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Michael B. Gerrard

Columbia Law School, michael.gerrard@law.columbia.edu

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Expert Analysis

Greenhouse Gases: Emerging Standards for Impact Review

Numerous federal and state judicial decisions have established that environmental impact statements (EISs) under the National Environmental Policy Act (NEPA) and its state equivalents should examine the impact of proposed projects on emissions of greenhouse gases (GHG), the principal anthropogenic cause of climate change.¹ Administrative agencies and court settlements are now establishing the guidelines for the conduct of these examinations.

This column surveys the emergence of these new guidelines, which is occurring against a backdrop of accelerated activity in both Congress and the U.S. Environmental Protection Agency (EPA), with the vigorous support of President Barack Obama, leading toward federal regulation of GHGs. The world community is also preparing for the 15th Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC) to be held in November-December 2009 in Copenhagen, Denmark, to devise a successor to the Kyoto Protocol.

The UNFCCC, which was ratified by the U.S. Senate in 1992, specifically identifies environmental impact assessment as an important tool for considering and reducing climate impacts.²

New York

On March 11, 2009, the New York State Department of Environmental Conservation (DEC) released a draft policy, "Assessing Energy Use and Greenhouse Gas Emissions in Environmental Impact Statements." DEC is accepting comments until April 10.³

On its face, the policy has narrow applicability. Once adopted, it will be binding only in the uncommon situation where DEC is the lead agency for the preparation of an EIS under the State Environmental Quality Review Act (SEQRA). However, the experience under prior similar DEC policies for SEQRA analysis (such as for noise and for visual impacts) is that they become the standard used by most lead agencies;

MICHAEL B. GERRARD is professor of Professional Practice and Director of the Center for Climate Change Law at Columbia Law School, and senior counsel to Arnold & Porter LLP. He is editor of *Global Climate Change and U.S. Law* (ABA 2007).

By
**Michael B.
Gerrard**



application of the DEC guidelines is the best way to survive judicial attack.

DEC says it "anticipates that this guide could be applicable to large scale projects, including major stationary sources of air pollutants requiring a DEC permit, such as electric generating facilities and solid waste facilities. The guide may also be applicable to other large proposed facilities or projects that generate thousands of vehicle trips or use significant amounts of electricity, such as very large-scale resort, industrial, or commercial development projects."

The draft policy only concerns the content of EISs; it does not specify when GHG emissions may trigger the need for an EIS in the first

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place. That earlier step in the SEQRA process involves consideration of a shorter document, the Environmental Assessment Form (EAF). The form is embodied in formal regulations. DEC has already begun outreach to stakeholders preparatory to the formal rulemaking process to revise the EAF. The proposed revisions include the addition of questions related to energy use and GHGs, and numerous other changes unrelated to energy use and GHGs. As a practical matter, few actions with major GHG emissions would not already trigger an EIS for other reasons, but DEC may be having some difficulty defining what "significant" (a magic word in SEQRA parlance) means in the context of local contributions to a global problem.

Following the pattern that has been adopted

elsewhere, DEC is calling for analysis of several kinds of GHG emissions:

1) Direct GHG emissions—a) stack and fugitive emissions from combustion processes or industrial processes conducted on-site, and b) emissions from fleet vehicles owned (or leased) and operated by the project proponent and associated with the project.

2) Indirect GHG emissions—a) emissions from off-site energy plants supplying energy used by the project, b) emissions from vehicle trips to and from the project site during its operation from, e.g., freight deliveries, employee commuting, and visitors (but not the owner's fleet), and c) emissions from the generation, transportation, treatment and disposal of wastes generated at the site.

The draft policy helpfully cites established methodologies that may be used to quantify each of these kinds of emissions. Many organizations around the world have been working to establish such methodologies, and DEC has chosen not to reinvent the wheel.

For indirect GHG emissions from off-site energy generation and from vehicle trips, the policy provides that "DEC staff may make a determination, based on a demonstration by a project proponent, that the project as designed has minimized emissions to the maximum extent practicable. In these situations, DEC staff may allow a qualitative discussion of emissions from these categories rather than a quantification of emissions."

Only a qualitative discussion is required for the GHG emissions from the construction phase, including the manufacture and transport of the construction materials.

