

**FOCUS:
ENVIRONMENTAL LAW**



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Long Island and New York City are at the center of the debate over New York State's renewable energy transition. In July 2019, Governor Cuomo signed the Climate Leadership and Community Protection Act ("CLCPA") into law.¹ Recognized as "one of the most ambitious climate targets by a legislature anywhere in the world" at the time of its passage,² the CLCPA mandates economy-wide greenhouse gas ("GHG") emission reductions and the decarbonization of New York's electric grid.³ The CLCPA requires considerable development of off-shore wind electric generation, electric transmission upgrades, and a significant deployment of battery storage facilities to route renewable energy to the Long Island and New York City load centers. While the State seeks to reduce GHG emissions, utilities servicing the downstate region have advised the State that forecasted natural gas demand will continue to increase, requiring additional supply to the area to avoid service moratoria. The continued rise in energy demand—specifically, demand for natural gas—must be balanced with the State's renewable energy goals to avoid uncertainty for developers and the regulated community in the region.

**Climate Leadership and
Community Protection Act**

The CLCPA mandates a statewide 40% reduction in GHG emissions by 2030, and an 85% reduction by 2050.⁴ The Climate Action Council, a 22-member body comprised of agency heads and appointees, is tasked with developing a scoping plan detailing how the State can achieve the CLCPA-mandated GHG emission reductions.⁵ The Climate Action Council must prepare and approve the final scoping plan by January 1, 2023.⁶ Thereafter, the New York State Department of Environmental Conservation ("DEC") must promulgate regulations on emissions reduction measures, based in part on the scoping plan, by January 1, 2024.⁷

In addition, the CLCPA requires the New York Public Service Commission (the "Commission") to establish a program by June 30, 2021, that would ensure that 70% of the State's electricity is generated by renewable energy systems by 2030, with a full decarbonization of the statewide electric system by 2040.⁸ On October 15, 2020, the Commission began implementing

New York's Clean Energy Transition

the renewable energy program by modifying the existing Clean Energy Standard, adopting procurement targets for renewable energy systems including offshore wind, and creating a new program focused on delivering renewable energy into New York City.⁹ By July 1, 2024, the Commission must establish programs requiring the State's load-serving entities to procure certain amounts of renewable generation.¹⁰

Renewable Energy Development

In order to meet the CLCPA's 70% by 2030 renewable energy goal, the New York State Department of Public Service estimates that statewide renewable generation procurement totals "will need to average over 4,500 gigawatt-hours annually over the 2021 to 2026 period."¹¹ To accelerate progress towards that goal, the Governor signed the Accelerated Renewable Energy Growth and Community Benefits Act ("Renewable Siting Act") in 2020, which is intended to streamline the permitting process for renewable generation projects in New York State.¹² Among other things, this legislation requires that final decisions on siting permits for major renewable energy projects (25 MW or more) be made within one year from the date the permit application is deemed complete.¹³ As of July 2021, two projects have been permitted through the expedited process created by the Renewable Siting Act and its implementing regulations: the Riverhead Solar 2 project, a 36 megawatt solar facility located in the Town of Riverhead, Suffolk County; and the Morris Ridge Solar project, a 177 megawatt solar facility that includes 83 megawatts of battery energy storage in the Town of Mount Morris, Livingston County.¹⁴

New York City presents a particular problem, as almost all of the electricity generated within New York City comes from fossil fuel-fired generation sources.¹⁵ The 70% by 2030 renewable electric generation target will be difficult to achieve without new transmission capacity allowing energy from upstate renewable resources to penetrate into New York City.¹⁶ To alleviate this transmission constraint, the Commission order modifying the Clean Energy Standard created the Tier 4 process to increase the flow of renewable energy into New York City. Through this process, the New York State Energy Research and Development Authority ("NYSERDA") will procure up to 1,500 megawatts of environmental attributes associated with renewable generation delivered into New York City.¹⁷ Eligible projects include certain renewable energy systems located in New York City or renewable resources delivered to New York City over a new transmission interconnection.¹⁸ NYSEDA's Tier 4 solicitation has led to bids from seven project sponsors for

projects that would generate over 35 million megawatt hours of renewable energy annually—or enough energy to power 5,000,000 homes.¹⁹ NYSEDA is expected to select winning bids in the third quarter of 2021.²⁰ While the State has taken steps towards achieving the CLCPA clean energy goals, currently it is unclear how the integration of renewable resources will intersect with the downstate region's dependence on existing energy resources.

