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THE EFFECT OF NEW YORK'S NEW CLIMATE LAW ON MUNICIPALITIES: DEEP BUT UNCERTAIN

*By Michael B. Gerrard**

The Climate Leadership and Community Protection Act (CLCPA) was passed by both houses of the state legislature and signed by Governor Andrew Cuomo in June 2019. L. 2019 ch. 106. Its ambitious targets—some are firm requirements, some are aspirational goals—will have a profound effect on municipalities throughout the state, if it is fully implemented. However, the nature of that impact is not yet known.

As of this writing, CLCPA is not yet in effect, under the terms of its Section 14. That is still awaiting Governor Cuomo's signature on A1564/S2385, which passed the Senate and the Assembly on June 19 and 20, 2019, respectively. This bill creates a permanent environmental justice advisory group and requires all state agencies to be guided by an environmental justice policy.

CLCPA requires total statewide greenhouse gas emissions to be 40% below 1990 levels in 2030 and 85% below 1990 levels in 2050. (As of 2015, the last year for which data is available, emissions were 8.5% below 1990 levels.) There is also an aspirational goal of a 100% reduction by 2050.

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PROCESS

CLCPA establishes a New York State Climate Action Council of 22 members (12 of them are the heads of state agencies) to devise a "scoping plan" for how the law would be implemented. It will work with special advisory groups on environmental justice and on "just transition." The draft plan is due two years from the effective date and the final is due one year after the effective date. (The effective date is the first day of the January when the Governor signs the environmental justice law, and thus presumably will be January 1, 2020.) This process of requiring an agency devise a scoping plan for implementation is modeled after California's Global Warming Solutions Act, AB32.

Four years from the effective date, and after holding public hearings, the state Department of Environmental Conservation (DEC) is required to promulgate regulations "to ensure compliance with the statewide emission reduction limits." These regulations shall "[i]nclude legally enforceable emissions limits, performance standards, or measures or other requirements to control emissions from greenhouse gas emission sources." The only exception is "agricultural emissions from livestock." Specifically included are "internal combustion vehicles that burn gasoline or diesel fuel and boilers or furnaces that burn oil or natural gas." The new law also requires the Public Service Commission to take actions to carry out its goals for the power sector.

REGULATED SOURCES

Regulated sources are those anthropogenic sources, as determined by DEC, "whose participation in the program will enable the department to effectively reduce greenhouse gas emissions, and that are capable of being monitored for compliance." This may have the effect of excluding some agricultural emissions, for example.

To meet their emissions requirements, regulated sources may use an "alternative compliance mechanism." These are offsets that will "enhance the conditions of the ecosystem or geographic area adversely affected." Offsets must "substantially reduce or prevent the generation or release of pollutants through source reduction." They must "be located in the same county, and within twenty-five linear miles, of the source of emissions, to the extent practicable." These requirements may be difficult to achieve, and may limit the availability of offsets, depending on how DEC writes the regulations. Electricity generating units are not eligible to use offsets.

BUILDINGS

The aspect of CLCPA that may have the greatest impact on municipal governance concerns buildings.

Residential and commercial uses add up to 26% of New York greenhouse gas emissions (not counting the pollution from making the electricity they use). Most of this is from burning natural gas and oil for space heating and cooling; water heating; and cooking.

CLCPA calls for "[m]easures to achieve reductions in energy use in existing residential or commercial buildings, including the beneficial electrification of water and space heating in buildings, establishing appliance efficiency standards, strengthening building energy codes, requiring annual building energy benchmarking, disclosing energy efficiency in home sales,

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and expanding the ability of state facilities to utilize performance contracting."

DEC will have to decide whether to require emissions permits for buildings over a certain size. In April 2019, the New York City Council adopted a major law, Local Law 97 of 2019, that sets limits for 2024 and 2030 on the amount of greenhouse gas emissions per square foot for different kinds of buildings. Unlike the CLCPA, the New York City law allows buildings to achieve compliance by purchasing renewable energy credits, buying a broader range of offsets, or paying a penalty. The interaction of CLCPA and the New York City law may become complicated.