DEC specifies a separate methodology for quantifying methane emissions from landfills.

Importantly, the draft policy calls for calculations of the projected reduction in GHG emissions that will result from mitigation measures, and, where practicable, a quantification of reductions in GHG emissions that would result from mitigation measures that were considered and rejected. A long list of examples of mitigation measures is appended. The policy also calls for a qualitative comparison of the proposed action to the total annual GHG emissions of its alternatives.

The one notable item missing in the draft policy is guidance on how EISs should analyze the effect of climate change on projects, such as

rising sea levels, warmer temperatures, and more frequent and severe flooding. The policy states that “[q]uestions regarding how climate change may potentially affect a proposed project will need to be decided on a case-by-case basis.” In 2007, the New York State Legislature created the Sea Level Rise Task Force to assess impacts to the state’s coastlines from rising seas and recommend protective and adaptive measures. The task force report is due to the Legislature by Dec. 31, 2009, and perhaps will contain recommendations for addressing the impact of rising seas within New York’s environmental review process.⁴

In New York City, the Mayor’s Office of Environmental Coordination is expected to release its own guidelines on how GHG analysis should be done under City Environmental Quality Review (CEQR), the City’s regulations under SEQRA. The Municipal Art Society will shortly release a report with suggestions for the conduct of this analysis.

Federal

At the federal level, on Feb. 28, 2008 the International Center for Technology Assessment, the Natural Resources Defense Council and the Sierra Club petitioned the U.S. Council on Environmental Quality (CEQ) to amend its regulations to clarify that climate change analyses should be included in environmental review documents.⁵ CEQ has not yet acted. However, important administrative action was taken in February 2009 in a case that had largely been flying under the radar.

Friends of the Earth Inc. and several other environmental groups filed a suit in 2002 in the U.S. District Court for the Northern District of California against the Overseas Private Investment Corporation (OPIC) and the Export-Import Bank (Ex-Im Bank), two federal corporations that are involved in financing U.S. exports and business operations abroad. The suit claimed that the National Environmental Policy Act (NEPA) requires OPIC and the Ex-Im Bank to analyze the GHG impacts of the energy projects abroad that they assist. The suit survived various motions for dismissal and for summary judgment,⁶ and quiet settlement negotiations ensued.

Final agreement was reached shortly after Mr. Obama took office. On Feb. 6, 2009, a draft settlement stipulation was filed with the court for judicial approval.⁷ Attached as exhibits were two separate settlement agreements, one with the Ex-Im Bank and one with OPIC. The Ex-Im Bank document specifies the NEPA procedures to be used to review GHG impacts of the Bank’s projects. Significantly, the agreement also obligates the Bank “to develop and implement a carbon policy,” in which the Bank will undertake certain substantive actions to assist projects that would reduce carbon dioxide emissions. This includes establishing a facility of \$250 million for renewable energy projects; considering the financing of aspects of project development that reduce or mitigate carbon emissions; and encouraging energy efficiency. Ex-Im Bank also agreed, subject to whatever legal constraints apply, to “promote consideration of climate change issues,” within the Organization for Economic Cooperation and

Development (OECD) and among export credit agencies. Several ways that this “leadership role” is to be exercised are specified.

The settlement agreement with OPIC has comparable terms.

These agreements display a new willingness, in an administration that is friendly to climate regulation, to undertake both NEPA procedural review and substantive measures on climate change issues. It remains to be seen whether they will be a model for other federal agencies.

California

The leader in environmental impact review of climate issues has been California. Attorney General Jerry Brown threatened action against several municipalities, manufacturing plants and other entities, saying they had violated California’s equivalent of NEPA, the California Environmental Quality Act (CEQA), by not analyzing climate issues in their EISs (which are called environmental impact reports in that state). He achieved numerous settlements that, in many ways, resemble the subsequent Ex-Im Bank/OPIC settlement—the defendants agreed to analyze GHG emissions and also to undertake substantive mitigation measures.⁸