Natural Gas Supply Issues

At the same time that the State is pursuing the GHG reductions mandated by the CLCPA, downstate New York gas utilities have warned of potential natural gas supply shortages.²¹ In January 2019, Con Edison notified the Commission that it would be imposing a moratorium on new gas customers in its Westchester County service territory, citing gas supply constraints that limited Con Edison's ability to meet demand on the coldest winter days.²² Con Edison expects to end the moratorium in November 2023 if approvals are obtained for a compression facility upgrade project that would increase natural gas capacity to Con Edison's distribution system.²³ In May 2019, National Grid determined it could no longer provide new gas service in much

of its downstate gas service territory, including Brooklyn, part of Queens, and Long Island.²⁴ National Grid's moratorium lasted only months—it ultimately reached a settlement with the State in November 2019, but that settlement did not resolve the long-term natural gas supply issue.²⁵ In its June 2021 Natural Gas Long-Term Capacity Second Supplement Report, National Grid forecasts that without an increase in natural gas capacity, a gap between natural gas supply and demand will start in winter 2022-23 at 9 MDth/day²⁶ and grow to a gap of 518 MDth/Day in 2035-36.²⁷

A number of recently proposed projects intended to address natural gas supply issues have failed to obtain State agency approvals. In 2016, DEC denied a Clean Water Act Section 401 Water Quality Certification ("CWA 401

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WQC”) for the Constitution Pipeline, a proposed 125-mile interstate natural gas pipeline that would carry natural gas from Pennsylvania to New York.²⁸ DEC based its denial on Constitution having failed to supply sufficient information for DEC to determine whether the project would comply with State water quality standards.²⁹ After a number of years litigating DEC’s permit denial, Constitution’s developers announced in February 2020 that they would be halting investment in the project.³⁰ In May 2020, DEC—for the third time—denied a CWA 401 WQC for the Northeast Supply Enhancement (“NESE”) project. The NESE project would have transported natural gas from Pennsylvania through New Jersey and into New York. Among other things, DEC’s permit denial relied on the project’s purported inconsistency with the CLCPA and its GHG emissions limits.³¹

In addition to establishing GHG emissions limits and renewable energy goals, the CLCPA requires state agencies to consider whether the issuance of project permits is inconsistent or interferes with the attainment of the State’s GHG emissions limits.³² As noted above, DEC relied upon that provision of the CLCPA in denying permits for the NESE project. DEC has recently issued preliminary determinations that pending permits for two natural gas-fired power plants would be inconsistent with the CLCPA’s GHG emissions limits.³³ As a result, draft permits issued for the two facilities include conditions requiring the applicants to prepare mitigation plans to reduce facility GHG emissions.³⁴ It is currently unclear what those mitigation plans will entail, but DEC’s draft permits suggest that mitigation could include, among other things, a commitment by the applicants to cease plant operations by a date certain.³⁵

Future of Natural Gas Infrastructure

The role of existing natural gas infrastructure in the State’s clean energy future remains unclear. New York City anticipates that natural gas demand will decrease significantly by 2050.³⁶ On the other hand, some have argued that it is too risky to abandon natural gas since renewable electric generation relies on unproven battery storage technology and that eliminating its use would also ignore the benefits realized from the displacement of high-intensity GHG

emitting fuels like fuel oil by natural gas.³⁷ Columbia University’s Center on Global Energy Policy has contended that investments in existing natural gas infrastructure, including the retrofitting of pipeline to support the delivery of zero-carbon fuels like hydrogen and renewable natural gas, should be part of a net-zero emissions future.³⁸ In addition, in July 2021, Governor Cuomo announced two initiatives to study the role of hydrogen in New York’s zero-carbon future, including a NYSERDA hydrogen strategy study and a New York Power Authority (“NYPA”) demonstration project that will investigate the potential of substituting renewable hydrogen for natural gas at NYPA’s Brentwood Power Station.³⁹ While hydrogen and renewable natural gas are likely to play important roles in the State’s clean energy future, the extent to which these low-carbon fuels can be integrated into existing distribution and energy generation infrastructure has yet to be determined. Given these uncertainties, even if demand for natural gas will diminish, it is likely to remain an important energy resource in the years to come.