In 2016, Mayor Bill de Blasio issued a report, "One City Built to Last: Transforming New York City Buildings for a Low-Carbon Future," from a large technical working group, that laid out how the City could slash building emissions. The report calls for major work on heating distribution systems and lighting, deep energy retrofit strategies, sub-metering of non-residential tenant spaces, workforce training, and many other actions. A study by Professor David Hsu of MIT concluded that retrofitting buildings in the New York area has the potential to create 126,000 jobs by 2030. This is more jobs than Amazon would have brought if it had gone through with its plan to move its second headquarters to the City.

It is uncertain whether DEC, or perhaps another state agency, will decide to use CLCPA to impose more stringent energy efficiency standards on existing buildings. Under current New York law, building codes are set by municipalities, but the State Energy Conservation Construction Code, which is adopted by the State Fire Prevention and Building Code Council, governs energy efficiency requirements. Cities, villages and counties have primary responsibility for administering and enforcing these codes. Municipalities must adopt their own code enforcement programs.

Executive Law § 379(3) has a preemption provision for the energy code. It states that "no municipality shall have the power to supersede, void, repeal or make more or less restrictive any provisions of this article or of rules or regulations made pursuant to" the state codes. However, municipalities may petition the State Code Council for a determination whether their local ordinances are reasonably necessary because of special conditions, under Executive Law § 383. Achieving the goals of CLCPA will require buildings to be considerably more energy efficient than most are today. It is possible that under CLCPA, the State will adopt much more efficient energy codes. If it does, it will primarily be the responsibility of municipalities to enforce these new rules.

Additionally, New York's Appliance and Equipment Energy Efficiency Standards Act, N.Y. Energy L. §§ 16-102 et seq., empowers the Secretary of State to develop energy efficiency standards for new products sold, offered for sale or installed in New York. The federal Energy Policy and Conservation Act expressly preempts states and municipalities from adopting their own minimum energy and water efficiency standards for appliances and equipment, but states may adopt standards for appliances and equipment that are not the subject of federal standards. We will see if, in order to meet CLCPA's goals, New York acts more aggressively to fill in the gaps in federal regulation of appliances, as California has done for many years.

The New York State Energy Research and Development Authority (NYSERDA) has found that there is tremendous opportunity to reduce energy use in buildings through improvements (in this order) in cooling, lighting, water heating, space heating, refrigeration, appliances, and ventilation. NYSERDA also declared in 2018 that energy efficiency can deliver nearly a third of the greenhouse gas emission reductions needed to meet New York's goal of a 40% reduction in greenhouse gas emissions by 2030.

The most radical change to building an energy codes would be to require that all heating, cooling and cooking be electric rather than natural gas or oil. Complete electrification is one of the principal ways that CLCPA's goals can be achieved. (Of course, this requires the electric grid to be supplied entirely be zero-emissions electricity; that is discussed in the next section.) Requiring all new buildings to be all electric is straightforward enough as a legal matter. However, requiring that existing buildings be retrofit is another

matter entirely. The costs are often very high—perhaps in the tens of thousands of dollars per unit. In many homes the electric system does not have sufficient capacity and would need to be completely redone. The state might consider setting up a low-interest loan program to help homeowners shoulder these costs. Moreover, to the extent that electricity costs more than natural gas or oil per unit of useful energy supplied, electrification could considerably raise utility bills—an eventuality that especially could harm low-income consumers unless these bills are subsidized.

There is also growing concern that cooking with natural gas not only generates carbon dioxide but also nitrogen dioxide, which is unhealthy to breathe. This is an important but little-recognized source of indoor air pollution. Several studies have shown that natural gas stoves, especially in kitchens without working vents, lead to levels of pollution inside homes that are higher than the one-hour national ambient air quality standard for nitrogen dioxide. This is an additional reason to move to electrification of home heating and cooking, and why expansion of natural gas infrastructure in New York would be moving in the wrong direction.

ELECTRICITY

CLCPA mandates that 70% of electric power demand in 2030 be met by renewables, and 100% be from "zero emissions" in 2040. Thus the requirement for 2040, unlike that for 2030, may include nuclear. In 2018, 32% of New York's power came from nuclear power plants. However, two of them—the Indian Point units in Westchester County—are scheduled to close in 2020 and 2021. The remaining four are all on the shores of Lake Ontario. Their operating licenses have all been extended, but they all expire before 2040 except for Nine Mile Point Unit 2, whose license expires in 2046. Since there are no proposals to build new nuclear power plants in New York, it appears that nuclear power will make little contribution to New York's electricity supply in 2040, barring very rapid development and acceptance of new nuclear technologies.

