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Environmental Action Committee

Group Report Requests Guidelines for Cumulative-Impact Assessments

By John M. Armentano

Several months ago, a group comprised of lawyers in private practice, government representatives, environmental consultants, builders, developers and citizens concerned about the environment submitted a report to the Commissioner of the New York State Department of Environmental Conservation (DEC) recommending a methodology for the cumulative-impact-assessment process.

The group members, all of whom were appointed by the commissioner, also submitted a subcommittee paper demonstrating the technical and scientific analysis involved in the overall cumulative-impact calculus, as well as another subcommittee document explaining how cumulative-impact analysis could relate to comprehensive planning and the management of environmental resources.

The reports were the culmination of a three-and-one-half year effort to provide the DEC with an outside perspec-

tive on the consideration of cumulative impacts under the State Environmental Quality Review Act (SEQRA).¹

The report advocates, among other things, that the DEC enact a new regulation that would define cumulative-impact for the first time. In addition, the report includes illustrations of the proposed process and the role that comprehensive planning should take in alleviating cumulative-impact concerns.

It is not yet certain whether the DEC will adopt the report's recommendations. If it does so, however, one can expect these recommendations to "streamline, clarify, and expedite cumulative-impact analysis within the spirit of SEQRA," as the report intended.

Defined Term

The need to study the "cumulative impacts" of a development has been recognized by both the DEC² and the New York Court of Appeals.³ Surprisingly,

however, the term "cumulative impact" in the environmental context is not defined in New York statutory law or DEC regulations, nor does it appear even in SEQRA. Yet the concept of additional multiple impacts on the same environmental resource is a critical aspect of environmental-impact analysis.

To remedy this omission, the report first proposes that the DEC add a definition of "cumulative impact" to its regulations. The term would be defined to mean "the effect of an action itself and the effects of other actions, which taken together substantially increase or substantially accelerate an effect on the same aspect(s) of the environment." The definition would add that the "lead agency is responsible for determining a reasonable period of time and a reasonable geographic area within which the actions and effects are to be considered."

Critically, the proposed definition requires that the combined actions taken together have an impact on the "same

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aspect of the environment." If adopted, this requirement should restrict cumulative-impact analysis to the cumulative effects on the same environmental resource of more than one action taken together. Put differently, the report states that its suggestion that the combined impact must be on the "same element" of the environment would create a situation in which the lead agency "cannot run amuck and require cumulative studies of proposed projects in areas which are disparate and do not implicate the same element of the environment."

Applying The Definition

The report contains several illustrations of how the proposed regulations would work in practice. Suppose, for example, that a developer wants to construct a project that will add traffic on a certain road. Suppose, too, that when the developer files its plans it is informed that two other developers had previously filed plans for the same road along with environmental assessment forms for their projects.

According to the report, the lead agency would be justified in concluding that the third developer to file should consider the other two proposals and their impacts on the road in its environmental-impact analysis.

However, the report continues, if the third developer's project will impact a road and the other two developers'

projects taken together would have a minimal impact on that road — but a potentially severe impact on water resources — the third developer should not have to analyze the cumulative-impact of its development, coupled with the other two developments, on the road. Naturally, if the third developer's project also will affect the water supply, the developer must analyze the impacts of that project, plus the impacts of those of the first two developers, on the water supply.

The report advocates that the Department of Environmental Conservation enact a new regulation that would define cumulative impact for the first time.

Suppose that the timing of these proposals is somewhat different. Imagine that a developer files appropriate applications for a project that will affect a particular road and that, during the approval process, two other developers file proposals that also will affect the same road. The report suggests that the first developer should not be required to study and analyze the cumulative-impacts created by the two subsequent proposals. This should not harm the environmental resource at issue, because the

developers who file the subsequent proposals will have to consider the combined impact of their proposals as well as the proposal or proposals that preceded them. To require the first developer to also study the impact on the road that later plans may have would unfairly penalize that developer and create a possible situation, depending on filings, that may unreasonably delay that developer.

Another illustration in the report focuses on a fictional lake in central New York. The report hypothesized that there were fifty homes around the lake, all with lake front rights. Moreover, all of the homes were permitted to have docks, but none of the homeowners had constructed any.

If one homeowner applies for the appropriate permits to build a dock, that owner must justify the absence of environmental impact by studying his or her own dock alone. In other words, this homeowner's environmental impact study need not assume that every owner on the lake had erected a dock.

Similarly, if another homeowner files a second application, that homeowner need consider the impact only of his or her own dock and the dock of the homeowner who first constructed a dock. Later homeowners must consider all prior docks already constructed on the lake, but no future docks.

Conceivably, at some point a homeowner may find that his or her dock, together with all other existing docks, will have a substantial detrimental impact on

the lake. That homeowner may face mitigation measures imposed by local government authorities, and the permitting agency may prohibit further construction of docks on the lake.

Comprehensive Plan

According to the report, some of this analysis may be different in the event a local municipality has enacted a comprehensive plan. For instance, if the town with the lake had enacted a comprehensive plan following appropriate SEQRA analysis, the comprehensive plan presumably would provide for "build-out" limits around the lake. In that event, so long as those limits were respected, no homeowner would have to prepare any cumulative-impact analysis.

The report suggests that the first developer to file an application should not be required to study and analyze the cumulative impacts created by subsequent proposals.

The existence of a comprehensive plan also should affect the result in the developer hypothetical discussed above, according to the report. Thus, if the community had adopted a comprehen-

sive plan, together with a SEQRA study, none of the developers would have to restudy the cumulative-impact of their proposed developments because the impacts had been examined in the comprehensive plan process. Indeed, at most, a developer might be asked for a Supplemental Environmental Impact Statement under SEQRA due to changes proposed for the project, newly discovered information, or a change in circumstances related to the project. The New York Court of Appeals approved this approach in *Neville v. Koch*.⁴

It should be noted that cumulative-impact analysis is not a substitute for comprehensive planning. However, where no express comprehensive plan exists in document form, cumulative-impact analysis would play a significant role in evaluating terms of impacts on the same element of the environment.

Conclusion

Of the nearly two dozen members of the working group, only six did not support the report. Several of the dissenters seemed to accept the majority's rationale, but for one reason or another felt compelled to dissent. For example, one dissenter did not want to mandate review of "the potential impact of projects that have not yet been formally proposed," which is the standard adopted by the majority. This dissenter was concerned that the proposed regulatory language "would allow for exces-

sively broad cumulative-impact assessments," a concern that the majority did not accept. Another seemed to accept the "definition and guidance" of the report, but asked for an expedited appeals process to test the lead agency's approach to cumulative-impact. Because of the potential magnitude and cost of a proposed cumulative-impact study, a provision for judicial review of the request may well have merit.

Cumulative impacts, as the DEC has recognized, are of great concern, involve legitimately competing interests, and deserve clear guidelines for analysis. The report proposes guidelines to meet that test. Whether and how the DEC enacts the report's proposals should be of great practical interest to local governments, citizens, and developers alike.

NOTES:

1. ECL, Art. 8.
2. See, e.g., Section 617.111 of the DEC's regulations, which refers to "two or more related actions undertaken, funded or approved by an agency, none of which has or would have a significant impact on the environment, but when considered cumulatively would meet one or more of the criteria in this section."
3. See, e.g., *Long Island Pine Barrens Society v. Planning Board of the Town of Brookhaven*, 80 N.Y.2d 500 (1992).
4. 79 N.Y.2d 416 (1992).