

A "hard look" doctrine may be used as the test for the sufficiency of a negative declaration.⁶² Under such a test, derived from Kleppe v. Sierra Club⁶³ and applied in other federal cases, the agency is required to identify and take a "hard look" at all relevant areas of environmental concern.⁶⁴ Under the "hard-look" test applied in Massachusetts, an EIS is required if the potential for environmental damage is "not insignificant."⁶⁵

In substance, a "hard-look" test may include a requirement for a "reasoned elaboration." Courts may annul a negative declaration due to the failure of the lead agency to identify relevant areas of environmental concern, to take the requisite "hard look" at potential environmental impacts, or to make the requisite "reasoned elaboration."⁶⁶

In Wisconsin, however, a "reasonableness" standard governs the determination of the validity of an agency decision not to prepare an EIS.⁶⁷ As noted infra, this is a standard

more often applied to challenges to the sufficiency of an EIS.

In 2001, a New York court annulled a negative declaration by a state power authority (the “NYPA”) regarding the installation of new turbine generators.⁶⁸ The court found that the NYPA, while acting as lead agency, failed to adequately analyze the environmental impact of fine particulate matter of 2.5 microns or less in diameter (“PM 2.5”). Although the agency had assumed that all PM of 10 microns in diameter are PM 2.5, the court found that such analysis was “not sufficiently detailed ... and not an adequate substitute for addressing the health impacts of PM 2.5 emissions.” Consequently, in an unusual step, the court held that the NYPA should have issued a positive declaration and prepared an EIS. However, rather than halt the nearly-completed project construction, the court stayed its injunction for approximately six months “to afford NYPA an opportunity to comply with SEQRA.”⁶⁹

As indicated by a Washington court, even proposals intended to protect or improve the environment may require an EIS. In Alpine Lakes Protection Society v. Washington State Department of Natural Resources,⁷⁰ the court disagreed with the Washington Forest Practices Appeals Board’s (“FPAB”) ruling that an EIS was not required for a watershed analysis. The FPAB decision was based on reasoning that approval of watershed analysis and selection of geo-technical prescriptions, in and of themselves, would have no probable significant adverse environmental impact. According to the Alpine Lakes court, however, Washington’s Little NEPA does not allow threshold determinations to be made by balancing potential “good/bad” effects of a proposal.⁷¹

Little NEPAs may provide for “categorical exclusions” of actions or projects that do not have a significant effect on the environment.⁷² The California and Washington courts have upheld guidelines and regulations that categorically exempt a variety of projects and actions because they do not have a significant environmental effect.⁷³ Similarly, New York’s act provides for a list of “Type II” actions, which are exempt from environmental review.⁷⁴ A Washington case, however, has recognized that state legislation provided for certain circumstances where otherwise categorically-exempt actions require environmental review.⁷⁵ In Washington, for example, if an otherwise potentially-categorically exempt Class III forest practice is a segment of a proposal and that proposal as a whole has a probable significant adverse environmental impact, it will require environmental review.⁷⁶

Certain states, including New York⁷⁷ and California,⁷⁸ identify general criteria of significance against which the proposed action should be assessed. Moreover, California encourages lead agencies to develop and publish thresholds of significance that the agency will use in the determination of significance.⁷⁹ These thresholds must be “adopted by ordinance, resolution, rule or regulation, and developed through a public review process and be supported by substantial evidence.”⁸⁰ General standards that are not adopted under this process may not be used as “thresholds of significance,” especially where the validity of such standards is questionable.⁸¹

New York allows “agencies” to adopt their own Little NEPA legislation, provided it is consistent with the State Act.⁸² New York City has adopted its own City Environmental Quality Review and, as part of its process, has adopted a technical manual that sets forth

specific criteria for numerous areas of concern, ranging from traffic and air quality to shadows and open space.⁸³ These criteria provide a high degree of predictability in determining significance; on the other hand, these detailed and precise parameters sometimes tend to discourage flexibility and new approaches to situations and mitigating environmental impacts.

