

## Climate CHANGE

An incisivemedia publication

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MONDAY, SEPTEMBER 15, 2008

# The **Ultimate** Challenge to SEQRA

*Debating whether greenhouse gases are an appropriate area of environmental inquiry.*

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**T**HERE IS A DEBATE among those familiar with New York's State Environmental Quality Review Act (SEQRA) as to whether this law authorizes municipalities and state agencies to assess the impacts of factors contributing to climate change as part of an environmental review under SEQRA. Central to the climate change discussion is the potential impact of greenhouse gases (GHGs). Except for one unreported case, which raised the issue of GHGs but was dismissed on procedural grounds,<sup>1</sup> New York case law is currently devoid of any discussion as to whether GHGs are an appropriate area of environmental inquiry under SEQRA.

The New York State Department of Environmental Conservation (DEC) has been active in beginning to address issues of climate change and GHGs. For example, on Aug. 11, 2008, the agency announced that New York has officially joined the Regional Greenhouse Gas Initiative (RGGI).

The RGGI, formed by 10 Northeastern and Mid-Atlantic states, provides for "cap and trade" of carbon dioxide (CO<sub>2</sub>) emissions, requiring power plant operators to purchase CO<sub>2</sub> allowances at auction. These funds will then be used



to develop energy conservation and non-carbon emitting technologies. This and other initiatives demonstrate that the DEC is examining the impacts of GHGs.

The agency has also indicated that it will be engaging in rule making to modify the Environmental Assessment Form (EAF) that is incorporated into the SEQRA Regulations contained in 6 NYCRR Part 617. The EAF is the first step in every review under SEQRA, and the DEC's 2008 regulatory agenda includes an intention to modify the requirements for the EAF to include matters specifically related to GHGs. Thus far, however, these proposed

modifications in the SEQRA regulations to specifically address GHGs have not been forthcoming.

### SEQRA Review Generally

Adopted in the 1970s to assess the impacts of governmental actions and approvals upon the environment, SEQRA requires that state and local agencies consider the environmental impact of their proposed actions,<sup>2</sup> requiring agencies to "strike a balance" between environmental and economic concern.<sup>3</sup> The SEQRA regulations note:

[I]t was the Legislature's intention that all agencies conduct their affairs with an awareness that they are stewards of the air, water, land, and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations.<sup>4</sup>

New York's highest court has required "strict, not substantial, compliance" with SEQRA's procedures outlined in the environmental laws and regulations,<sup>5</sup> as "departures from SEQRA's procedural mechanisms thwart the purposes of the statute."<sup>6</sup> Further, the public's opportunity to participate in the environmental review process is embodied in SEQRA.<sup>7</sup> As noted by one commentator, SEQRA takes governmental land use decisions out of the proverbial "smoke filled room and into the light of public awareness and participation."<sup>8</sup>

Those who would argue that SEQRA already provides authority to look at issues related to

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GHGs and climate change may point to the broad umbrella that the courts have stated is part of the law. For example, the New York Court of Appeals has ruled that SEQRA guarantees that decision-makers “will identify and focus attention on any environmental effects of a proposed action, that they will balance those consequences against other relevant social and economic considerations, minimize adverse environmental impacts to the maximum extent practicable, and then articulate the bases for their choices.”<sup>9</sup>

## Just What Is Climate Change?

In determining whether SEQRA permits or requires that an environmental review consider “climate change,” that term should first be defined. According to the U.S. EPA Web site:

The term climate change is often used interchangeably with the term global warming, but according to the National Academy of Sciences, “the phrase ‘climate change’ is growing in preferred use to ‘global warming’ because it helps convey that there are [other] changes in addition to rising temperatures.”

Climate change refers to any significant change in measures of climate (such as temperature, precipitation, or wind) lasting for an extended period (decades or longer). Climate change may result from:

- natural factors, such as changes in the sun’s intensity or slow changes in the Earth’s orbit around the sun;
- natural processes within the climate system (e.g., changes in ocean circulation);
- human activities that change the atmosphere’s composition (e.g., through burning fossil fuels) and the land surface (e.g., deforestation, reforestation, urbanization, desertification, etc.).<sup>10</sup>

Those who are of the belief that climate change is not coming but, rather, is already here, want municipalities and the state to use the authority already existing under SEQRA to require that approving agencies mandate that the impacts of GHGs, which are viewed as a major contributing factor to climate change, be mitigated before projects are approved.

## Authority to Consider GHG Impact

Often when municipalities review large projects, the environmental impact statement (EIS)

reflects that there will be increases in traffic or increases in other activities that will generate additional GHGs. Yet, just as often, the EIS will do little more than mention that the activities will result in an increase in GHGs with no attempt to reduce their impacts.

