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New Statute Requires State Agencies to Consider Climate Risks

New York has moved into the front rank of states in legally mandating that future climate change be considered in decisions by state agencies.

On Sept. 22 Governor Andrew Cuomo signed the Community Risk and Resiliency Act (CRRA), Chapter 355 of the Laws of 2014. It requires the state to adopt official projections of future sea level rise, and it mandates that in many specified state programs, sea level rise and some other climate-related events be considered. It also directs the Department of State to prepare model municipal laws for consideration of these issues.

The CRRA merely requires consideration of climate change; it does not demand any particular outcome. However, it makes climate impacts an important part of the decision-making process, much as nearly 40 years ago the State Environmental Quality Review Act (SEQRA) made environmental considerations an important part of many state and local processes.

This column summarizes the provisions of CRRA. It then discusses several existing New York legal requirements outside of CRRA that require consideration of the effects of climate change on proposed projects.

By **Michael B. Gerrard**

Procedural Requirements

Unless otherwise stated, the physical climate risks to be considered under CRRA are sea level rise, storm surges and flooding "based on available data predicting the likelihood of future extreme weather events, including hazard risk analysis data if applicable." Thus CRRA applies to flood-prone inland as well as coastal areas, but it does not look at other effects of climate change, such as heat waves, wildfires, loss of snow pack, and drought.

The statute has two important procedural requirements to help state agencies and applicants implement it.

First, Section 17 provides that by Jan. 1, 2016, the New York Department of Environmental Conservation (DEC) shall "adopt regulations establishing science-based state sea level risk projections." In doing so, DEC "shall consider information including, but not limited to reports of the Intergovernmental Panel on Climate Change, the National Oceanic Atmospheric Administration Climate Assessment, the Sea Level Rise Task Force..., the New York City Panel on Climate Change and any other relevant regional, state and local reports." DEC "shall update such regulations no less than every five years."

This resembles one of the key recommendations made by the legislatively created New York Sea Level Rise Task Force on Dec. 31, 2010, that the state "[a]dopt official projections of sea level rise and ensure continued and coordinated adaptation efforts." However, it did not go so far as to follow the recommendation that the state "[c]lassify areas where significant risk of coastal flooding due to storms has been identified and implement risk reduction measures in those areas."[1] (The author was a member of the task force.)

Second, Section 16 requires DEC, in consultation with Department of State, by Jan. 1, 2017 to prepare guidance on implementation of the statute, including relevant data sets and risk analysis tools, and available data predicting likelihood of future extreme weather events. DEC and the Department of State also "shall develop additional guidance on the use of resiliency measures that utilize natural resources and natural processes to reduce risk."

Another important provision is Section 14, which requires the Department of State, in cooperation with DEC, to prepare model local laws that include consideration of climate risk. No deadline is provided for these model laws, and municipalities are not required to adopt them.

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Under Section 19, the statute is effective on March 21, 2015 (180 days after it became law). It applies to all applications and permits received after the adoption of guidance on the implementation of the statute but no later than Jan. 1, 2017.

Programs Covered

It is not easy from the face of the new law to grasp what it covers because much of its text simply recites statutory section numbers to which it applies. Thus below is an identification of the statutory program that is affected by each substantive section of the law.

Section 2 of the CRRA adds mitigation of climate risk to the criteria to be considered under the Smart Growth Public Infrastructure Policy Act. This 2010 enactment aims to reduce sprawl by requiring state agencies, authorities and public corporations to evaluate public infrastructure projects that they approve, undertake, support or finance for consistency with smart growth criteria.

Section 3 provides that in order for a project to be eligible for funding under the Water Pollution Control Revolving Fund (which is mostly for municipal wastewater treatment plants and for the treatment of nonpoint source water pollution), there must be a demonstration that the design and construction considered climate risk.