A “positive declaration” that an EIS is necessary can often be avoided by the inclusion of mitigation measures in the proposal by the lead agency.⁸⁴ Often, as in New York and California, this process requires public notice of the proposed issuance of this “conditioned negative declaration” and an opportunity for the public or other agencies to demonstrate that the mitigation does not negate the significant impacts.⁸⁵

Under the “hard look” test of an agency's determination that an EIS is not required (as well as in the sufficiency of an EIS, discussed below), the cumulative effects of the project must be considered. Minnesota addresses cumulative impacts in its Little NEPA, which requires that:

Connected actions and phased actions shall be considered a single project for purposes of the determination of the need for an [EIS]....⁸⁶

In Trout Unlimited, Inc. v. Minnesota Depart. of Agriculture,⁸⁷ the court concluded that the Commissioner of Agriculture had erred in deciding not to prepare an environmental impact statement for an irrigation project because he had failed to consider the potential cumulative impacts of the project. Moreover, in Pope County Mothers v. Minnesota Pollution Control Agency,⁸⁸ the court found that the agency's negative declaration for a multi-site feedlot operation was arbitrary and capricious because it failed to consider cumulative effects of all the sites involved in the project.⁸⁹

IS AN EIS SUFFICIENT?

Litigants commonly challenge the sufficiency of an EIS. This issue is a critical one given the fact that, as stated by one California court, “[t]he ultimate decision of whether to approve a project, be that decision right or wrong, is a nullity if based upon an [environmental impact statement] that does not provide the decision-makers, and the public, with the [requisite] information about the project....”⁹⁰

While large numbers of EISs have been held insufficient under the federal NEPA, they have been held insufficient in a much smaller proportion of the cases under Little NEPAs. The New York courts, for example, have upheld the adequacy of impact statements in all but a handful of cases that have considered the problem.⁹¹ There are several reasons for this significant difference.

1. The judicial review is generally under the state equivalent of the federal Administrative Procedure Act, which typically provides for a more summary proceeding than a federal civil action. For example, state proceedings generally preclude discovery, or have fewer exceptions than under federal court challenges to the adequacy of an EIS. In addition, in state practice the “record” for judicial review generally tends to be more limited than under

federal practice, which allows the defending agency to be more selective in putting together the record. The means of judicial review are discussed below.

2. State courts, in the writers' experience, are more deferential toward, and generally less willing to overrule, administrative actions, whatever the applicable judicial review test may be, also discussed below.

3. The Little NEPA cases have arisen after a number of years of practice under the federal NEPA, in the later years of which federal agencies have been more sophisticated and fewer EISs have been ruled insufficient. This would seem to be true, though to a somewhat lesser degree, in the case of state agencies, particularly those which enacted Little NEPAs in the early or mid-1970s.

As in the case of rulings on the necessity of an EIS, the cases under any particular Little NEPA must be studied carefully. In many states, such as California, New York and Washington, the "hard look" doctrine, discussed above, is applied in determining the sufficiency of an EIS, though it is applied within the context of a "rule of reason" which affords a much greater degree of leeway to an EIS than would be applied to a negative declaration.⁹² That doctrine does not "allow the court to analyze the thought process of the lead agency or its individual members; the contents of the EIS and its availability to the lead agency are what matters, not whether the particular individuals actually read it."⁹³ The "rule of reason" standard makes it difficult to attack the sufficiency of an EIS, although the EIS may nonetheless be reviewable as a matter of law.⁹⁴

The most frequent attack on the sufficiency of EIS is with respect to its treatment of alternatives. There, particularly, a "rule of reason" applies -- a reasonable range of alternatives must be considered by the agency.⁹⁵ If, however, the discussion is not a sufficient basis of informed decision making, the EIS may be held insufficient.⁹⁶

An "alternatives" issue that often arises is that of whether a private developer of land owned by it must consider alternative locations not owned by it. Generally the permitting agency need not consider such alternative locations.⁹⁷

In reviewing the sufficiency of an EIS, a court affords considerable deference to expert agencies even though the court itself may have some skepticism.⁹⁸ A Washington court emphasized that when an agency is presented with conflicting expert opinions, it is the agency's responsibility to resolve those differences, and the court will accord deference to the agency selection among differing expert opinions.⁹⁹

An EIS must discuss the cumulative impacts of a project,¹⁰⁰ including those of several projects that are the subject of a plan or municipal ordinance.¹⁰¹ Where there is, however, only a generalized plan manifested in consideration by a number of federal, state and local agencies, the cumulative impacts may not be required to be considered.¹⁰²

In addition, several decisions suggest that the financial ability of a private or public entity to implement mitigation measures may be an issue which is required to be discussed in an EIS, and thus is a valid subject of inquiry.¹⁰³

MEANS FOR AND STANDARDS OF JUDICIAL REVIEW

Little NEPA litigation is generally a review of some administrative action. In the cases of Little NEPAs which apply to municipalities, particularly zoning and other land use actions, the actions (e.g., the enactment or amendment of zoning ordinances being reviewed) may, however, be deemed legislative. Nonetheless, challenges to either negative declarations or EISs are viewed as challenges to administrative actions.¹⁰⁴ In those cases in which the action being reviewed is administrative, the means of judicial review is, in the great majority of cases, the applicable state Administrative Procedure Act, containing a judicial review provision and serving as the statutory substitute for the traditional writs of certiorari, mandamus and prohibition.