Although there are those who argue SEQRA grants no authority to review GHGs as part of the environmental review of a project, even the current regulations provide some basis for lead agencies wishing to examine their impacts. The current long form EAF, incorporated in the SEQRA regulations under 6 NYCRR 617.20, provides some ability to begin to address the impacts of GHGs, at least from larger projects.

In Part 1 of the EAF the applicant is asked, in item 21: “[w]ill the project result in an increase in energy use?” Likewise Part 2 of the EAF, at item 7, asks: “[w]ill proposed action affect air quality” and item 16 asks, “[w]ill proposed action affect the community’s sources of fuel or energy supply?” Therefore, where there is a large enough project that

- (a) increases energy use,
- (b) affects air quality, and/or
- (c) affects the community’s fuel or energy supply,

the door is open to consider GHGs as part of a SEQRA review.

## DEC Initiatives

Significantly, the DEC has not waited for changes in the rules to begin requiring that projects examine the impacts of GHGs. In several recent instances, the agency has clearly signaled that it believes the SEQRA regulations already provide the tools necessary to begin addressing GHGs.

Within the last year, the DEC has begun requiring that the impact of GHGs and other issues related to climate change be addressed in environmental reviews where it is the lead agency. There are several current examples of the DEC adopting the scope for an EIS that mandates that the EIS for a particular project must very specifically provide detailed information on matters directly related to climate change, and more specifically, the generation of GHGs.

On Dec. 5, 2007, the DEC Commissioner, in settling a dispute over a lead agency designation, cited GHGs as one of the significant reasons for designating the DEC as lead agency. The project in question, commonly referred to as Kingwood, is located in parts of three different towns in rural Sullivan County. The

project proposes 1,000 detached single family homes and 1,300,000 square feet of commercial development ranging over 1,845 acres. After the towns could not agree on which one of them should be the lead agency, the Commissioner of DEC was brought in, pursuant to the SEQRA regulations,<sup>11</sup> and issued a decision finding that the size, scope and potential regional and state-wide impacts of the project warranted that DEC act as lead agency.

In setting forth its reasons for taking over as lead agency, the Commissioner noted the DEC’s “broad mandates encompassing protection of air and water resources and quality generally” and raised the issue of GHGs resulting from a project of this nature, noting in part: “[f]emote, ‘ex-urban’ subdivisions such as the one proposed here may contribute disproportionately to accelerated generation of greenhouse gases, based on their inherently long daily driving distances to jobs or services for residents, equally long drives by potential customers of the commercial area, and basically car-dependent layout.”

Subsequently, in February 2008, the DEC adopted a final scope for the Belleayre Mountain Ski Area project that requires an extensive examination of the production of GHGs from every aspect of the construction and operation of the project. Encompassing portions of two towns in Ulster and Delaware Counties, the Belleayre Mountain Ski Area project was described in the positive declaration issued by the DEC, in November 2007, as:

construction and operation of the Wildacres Resort and Highmount Spa Resort complex by Crossroads Ventures LLC (“Crossroads”); expansion of the Belleayre Mountain Ski Center by the New York State Department of Environmental Conservation (DEC), including ski-in-ski-out public access to the proposed Highmount Spa Resort; acquisition by DEC on behalf of the People of the State of New York of a 1200 acre +/- parcel referred to as the Big Indian; and acquisition by DEC on behalf of the People of the State of New York of a 78 acre +/- parcel referred to as the Former Highmount Ski Center and a related 21 acre +/- Highmount Spa Easement.

The two proposed resorts will together include 370 hotel rooms and 250 “lodging” units in townhouse and multi-unit buildings. The DEC’s positive declaration further describes the project as consisting of “two resort complexes, both located west of the NYS Belleayre Mountain Ski Center along Ulster County

Route 49A and south of NYS Route 28. The first resort, Wildacres, will include a 250 room hotel plus 139 lodging units in townhouse-style units surrounding an 18-hole golf course. The second resort, the Highmount Spa, consists of a 120 room hotel, spa facility, 60 lodging units in two multi-unit buildings and 60 detached lodging units in up to 52 buildings.”

While clearly a large project, the DEC has required what appears to be the most detailed analysis of GHGs yet mandated for a project of this nature in New York. Setting out a laundry list of issues that must be addressed in the supplemental DEIS for this project, at least part of the list bears repeating.

Identification of these issues demonstrates both the scope of what the DEC believes is now appropriate for review under SEQRA for large scale projects, as well as where the DEC is likely to go in future rule making. The final scoping document beginning at section 4.9 states:

#### 4.9.2 Carbon Footprint: Assessing GHG Emissions

A. The UMP DEIS should include both a quantitative (where practicable) and qualitative discussion of the GHG emissions resulting from construction activities, including the manufacture or transport of the construction materials, specifically including the following:

1. A qualitative analysis of how the building products will be environmentally-preferable....
2. A quantitative analysis of GHG emissions resulting from construction activities and the transport of building supplies from the supplier to the work site.