The California legislature has also been active in this area. Senate Bill 97 (Chapter 185, 2007) required the Governor’s Office of Planning and Research (OPR) to develop guidelines under CEQA for mitigation of GHG emissions and their effects. OPR drafted such guidelines, and has been holding a series of workshops around the state to explain them and secure input. The final guidelines are to be adopted by the California Resources Agency by Jan. 1, 2010.⁹

Even in advance of these final guidelines, however, climate change is now routinely analyzed as part of CEQA documents. Indeed, OPR has published a list of 661 CEQA documents with such analysis.¹⁰

Massachusetts

Massachusetts adopted a Greenhouse Gas Emissions Policy and Protocol under the Massachusetts Environmental Policy Act (MEPA) effective Oct. 31, 2007 requiring GHG review for projects undergoing EIS review except those with minimal emissions. An advisory group is now at work helping to refine the policy.

There, too, the legislature has been active. The Massachusetts Global Warming Solutions Act of 2008 (Chapter 298 of 2008), in §7, provided, “In considering and issuing permits, licenses and other administrative approvals and decisions, the respective agency, department, board, commission or authority shall also consider reasonably foreseeable climate change impacts, including additional greenhouse gas emissions, and effects, such as predicted sea level rise.”

Washington

King County, Washington (which includes Seattle) was an early mover in requiring climate change analysis in the EIS process. On a statewide basis, the Department of Ecology convened an Implementation Working Group (IWG) under the State Environmental Policy Act (SEPA) to

recommend changes in the SEPA rules, guidance and/or environmental review documents in connection with climate change analysis. The IWG released a detailed report on Oct. 30, 2008 with its recommendations.¹¹

Hawaii

In a budget bill in 2008, Hawaii’s legislature required a study of the effectiveness of the state’s existing environmental review process. As part of this study, the state has commissioned a study of the best practices related to climate change mitigation and adaptation for project-level environmental impact reviews. This study is now being conducted by the Department of Urban and Regional Planning of the University of Hawaii.

Conclusion

Disclosure of climate change issues is being advanced in numerous legal contexts. As just shown, it is rapidly becoming common under the environmental review laws. Additionally, on March 10, 2009, EPA published a massive proposed regulation on mandatory reporting of GHGs, as a likely precursor to GHG regulation under the Clean Air Act or under a new program to be adopted by Congress. Its rules on how particular sectors of the economy are to account for and report their GHG emissions will likely feed into NEPA reporting. A petition is pending with the Securities and Exchange Commission concerning climate disclosures in securities filings, and meanwhile New York Attorney General Andrew Cuomo has reached settlements with two electric utilities with specifications for such disclosures. The pending federal legislation will no doubt have its own reporting requirements.



1. The leading federal case is *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 508 F.3d 508 (9th Cir. 2007). The relevant cases were reviewed in Michael B. Gerrard, “Climate Change and the Environmental Impact Review Process,” *Natural Resources & Environment*, Winter 2008.

2. United Nations Framework Convention on Climate Change, Art. 4 §1(f).

3. The proposed policy is available at www.dec.ny.gov/permits/52508.html or www.dec.ny.gov/enb/20090311_not0.html. Written comments should be sent to John Marscholik, NYSDEC, Office of Climate Change, 625 Broadway, Albany, NY 12233, or via e-mail to climatechange@gw.dec.state.ny.us.

4. See <http://www.dec.ny.gov/energy/45202.html>.

5. The author represents NRDC in this matter.

6. *Friends of the Earth v. Mosbacher*, 488 F.Supp.2d 889 (N.D. Cal. 2007); *Friends of the Earth v. Watson*, 2005 U.S. Dist. LEXIS 42335 (N.D. Cal. 2005).

7. *Friends of the Earth v. Spinelli* (Civ. No. 02-4106, N.D. Cal.).

8. These settlements, as well as the other decisions and settlements discussed in this article, are linked from this frequently-updated Web site, which displays all U.S. climate-related litigation: www.climatecasechart.com.

9. The relevant documents are linked from <http://www.opr.ca.gov/index.php?a=ceqa/index.html>.

10. http://www.opr.ca.gov/ceqa/pdfs/Environmental_Assessment_Climate_Change.pdf.

11. http://www.ecy.wa.gov/climatechange/2008CATdocs/IWG/sepa/103008_sepa_iwg_report.pdf.