Judicial reviews of Little NEPA administrative actions raise the classical problems of judicial review of administrative actions generally, including those of standing, the applicable statute of limitations, ripeness, exhaustion of administrative remedies, the standard(s) of review, and the limitation of the review to the administrative record. While detailed discussion of any of those matters is beyond the scope of this article, some particular aspects can be noted.

The criteria for standing may be more liberal in Little NEPA proceedings than in environmental litigation generally.¹⁰⁵ As stated in Industrial Liaison Committee of Niagara Falls Area Chamber of Commerce v. Williams:

In order to establish standing to challenge compliance with SEQRA "[a] petitioner need only show that the administrative action will in fact have a harmful effect on the petitioner and that the interest asserted is arguably within the zone of interest to be protected by the statute."¹⁰⁶

In Citizens for the Protection of the North Kohala,¹⁰⁷ the court found that although the Citizens' members were neither owners nor adjoining owners of property to the proposed project, they had still alleged an injury in fact sufficient to constitute standing by asserting personal and special interests. Those interests included recreational, aesthetic and environmental injuries.

This apparent breadth has been somewhat limited, however, by the requirement that the environmental injury must be individual and not the type of harm that would be suffered by the general public.¹⁰⁸ A New York court recently denied standing to an association formed to preserve historic resources, reasoning that the association's members "would not sustain the alleged visual impacts [of the proposed construction of a large office building in the middle of a historic district] because their residences are not within sight of the Project and, as a result, any adverse effects on scenic view would be no different for them than for the public at large."¹⁰⁹

A Massachusetts case outlined criteria a court should consider in determining if standing exists to challenge the certification of an EIS by the Secretary of Environmental Affairs, who prepares but does not take action based on the document. Those factors include:

language of the statute in issue; legislative intent and purpose in enacting the statute; nature of administrative scheme; decisions on standing; any adverse effects that might occur if standing is recognized; and availability of other, more definite remedies to the plaintiffs.¹¹⁰ Furthermore, the court noted that “in making the inquiry, the court pays special attention to the requirement that standing usually is not present unless the government official or agency can be found to owe a duty directly to the plaintiffs.”¹¹¹ The court did suggest that plaintiffs would have standing to challenge the decision of an agency taking action on the EIS, and thereby challenge the adequacy of the document.¹¹²

There is generally a short period under the applicable statute of limitations, often only thirty days, when the agency action reviewed is a zoning or other land use action.¹¹³ A short statute of limitations provision is found in most Administrative Procedure Acts, and there may be a limitation of actions provision in the Little NEPA act itself.¹¹⁴ In New York, for example, a challenge to a lead agency’s alleged noncompliance with SEQRA is four months from the resolution or determination at issue, unless that period is shorter by virtue of a separate statute, such as that noted above.¹¹⁵

One particular statute of limitations or ripeness problem is whether the period begins to run when the Little NEPA action -- a negative declaration or the promulgation of an EIS -- is completed, or when the principal action addressed in the Little NEPA processing is taken. The majority of cases follow the federal rule, which is that the latter date governs.¹¹⁶

However, two recent cases in New York allowed challenges to administrative determinations immediately following the agency’s decision whether to prepare an EIS. Gordon v. Rush¹¹⁷ concerned one agency’s authority to issue positive declarations for related actions under a “coordinated review” when the New York Department of Environmental Conservation, the sole lead agency, had already issued negative declarations. The Court of Appeals reviewed the action immediately after the issuance of the positive declarations, and held that the Department of Environmental Conservation’s negative declarations were binding on other agencies because of the coordinated review process.¹¹⁸

While Gordon arose in the somewhat unusual circumstances of one agency seeking to essentially circumvent the decision of another agency, Stop the Barge v. Cahill¹¹⁹ was a direct rejection of the accepted notion that a challenge to a negative declaration prior to the substantive decision to which the environmental review was addressed is premature. In Stop the Barge, the New York Court of Appeals determined that the statute of limitations for a claim challenging a negative declaration with respect to a proposed power plant ran from the date the negative declaration was issued, rather than from the date the air permit was eventually issued, because the negative declaration marked the endpoint of environmental review.

