Greenhouse Gases: Emerging Standards for Impact Review

Michael B. Gerrard
Columbia Law School, michael.gerrard@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship

Part of the Environmental Law Commons

Recommended Citation
Available at: https://scholarship.law.columbia.edu/faculty_scholarship/3064

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.
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. 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.

New York


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.

The world community is preparing for the 15th Conference of the Parties to the United Nations Framework Convention on Climate Change to devise a successor to the Kyoto Protocol.

By Michael B. Gerrard
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.

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. 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 Overseas Private Investment Corporation (OPIC), a federal corporation that analyzes climate change issues in its EISs and also to undertake substantive mitigation measures.

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. 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.

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.

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 2009.


3. The proposed policy is available at www.dec.ny.gov/permits/52508.html or www.dec.ny.gov/ebt/2209311_not0.html. Written comments should be sent to John Marschick, NYSEEC, Office of Climate Change, 625 Broadway, Albany, NY 12213, or via e-mail to climatechange@gw.dec.state.ny.us.


5. The author represents NRDC in this matter.


7. The author represents NRDC in this matter.


9. Friends of the Earth v. Spindel (Civ. No. 02-4106, N.D. Cal.).

10. 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.climatecaseschart.com.

11. The relevant documents are linked from http://www.opr.ca.gov/index.html.