Of the remaining sources of power for New York, 39% comes from fossil fuel; 23% from hydro; and 6% from wind and solar. The fossil fuel electricity is overwhelmingly from natural gas. (The two remaining coal-fired power plants in the state are scheduled to close by 2020.) Since electric generating plants cannot use offsets, it looks like all the natural gas power plants in the state will need to close by 2040, unless carbon capture and sequestration technology for such plants develops rapidly and is able to achieve zero emissions, which is beyond current commercial capabilities. The environmental justice community played a major role in shaping CLCPA, and has long complained that natural gas plants are disproportionately located in or near low-income and minority communities.

Oil is no longer used for baseload power generation in New York, but there are numerous emergency generators that burn gasoline, diesel fuel, propane, or natural gas. Many of them have high emissions of conventional air pollutants as well as greenhouse gases when they are in use. Non-fossil biofuels may work in some of them. DEC will have to decide how to treat these generators.

The new law contemplates a massive increase in renewables. It mandates a minimum of 6 gigawatts (GW) of distributed solar capacity (such as on rooftops) by 2025 (there is now 1.5 GW), and 9 GW of offshore wind capacity by 2035 (there is now none, though the state is actively working to build several plants off Long Island). (To put these numbers in perspective, a large nuclear power plan has a capacity of about 1 GW.) There will be more onshore wind as well, but CLCPA does not specify how much. The law further requires 3 GW of energy storage capacity by 2030 (there is now 0.039 GW). The storage does not itself generate electricity, but it helps provide power when the sun is not shining and the wind is not blowing.

This massive increase in renewable energy capacity may cause tensions at the local level. Some residents do not like to see wind turbines or solar arrays from their homes. Thus in quite a few communities, groups have arisen to oppose large-scale (and occasionally small-scale) renewables in their midst, and have called upon local governing boards to adopt zoning or build-

ing code provisions that ban or restrict these facilities. Article X of the New York Public Service Law allows a state siting board to waive local restrictions. Public Service Law § 172 provides that local permits are not required for covered facilities, and § 168(3)(e) states that the siting board will apply the substantive requirements of local laws unless it finds them "unreasonably restrictive." In other words, the siting board is to be the sole permitting authority (except for federal permits), but otherwise applicable substantive requirements still apply unless they would unduly interfere with approval and construction.

If local restrictions continue to pose an obstacle to building renewables at the scale required by CLCPA, the siting board may need to exercise its waiver authority more frequently and aggressively. It is possible that this could lead to a political backlash and to legislative attempts to take away the siting board's authority; but such an action would make CLCPA's goals even harder to achieve. Meanwhile, the state courts have repeatedly upheld the siting board's authority to waive local zoning.[1]

There is limited ability to expand hydro generation within the state. (It now mainly comes from massive power plants at Niagara Falls and on the Saint Lawrence River; there are also numerous smaller ones.) However, HydroQuebec has indicated that it has ample excess capacity (and could build more) and would be pleased to sell it to New York if the necessary transmission lines were built to carry the power from Canada to the New York City area, where most of the demand is located. The CLCPA has no restrictions on importing zero-emissions power.

The CLCPA also calls for efforts to increase energy efficiency, leading to a 185 trillion BTU reduction below 2025 forecasts. (The State Energy Plan, Table 9B, forecasts total state primary energy use of 3,809 trillion BTU in 2025, compared to 3,715 trillion BTU in 2015.) This is energy of all kinds. However, despite efficiency measures, electricity use is likely to soar as the transport, residential and commercial sectors rely more on electricity, as discussed here.

TRANSPORTATION

Though electricity receives much of the attention, its generation only accounts 13% of the greenhouse gas emissions in the state (17% if net imports are included). Transportation accounts for 33%; residential, 16%; and commercial, 10%.

Drastically reducing transportation emissions will require the replacement over time of virtually all gasoline- and diesel-using passenger cars and SUVs with electric vehicles. (It is possible that some will use hydrogen or other zero-emission energy sources.) Heavy-duty vehicles such as trucks and buses will also need to move to cleaner fuel sources; unless battery technology improves considerably, biogas from municipal and agricultural waste may be used increasingly.