The Little NEPA act may explicitly state the standard of review. For example, Washington’s act (“SEPA”) provides that:

In any action involving an attack on a determination by a governmental agency relative to the requirement or the absence of the requirement, or the adequacy of a “detailed statement,” the decision of the governmental agency

shall be accorded substantial weight.¹²⁰

Accordingly, Washington courts have held that a governmental agency's threshold SEPA determination is reviewed under the "clearly erroneous" standard, and that a decision is clearly erroneous when the court is "left with the definite and firm conviction that a mistake has been committed."¹²¹

The California act mandates a "substantial evidence" test.¹²² If an administrative hearing has been held, the substantial evidence must be in the record.¹²³ The general standards of review under New York's Article 78, are stated as the "Questions raised:"¹²⁴

The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or
2. whether the body or officer is proceeding or is about to proceed without or in excess of jurisdiction; or
3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or
4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.¹²⁵

In Jackson v. New York State Urban Development Corp.,¹²⁶ an "arbitrary and capricious" test was held to apply in adjudging the adequacy of an EIS. Minnesota courts employ the same standard, and deem an agency ruling "arbitrary and capricious" if the agency: (a) relied on factors not intended by the legislature; (b) entirely failed to consider an important aspect of the problem; (c) offered an explanation that runs counter to the evidence; (d) issued a decision that is so implausible that it could not be explained as a difference in view or the result of the agency's expertise; or (e) issued a decision that "represents the agency's will, rather than its judgment."¹²⁷ In applying the arbitrary and capricious standard, a Minnesota court opined that "a reviewing court will intervene only where there is a combination of danger signals [that] suggest the agency has not taken a hard look at salient problems and has not genuinely engaged in reasoned decision-making."¹²⁸

The test that applies may depend, of course, on whether the judicial review involves the procedural regularity of the proceedings being reviewed, in which case the question(s) would be of law and the court may rule upon the question(s) de novo, or questions of fact, as is generally the case in adjudging the adequacy of an EIS.

The limitation of the judicial review to the administrative record, as to which a limited federal NEPA exception has been applied,¹²⁹ is in effect under most state

Administrative Procedure Acts. The writers are not aware of any Little NEPA cases explicitly adopting the exception, although state court decisions sometimes refer to material outside the record without accompanying explanation.

END NOTES

1. Dan Chorost, an associate at Sive, Paget & Riesel, P.C., assisted in the preparation of this article.
2. Mandelker, NEPA Law and Litigation (2d Ed.), Clark Boardman Callaghan (1984).

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3. See Stryckers Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980).
4. Minn. Stat. Ann. § 116D.04, Subd. 6 (Emphasis supplied).
5. N.Y. Env'tl. Conserv. Law Article 8.
6. N.Y. Env'tl. Conserv. Law. § 8-0109(8) (emphasis supplied).
7. Jackson v. New York State Urban Development Corp., 67 N.Y.2d 400, 503 N.Y.S.2d 298 (1986).
8. N.Y. Env'tl. Conserv. Law § 8-0109(8); see also Jackson, 503 N.Y.S.2d at 308.
9. Cal. Pub. Res. Code, § 21061.1.
10. See Murray v. Green, 240 Va. 204, 396 S.E.2d 653 (1990).
11. 114 A.D.2d 850, 494 N.Y.S.2d 760 (2d Dept. 1985).
12. No. 15566/90 (Sup. Ct. West. Cty. 1991); see also Oyster Bay Associates Ltd. Partnership v. Town Bd. of Oyster Bay, No. 16830/01, slip op. at 6 (Sup. Ct. Suffolk Co. July 8, 2002)(court rejected town board's findings with respect to the disapproval of a proposed shopping center, as they were based on "generalized objections and concerns by community members that are uncorroborated by empirical data").
13. Cal. Pub. Res. Code, § 21063.
14. N.Y. Env'tl. Conserv. Law, § 8-0105(1).
15. Wis. Stat., § 1.11(2).
16. Wash. Admin. Code, § 43.21C.030.
17. Va. Code, § 10.1-1188.

