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Two Major Changes to NY Environmental Law Generate Litigation and Uncertainty

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By Chris Rizzo and Karen Meara. Published in the New York Law Journal

Recent court decisions suggest that the 2019 Climate Leadership and Community Protection Act (CLCPA) and 2021 Environmental Rights Amendment (amendment) are going to have very significant impacts on environmental regulation and litigation in New York state. Through CLCPA, the state legislature mandated the near total elimination of greenhouse gas emissions from New York's economy by 2050. Buried in the law is Section 7(2), which requires all New York state agencies to consider consistency with CLCPA's greenhouse gas mandates when issuing discretionary approvals. Read broadly, state agencies cannot issue permits, licenses, funding awards or other approvals without a finding that either the activity will not interfere with achieving CLCPA's emissions limits or that any interference is justified, and mitigated as much as possible. As the New York State Department of Environmental Conservation (DEC) and other agencies wield this new authority, the resulting agency decisions are likely to elicit much litigation.

The amendment is even broader. It adds to Article I of the New York Constitution a right to a clean environment for citizens, enforceable against all levels of state and local government. DEC has, at least in defending against one lawsuit, resisted a broad interpretation of the amendment. While the full implications of CLCPA and the amendment will not be known for years, recent litigation and agency decision-making shed light on how they have already reshaped New York's legal landscape. And both laws are clearly headed to the court of appeals for interpretation.

According to at least one Supreme Court judge, the Environmental Rights Amendment provides a private right of action and substantially expands the duties of state and local government to consider environmental harms.

The amendment states: "Each person shall have a right to clean air and water and a healthful environment." The June 2021 edition of this column expressed concern about the vaguely worded right, including how courts would interpret it and the impact it would have on the state's ability to address other critical state problems-namely transitioning to a clean energy grid and building hundreds of thousands of desperately needed affordable housing units. Two unreported trial court decisions from December 2022 now underscore those concerns and are likely harbingers of a decade of significant litigation around the amendment.

In two related cases challenging state and local approvals of a landfill expansion in Monroe County a state Supreme Court justice had the occasion to consider the amendment. The two important takeaways from these cases are that the amendment is self-executing, takes effect immediately without the necessity for supplementary legislation, and is enforceable by a private cause of action, and government compliance with environmental laws and rules will not insulate it from a constitutional scrutiny. Beyond this, these cases do little to define what is the standard the government conduct will be judged by on this amendment. See Fresh Air For the East Side v. Town of Perinton (Index No. E2021008617, Sup. Ct. County of Monroe, December 8, 2022); In Fresh Air for the East Side v.

New York State Department of Environmental Conservation (Index No. E202200699, Sup. Ct. County of Monroe, December 20, 2022).

It seems likely that most New York courts will find that the Environmental Rights Amendment is self-executing and enforceable by a private cause of action. But the standards for such litigation remain completely unclear.

Like federal courts considering claims under the U.S. Constitution, New York courts generally apply "strict scrutiny" to laws, regulations and government actions that implicate fundamental rights set forth in the state constitution. Courts almost always rule against government actors in such cases.

For the amendment, a key consideration will therefore be whether the top court applies a true strict scrutiny analysis to such lawsuits or crafts some modified analysis that permits courts to balance the new environmental right with other policy goals and legislative standards. To consider such a standard, the court of appeals might look to Pennsylvania. That state's 1970 environmental rights amendment has resulted in a significant amount of state litigation (two dozen cases in 2021 and 2022 alone). The Pennsylvania Supreme Court has not applied a true strict scrutiny analysis to challenges under the amendment, however, stating: "The Environmental Rights Amendment does not call for a stagnant landscape; nor, as we explain below, for the derailment of economic or social development; nor for a sacrifice of other fundamental values. But, when government acts, the action must, on balance, reasonably account for the environmental features of the affected locale, as further explained in this decision, if it is to pass constitutional muster." See Robinson Township v. Commonwealth, 623 Pa. 564. (Pa. Supreme Ct. 2013) (finding several provisions of the state's oil and gas law unconstitutional); compare P ennsylvania Environmental Defense Fund v. Commonwealth, 285 A.3d 702 (Commonwealth Ct. of Pa. 2022) (dismissing challenge to state's law allowing all-terrain vehicles in state forest after finding the legislature had balanced the promotion of outdoor recreation interests with environmental protection). This balancing test has not resulted in certain doom for all state and local laws and actions impacting the environment. But it has required state and local governments to justify and explain the balancing undertaken to avoid environmental harms.