Climate risk must also:

- Be included by DEC in the criteria for siting of commercial hazardous waste treatment, storage and disposal facilities (Section 4) and hazardous substances bulk storage facilities (Section 5);
- Be included in the criteria to be considered by DEC and the State Office of Parks, Recreation and Historic Preservation in state acquisition of land (Section 6);
- Be considered when the Office of Parks, Recreation and Historic Preservation enters into an agreement for the maintenance and operation of open space land conservation projects in urban areas or metropolitan park projects (Section 7);
- Be considered in the closure investigation for municipal landfill closure projects that receive state assistance (Section 8);
- Be considered in DEC's regulations for existing and new petroleum bulk storage facilities (Section 9);
- Be considered in connection with state assistance payments for coastal rehabilitation projects (Section 11);
- Be considered by the Commissioner of Agriculture and Markets in evaluating applications for state funding for local farmland protection programs (Section 12);
- Be considered by the Commissioner of Health in evaluating applications for state funding for drinking water projects (Section 13);
- Be considered by DEC in issuing oil and natural gas well permits (Section 14-a).

> The Community Risk and Resiliency Act mandates that in many specified state programs, sea level rise and some other climate-related events be considered.

Under Section 10, local waterfront revitalization programs may include planning projects to mitigate future physical climate risks. (Unlike the rest of CRRA, this section is not limited to sea level rise, storm surges and flooding.) In order for a municipality to receive state assistance for such programs, it must demonstrate that future physical climate risk has been considered.

Section 15 provides that applicants to DEC for certain "major projects" must demonstrate that they have considered climate risk. This applies to permits issued under the following programs: protection of waters; sewerage service for realty subdivisions; liquefied natural and petroleum gas; mined land reclamation; freshwater wetlands; tidal wetlands; and coastal erosion hazard areas. Interestingly, the list of covered programs does not include these: water supply and water transport; wild, scenic and recreational rivers; water quality certifications; State Pollutant Discharge Elimination System; air pollution; and solid and hazardous waste collection, treatment, and disposal. Thus some of DEC's largest programs are excluded from this particular requirement.

SEQRA

At first glance it would appear surprising that there is no reference in CRRA to SEQRA, the principal law in New York for consideration of environmental issues by state agencies and local governments. However, statutory amendments to or concerning SEQRA are uncommon; the environmental community is concerned that if the text of SEQRA were reopened, there would be major efforts to weaken it.

Nonetheless, consideration of future climate impacts under SEQRA is becoming increasingly common. On July 15, 2009, DEC issued a policy document, "Assessing Energy Use and Greenhouse Gas Emissions in Environmental Impact Statements."[2] It is to be used in DEC staff review of proposed actions when energy use or greenhouse gas (GHG) emissions are being addressed in an environmental impact statement (EIS), and also when DEC is the SEQRA lead agency.

The policy states (on page 5) that it is focused on GHG emissions, but in some cases "the project itself may be affected by projected impacts of global warming expected to result regardless of future global GHG emission scenarios, such as sea level rise.… [T]his Policy is not directed to those cases, however, it is expected that DEC as the lead agency or other involved agencies would address those potential impacts in the EIS scoping phase on a case-by-case basis."

New York City has produced a comprehensive manual on how to prepare EISs under City Environmental Quality Review (the city's imple-

mentation of SEQRA), CEQR Technical Manual. The latest revision, released in March 2014, includes the following guidance on when to conduct an analysis of climate change's effect on a proposed project:

> Although significant climate change impacts are unlikely to occur in the analysis year for most projects, depending on a project's sensitivity, location, and useful life, it may be appropriate to provide a qualitative discussion of the potential effects of climate change on a proposed project in environmental review. Such a discussion should focus on early integration of climate change considerations into the project and may include proposals to increase climate resilience and adaptive management strategies to allow for uncertainties in environmental conditions resulting from climate change.[3]

Additionally, climate change and sea level rise for projects located in the designated coastal zone must be considered under recently adopted revisions to the city's local waterfront revitalization program.[4]

A recent survey conducted by the Sabin Center for Climate Change Law found that in the past year, most New York City environmental impact reviews for projects located in floodplains have explicitly addressed adaptation to climate change, and several EISs in other parts of the state have also discussed how a changing climate may affect the proposed project.[5]

Other DEC Policies

On Oct. 22, 2010, DEC adopted "Commissioner's Policy—Climate Change and DEC Action." It adopts a policy to "[i]ncorporate climate change adaptation strategies into applicable DEC programs, actions and activities, based on reduction of threats from physical, chemical or ecological stressors, vulnerability analyses, risk assessments, and uncertainty identification, where permitted under applicable federal and State legal authority."[6] Thus this policy would seem to call on DEC to consider climate change impacts even in those programs not specifically designated for such consideration under CRRA.