18. N.C. Admin. Code, Pollution Control and Environment, § 113A-4.
19. Minn. State., § 116D.04(1a).
20. Mass. Gen. Laws, Title III, Ch. 30, § 62.
21. M.D. Regs. Code, § 1-301(d).
22. N.Y.L.J. Jan. 12, 1995 (Sup. Ct. N.Y. Cty. 1995).
23. West Village Committee, Inc. v. Zagata, 242 A.D.2d 91, 99, 669 N.Y.S.2d 674, 677 (3d Dept. 1998).
24. Cal. Pub. Res. Code, §§ 21100, 21151
25. N.Y. Envtl. Conserv. Law, § 8-0105.
26. Wash. Admin. Code, § 43.21C.020; see Barrie v. Kitsap County, 93 Wash. 2d 843, 613 P.2d 1148 (1980).
27. Minn. Stat., § 116D.04(1)(a).
28. Mass. Gen. Laws, Title III, CH. 30, § 62.
29. N.C. Admin. Code, Pollution Control and Environment, § 113A-4.
30. Id. (Emphasis supplied.)
31. 42 U.S.C. § 102.2(C). But note that under NEPA § 102(2)(C), proposed legislation is encompassed by the term "major federal actions." General revenue sharing legislation, however, is not considered within the ambit of Section 102(2)(C).
32. Under NEPA, the term "major federal actions significantly affecting the quality of the human environment" has been narrowed to the single criterion of significance. 40 C.F.R. § 1508.27.
33. Wash. Admin. Code, § 43.21C.030.
34. Ind. Admin. Code, Title 13, § 13-1-10-3.
35. Wis. Stat., § 1.11.
36. Minn. Stat., § 116D.04(2)(a).
37. Cal. Pub. Res. Code, § 21100.

38. N.Y. Envtl. Conserv. Law, § 8-0109.
39. See Steele v. Town of Salem Planning Bd, 200 A.D.2d 870, 606 N.Y.S.2d 810 (3d Dept. 1994); see also Plaza v. City of New York, 305 A.D.2d 604, 759 N.Y.S.2d 748 (2d Dept. 2003) (New York courts “have repeatedly held that a building’s change in use, in and of itself, does not constitute an ‘action’ under SEQRA or CEQA unless that change has significant environmental impact”).
40. Md. Regs. Code, Title 8, § 1-304.
41. Mass. Gen. Laws, Title III, Ch. 30, § 62B.
42. Haw. Rev. Stat., § 343-5.
43. 979 P.2d 1120 (Haw. 1999).
44. N.Y. Envtl. Conserv. Law, § 8-0105(4).
45. Id.
46. Wash. Admin. Code, § 43.21C.030.
47. Cook v. Clallam County, 27 Wash. App. 410, 618 P.2d 1030 (1980).
48. Mass. Gen. Laws, Title III, Ch. 30, § 62A.
49. Minn. Stat., § 116D.04(d).
50. Md. Regs. Code, Title 8, § 1-301.
51. Conn. Gen. Stat. Ann. §§ 22a-1c.
52. N.Y. Envtl. Conserv. Law, §§ 8-0105, 8-111.5.(b), (c).
53. Cal. Pub. Res. Code, § 21080.5. See Land Waste Mgmt. v. Contra Costa Cty. Bd. of Suprvs., 222 Cal. App. 3d 950, 271 Cal. Rptr. 909 (1st Dist. 1990); Wildlife Alive v. Chickering, 18 Cal. 3d 190, 132 Cal. Rptr. 377 (1976).
54. Ind. Admin. Code, Title 13, § 13-1-10-3.
55. Wash. Rev. Code §1-97-11-158 (2000); Wash. Admin. Code, §43.21C.240.
56. See No Oil, Inc. v. City of Los Angeles, 13 Cal. 3d 68, 118 Cal. Rptr. 34 (1974); H.O.M.E.S. v. New York State Urban Dev. Corp., 69 A.D.2d 222, 418 N.Y.S.2d 827 (4th Dept. 1979); Wisconsin's Envtl. Decade, Inc. v. Public Service Comm'n, 79 Wis. 2d 409, 256 N.W.2d 149 (1977).

