

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Environmental LAW

SEQRA and greenhouse gases

Concern about man-made climate change has moved to the forefront as the environmental challenge of the 21st century, and the news is increasingly grim.

In March, the International Scientific Congress on Climate Change published preliminary conclusions that many of the worst-case scenarios previously envisioned are now being realized, and at a faster pace than previously predicted.

Three months into the Obama administration, national legislation to mandate reductions in greenhouse gas (GHG) emissions is taking shape, although early resolve to enact a "cap and trade" program has been overshadowed by the economy. Still, the House and Senate are expected to get down to the business of shaping a federal cap and trade program before the next United Nations Conference on Climate Change in December, where a global agreement to succeed the Kyoto Protocol could be finalized.

In New York, the Department of Environmental Conservation is moving on several fronts to address climate change from a regional perspective. The DEC created an Office of Climate Change, which is involved in a number of initiatives, including transforming DEC's Web site to include myriad climate change information resources.

Some efforts reach out to communities across the state to create state and local partnerships. The voluntary Climate Smart Communities program, for instance, is encouraging local governments to set goals to reduce GHG emissions and make plans to adapt to predicted climactic changes.

DEC also initiated steps to incorporate concern about GHG emissions into the environmental impact review, which the State Environmental Quality Review Act (SEQRA) requires for every governmental action or approval. The DEC recently issued a draft Guide for Assessing Energy Use and Greenhouse Gas Emissions in an Environmental Impact Statement. Following a review of public comments, the final version is expected later this year.

As a long-time advocate of meaningful environmental impact review, I fear that incorporating abstract concerns about climate change on to very localized projects will undermine SEQRA's legitimacy and simply become an additional point of dispute for what already is a misunderstood and overly-litigated statute.

SEQRA's objectives are to identify environmental impacts associated with taking an action or giving an approval and assess

adverse impacts to determine whether any are potentially significant. If so, those impacts are studied, and alternatives or mitigation to such an action are determined, forming the basis for the decision of whether to approve the action. The key to SEQRA is to identify, study and mitigate, or avoid significant adverse environmental impacts. It is inconceivable that any project will produce so much GHG as to have a significant adverse effect on the global climate. The problem of climate change is too large in relation to any individual project to pretend the impacts will be significant.

The DEC does not claim to have solved the problem, and its draft guidance simply begs the question. Although it advises local officials on how to measure potential GHG emissions and suggests possible mitigations, it sidesteps the question of jurisdiction entirely, stating that the guidance does not establish a threshold for the determination of significance under SEQRA.

DEC officials anticipate that the guidance could be applicable to large scale projects, but without criteria for determining significance, the guidance simply may complicate environmental assessments and encourage litigation, leaving it to judges rather than the Legislature to guide state environmental policies.

Does it make sense to require every town and village to develop *ad hoc* climate change policies on a case-by-case basis as subdivisions and site plans are considered? In the absence of state legislation and regulations, does it make sense to expect local officials to evaluate global environmental impacts or encourage a patchwork of local policies and regulations?

As conceived in statute, regulation and case law, SEQRA has a focus, that is to identify, evaluate and mitigate significant adverse environmental impacts. The focus on significant impacts is what makes SEQRA functional as a useful planning tool.

To avoid undermining more than 30 years of jurisprudence defining SEQRA's meaning and applicability, the DEC should reconsider its mistaken efforts to use the Act as-is as a tool to combat climate change. The situation requires a legislative solution to redefine SEQRA's scope of review. Legislative action to include greenhouse gas emissions in SEQRA assessments, even if the emissions are not individually significant causes of climate change, is the only legitimate way to address the issue.

The DEC's draft guidance suggests numerous mitigation mea-



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sures to reduce GHG emissions, including building design and operation measures, efficiency or mitigation measures for on-site GHG sources, site selection and design measures, transportation measures and waste reduction or management measures.

Independent of the Act, the DEC's summary of possible mitigations is worthy of consideration when planning of any project. Relying on the Act rather than site plan requirements and building codes to force energy-saving efficiencies, however, likely will lead to failure. Unsubstantiated and unverifiable claims that a

project's impact on climate change will be significant are unlikely to withstand judicial review. Such macroenvironmental and economic issues should be addressed on their own merits with clear guidelines to ensure fairness and consistency in meeting the burdens of reducing greenhouse gas emissions.

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