If existing natural gas infrastructure cannot be repurposed for the transmission and distribution of renewable natural gas or hydrogen, those systems could be rendered obsolete under the CLCPA’s 2050 mandate.⁴⁰ If that occurs, the cost of obsolescence could be borne in part by ratepayers.⁴¹ In 2020, Corning Natural Gas Company (“Corning”) filed a rate case in which it proposed to accelerate the depreciation of its gas infrastructure to coincide with the CLCPA’s 2050 emissions reduction goals.⁴² Corning argued that the CLCPA goals shorten the effective life of its “existing and future investments in infrastructure.”⁴³ However, the Department of Public Service Staff disagreed, believing Corning’s proposal to be “premature, because it is unknown how the CLCPA will be implemented.”⁴⁴ Ultimately, the Commission rejected Corning’s proposal, stating:

It is impossible to make a precise forecast...of what the Company’s business will look like in 2050, but it is clear that the assumption that the Company will be out of business at that time is at the extreme end of many possibilities. These possibilities include business as usual if the State’s climate goals can be met through other means,...use by the Company of renewable natural gas supplies, and...conversion of

the Company’s system to renewable hydrogen gas.⁴⁵

This exemplifies the challenges confronting the regulated community due to the uncertainty posed by the CLCPA and the State’s pursuit of its GHG emissions reduction goals.⁴⁶

Conclusion

Until the CLCPA scoping plan and implementing regulations are finalized, it will remain unclear how the State will achieve the statewide GHG emissions reductions mandated by the CLCPA. Surely, the increasing energy demands of the metropolitan area remain one of many obstacles to those goals. The uncertainty associated with the CLCPA’s implementation and, in particular, its impact on existing energy resources, is likely to be a significant consideration for developers and the regulated community in the downstate region over the next several years.

1. See *Governor Cuomo Executes the Nation’s Largest Offshore Wind Agreement and Signs Historic Climate Leadership and Community Protection Act*, New York State (July 18, 2019), <https://www.governor.ny.gov/news/governor-cuomo-executes-nations-largest-offshore-wind-agreement-and-signs-historic-climate>.
2. See Jason McKinley and Brad Plumer, *New York to Approve One of the World’s Most Ambitious Climate Plans*, The New York Times (June 18, 2019), <https://nyti.ms/3rYvYiB>.
3. *Id.*
4. ECL § 75-0107(1), as added by the CLCPA.
5. Environmental Conservation Law (“ECL”) § 75-0103, as added by Chapter 106 of the Laws of 2019 (“CLCPA”), available at: <https://bit.ly/3Cjwqgg>.
6. ECL § 75-0103 (12)(c), as added by the CLCPA.
7. ECL § 75-0109(1), as added by the CLCPA.
8. Public Service Law § 66-p(3), as added by the CLCPA, S. 6599 2019-2020 Reg. Sess., §4 (N.Y. 2019).
9. Case 15-E-0302, *Order Adopting Modifications to the Clean Energy Standard* (issued Oct. 15, 2020).
10. *Id.* at subdivision (5), as added by the CLCPA. This subdivision requires the procurement of at least nine gigawatts of offshore wind electricity by 2035, six gigawatts of photovoltaic solar generation by 2025, and three gigawatts of statewide energy storage capacity by 2030.
11. Case 15-E-0302, *White Paper on Clean Energy Standard Procurements to Implement New York’s Climate Leadership and Community Protection Act*, 26 (issued June 18, 2020) (“Staff White Paper”).
12. See *New York State Announces Passage of Accelerated Renewable Energy Growth and Community Benefit Act as Part of 2020-2021 Enacted State Budget*, New York State (Apr. 3, 2020), <https://on.ny.gov/3yu31xt>
13. Executive Law § 94-c(5)(f), as added by Part III of Part 58 of the Laws of 2020.
14. See DMM Matter Numbers 21-00024 and 21-00025, *Siting Permit for a Major Renewable Energy Facility* (issued 6/25/2021).
15. *Staff White Paper*, supra note 11 at 45.
16. *Id.* at 45-46.
17. Tier 4 – New York City Renewable Energy, New York State, <https://www.nyscrda.ny.gov/All-Programs/Programs/Clean-Energy-Standard/Renewable-Generators-and-Developers/Tier-Four>.
18. *Id.*
19. *Id.*
20. *Id.* As of the date of this writing, Tier 4 award notifications have not been made publicly available.
21. See Case 17-G-0606, *Notice of Temporary Moratorium for Gas Service* (filed Jan. 17, 2019).
22. *Id.*
23. *Natural Gas Capacity Expansion*, ConEdison, <https://bit.ly/3rYpjFu>.
24. Case 19-G-0678, Response to the Order to



