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Environmental LAW

Risk & resiliency: NY's plan to cope with climate change

New Yorkers will soon be required by law to prepare for the negative impacts of climate change. Convinced that the earth's climate is warming, and that the sea is rising and extreme weather events are becoming more common as a result, on June 19, the New York Legislature passed amendments to a number of statutes to require consideration of the impacts of climate change for many new projects and permits.

Coined the Community Risk and Resiliency Act, the legislation gained bipartisan support and passed in both the Assembly and the Senate by overwhelming majorities. The act is expected to be signed into law by Gov. Cuomo.

The cross-section of support for this legislation, which puts New York into the forefront as a national leader on addressing climate change, is a story in itself. Support is not only bipartisan and overwhelming among legislators; it brought together the Business Council and the Nature Conservancy, the building and insurance industries and environmentalists. No group publicly opposed the proposal.

By RONALD G. HULL

Daily Record Columnist

Widespread support was possible because the Legislature did not seek to identify or affix blame for the causes of climate change; rather, the legislative purpose is to accept that the climate is changing and that negative impacts are likely inevitable, and to find ways to plan for and adapt to the consequences. According to the legislative history, "[t]his legislation is intended to encourage advance planning for extreme weather events and to encourage the consideration of the effects of climate change. ... It is appropriate and necessary for climate risk to be an eligible component of funding and permitting and also for applicants to demonstrate that they have considered climate change and extreme weather impacts on their proposed projects."

All of New York state has been affected by one or both of these phenomena. Major storms, such as Hurricanes Sandy and Irene and Tropical Storm Lee are clearly only one cause for concern as lesser, unnamed but devastating storms have caused very recent flooding and damage in all regions of the state. The Legislature is now convinced that these are not fluke occurrences, but that these storms and worse are the new "normal" as a consequence of a changing climate.

The act has several components. First, it incorporates consideration of how climate change may impact a project as a factor in determining eligibility for funding and approval for a number of existing programs. The amendments add a requirement that, in addition to existing criteria, proposals must be evaluated for "future physical climate risk due to sea level rise, and/or storm surges and/or flooding, based on available data predicting the likelihood of future extreme weather events, including hazard risk analysis dates if applicable."

The act amends the requirement in 13 programs, including: the State Smart Growth Infrastructure Policy Act; water pollution and drinking water revolving funds; programs under the Environmental Protection Fund, including municipal landfill closure and landfill gas management; local waterfront revitalization; coastal rehabilitation projects; and farmland protection, and adds to the criteria for siting hazardous waste facilities, permitting hazardous substances, petroleum bulk storage facilities and oil and natural gas wells.

Second, in addition to the individual amendments, the act amends the uniform procedures for permits issued by the Department of Environmental Conservation to require consideration of the risks posed by climate change on major projects in designated permit programs. The Legislature singled out projects requiring stream disturbance permits, wetland permits, mining permits, coastal erosion hazard permits, liquefied natural gas and petroleum facility permits and sewerage service, but omitted State Pollutant Discharge Elimination System permits, air permits and solid waste management facility permits.

Third, the act requires DEC to adopt regulations establishing

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"science-based state sea level rise projections" by Jan. 1, 2016, and to update the projections no less than every five years.

Fourth, the Department of State and DEC are required to prepare model local laws to encourage local governments to incorporate climate risk due to sea level rise or extreme weather events into local codes.

Finally, and this may prove to be problematic, the act requires DEC, in consultation with the Department of State, to develop guidance on how to implement the act's requirements and to provide applicants access to "relevant data sets and risk analysis tools and available data predicting the likelihood of future extreme weather events" by Jan. 1, 2017, and ties the effective date to incorporate the planning into funding and permit application to the adoption of guidance on implementation, "but no later than January 1, 2017." On its face, this appears to threaten that even if DEC misses its deadline and no guidance is available, applicants for funding and permits must do the risk analysis anyway.

The required climate change risk analysis will become a part of the substantive criteria for funding and permits. The analysis required is separate and distinct from environmental impact review required under the State Environmental Quality Review Act. In fact, the act does not amend SEQRA and neither endorses nor provides statutory authority for changes DEC has already made through policy documents to incorporate consideration of mitigation of climate change into the SEQRA process.

Through guidance issued in 2009, a Commissioner's Policy statement issued in 2010 (CP-49/Climate Change and DEC Action), and revisions to SEQRA environmental assessment forms adopted in 2012, DEC has pushed applicants for funding and permits to assess energy use and greenhouse gas emissions, and to evaluate whether their projects will have a significant adverse impact by contributing to climate change.

By contrast, the Community Risk and Resiliency Act does not require an applicant to evaluate a project's potential contribution to climate change, but instead requires only consideration of the effects of climate change on the project.

To that extent the Legislature's action is not groundbreaking, but codifies part of the analysis DEC already requires through its administrative policy. Commissioner's Policy 49 makes greenhouse gas reduction and climate change mitigation a "fundamental goal" of DEC programs, but the new legislation does not go that far.

However, DEC's policy also directs agency staff to incorporate climate change adaptation strategies into DEC-administered programs, actions and activities "where permitted" under applicable legal authority. The Community Risk and Resiliency Act provides statutory authority for DEC's adaptation policy and transforms DEC guidelines into statutory mandates. This adds significant clout to DEC's policy and should remove any doubt as to whether the requirement for this type of planning is enforceable.

Environmentalists quickly hailed passage of the act as transformative and voiced hopes that the initiative will spur other states to follow suit, but their elation would seem to be out of proportion to what has actually been accomplished, and to stem more from the fact that a state legislature has officially recognized that climate change is occurring in the face of a national stalemate on the subject.

The Legislature has taken a large step to supply statutory authority to support part of what the executive branch was already trying to do through administrative policy, but has stopped short of fully dealing with climate change. For the time being though, the two branches of government have moved closer in alignment and have committed New York to a pragmatic policy of adaptation to the damaging consequences of a changing climate.

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