USA – NEW YORK

Trends and Developments

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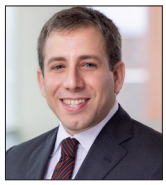

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Climate Change and Environmental Justice

The Climate Leadership and Community Protection Act (CLCPA) was signed into law on 18 July 2019 and went into effect on 1 January 2020. Among its many ambitious goals, the CLCPA requires the New York State Department of Environmental Conservation (NYSDEC or the "Department") to promulgate regulations establishing statewide greenhouse gas (GHG) emissions limits for the years 2030 and 2050 equal to 60% and 15%, respectively, of 1990 emissions. NYSDEC has estimated that statewide GHG emissions in 1990 were 409.78 million metric tons of carbon dioxide equivalent. The CLCPA further requires state agencies to invest at least 35% of related statewide programmatic resources in disadvantaged communities, which were identified using the criteria established by the Climate Justice Working Group, an advisory body created under the CLCPA.

In its unconsolidated sections, the CLCPA mandates that state agencies take certain steps to limit GHG emissions. Section 7(2) requires state agencies to consider whether an administrative decision (including permit issuance, contract and grant execution, and other administrative approval) is consistent with the attainment of the statewide GHG emissions limits. Section 7(3) requires that such administrative decisions do not disproportionately burden disadvantaged communities, and that state agencies prioritise reduction of GHG emissions and co-pollutants (ie, hazardous air pollutants from GHG emissions sources) in those communities.

A 22-member Climate Action Council was created to develop a scoping plan detailing how the state would reach its emissions reduction goals. The final scoping plan, released on 19 December 2022, provided estimates of statewide GHG emissions across major economic sectors. It used these estimates to recommend actions to achieve emission reductions for each sector.

Post-CLCPA NYSDEC Guidance

On 14 December 2022, NYSDEC released two policy guidance documents: Commissioner Policy 49 (CP-49/Climate Change and DEC Action) and Division of Air Resources Policy 21 (DAR-21/The CLCPA and Air Permit Applications).

CP-49 requires NYSDEC to incorporate climate change considerations into departmental activities. CP-49 applies to applications, modifications and renewals of a variety of environmental permits, including water supply, air pollution control, liquefied natural gas and petroleum gas, solid waste and hazardous waste management, and the construction of energy production, generation, transmission and storage facilities. CP-49 provides examples of activities that would be deemed inconsistent with the statewide GHG reduction goals (eg, an action that directly reduces the market demand or market access for GHG emissions-reducing technologies) and offers examples of acceptable justifications under the CLCPA Section 7(2) analysis (eg, absence of the project will impact the safety and reliability of energy systems).

DAR-21 provides guidance for preparing and reviewing CLCPA analyses for Title V and Air State Facility permit applications. It provides that, for the purposes of a Section 7(2) consistency determination, applicants must analyse GHG and carbon dioxide equivalent emissions from upstream sources (attributable to the production, transmission and use of fossil fuels and imported electricity). It also lists the minimum requirements for such analysis (eg, accounting for indirect emissions, such as from truck traffic increases associated with a project). Under DAR-21, if an analysis finds the project to be

inconsistent with the CLCPA's goals, then the applicant would discuss the lack of feasibility of alternatives (eg, using an electric heater instead of a natural gas-fired boiler would require the construction of a substation with significant costs) and undertake mitigation measures.

New Environmental Permitting Requirements

On 30 December 2022, Governor Hochul signed new legislation concerning environmental permitting decisions for projects imposing disproportionate pollution burdens on disadvantaged communities. On 3 March 2023, the Governor signed additional legislative amendments. This environmental justice legislation is codified in Section 70-0118 of the Environmental Conservation Law (ECL), pursuant to which NYSDEC will be prohibited from issuing a new permit "if it determines that the project will cause or contribute more than a de minimis amount of pollution to a disproportionate pollution burden on [a] disadvantaged community". N.Y. Env't Conserv. Law Section 70-0118(3)(b). A similar prohibition will also apply to permit modifications and renewals that "would significantly increase the existing disproportionate pollution burden on [a] disadvantaged community". N.Y. Env't Conserv. Law Section 70-0118(3)(c)-(d). Additionally, ECL Section 70-0107, which governs NYSDEC's permitting procedures, was amended to require consideration of cumulative pollution impacts on disadvantaged communities. The cumulative impacts include impacts from all forms of pollution as defined in ECL Section 1-0303(19). These changes will take effect after 30 December 2024.

On 8 May 2024, NYSDEC's Division of Environmental Permits issued a new policy, DEP 24-1/ Permitting and Disadvantaged Communities, to implement CLCPA Section 7(3). DEP 24-1 requires NYSDEC staff to screen whether a facility seeking a covered permit would likely affect a disadvantaged community. This would include facilities that are outside a disadvantaged community but have pollution impacts on it. DEP 24-1 requires an impact study of areas within a half-mile radius of a proposed facility. If NYSDEC finds a likelihood of impact on a disadvantaged community, then the permit applicant is required to provide a disproportionate burden analysis and seek enhanced public participation.