Fuel and emission standards for motor vehicles are under federal control. New York cannot mandate electric vehicles on its own except for publicly owned fleets. The Trump Administration is moving to relax the existing standards, but if a different president is elected in 2020, he or she may well strengthen them again. Meanwhile, an essential role for the state and city governments is to establish a robust system of electric vehicle charging stations.

Efforts are also needed to reduce vehicle miles traveled. CLCPA provides that the plan must include "[l]and-use and transportation planning measures." The state law requiring congestion pricing in Manhattan south of 60th Street will also help that area when it goes into effect in early 2021, both by discouraging driving and by providing new funding for mass transit. Most land-use planning decisions are made at the local level; CLCPA does not explicitly grant any zoning override authority to any state agency. California has adopted statutes requiring regional land use planning with an eye toward increasing density and reducing vehicle miles traveled and air emissions, but implementation of these statutes has proven to be rocky.

OVERARCHING RULE

Tucked in the back of CLCPA as Section 7(2), apparently not to be codified in the Environmental Conservation Law (ECL) or elsewhere, is this provision:

> In considering and issuing permits, licenses, and other administrative approvals and decisions, including but not limited to the execution of grants, loans, and contracts, all state agencies, offices, authorities and divisions shall consider whether such decisions are inconsistent with or will interfere with the attainment of the statewide greenhouse gas limits established in article 75 of the [ECL]. Where such decisions are deemed to be inconsistent with or will interfere with the attainment of the statewide greenhouse gas emission limits, each agency, office, authority or division shall provide a detailed statement of justification as to why such limits/criteria may not be met, and identify alternatives or greenhouse gas mitigation measures to be required where such project is located.

The referenced Article 75—the Climate Change article of ECL that was added by the same enactment—includes the statewide greenhouse gas limits discussed above.

Though the new statute does not reference the State Environmental Quality Review Act (SEQRA), Section 7(2) should function as an amendment to it, since SEQRA is the primary mechanism by which state agencies consider environmental factors. Thus environmental impact statements (EISs) and environmental assessments for state actions should reflect the consideration required by Section 7(2). Moreover, the requirement for "a detailed statement of justification" when the project falls short of the goals would fit well into SEQRA's requirement that a formal statement of findings be issued for all actions that were the subject of an EIS.

Though SEQRA applies to local as well as state entities, Section 7(2) only applies to state entities. However, under the CEQR (City Environmental Quality Review) Technical Manual, actions subject to CEQR that are taken or approved by New York City must include consideration of greenhouse gas emissions.

DRAFTING THE SCOPING PLAN

It will not be necessary to start from scratch in drafting the Scoping Plan to implement the CLCPA.

Governor David Paterson established the New York State Climate Action Council in 2009. It consisted of the heads of many state agencies, and had several large technical advisory committees, whose members spent an enormous amount of time writing their report. The Council issued an interim report in November 2010 with a great many specific recommendations. But Governor Cuomo took office two months later and the report was largely shelved, though parts of it morphed into what became the *State Energy Plan*. Other large parts of that report could be pulled off the shelf to help formulate a new comprehensive climate plan to meet the needs of new legislation.

The *State Energy Plan*, the *New Efficiency: New York* plan from NYSERDA and the Department of Public Service, and other plans have long lists of excellent recommendations. Professor John Dernbach and I have also co-edited a book, *Legal Pathways to Deep Decarbonization in the United States*, that was published by the Environmental Law Institute in April 2019; it contains more than 1,500 specific recommendations for federal, state and local action, many of which are relevant to New York.

CARBON PRICE?

CLCPA makes no reference to imposition of a price on carbon, whether through a carbon tax or otherwise. When the California Air Resources Board (CARB) prepared the scoping plan to implement that state's AB32 law, it concluded that some kind of carbon pricing was essential to meet the objectives. CARB selected a cap and trade mechanism. This was very unpopular with California's environmental justice community, which feared that cap and trade would lead to the continued siting and operation of polluting facilities in low-income and minority communities, as the industries would purchase allowances to authorize them to remain in place without sufficiently reducing their own emissions. Environmental justice groups sued CARB, arguing that a carbon tax should have been proposed instead. These groups won a temporary

halt in implementation of the scoping plan until new analysis was performed justifying the selection of cap and trade.[2]

New York does have a cap and trade program—the Regional Greenhouse Gas Initiative (RGGI), which applies only to carbon dioxide from electric generating stations. However, the price of an allowance for one ton of carbon dioxide under RGGI is only about one-third of the price of a comparable California allowance.

