What New York State is Doing, Might Do and Should Not Do on Climate Change

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As 2021 winds down, the New York State Climate Action Council (the Council) is in high gear. The Climate Leadership and Community Protection Act of 2019 (the Climate Act) requires the Council to produce a draft scoping plan by Jan. 1, 2022 to lay out a proposed road map for achieving the deep greenhouse gas reductions required under the Act. While January 1st will hardly be the final word (the draft plan will be the subject of extensive public hearings in 2022), we offer thoughts on several specific initiatives that are under consideration by the Council and/or have been proposed by the New York State Legislature in the interim.

New York's Carbon Reduction Goals

The centerpiece of the Climate Act is a provision calling for a 40% reduction in greenhouse gas emissions from all sources by 2030 (over 1990 levels) and an 85% reduction by 2050. The Council must issue a final scoping plan for achieving those goals by Jan. 1, 2023. By Jan. 1, 2024 the NYS Department of Environmental Conservation (DEC) must promulgate regulations ensuring that "aggregate emissions of greenhouse gas emission sources will not exceed" the established limits. The Climate Act requires those regulations to "include legally enforceable emissions limits, performance standards, or measures or other requirements to control emissions from greenhouse gas emission sources" and to "reflect, in substantial part, the findings of the scoping plan ." See NYS Envtl. Cons. L. §75-0109. The Council has determined that over half of current GHG emissions come from buildings and transportation, particularly heating systems and passenger vehicles, and thus these two areas have been a major focus of the Council's work.

The Climate Act also requires electric service providers to purchase at least 70% of electricity from renewable sources by 2030 and 100% from carbon-free sources (including nuclear) by 2040. Carbon-free electricity will be key to achieving the "all sources" goals, as electrification of vehicles and building heating systems are expected to feature prominently in the Council's draft scoping plan.

Existing Efforts

New York state has been working on reducing climate warming emissions since long before the Climate Act was enacted. This has been particularly true in the power sector. According to the New York Independent System Operator, CO_2 emissions from electricity generation have declined by 52% between 2000 and 2020. There are many reasons for this decline, including DEC's exercise of its authority under the Clean Air Act and adoption of regulations that forced remaining coal-fired power plants to retire. Perhaps the most significant, with parallels for some initiatives under consideration by the Council, is the Regional Greenhouse Gas Initiative or RGGI. RGGI is a voluntary regional cap-and trade program launched in 2009 that, over time has included nine or 10 Northeast and Mid-Atlantic states. Participating states require power generators over 25 MW to purchase emissions credits, and New York has extended that to 15 MW or more. Over time, the available credits and corresponding CO_2 emissions have been cut in half. And in New York, funds generated via the credit auctions have been allocated to the

NewYork Energy Research and Development Authority (NYSERDA) to invest in both assistance to large-scale renewable energy and consumer-end programs for energy efficiency and distributed energy generation (e.g., solar panels).

Also, in 2016 the New York Public Service Commission adopted the Clean Energy Standard, requiring load-serving entities like Con Edison to secure 50% of their power from renewable sources by 2030. That initiative provided the framework for the state to pursue its ambitious offshore wind program.

This focus on large scale renewables is beginning to bear fruit. After two offshore wind solicitations by NYSERDA in 2018 and 2020, there are now five offshore wind projects in active development, expected to generate 4300 MW. That's almost halfway to the Climate Act's goal of 9000 MW of offshore wind by 2035. And the state's new Office of Renewable Energy Siting (ORES) designed to expedite permit and environmental review for onshore utility scale renewable energy projects has been up and running for less than a year but already has an active project pipeline. In the past few months it issued permits for two solar projects that will generate 213 MW, and eight applications (seven solar and one wind) totaling another 1500 MW are in the queue for decision over the next three to seven months. For more on ORES, see our prior article, *New York Gets Serious About Climate and Energy Goals*, *NYLJ* (Oct. 21, 2020).

Vehicles are a tougher nut. While state and local governments can and have been taking steps to electrify public and private vehicles (e.g., charging infrastructure, rebates for EV purchases), federal law generally preempts state and local regulation of private vehicle emissions and courts have strictly enforced the preemption. There is one exception for California and states that choose to adopt California's standards. New York therefore must follow federal law or follow California. Just last month New York set itself up to do the latter. The state adopted new legislation (A4302/S02758) amending the Environmental Conservation Law to require all new passenger vehicles and trucks sold in New York State beginning in 2035 to have zero emissions and directing DEC to promulgate regulations for achieving that goal "to the extent consistent with federal law."

What NYS Should Consider

New York state is moving aggressively on reducing emissions from the energy sector with in-state renewable generation, distributed generation and new connections to hydro-electric power in Quebec. But there is much work to be done on vehicle and building emissions. Here are three options the Council should consider the Transportation Climate Initiative, the Low Carbon Fuel Standard, and efficiency updates to the State Building Code.