CLCPA Case Law

Thus far, there has been limited case law interpreting the reach of CLCPA Sections 7(2) and 7(3). In Danskammer Energy, LLC v New York State Department of Environmental Conservation, 76 Misc. 3d 196 (Sup. Ct. Orange Cnty. 2022), the New York State Supreme Court upheld NYSDEC's denial of an application for a Title V air permit to construct and operate a natural gas-fired power plant. The Department's denial was based partly on Section 7(2). The Court affirmed that Section 7(2) not only requires NYSDEC to consider whether its issuance of a permit will be consistent with the attainment of the statewide GHG emissions limits, but also authorises NYSDEC to deny a permit when issuance thereof would be inconsistent or interfere with the attainment of such limits.

NYSDEC has also denied a natural gas-fired electric-generating plant's application to renew its Title V air permit, where the plant had begun providing behind-the-meter generation for cryptocurrency mining operations and had significantly increased its actual and projected emissions since its permit was initially issued. The NYSDEC regional director's decision upholding the denial concluded that NYSDEC's authority pursuant to Section 7(2) extends to permit renewals as well as new applications. The decision further concluded that, under Section 7(2), an administrative decision that is inconsistent

with or would interfere with the statewide GHG emissions limits only requires a statement justifying NYSDEC's decision, not a statement finding that the project or facility seeking approval is justified. Accordingly, a finding that a project or facility is justified would not compel NYSDEC to issue a decision that is inconsistent with or will interfere with attainment of the statewide GHG emissions limits. NYSDEC's denial of the permit renewal under Section 7(2) is currently being challenged in New York State Supreme Court (Greenidge Generation LLC v New York State Dep't of Env't Conservation, Index No. 2024-5221 (Sup. Ct. Yates Cnty. filed Aug. 15, 2024).

Freshwater Wetlands Regulations

In July 2024, NYSDEC officially released its proposed regulations that will implement the 2022 amendments to the Freshwater Wetlands Act, codified in ECL Article 24. The regulations arrive just as two of the major 2022 amendments are set to take effect on 1 January 2025. First, NYSDEC's regulatory authority will no longer be limited to the wetlands mapped on the department's freshwater wetlands maps, which have historically put landowners on notice that state-regulated wetlands are located on their property. Second, NYSDEC will now have regulatory authority over wetlands of any size that meet one of 11 new criteria for "wetlands of unusual importance". The third major amendment will see the threshold size of NYSDEC-regulated wetlands decrease from 12.4 acres to 7.4 acres, and will take effect on 1 January 2028. NYSDEC is required to have regulations implementing these amendments in effect by 1 January 2025, and they are currently being finalised following the public comment period.

New Jurisdictional Determination Procedures

Extending NYSDEC's jurisdiction to unmapped wetlands will create a rebuttable presumption that any area meeting the ECL's definition of freshwater wetland is covered by the law and subject to its permitting requirements. As a result, the state programme will begin to resemble the federal wetlands programme administered by the US Army Corps of Engineers; most landowners will now have to obtain a wetlands delineation and request a jurisdictional determination (JD) from NYSDEC. Upon request, the department will have 90 days to provide a JD, subject to weather and ground conditions. However, in a change from an earlier draft of the regulations, if NYSDEC fails to provide a JD within 90 days plus an additional ten days following notice of its failure, then the department must waive its jurisdiction over the parcel's wetlands for five years.

Wetlands of Unusual Importance

Unlike at the federal level, where wetland of any size can be regulated, wetlands generally have to be at least 12.4 acres to come under NYSDEC's jurisdiction. However, the 2022 amendments introduced 11 new criteria by which a wetland will be regulated regardless of its size. These include wetlands:

- located in a watershed that has experienced significant flooding in the past, or is expected to experience significant flooding in the future from severe storm events related to climate change;
- located in or partially within an urban area, as defined by the United States Census Bureau;
- containing a plant species occurring in fewer than 35 sites statewide or having fewer than 5,000 individuals statewide;
- containing a habitat for an essential behaviour of an endangered or threatened species, or a species of special concern or listed as a species of greatest conservation need in New York's wildlife action plan;

- classified as a Class I wetland;
- previously classified and mapped by the department as a wetland of unusual local importance;
- that are vernal pools known to be productive for amphibian breeding;
- located in a Federal Emergency Management Agency (FEMA)-designated floodway;
- previously mapped by NYSDEC as a wetland on or before 31 December 2024;
- with wetland functions and values that are of local or regional significance; and
- that have been determined by the NYSDEC Commissioner to be of significant importance for protecting the state's water quality.

N.Y. Env't Conserv. Law Section 24-0107(9).

Of these, the urban area criteria will likely have the most significant impact. Census-defined urban areas are expansive and, particularly in western, central and upstate New York, can include areas that outwardly appear suburban or even rural. The urban area criteria could also bring under NYSDEC jurisdiction small "accidental wetlands" that materialise on undeveloped parcels due to poor stormwater management. And even more suburban wetlands will become jurisdictional under NYSDEC's proposed criteria for watersheds that have or are expected to experience significant flooding.

