

CLIMATE CHANGE ENTERS THE REGULATORY LANDSCAPE

In separate actions, the United States Environmental Protection Agency (USEPA) has proposed a rule requiring the reporting of greenhouse gas emissions beginning in 2011. At the same time, the New York State Department of Environmental Conservation (NYSDEC) has issued a policy that would require assessment of greenhouse gas emission impact and energy efficiency as part of the Environmental Impact Statements (EISs) for certain large projects under the State Environmental Quality Review Act (SEQRA). Both proposals have significant implications for a wide range of industries as well as for commercial and large scale residential development projects.

USEPA PROPOSED RULE:

On March 10th, USEPA released a proposed rule that for the first time would impose annual reporting requirements on industrial facilities that emit more than 25,000 tons of carbon dioxide or carbon dioxide-equivalent greenhouse gases per year. For some industrial sectors, the reporting threshold would be based on the heat input of the operations -- 30 million BTUs or more of energy per hour. As proposed, reporting would be due in 2011 for the 2010 calendar year.

The greenhouse gases would include carbon dioxide and the following carbon-dioxide equivalent gases: methane, nitrous oxide, sulfur hexafluoride, hydrofluorocarbons and several other fluorinated gases. The USEPA estimates that 13,000 sources nationwide would be required to report under the proposed rule. Power plants, automakers, petroleum refineries and landfills are among the large sources impacted by the requirement. Fuel suppliers and vehicle manufacturers would also be required to report for emissions from mobile sources (not vehicle owners). Some industry sources believe the number of sources required to report will be much higher than the USEPA estimates. The rule, as proposed, allows self-certification of the annual reports by the reporting entity. The USEPA has left third-party certification open as a possible future reporting requirement, a feature that would greatly increase reporting costs for those covered under the new rule.

NYSDEC DRAFT POLICY:

On March 11th, NYSDEC issued a draft Policy titled "Assessing Energy Use and Greenhouse Gas Emissions in Environmental Impact Statements." The draft Policy directs that assessments of these items be an integral part of SEQRA Environmental Impact Statement (EIS) analysis for certain projects. Such assessments would be required for large scale projects, including major stationary sources requiring an air permit. The draft Policy also notes that projects generating thousands of vehicle trips or using significant amounts of electricity would be required to assess energy use and greenhouse gas emissions in the EIS. The draft Policy mentions as candidates "very large-scale resort, residential, industrial or commercial development projects."



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The draft Policy does not set any specific thresholds for when energy use and greenhouse gas emission assessments would need to be part of an EIS. It will be up to the SEQRA lead agency, or other involved agencies, to make that determination. Six greenhouse gases are to be addressed: carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride.

The draft Policy suggests that energy use and greenhouse gas emissions be quantified and cites several established protocols that should be used. The scope of the assessment may become very broad, including impacts relating to global warming such as deforestation and sea level rise, as well as possible evaluation of future use of carbon sequestration.

Specific issues to be addressed in an EIS include:

(1) Greenhouse gas emissions. A quantification of total annual emissions of greenhouse gases from direct or indirect emission sources will be necessary. Sources identified in the draft Policy include on-site operations and vehicle fleets operated by the development owner or tenant. Indirect sources include off-site energy production (electricity, oil, natural gas, etc.), employee commuting, freight delivery, waste generation and disposal, among others. In addition, a qualitative discussion of manufacture and transport of construction materials will be required.

(2) Alternatives Analysis. As with other EIS analyses, alternatives need to be presented, including a description and evaluation of the range of reasonable alternatives regarding site location, technology, scale, design or use, and a description of their implication on greenhouse gas emissions.

(3) Mitigation Measures. "Where practical", the draft Policy requires a quantification of reductions in greenhouse gas emissions. It highlights a number of examples of mitigation measures, such as multiple aspects of green building design and operation, sustainable development initiatives and the location of projects near public transportation and other infrastructure.



These actions by USEPA and NYSDEC signal the entrée of climate change issues as significant components of environmental reporting and development requirements. Although the final regulations are pending, the NYSDEC draft Policy is likely to accelerate the adoption of green building (LEED) certification as a requirement for new development and may also assist in discouraging continued suburban sprawl.

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