57. N.Y. Envtl. Conserv. Law, § 8-0109(2).
58. Cal. Pub. Res. Code, § 21100.
59. Id.
60. Minn. Stat., § 116D.04(2)(a).
61. Norway Hill Preservation and Protection Ass'n v. King County Council, 87 Wash. 2d 267, 278, 552 P.2d 674, 680 (1976).
62. H.O.M.E.S. v. New York State Urban Development Corp., 69 A.D.2d 222, 418 N.Y.S.2d 827 (4th Dept. 1979).
63. 427 U.S. 390 (1976).
64. See Inland Vale Farm Co. v. Stergianopoulos, 104 A.D.2d 395, 478 N.Y.S.2d 926 (2d Dept. 1984), aff'd, 65 N.Y.2d 718, 492 N.Y.S.2d 7 (1985).
65. Secretary of Environmental Affairs v. Massachusetts Port Authority, 366 Mass. 755, 323 N.E.2d 329 (1975).
66. See, e.g., Inland Vale Farm Co. v. Stergianopoulos, 65 N.Y.2d 718, 492 N.Y.S.2d 7 (1985) (failure to assess impacts on drinking water); New York Archeological Council v. Town Board of Coxsackie, 177 A.D.2d 923, 576 N.Y.S.2d 680 (3d Dept. 1991) (failure to assess impact of proposal on archeological district).
67. Wisconsin Environmental Decade, Inc. v. Public Service Commission, III, 79 Wis. 2d 409, 256 N.W.2d 149 (1977).
68. Uprose v. Power Authority of the State of New York, 285 A.D.2d 603, 729 N.Y.S.2d 42, 46 (2d Dept. 2001).
69. Id.
70. 979 P.2d 929, 936 (Wash. App. 1999).
71. Id. New York, like most states with Little NEPAs, defines the term “environment” quite broadly to include socio-economic impacts. See N.Y. Envtl. Conserv. Law § 8-0105.6 and N.Y.C.R.R. § 617.2(k); see also Chinese Staff and Workers Ass’n v. City of New York, 68 N.Y.2d 359, 509 N.Y.S.2d 499 (1986).
72. Alpine Lakes, 979 P.2d at 936.
73. Cal. Pub. Res. Code § 21084(a); Wash. Rev. Code Ann. §21C.110(1)(a); See, e.g., Bloom v. McGurk, 26 Cal. App. 4th 1307, 31 Cal. Rptr. 2d 914 (1994) (upheld

- exemption for replacement of existing public facilities); Association for Protection of Environmental Values in Ukiah v. City of Ukiah, 2 Cal. App. 4th 720, 3 Cal. Rptr. 2d 488 (1991) (upheld exemption for construction of a single family dwelling); Petition of Port of Grays Harbor, 30 Wash. App. 855, 638 P.2d 633 (1982) review denied, 97 Wash.2d 1010 (1982) (upheld exemption for acquisition of property through eminent domain).
74. N.Y. Evtl. Conserv. Law § 8-0113.2(c)(ii).
 75. See Plum Creek Timber Co. v. Washington State Forest Practices, 993 P.2d 287 (Wash. App. 2000).
 76. See Id. (citing WAC 197-11-720(b)(ii)).
 77. 6 N.Y.C.R.R. § 617.7(c).
 78. Cal. Pub. Res. Code § 21083(a) (when a proposed project has "the potential to degrade the quality of the environment, curtail the range of the environment, or to achieve short-term, to the disadvantage of long-term, environmental goals."); see also Cal. Pub. Res. Code § 21083(b)(c) (if environmental effects are "individually limited but cumulatively considerable," and if they "cause substantial adverse effects on human beings, either directly or indirectly").
 79. Cal. Pub. Res. Code § 15064.7(a).
 80. Cal. Pub. Res. Code § 15064.7(b).
 81. Save-The-Redwoods League v. County of Humboldt, No. CP9700778 Humboldt Cty. Super. Ct. May 11, 1999)(finding that no indication that county adopted general plan noise standards as "thresholds of significance" and that such standards are not intended to prescribe the amount of noise a proposed use should be permitted to inflict on existing neighbors).
 82. N.Y. Evtl. Conserv. Law § 8-0107; 6 N.Y.C.R.R. § 617.14.
 83. Mayor's Office of Environmental Coordination, City Environmental Quality Review: Technical Manual (1993).
 84. Merson v. McNally, 90 N.Y.2d 742, 688 N.E.2d 479, 665 N.Y.S.2d 605 (1997).
 85. See, e.g., 6 N.Y.C.R.R. § 617.7(d); Cal. Code Regs tit. 14 § 15073 (2000).
 86. Minn. R. 4410.1700 Subpt. 9 (1997).