New York will presumably perform a quantitative analysis of the emissions impacts of all the emissions control measures that it is considering. If the reductions selected come up short and do not achieve the necessary emissions reductions, there will be loud calls for a carbon pricing system. Such a state-level system poses inherent tensions with federal rules, as there is considerable potential for leakage, for difficulties under the Commerce Clause, and for a "race to the bottom" from states without such pricing. The political perils are also considerable, as shown by the two public referenda in Washington state in which a state-level carbon tax was defeated. CLCPA does not explicitly authorize any state agency to adopt a carbon pricing system. The New York Independent System Operator has been considering the adoption of a carbon fee of some sort as part of the electric transmission system; as a price on wholesale electricity, this would require the approval of the Federal Energy Regulatory Commission, which has not been sought. A general carbon tax would probably require an action of the State Legislature, and would be an important test of the Legislature's resolve to slash greenhouse gas emissions.

ADAPTATION TO CLIMATE CHANGE

The discussion so far has all been about mitigation—reducing GHG emissions. However, under the best case scenario, temperatures will continue to rise and extreme weather conditions will occur with greater frequency and intensity. Thus adaptation is essential—preparing for the climate change that will happen regardless of our best efforts. In recognition of this reality, in September 2014 Governor Cuomo signed the Community Risk and Resilience Act. It required DEC to adopt official sea level rise projections by January 1, 2016. DEC did that, though a year after the statutory deadline. The projections showed a worst case scenario of 75 inches (more than six feet) by 2100. Recent troubling observations of the West Antarctic and Greenland ice sheets show that the worst case scenario might be even worse than this; and of course seas will not stop rising in 2100—they will continue to rise for centuries.

The Community Risk and Resilience Act required DEC, in consultation with the Department of State, by January 1, 2017 to prepare guidance on implementation of the statute, and additional guidance on the use of resiliency measures that use natural resources and natural processes to reduce risk. DEC has been preparing its Flood Risk Management Guidance, which it issued in draft form in June 2019, 18 months after the statutory deadline for the final version. It is nonbinding technical guidance to agencies, with specific guidelines by type of structure and type of location. The final version has still not been released. The Natural Resiliency Measures Guidelines, also prepared pursuant to the Community Risk and Resilience Act, is still being drafted and has not been publicly released. DEC is also working on updating the state wetlands and coastal erosion hazard area maps to reflect climate change, but their release date has not been announced. Similarly, DEC proposed draft Guidance for Smart Growth Public Infrastructure Assessment in 2018; it is not final yet. The Community Risk and Resilience Act also requires the Department of State, in cooperation with DEC, to prepare model local laws that include consideration of climate risk. It issued the first batch of those in June 2019.

My point in going through all of this is not to dump on the hard-working staffs at the state agencies, who are working under difficult conditions with often inadequate resources. But there is a tendency, in Albany, in New York City, and in just about every other place to set great objectives or to draw up wonderful plans and to put them on the shelf, or to take a very long time to implement them. Given the stakes involved, it is essential that CLCPA be implemented vigorously and on time.

ENDNOTES:

[1]*Consolidated Edison Co. of New York, Inc. v. Town of Red Hook*, 60 N.Y.2d 99, 468 N.Y.S.2d 596, 456 N.E.2d 487 (1983); *Skyview Acres Co-op., Inc. v. Public Service Com'n of State*, 163 A.D.2d 600, 558 N.Y.S.2d 972 (2d Dep't 1990); *Delaney v. Public Service Com'n of State of N.Y.*, 123 A.D.2d 861, 507 N.Y.S.2d 471 (2d Dep't 1986).

[2]*Association of Irritated Residents v. State Air Resources Bd.*, 206 Cal. App. 4th 1487, 143 Cal. Rptr. 3d 65, 80 A.L.R.6th 695 (1st Dist. 2012).

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