Section 18 of CRRA provides that nothing in this act "shall limit the existing authority of [DEC] to address climate risk due to sea level rise, storm surges, and flooding."

Section 14 requires the Department of State, in cooperation with DEC, to prepare model local laws that include consideration of climate risk. No deadline is provided for these model laws, and municipalities are not required to adopt them.

Public Service Commission

In February 2014, the New York Public Service Commission approved a rate plan for Consolidated Edison under which the utility agreed to undertake a study of its vulnerability to climate change. The PSC found that these issues

> have important implications for the regulatory regime in New York. The obligation to address these considerations should be broadened to include all utilities. The State's utilities should familiarize themselves with scientists' projections for local climate change impacts on each service territory. These will differ: other coastal and estuarine utilities also face sea level rise and storm surges, while all the State's utilities face challenges such as Hurricane Irene and Tropical Storm Lee, Nor'easters, floods, severe winds, increasing ambient heat, and extreme heat events. We expect the utilities to consult the most current data to evaluate the climate impacts anticipated in their regions over the next years and decades, and to integrate these considerations into their system planning and construction forecasts and budgets.[7]

The PSC regulates utilities providing electric, natural gas, steam, and telecommunications services, plus private water companies, so all of these are covered by the PSC finding.

Conclusion

CRRA is a very important step but it is not self-executing. DEC will need to adopt sea level rise projections, undertake at least three rulemakings, and revise many of its other practices. The Department of State must prepare model local laws, and municipalities around the state will consider whether to adopt them. The State Office of Parks, Recreation and Historic Preservation, the Department of Agriculture and Markets, and the Department of Health all have important obligations. Applicants for many kinds of projects will need to familiarize themselves with the new requirements, and the advocacy community will need to make sure all of this happens as the new law requires.

1. New York State Sea Level Rise Task Force, Report to the Legislature (December 31, 2010), p. 8, http://www.dec.ny.gov/docs/administration_pdf/slrtffinalrep.pdf.
2. http://www.dec.ny.gov/docs/administration_pdf/eisghgpolicy.pdf
3. CEQR Technical Manual, http://www.nyc.gov/html/oec/html/ceqr/technical_manual_2014.shtml, at 18-7.
4. N.Y.C. Dept. of City Planning, The New York City Waterfront Revitalization Program, Oct. 30, 2013, p. 43, available at http://www.nyc.gov/html/dcp/html/wrp/wrp_revisions.shtml (Policy 6.2: "Integrate consideration of the latest New York City projections of climate change and sea level rise (as published by the NPCC, or any successor thereof) into the planning and design of projects in the city's Coastal Zone.").
5. Ethan I. Strell, "New York Environmental Impact Statements Beginning to Address Climate Resiliency," Envtl. L. N.Y. (October 2014), available at http://web.law.columbia.edu/sites/default/files/microsites/climate-change/files/Publications/Fellows/strell.pdf. See also Michael B. Gerrard, "Reverse Environmental Impact Analysis: Effect of Climate Change on Projects," NYLJ, March 8, 2012.
6. http://www.dec.ny.gov/regulations/65034.html, Sec. II.
7. N.Y. Public Service Commission, "Order Approving Electric, Gas and Steam Rate Plans in Accord with Joint Proposal," Feb. 21, 2014, at 71, available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={1714A09D-088F-4343-BF91-8DEA3685A614}, pp. 71-72. See also Maria Gallucci, "N.Y. Regulator, Con Ed Embrace Plan to Climate-Proof Power Grid," Inside Climate News, March 12, 2014, available at https://insideclimatenews.org/news/20140312/ny-regulator-con-ed-embrace-plan-climate-proof-power-grid.