87. 528 N.W.2d 903 (Minn.Ct.App. 1995).
88. 594 N.W.2d 233, 237 (Minn.Ct.App. 1999).
89. See also Village of Tarrytown v. Planning Bd. of Village of Sleepy Hollow, 292 A.D.2d 617, 741 N.Y.S.2d 44 (2d Dept. 2002) (planning board had taken the requisite “hard look” with respect to considering cumulative impacts associated with the subdivision of land for a housing development).
90. Friends of the Eel River v. Sonoma County Water Agency, 108 Cal. App. 4th 859, 872, 134 Cal. Rptr. 2d 322 (2003).
91. For the years 1990 through 2000, plaintiffs won on average only 11% of SEQRA cases where an EIS had been prepared. See Michael B. Gerrard, Daniel A. Ruzow, and Philip Weinberg, Environmental Impact Review in New York § 7.04[5] (2004). See also Mandelker, § 12.09[3].
92. See, e.g., Jackson v. New York State Urban Development Corp., 67 N.Y.2d 400, 503 N.Y.S.2d 298 (1986); Aldrich v. Pattison, 107 A.D.2d 258, 486 N.Y.S.2d 23 (2d Dept. 1985); Ebbetts Pass Forest Watch v. Dept. of Forestry and Fire Protection, 123 Cal. App. 4th 1331, 20 Cal. Rptr. 3d 808 (3d Dist. 2004); Thornton Creek Legal Defense Fund v. City of Seattle, 113 Wash. App. 34, 52 P.3d 522 (2002).
93. Gerrard, Ruzow & Weinberg, Environmental Impact Review in New York, (1999), 7-57.
94. See Leschi Improvement Council v. Washington State Highway Comm'n, 84 Wash.2d 271, 525 P.2d 774 (1974); Barrie v. Kitsap County, 93 Wash.2d 843, 613 P.2d 1148 (1980); Citizens for the Protection of the North Kohala Coastline v. County of Hawaii, 979 P.2d 1120 (Haw. 1999).
95. Village Laguna of Laguna Beach, Inc. v. Board of Supervisor's of Orange County, 134 Cal. App. 3d 1022, 185 Cal. Rptr. 41 (4th Dist. 1982); City of Ithaca v. Tompkins County Board of Representatives, 164 A.D.2d 726, 565 N.Y.S.2d 309 (3d Dept. 1991); Village of Ossining v. Planning Board of the Town of Ossining, No. 16248/88 (Sup. Ct. Westchester Cty. 1989).
96. Laurel Heights Improvement Ass'n of San Fran. v. Regents of Univ. of Calif., 47 Cal. 3d 376, 253 Cal. Rptr. 426 (1988).
98. Citizens of Goleta Valley v. Board of Spvrs. of Cty. of Santa Barbara, 52 Cal. 3d 755, 276 Cal. Rptr. 410 (1990); Horn v. I.B.M., 110 A.D.2d 304, 493 N.Y.S.2d 184 (2d Dept. 1985).

98. Orchards Assoc. v. Planning Bd., 114 A.D.2d 850, 494 N.Y.S.2d 760 (2d Dept. 1985).
99. City of Des Moines v. Central Puget Sound Growth Management Hearing Board, 988 P.2d 27 (Wash. App. 1999) (holding the Port of Seattle and the FAA are agencies with expertise in forecasting aviation demand and should receive deference in choosing the appropriate methodology for data collection).
100. Coalition Against Lincoln West, Inc. v. City of New York, 208 A.D.2d 472, 617 N.Y.S.2d 744 (1st Dept. 1994), aff'd, 86 N.Y.2d 123 (1995); Kings County Farm Bureau v. City of Hanford, 221 Cal. App. 3d 692, 270 Cal. Rptr. 650 (5th Dist. 1990); San Franciscans for Reasonable Growth v. City and County of San Francisco, 198 Cal. Rptr. 634 (Cal.App. 1984); Save the Pine Bush, Inc. v. City of Albany, ("Pine Bush"), 70 N.Y.2d 193, 512 N.E.2d 526, 518 N.Y.S.2d 943 (1987).
101. In New York, however, the several projects must be related in a significant fashion. See Pine Bush, 70 N.Y.2d 193, 512 N.E.2d 526, 518 N.Y.S.2d 943 (1987).
102. Long Island Pine Barrens Socy., Inc. v. Planning Bd. of Brookhaven, 80 N.Y.2d 500, 591 N.Y.S.2d 982 (1992); S. Thornton "Cumulative Impacts in Environmental Review: The New York Standpoint"; see 9 Pace Env'tl. L. Rev. 253 et seq. (1991).
103. See Coalition Against Lincoln West, Inc. v. City of New York, 208 A.D.2d 472, 617 N.Y.S.2d 744, 745 (1st Dept. 1994), aff'd, 86 N.Y.2d 123, 630 N.Y.S.2d 265 (1995); see also Nixbot Realty Assoc. v. New York State Urban Dev. Corp., 193 A.D.2d 381, 597 N.Y.S.2d 55, 56 (1st Dept. 1993).
104. See Brandman v. Bd. of Standards and Appeals, 213 A.D.2d 204, 623 N.Y.S.2d 246, 247 (1st Dept. 1995).
105. Industrial Liaison Committee of Niagara Falls Area Chamber of Commerce v. Williams, 131 A.D.2d 205, 521 N.Y.S.2d 321, 324 (3d Dept. 1987), aff'd, 72 N.Y.2d 137, 531 N.Y.S.2d 791 (1988).
106. Id. (quoting Matter of Dairlea Coop. v. Walkley, 38 N.Y.2d 6, 9, 377 N.Y.S.2d 451 (1975)).
107. 979 P.2d 1120, 1126 (Haw. 1999).
108. See, e.g., Society of the Plastics Industry, Inc. v. County of Suffolk, 77 N.Y.2d 761, 570 N.Y.S.2d 778 (1991).
109. Save Our Main Street Buildings v. Greene County Legislature, 740 N.Y.S.2d 715, 718 (3d Dept. 2002).