The Environmental Rights Amendment is likely to serve some environmental goals well-mainly eliminating health threats to drinking water, food and air. It also has the potential, however, to be weaponized against clean energy generation, affordable housing production and other necessary government actions that will have environmental impacts of their own. Courts ought to take a balanced approach, taking care not to allow the amendment to become a blunt tool to derail these efforts.

Climate Change Is Now a Consideration in All State Agency Decision-Making

CLCPA mandates that New York reduce emissions of greenhouse gases from all sources (from 1990 levels) by 40% by 2030, and by 85% by 2050 (emissions limits). To achieve those reductions, CLCPA laid out a multi-year process that included establishment of a Climate Action Council, preparation of draft and final scoping plans (a sector by sector framework for achieving the emissions limits) and promulgation of regulations enacting the scoping plan by the end of 2023.

In addition, CLCPA independently requires "all state agencies, offices, authorities and divisions" to consider whether discretionary approvals, "are inconsistent with or will interfere with" achieving the emissions limits. See CLCPA 7(2). Where an agency determines that an approval would be inconsistent, Section 7(2) requires "a detailed statement of justification" and "alternatives or greenhouse gas mitigation measures." Virtually any government action could trigger this consistency analysis.

Since the enactment of CLCPA, DEC has relied on Section 7(2) to deny three Clean Air Act Title V air permit applications for fossil fuel fired power plants-Danskammer Energy, NRG Astoria and Greenidge Generation. While the facts varied, each applicant proposed to increase facility-specific greenhouse gas emissions over current levels. Those denials were challenged in administrative proceedings, two of which are still pending. The third-NRG Astoria- has become moot, as the Public Service Commission recently approved a subsequent petition by NRG to sell its Astoria property to Beacon Wind for purposes relating to the proposed 1,230 MW Beacon offshore wind facility. The

Danskammer denial has also already been the subject of litigation, generating the first of what will no doubt be many decisions on the scope of authority under Section 7(2).

Danskammer challenged the denial on grounds that Section 7(2) does not give DEC the authority to deny a permit, particularly a Title V air permit in the context of an Article 10 proceeding under the Public Service Law; even if Section 7(2) does grant DEC such authority, DEC's denial was arbitrary and capricious on the merits; that DEC's Section 7(2) denial constituted an unlawful rule-making; and that DEC's denial violated Danskammer's due process rights under the state constitution. The court ruled against the petitioner on all questions of law, and dismissed as unripe fact-based claims that are the subject of the ongoing DEC administrative appeal. See Danskammer Energy v. DEC, 173 N.Y.S. 3d 134 (Sup. Ct., Orange Cty, 2022).

The court's holding that DEC (and by implication other state decision-makers) has the power to deny a permit on the basis of Section 7(2) alone will have statewide implications. But the court appeal is likely to focus on the case's context-an ongoing permit proceeding under Article 10 of the New York State Public Service Law. Article 10 was intended to expedite state permitting of power generation facilities and explicitly preempts other state laws except where specifically allowed. DEC's federally delegated authority to issue Title V air permits is an enumerated exception; consistency analysis under CLCPA 7(2) is not. Ultimately, we expect the broad holding on agency authority under 7(2) to stand but not necessarily in the context of Article 10 applications where the New York Sate Siting Board has ultimate authority.

Notwithstanding the fate of the Danskammer proceedings, Section 7(2) is a powerful tool for state agencies. Regulated industries would be well-advised to ensure future proposals demonstrate consistency with CLCPA's Emissions Limits. No doubt many have already adjusted plans to avoid the fate of Greenidge, NRG and Danskammer-which is exactly the aim of CLCPA.

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