Grandfathering

A key component of the proposed regulations are grandfathering provisions for projects that are already in the planning or permitting stages. If a project receives a freshwater wetlands permit from NYSDEC prior to 1 January 2025, then the project can proceed under its existing JD, and many of the new regulations will not apply.

Additionally, certain projects that do not require a freshwater wetlands permit under the existing regulations can delay the application of the new regulations. These include:

- projects in which the lead agency accepts a Final Environmental Impact Statement pursuant to the State Environmental Quality Review Act (SEQRA) prior to 1 January 2025.
- type I actions that receive a negative declaration pursuant to SEQRA prior to 1 January 2025; and
- projects that receive written site plan approval from a local government.

Depending on whether these projects are considered "major" or "minor" under existing NYSDEC regulations, the proposed wetlands regulations will not affect the project parcel for two to three years.

The Sackett Effect

The forthcoming freshwater wetlands regulations will significantly expand the number of state-regulated wetlands just as the number of federally regulated wetlands seemingly shrank in the wake of the United States Supreme Court's decision in Sackett v Environmental Protection Agency, 598 US 651 (2023). In Sackett, the Supreme Court eliminated the broader of two tests used to determine federal jurisdiction over wetlands pursuant to the Clean Water Act. The Environmental Protection Agency and United States Army Corps of Engineers subsequently amended the regulatory definition of "waters of the United States", though the extent to which the new definition conforms to the Sackett opinion has been questioned and is already the subject of litigation in North Carolina. Whatever reprieve Sackett may have offered to landowners and developers at the federal level might now be offset by these forthcoming state regulations,

under which vast acres of wetlands that were previously unregulated by the state will now be subject to permitting requirements.

Limiting 1,4-Dioxane in Cleaning, Personal Care and Cosmetic Products

In 2020, the New York State legislature amended Articles 35 and 37 of the ECL to establish limits on the amount of 1,4-dioxane that can be present in household cleaning, personal care and cosmetic products sold or offered for sale in the state. For household cleaning and personal care products, the maximum allowable concentration was not to exceed 2 parts per million by 31 December 2022, and was not to exceed 1 part per million by 31 December 2023. For cosmetic products, the allowable concentration was not to exceed 10 parts per million by 31 December 2023. NYSDEC, in consultation with the New York State Department of Health (NYSDOH), will reevaluate those limits by 1 May 2025, and every two years thereafter.

In September 2024, NYSDEC finalised regulations at 6 NYCRR Part 352-1. Pursuant to 6 NYCRR Section 352-1.4, a manufacturer may apply for a one-year waiver, up to two times, from compliance with the above maximum allowable concentrations. Applicants must prove they have taken steps to reduce the presence of 1,4-dioxane in an individual product and are unable to comply with the applicable limit on the product. A list of currently granted waivers is updated monthly on NYSDEC's website.

Banning Intentionally Added Per- and Polyfluoroalkyl Substances in Food Packaging

Effective 31 December 2022, New York State prohibits the distribution, sale and offer for sale of food packaging containing intentionally added per- and polyfluoroalkyl substances, also known as PFAS substances (defined as a class of fluorinated organic chemicals containing at least one fully fluorinated carbon atom). This prohibition applies to chemicals that are added to serve an intended function in the product component. Retailers and food service establishments may rely on written certification from upstream manufacturers that the packaging components are in compliance with the prohibition.

Regulating Emerging Contaminants in Drinking Water and Its Sources

Effective 28 December 2022, NYSDOH regulations at 10 NYCRR Section 5-1.52 set forth the maximum contaminant levels (MCLs) for perfluorooctanoic acid (PFOA) (10 parts per trillion), PFOS (10 parts per trillion) and 1,4-dioxane (1 part per billion). These MCLs are enforceable limits describing the highest level of contaminants allowed in drinking water based on considerations of health risks, the technical feasibility of treatment and cost-benefit analysis.

On 15 March 2023, NYSDEC released final ambient water quality guidance values for PFOA, PFOS and 1,4-dioxane through an addendum to the Technical and Operational Guidance Series (TOGS) 1.1.1. The guidance values are derived from the procedures set forth in the regulation at 6 NYCRR Part 702. The guidance values for the protection of sources of drinking water are 6.7 parts per trillion for PFOA, 2.7 parts per trillion for PFOS and 0.35 parts per billion for 1,4-dioxane.

In February 2023, NYSDEC released two additional technical guidance documents. TOGS 1.3.7 informs NYSDEC's selection of analytical testing methods for monitoring emerging contaminants. TOGS 1.3.13 sets forth NYSDEC's prioritisation strategy for incorporating the guidance values for PFOA, PFOS and 1,4-dioxane

into State Pollutant Discharge Elimination System (SPDES) permits for certain industrial facilities and wastewater treatment works. NYSDEC periodically updates a list of Standard Industrial Classification (SIC) codes that are potentially associated with emerging contaminants and requires additional monitoring for emerging contaminants as a permitting condition of certain SPDES permittees.