

Environmental Review of Climate Change Adaptation After Sandy

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This article addresses two key legal requirements that must be considered by New York City and State as they implement measures needed to improve New York City's infrastructure so that it is better adapted to high-impact events such as the catastrophic storm surge caused by Hurricane Sandy.

The devastation caused by Sandy may have stunned most New Yorkers, but it came as no surprise to the climatologists, urban planners and government officials who have been focusing with an ever-increasing level of concern on the implications of a changing climate on the long-term well-being of New York City.

In August 2008, Mayor Michael Bloomberg convened a panel of experts to assess the risks posed to the city by climate change. That group, the New York City Panel on Climate Change (NYPCC), issued its first report on climate risks 18 months later.¹ The report concluded that "[w]armer temperatures are extremely likely in New York City" in the coming years, with mean annual temperature levels rising by up to 3 degrees Fahrenheit by the 2020s and by up to 5 degrees by the 2050s; that "[r]ising sea levels are extremely likely," with mean annual sea levels rising by up to a foot by mid-century and by up to 23 inches by the 2080s (with the possibility that, if there is a rapid melting of polar ice, those levels could skyrocket, increasing by up to 29 inches by the 2050s and by up to 55 inches by the 2080s); and that "[s]torm-related coastal flooding due to sea level rise is very likely to increase."

The report added the understatement that such climate changes "have consequences for New York City's critical infrastructure." Responding promptly to the NYPCC report, the mayor empanelled the Climate Change Adaptation Task Force, with the mission of developing plans to prepare for risks associated with the projected incremental changes in temperature and precipitation, and for high-impact events such as catastrophic storm surges exacerbated by sea level rise.

In September 2012, the City Council enacted Local Law No. 42, which institutionalized both the NYPCC and the Climate Change Adaptation Task Force.² Under the law, the task force is to meet at least twice a year to evaluate, in light of updated NYPCC projections, the potential impacts of climate change on the city; to identify the city "rules, policies and regulations" that may be affected by climate change; and to develop "coordinated strategies to address the potential impact of climate change on the city's communities, vulnerable populations, public health, natural systems, critical infrastructure, buildings and economy."

These efforts take on a new sense of urgency in the wake of Sandy. In light of the destruction that storm caused, the city and state are focusing on whether and how they can provide for the safe and productive development of coastal areas. New York City alone has 578 miles of coastline shouldering residential, commercial and industrial neighborhoods in all five boroughs. On a larger scale, they will also be working on plans to protect the city's infrastructure from sea level rise, storm surges and the other dangers that climate change is increasingly certain to bring. Thus, Governor Andrew Cuomo recently announced the formation of the NYS 2100 Commission, which has been tasked with finding ways to improve the resilience and strength of the state's infrastructure in the face of natural disasters and other emergencies. Bloomberg has asked various city officials to take the lead in, among other things, investigating ways to contend with future storm surges and working with the city's hospitals to develop better preparedness and recovery plans.³

As these city and state efforts move forward, government officials must address how the strategies they devise fit within the mandates established by the State Environmental Quality Review Act (SEQRA) and the programs established under the Coastal Zone Management Act of 1972. Simply stated, SEQRA and the coastal zone management program require state and local agencies to "look before they leap"; to think through their actions before they take them, and to consider their environmental impacts and whether they would be consistent with the officially adopted plans for a coastal area. The relevance of these statutory programs to climate change adaptation is discussed below.

SEQRA

It is fair to say that SEQRA (which is implemented by New York City agencies under the City Environmental Quality Review procedures) dramatically changed how government agencies in the State of New York go about their business. Under SEQRA, a state or local agency may not undertake a discretionary action (such as directly undertaking a project, issuing a discretionary permit or providing funding) without first making a determination as to whether that action "may have a significant effect on the environment."⁴ If the agency determines that the action may have at least one significant adverse environmental impact, it cannot proceed without first preparing an environmental impact statement (EIS) that thoroughly examines such impacts and identifies how they could practicably be minimized or avoided. This is a broad and flexible mandate that has made SEQRA a fundamental planning tool for addressing emerging environmental issues.

One pressing question is whether the immense projects that may be necessary to protect our coastal city from the ravages of climate change over the coming decades are subject to the environmental review requirements of SEQRA. As a general rule, the answer to that question would be in the affirmative, unless the project is federally funded and an EIS is prepared under the National Environmental Policy Act, in which case state and local agencies could discharge their responsibilities under SEQRA by relying on federal documents.⁵ However, there are a number of exceptions to this general rule with relevance to climate change adaptation.