B. A quantitative estimate of both direct and indirect GHG sources during the post-construction operation of the project should be included:

1. Direct GHG emissions will include emissions from combustion processes or industrial processes conducted on-site, including but not limited to the heating and cooling systems and boilers, snow making guns and from fleet vehicles owned (or leased) and operated by the project proponent and associated with the project.
2. Indirect GHG emissions will include emissions generated by energy generating plants (off-site) supplying energy to the proposed project during its operation, and from vehicle trips generated by the project where vehicles are not owned or operated by the project pro-

ponents (i.e., freight deliveries, employee commuting, customer visits). A potential source of indirect emissions is the generation, transportation, and treatment or disposal of wastes. Waste generation should also be expressed as GHG emissions and included in the quantification of total annual emissions.

#### 4.9.3 Changes in Carbon Sinks

Site build-out will result in loss of forested area and therefore some loss of CO<sub>2</sub> sequestration capacity. The UMP DEIS must include a quantitative and qualitative assessment of that loss.<sup>12</sup>

More recently, on April 14, 2008, the DEC issued a final scoping document for the South Pier Improvement Project for the Gowanus Generating Station in the City of New York, which recognized as one of its potential benefits the reduction of emissions. The project, which is intended to improve the current power generating facilities, is described as having a number of benefits. The final scoping document describes those benefits as:

additional cleaner electric generation while reducing the actual net emissions for carbon monoxide (CO), particulate matter PM<sub>2.5</sub>, PM<sub>10</sub>, and nitrogen and sulfur oxides (NO<sub>x</sub> and SO<sub>x</sub>), which are precursors to PM<sub>2.5</sub> formation. NO<sub>x</sub> is also a precursor to ozone formation. These air quality benefits will be achieved through one or more emission reduction strategies which may include implementing enforceable permit limits, emission control technologies, and other environmental improvements within the community.”

Yet, while the project is being implemented in a manner that will have a beneficial environmental affect, the scoping document still raises the issue of climate change. Commencing on page 10 of the final scoping document, the DEIS is required to address myriad air quality issues, including emission caps under the heading of “Climate and Air Quality.” This section of the scope concludes with the following directive:

[i]n addition to responding to local community air quality concerns, the EIS will discuss anticipated Project emissions within the context of climate change and greenhouse gas emissions. Background on state policies such as the Regional Greenhouse Gas Initiative (RGGI) will be summarized. Project emissions of CO<sub>2</sub> will be determined and compared to global,

national, and state emission levels. Potential reduction of CO<sub>2</sub> emissions will be discussed. In addition, implications of potential sea level rise due to climate change at the SPIP site will be discussed and potential mitigation measures will be presented.<sup>13</sup>

## Conclusion

The current SEQRA regulations provide some tools to permit review of impacts related to climate change, including the production of GHGs. The DEC clearly recognizes its authority to review these issues based upon the examples noted in this article.

Whether or not individual municipalities will adopt the same position before the DEC implements formal regulatory changes that more directly spell out this mandate, and whether the courts will uphold such local consideration of GHGs in the context of a SEQRA review, remains to be seen.

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1. *Preserve Scenic Perinton v. N.Y. DEC* (Monroe County, 2007).
2. *Spitzer v. Farrell*, 100 N.Y.2d 186, 791 N.E.2d 394, 761 N.Y.S.2d 137 (2003).
3. *Id.* at 140, relying upon *Jackson v. New York State Urban Development Corp.*, 67 N.Y.2d 400, 494 N.E.2d 429, 503 N.Y.S.2d 298, 303 (1986).
4. 6 NYCRR 617.1 (b).
5. *King v. Saratoga County Board of Supervisors*, 89 N.Y.2d 341, 349, 675 N.E.2d 1185, 653 N.Y.S.2d 233 (1996); *Merson v. McNally*, 90 N.Y.2d 742, 688 N.E.2d 479, 665 N.Y.S.2d 605 (1997).
6. *King*, supra.
7. *Zagala v. Freshwater Wetlands Appeals Board*, 244 A.D.2d 343, 663 N.Y.S.2d 881 (2d Dept. 1997).
8. Philip Weinberg, “SEQRA’s Too Valuable to Trash: A Reply to Stewart Sterk,” 14 *Cardozo L. Rev.* 1959 (1993).
9. *New York City Coalition to End Lead Poisoning v. Vallone*, 100 N.Y.2d 337, 794 N.E.2d 672, 763 N.Y.S.2d 530, 535 (2003).
10. <http://www.epa.gov/climatechange/basicinfo.html>.
11. 6 NYCRR 617.6 (b)(5).
12. Proposed Scope Belleayre Mountain Ski Area, Feb. 28, 2008, page 35.
13. Proposed South Pier Improvement Project Proposed Scope of DEIS pages 11 to 12.