Cars and Trucks. The State Legislature is considering the Clean Fuel Standard of 2021 (S2962A/A862). It would amend the Environmental Conservation Law to require DEC to develop a "low-carbon fuel standard" for vehicles, which is an important step on the path to having all new cars meet the "zero emission standards." As noted above, federal law strictly prohibits states from regulating vehicle efficiency and vehicle emissions. Proponents of the bill seem to have concluded that regulating the fuel sources, like gasoline vendors, would not be preempted. Unlike the new law requiring sales of only zero-emission vehicles starting in 2035, the Clean Fuel Standard could also reduce emissions from the existing fossil fuel-fired cars and trucks on the road today.

A second way to address emissions from existing vehicles would be New York's participation in the Transportation & Climate Initiative (TCI), a regional cap and trade scheme targeting GHG emissions from transportation fuels, that would operate much like RGGI by requiring fuel vendors to purchase emissions credits and shift to lower carbon fuel options. TCI has the advantage over the Clean Fuel Standard of leveraging emissions reductions not only in New York, but throughout the Northeast and Mid-Atlantic. Perhaps owing to the economic uncertainly from the Pandemic, in 2021 just four states (Connecticut, District of Columbia, Massachusetts and Rhode Island) chose to sign a memorandum of understanding affirming that they would adopt new laws and regulations to implement TCI. New York and seven other states signed a statement of support. The Council's Transportation advisory panel appears poised to recommend participation in TCI unless there is a multi-sector carbon pricing approach that would generate comparable or greater reductions.

New York needs one or the other to addressing emissions from the existing fleet of both passenger and heavy-duty vehicles on the road today.

Buildings. As we wrote about in our prior column (Challenges for Co-Ops, Condos and Other Residential Buildings in Complying With New York City's 2019 Climate Mobilization Act, NYLJ (June 20, 2019)), New York City's Climate Mobilization Act will force modest changes to buildings in its first compliance period starting in 2024 and significant changes in the second compliance period starting in 2029. It applies specific GHG emission limits to various building classes and fees for failure to meet those limits. Significantly, the law applies to both new and existing buildings of 25,000 square feet or more. It is time for New York state to take a fresh look at the NYS Building Code, which sets a baseline for all municipal building codes, to incorporate better energy efficiency requirements. The Council will undoubtedly do just that, as its current draft plans assume about half of building emissions reductions will be achieved through increased efficiency. See, e.g., Climate Action Council meeting materials, Oct. 14, 2021 at 12. It is also time to think beyond the building code to potential changes in state law to require municipalities to adopt more climate-friendly patterns of development (i.e., smart growth rather than sprawl).

What NYS Should Reject

Both the Senate and Assembly are currently considering the Climate and Community Investment Act (S4264A/A6967), with hearings held in Spring 2021. They should reject the bill entirely. It is certainly well-intentioned, with findings pointing out that climate change is having a larger impact on extreme weather each year; disadvantaged communities are facing disproportionate impacts; and the Climate Act is entirely unfunded.

But critics of the bill have pointed out three key problems the creation of a large new state authority with a mission that conflicts with DEC's and NYSERDA's duplication of efforts of the Climate Action Council and some of the other legislation pointed out above; and use of new funding streams for goals that have little to do with climate change. Our careful reading of the voluminous bill suggests those concerns are valid.

The bill amends the Public Authorities Law to create a new "Climate and Community Investment Authority" with at least seven internal offices mostly focused on using revenues raised under the law to achieve economic and environmental justice goals. The sheer scope of its statutory mandate could make it one of the largest public authorities in the state. The Authority would be required to work with DEC to (1) develop a vaguely-defined "social impact fee" for all regulated air contaminants (climate-related or otherwise) and (2) consider an emission standard for mobile sources. Through an amendment to the Tax Law, the Authority would implement a carbon fee on vendors of any fuel source with GHG emissions (albeit for energy generation or transportation). Finally, the bill also amends the NYS Labor Law to require any renewable energy project receiving state financial assistance to enter into a labor relations agreement. The Authority would be required to spend most of the new funding from the programs and fees above on undefined environmental and economic justice programs.

Other than sheer impatience for action on climate change, it is not clear why the Legislature should not wait for recommendations from the Council of experts that the Legislature itself created under the Climate Act and the public review process it wisely authorized. Proponents do not appear to have considered (1) conflicts with existing DEC and NYSERDA programs and RGGI; and (2) certain federal preemption of any mobile source standards. Also unclear is whether the spending prescribed by the law will actually help the State meet its new zero-emission goals (let alone other employment, labor and equity goals) and how the taxes on carbon and other pollutants would impact New York households and its overall economy. By contrast, the Council is in the process of quantifying and weighing the costs and benefits of the complex policies under consideration.

Stay the course.

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