For example, the New York Public Authorities Law exempts from SEQRA transportation projects carried out by the Metropolitan Transportation Authority (MTA) on property previously in transportation use or on an insubstantial addition to such property, so long as the project would not substantially change the nature of such prior transportation use.⁶ Accordingly, projects undertaken by MTA to protect subway tunnels or other essential infrastructure from flooding may enjoy an exemption under this statutory provision, even if their cost were to run into the billions. Moreover, replacements of existing structures in kind, on the same site, may be exempt from environmental review under a "Type II" category established by the SEQRA regulations.⁷ This exemption could cover much of the reconstruction needed in the aftermath of an extraordinary storm event.

SEQRA also includes an emergency exemption, which applies to actions that are immediately necessary on a limited and temporary basis to protect or preserve "life, health, property or natural resources," provided that such actions are directly related to the emergency and are performed to cause the least disturbance practicable to the environment.⁸ Thus, for this exemption to apply there must be a real emergency, the agency action must be tailored in scope and duration to address that emergency, and the action must be urgently required and must cause as little environmental disruption as practicable.

Since a general consensus has developed among credible experts that a crisis is looming as a result of climate change and its potentially profound global and localized environmental consequences, an argument could be made; given the apparent inability to predict the timing of the next extraordinary storm event in New York; that a climate-related emergency within the meaning of the SEQRA regulations now exists.

It should be noted, in this regard, that the emergency exemption under SEQRA has been applied not only to sudden catastrophic events, but also to emergency situations that have emerged over time. For example, courts have sanctioned application of the exemption where the city proposed to renovate existing buildings for use as homeless shelters⁹ and to temporarily deploy a prison barge to ease overcrowding in prisons.¹⁰ In such cases, courts have allowed immediate action to address emergencies that had developed over the course of years. However, the courts have indicated that agencies must still proceed with environmental review prior to the completion of permanent measures.¹¹

An agency would be hard pressed to characterize a mega-project such as a multibillion-dollar storm barrier as being "limited" or "temporary" in nature for purposes of the SEQRA regulations. Nevertheless, the exemption could come into play in the event the state and city were to take a phased approach to shoreline and infrastructure protection, with immediate interim steps being taken while longer-term solutions are developed. With such an approach, it is possible that the emergency exemption could be brought to bear to allow implementation of first-phase measures while planning, along with a comprehensive environmental review, is carried forward for the subsequent phases of the effort.

Another important issue is whether agencies should address in their SEQRA review of public or privately sponsored shoreline projects the risks of climate change (such as flooding or erosion). It is not clear from its statutory and regulatory language that SEQRA should cover those sorts of issues because the statute is focused on the impacts that an action would have on the environment, not the impact that the environment (as altered by a warming climate) would have on the action.

Yet for decades agencies have required applicants seeking discretionary approvals to site residential buildings near stationary sources of air pollution, to examine the impacts of those sources on the proposed buildings' future residents. Likewise, agencies regularly require that an EIS assess levels of traffic noise from adjacent highways at the windows of proposed buildings. Some regulatory basis exists for this prior agency practice, since the SEQRA regulations require an EIS to include "a concise description of the environmental setting of the areas to be affected [by an action]." See 6 N.Y.C.R.R. 617.9(b)(5)(ii). It would be a logical extension of such precedent to require analysis of the impacts of sea level rise on a development project proposed for the shoreline.

Moreover, as was well illustrated by incidents occurring during recent storm events, people trapped by floodwaters put first responders at risk. It follows that placing large numbers of new residents in coastal areas without appropriate safeguards could have an indirect effect on emergency services, an area of concern that has long been examined under SEQRA.

Thus, when past agency practice and the indirect effects of climate change are taken into account, it appears that in appropriate cases an agency considering whether to issue a discretionary approval would be acting well within its discretion to require that climate change risks be examined in an environmental review under SEQRA. Indeed, the New York State Department of Environmental Conservation has stated, in guidance issued on greenhouse gas emissions and SEQRA, that "impacts of climate change on a project may be important in some cases," and that "[q]uestions regarding how climate change may potentially affect a proposed project will need to be decided on a case-by-case basis."¹²

Coastal Zone Management

The federal Coastal Zone Management Act creates a program for the development of "coastal zone management plans" by states, with input from local governments, for the management, protection and enhancement of shoreline areas.¹³ This program is implemented in the State of New York under Article 42 of the Executive Law, which makes the Secretary of State responsible for administering waterfront policies.¹⁴

Under Executive Law section 915, localities are permitted to develop their own local waterfront revitalization plans (LWRPs), which upon approval of the secretary are incorporated into the state's coastal zone management program for that locality.