- Show Cause (filed Oct. 15, 2019). National Grid’s downstate service territory includes Brooklyn, Queens, Staten Island and Long Island.
25. Case 19-G-0678, *Order Adopting and Approving Settlement* (issued and effective Nov. 25, 2019).
 26. MDth=Thousands of Dekatherms.
 27. *Natural Gas Long-Term Capacity Second Supplemental Report*, National Grid (issued June 25, 2021), at 11-12.
 28. DEC Notice of Denial of Water Quality Certification for Constitution Pipeline (April 22, 2016).
 29. *Id.* at 14.
 30. Feb. 24 Media Statement, Constitution Pipeline, <https://constitutionpipeline.com>.
 31. DEC Notice of Denial of Water Quality Certification for NESE Project, at 14 (May 19, 2020).
 32. Section 7(2) of the CLCPA, S. 6599 2019-2020 Reg. Sess., §7 (N.Y. 2019).
 33. See DEC Notice of Complete Application for Astoria Gas Turbine Power LLC; DEC Notice of Complete Application for Danskammer Generating Station.
 34. See Draft Title V Permit for Astoria Gas Turbine Power Facility; Draft Title V Permit for Danskammer Generating Station.
 35. *Id.*
 36. Pathways to Carbon-Neutral NYC, Modernize, Reimagine, Reach (Apr. 2021).
 37. See John J. Faso, Opinion, *We Need Natural Gas to Power Our Lives*, Newsday (March 24, 2021), <https://www.newsday.com/opinion/commentary/gop-congressman-john-faso-natural-gas-energy-1.50192266>.
 38. *Investing in the US Natural Gas Pipeline System to Support Net-Zero Targets*, Columbia University Center on Global Energy Policy, at 10 (Apr. 2021).
 39. See *Governor Cuomo Announces New York Will Explore Potential Role of Green Hydrogen as Part of Comprehensive Decarbonization Strategy*, New York State (July 8, 2021), <https://www.governor.ny.gov/news/governor-cuomo-announces-new-york-will-explore-potential-role-green-hydrogen-part>.
 40. See Case 20-G-0101, *Direct Testimony of Firouzeh Sarhangi*, at 6 (Feb. 27, 2020).
 41. See *Zero Net Gas: A Framework for Managing Gas Demand Reduction as a Pathway to Decarbonizing the Buildings Sector*, Pace Energy and Climate Center, at 26 (July 2020).
 42. Case 20-G-0101, *Order Establishing Rates and Rate Plan*, at 30 (issued May 19, 2021).
 43. *Id.*
 44. *Id.* at 31.
 45. *Id.* at 31-32.
 46. See Case 21-G-0394, *Direct Testimony of Ann E. Bulkeley and Christopher M. Wall*, at 100 (July 16, 2021) (“While the implementation of this legislation [CLCPA] has yet to be determined, the uncertainty surrounding this mandate creates significant financial and market risk for natural gas distribution companies, including Corning Natural Gas”).

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