110. See Enos v. Secretary of Environmental Affairs, 731 N.E.2d 525, 528 (Mass. 2000).
111. Id.
112. Id. at 21.
113. See, e.g., New York Town Law § 282.
114. See, e.g., Hawaii, § 343-7 (120 days for lack of assessment, sixty days "after the public has been informed of the determination that [an EIS is not required]," and 60 days after the public has been informed of the promulgation of an allegedly defective EIS.)
115. See, e.g., Concerned Port Residents Committee v. Village of Sands Point, 739 N.Y.S.2d 162, 163 (2d Dept. 2002).
116. See, e.g., City of Schenctady v. Flacke, 100 A.D.2d 349, 475 N.Y.S.2d 506 (3d Dept. 1984).
117. 100 N.Y.2d 236, 762 N.Y.S.2d 18 (2003).
118. Id. at 23.
119. 1 N.Y.3d 218, 771 N.Y.S.2d 40 (2003).
120. Wash. Admin. Code, § 43.21C.090.
121. Moss, et al. v. City of Bellingham, 31 P.3d 703, 707 (Wash. App. 2001).
122. Cal. Pub. Res. Code, § 21168.
123. Cal. Pub. Res. Code, § 21168.5.
124. CPLR § 7803.
125. Id. (Emphasis supplied.)
126. 67 N.Y.2d 400, 503 N.Y.S.2d 298 (1986).
127. See Minnesota Ctr. for Env'tl. Advocacy v. Minnesota Pollution Control Agency, 632 N.W.2d 230, 235 (Minn. App. 2001).
128. Pope County Mothers v. Minnesota Pollution Control Agency, 594 N.W.2d 233, 236 (Minn. App. 1999).

129. See County of Suffolk v. Secretary of Interior, 562 F.2d 1368 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978).

APPENDIX

JURISDICTION	LITTLE NEPA CITATION
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Arkansas	Ark. Stat. Ann. § 8-1-101
California	Cal. Pub. Res. Code §§ 21000 <u>et seq.</u>
Connecticut	Conn. Gen. Stat. Ann. §§ 22a-14 <u>et seq.</u>
District of Columbia	D.C. Code Ann. §§ 6-981 <u>et seq.</u>
Florida	Fla. Stat. §§ 380.92 <u>et seq.</u>
Hawaii	Haw. Rev. Stat. §§ 343-1 <u>et seq.</u>
Indiana	Ind. Code Ann. §§ 13-12-4-1 <u>et seq.</u>
Maryland	Md. Nat. Res. Code Ann. §§ 1-301 <u>et seq.</u>
Massachusetts	Mass. Gen. Laws Ann. ch. 30, §§ 61 <u>et seq.</u>
Minnesota	Minn. Stat. Ann. §§ 116D.01 <u>et seq.</u>
Montana	Mont. Code Ann. §§ 75-1-101 <u>et seq.</u>
New York State	N.Y. Env'tl. Conserv. Law §§ 8-0101 <u>et seq.</u>
New York City	43 RCNY § 6-01 <u>et seq.</u>
North Carolina	N.C. Gen. Stat. §§ 113A-1 <u>et seq.</u>
Puerto Rico	P.R. Laws Ann. tit. 12, §§ 1121 <u>et seq.</u>
South Dakota	S.D. Codified Laws Ann. §§ 34A-9-1 <u>et seq.</u>
Virginia	Va. Code §§ 10.1-1200 <u>et seq.</u>
Washington	Wash. Rev. Code §§ 43-21C.010 <u>et seq.</u>
Wisconsin	Wis. Stat. §§ 1.11 <u>et seq.</u>

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