The policies established under the program, including those embodied in LWRPs, can have real teeth. For example, applicants for federal permits that would authorize activities within or affecting a coastal area must certify that such activities would be consistent with the relevant state coastal zone management program.¹⁵ State and local actions must also be consistent with such policies to the maximum extent practicable.¹⁶ Indeed, a specific finding to that effect is required upon completion of an EIS, where a state or local action would take place in a coastal area. There have been dramatic examples over the years where a failure to demonstrate coastal zone consistency has been fatal to a project. For example, in 2005, the New York Department of State objected to the consistency certification for a proposed regional cement manufacturing facility in Greenport, N.Y., resulting in the withdrawal of the proposal.

The City Planning Commission (CPC), acting in its capacity as the City's Coastal Commission, first adopted the city's LWRP in 1982. That plan, which was last amended in 2002, touches on climate change-related risks. For example, Policy 6.1 of the plan calls for minimizing "losses from flooding and erosion" through the use of "non-structural and structural management measures appropriate to the condition and use of the property to be protected and the surrounding area," including, for example, locating new development "in a manner that minimizes or eliminates potential exposure to flooding and other coastal hazards."¹⁷ With such provisions in place, CPC has ample authority to consider coastal storm-related issues such as flooding and erosion in its review of projects proposed by other public agencies and private applicants.

In September 2012, CPC held a public hearing on amendments to the LWRP that squarely address climate change risks, primarily by amplifying the considerations articulated in Policy 6. Among other things, these amendments would explicitly require assessment of the vulnerability of projects to sea level rise, storm surges and coastal flooding over the lifetime of a development.¹⁸ They would also call for the incorporation of design features allowing for resiliency in recovering from storm-related damage. Although the proposed amendments have undergone the requisite public review, CPC has not yet adopted them, pending consideration of lessons learned from Sandy. Once adopted, these amendments will be of significant importance to coastal planning in New York City.

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Endnotes:

1. See New York City Panel on Climate Change, Climate Risk Information (Feb. 17, 2009), http://www.nyc.gov/html/om/pdf/2009/NPCC_CRI.pdf.
2. New York, N.Y., Local Law 42 (2012) (to be codified at N.Y.C. Admin. Code 3-122–3-123).
3. Dana Rubinstein, "Introduced by Al Gore, Bloomberg advocates anti-storm infrastructure, but not sea walls," Capital New York (Dec. 6, 2012, 10:51 AM), <http://www.capitalnewyork.com/article/politics/2012/12/6785074/introduced-al-gore-bloomberg-advocates-ant>
4. N.Y. Envtl. Conserv. Law 8-0109(2).
5. Id. 617.15(a).

6. See N.Y. Pub. Auth. Law 1266(11).
7. See 6 N.Y.C.R.R. 617.5(c)(2).
8. See id. 617.5(c)(33).
9. See, e.g., *Greenpoint Renaissance Enterprise v. City of N.Y.*, 137 A.D.2d 597, 524 N.Y.S.2d 488 (2d Dept. 1988).
10. See *Silver v. Koch*, 137 A.D.2d 467, 525 N.Y.S.2d 186 (1st Dept. 1988).
11. See *Bd. of Visitors-Marcy Psychiatric Center v. Coughlin*, 60 N.Y.2d 14, 20-21, 453 N.E.2d 1085, 1089 (1983).
12. New York State Department of Environmental Conservation, Assessing Energy Use and Greenhouse Gas Emissions in Environmental Impact Statements 4 (July 15, 2009), http://www.dec.ny.gov/docs/administration_pdf/eisghgpolicy.pdf.
13. See 16 U.S.C. 1454, 1455.???
14. See N.Y. Exec. Law 913.
15. See 15 C.F.R. 930.57.
16. See N.Y. Exec. Law 916(1)(b); 6 N.Y.C.R.R. 617.11(e).
17. New York City Department of City Planning (NYCDCP), The New Waterfront Revitalization Program 21 (September 2002), http://www.nyc.gov/html/dcp/pdf/wrp/wrp_full.pdf.
18. NYCDCP, The NYC Waterfront Revitalization Program: Proposed Revisions for Public Review 46 (March 2012), http://www.nyc.gov/html/dcp/pdf/wrp/revisions/wrp_partII_policies.pdf.