

Insights

NEW YORK STATE IS MOVING FORWARD TO IMPLEMENT THE CLIMATE LEADERSHIP AND COMMUNITY PROTECTION ACT

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SUMMARY

The State of New York is mobilizing to implement the economy-wide greenhouse gas (“GHG”) emission reductions required by the New York Climate Leadership and Community Protection Act (“CLCPA”). This landmark statute, which went into effect on January 1, 2020, requires extraordinary reductions in statewide GHG emissions. If its mandates are achieved, as of 2030 statewide GHG emissions in New York will be 40 percent lower than they were in 1990, and by 2050 emissions will be 85 percent lower than baseline 1990 emissions. This Client Alert summarizes the steps that the State has taken to implement the CLCPA.

As described in an earlier Client Alert, the CLCPA does not provide much specificity as to the measures to be taken to accomplish its ambitious goals. Instead, it creates an elaborate policy-making apparatus, assigns specific duties to the various bodies to be engaged in the effort, and imposes deadlines for accomplishment of those duties. Initially a 22-member Climate Action Council (the “CAC” or “Council”) co-chaired by the heads of the New York State Department of Environmental Conservation (“NYSDEC”) and the New York State Energy Research and Development Authority is to take the lead in developing specific policies to achieve the statute’s emission reduction mandates. Under the CLCPA, the Council, assisted by a variety of advisory panels and working groups, must come up with a “scoping plan” by January 1, 2023 (the third anniversary of the law’s effective date). That plan will identify the wide range of strategies the State should pursue to achieve the mandated emission reductions. NYSDEC will then take hold of the laboring oar: by January 1, 2024 (the fourth anniversary of the law’s effective date) the agency must transform the strategies formulated by the Council into enforceable regulations crafted to achieve the statutory goals.

The statute also assigns two early foundational duties to NYSDEC. First, by regulations to be adopted no later than the end of this year, it is to establish “a [quantified] statewide greenhouse gas

emissions limit as a percentage of 1990 emissions” that reflects the 40 percent and 85 percent reductions required by the law. Second – also by the end of this year – NYSDEC is required to establish a “social cost of carbon,” i.e., “a monetary estimate of the value of not emitting a ton of greenhouse gas emissions.” This value is to be developed pursuant to an informal proceeding (as opposed to formal rulemaking), and may be based either on “marginal greenhouse gas abatement costs” or “the global economic, environmental, and social impacts of emitting a marginal ton of greenhouse gas emissions into the atmosphere.”

The apparatus created by the CLCPA has now shifted into high gear. The members of the CAC have been appointed, and the group has held three meetings thus far. Advisory Panels have been appointed to advise the CAC on (i) Agriculture and Forestry, (ii) Energy Efficiency and Housing, (iii) Energy-Intensive and Trade-Exposed Industry, (iv) Land Use and Local Government, (v) Power Generation, and (vi) Transportation. The work of these Advisory Panels is about to begin in earnest. They are expected to hold their kickoff meetings during the first half of September, and at those meetings they will begin to identify topics, issues and sub-issues for discussion among the panel members; identify needed research and analysis; and develop a timeline for conducting their work and reaching recommendations. The panels will meet monthly, provide opportunities for public input on their recommendations, and coordinate their work with the CAC and two other bodies playing a significant role in the CLCPA process: the Environmental Justice Working Group (discussed below) and the Just Transition Working Group (focusing on issues and opportunities for workforce development, and potential disruption to industries and affected communities). The panels are to provide regular updates on their progress in developing recommendations to the Council, and deliver their final sector-specific recommendations six months prior to release of the draft scoping plan. Importantly, the CAC has made arrangements to provide the advisory panels with technical support from an outside consultant and agency staff.

NYSDEC recently has taken a major step forward in accomplishing one of its near-term tasks under the CLCPA. By notice published in the *State Register* on August 19, the agency commenced formal rulemaking procedures for the adoption of a new regulation (to be codified as Part 496 of Title 6 of the New York Code of Rules and Regulations) that would establish statewide emission limits for greenhouse gases. As required by the CLCPA, this regulation would translate the statutory percentage reduction targets into mandatory economy-wide GHG tonnage limits for 2030 (reflecting a 40 percent reduction from 1990 emission levels) and 2050 (reflecting an eighty-five percent reduction from 1990 levels). The agency indicates that it generally has followed the protocol created by the International Panel on Climate Change (“IPCC”) in its calculations, except that – in accordance with the CLPCA – it has gone beyond the IPCC protocol to include in its statewide totals emissions associated with imported electric power and fossil fuels. According to the calculations presented in the proposed rule, the estimated level of statewide GHG emissions in 1990 was 401.38 million metric tons of carbon dioxide equivalent. From that baseline, the agency is proposing to establish a statewide emissions limit of 240.83 million metric tons for 2030 and 60.21 million metric tons for 2050.

Although the proposed rule does not impose compliance requirements on any entity, when finalized it will be of profound importance going forward. The scoping plan being prepared by the CAC must include recommendations designed to ensure the statewide emission limits are achieved. And the statewide emission limits will be the lodestar for the enforceable regulations to be promulgated by NYSDEC by January 1, 2024. Thus, the proposed limits will serve as the foundation for future regulatory action. A virtual public hearing will be held to consider the proposed regulation on October 20, 2020, and written comments on the proposal rule may be submitted by October 27, 2020.

The Environmental Justice Working Group convened its first meeting on August 14, 2020. Among its initial tasks is to develop criteria for NYSDEC's identification of "disadvantaged communities" for purposes of the statute. The importance of this designation cannot be overstated because under the law no less than 35 percent of all state spending on clean energy or energy efficiency programs, projects and investments must be directed to disadvantaged communities on the list. Perhaps more importantly, the CLCPA imposes a general prohibition barring state agencies or authorities from funding or approving any project or program that would impose a disproportionate burden on a listed community.

The CLCPA will have a profound impact on virtually every sector of the New York economy. Accordingly, New York businesses, real estate owners, non-profit organizations and municipal governments would be well advised to stay abreast of developments under the statute and to take advantage of the multiple opportunities for public input that will be afforded as the statutory process goes forward.

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