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New York Appellate Court Curtails Enforceability of Green Amendment Claims

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Over the years, there have been several lawsuits challenging the interpretation and the applicability of New York's environmental rights amendment to the Bill of Rights of the New York State Constitution, Article 1, §19, known as the "Green Amendment", which we reported about in the 2024 forecast. Most notably, in July 2024, an appellate court dismissed Green Amendment claims brought by an environmental group in *Fresh Air for the Eastside, Inc. v. State of New York*, No. 23-00179, 2024 WL 3547674. This is the first Green Amendment case to reach a New York appellate court. In this case, plaintiff claimed that odors and fugitive greenhouse gas emissions from a landfill in upstate New York violates the Green Amendment and that New York State Department of Environmental Conservation (NYSDEC) never conducted an environmental review pursuant to the State Environmental Quality Review Act to address air impacts the community has experienced since 2016. Plaintiff sought closure of the landfill or more enforcement by the NYSDEC. In 2022, the trial court dismissed claims against the landfill operator and New York City as a waste generator but denied the motions to dismiss by the State of New York and NYSDEC and, among other rulings, found that plaintiff had a viable Green Amendment claim. The trial court held that private citizens could bring a Green Amendment case based on the alleged rights violations, which the court could compel New York state to address. Defendants filed an interlocutory appeal.

On appeal, the Appellate Division, Fourth Department dismissed the claims against NYSDEC, holding that enforcement decisions of an administrative agency against a private entity are generally not suitable for judicial review. The appellate court noted that the lawsuit was in fact an Article 78 proceeding seeking mandamus rather than a declaratory judgment action. As to the trial court's dismissal of the claim against New York City, the appellate court agreed with the trial court that lawful conduct in contracting for waste disposal could not be a violation of the Green Amendment. Finally, the court affirmed that Green Amendment claims cannot be made against private parties, such as the landfill operator, because constitutional rights only regulate government action.

The Fourth Department's decision appears to curtail the enforceability of the Green Amendment and maintain environmental regulators' discretion to decide whether to enforce particular regulatory standards. The decision may yet be appealed to New York Court of Appeals.

New York Finalizes Policy for Evaluating Permit Impacts on Disadvantaged Communities

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In 2024, the New York State Department of Environmental Conservation (NYSDEC) issued policy guidance for assessing impacts of environmental permits on disadvantaged communities. The policy, DEC Program Policy – Permitting And Disadvantaged Communities Under The Climate Leadership And Community Protection Act (DEP-24-1), outlines the requirements for analyses developed pursuant to section 7(3) of the Climate Leadership and Community Protection Act (CLCPA). This section of CLCPA requires NYSDEC permitting decisions to (i) not disproportionately burden disadvantaged communities and (ii) prioritize reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities.

The policy applies to permit applications designated as "major" under the Uniform Procedures Act (UPA), Article 70 of the Environmental Conservation Law (ECL), in addition to any project requiring a UPA permit from NYSDEC involving the construction of energy production, generation, transmission, or storage facilities, and any project requiring an UPA permit from NYSDEC with sources and activities that may result in greenhouse emissions. For the policy to apply to the project, NYSDEC must also determine that the project is "likely to affect" a "disadvantaged community". Disadvantaged communities are generally "communities that bear burdens of negative public health effects, environmental pollution, impacts of climate change, and possess certain socioeconomic criteria, or comprise high-concentrations of low- and moderate- income households" (as identified by New York's Climate Justice Working Group). The "likely to affect" standard is met where a permit would increase greenhouse gases or co-pollutants in a disadvantaged community, even where the source is located outside of the disadvantaged community. DEP-24-1 describes the analyses and procedures required to be followed by NYSDEC staff when reviewing various permit application types pursuant to the requirements of Section 7(3), including considering potential impacts within a half mile of the facility.

Once a project is determined to be subject to DEP-24-1, facilities operating in "disadvantaged communities" are required to prepare "existing burden reports" identifying information such as existing pollution sources affecting the community and potential routes of human exposure to pollution from those sources, ambient concentrations of regulated air pollutants and regulated or unregulated toxic air pollutants, noise and odor levels, and the projected contribution of the proposed action to existing pollution burdens in the community and potential health effects of such contribution. A permit applicant may propose, or NYSDEC may impose, conditions on the permit to address any disproportionate burden. The analysis will be subject to enhanced public participation opportunities following guidance set out in NYSDEC Commissioner's Policy 29 (CP-29).

DEP-24-1 is one of several actions taken by New York state to implement the CLCPA. On December 30, 2024, New York's Cumulative Impacts Bill came into effect, amending the State Environmental Quality Review Act (SEQRA) and the UPA to require consideration of the effects of disproportionate pollution impacts on a disadvantaged community. In 2022, the NYSDEC Commissioner's Policy 49 (CP-49) / Climate Change and DEC Action, and NYSDEC Division of Air Resources Policy 21 (DAR-21) / CLCPA and Air Permit Applications were finalized.

New York's New Climate Superfund Law Signed

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On December 26, 2024, New York Governor Hochul signed the Climate Change Superfund Act (CCSA) into law to attempt to impose the cost to repair climate change impacts on the fossil fuel industry. The CCSA amends the New York State Environmental Conservation Law to establish a climate change adaptation cost recovery program overseen by the New York State Department of Environmental Conservation (NYSDEC).

Predicated on the "polluter pays" principle, the new law authorizes New York State to issue cost recovery demands to "responsible parties" defined as entities that "engaged in the trade or business of extracting fossil fuel or refining crude oil" during any part of the period from January 1, 2000 to December 31, 2018 (the covered period), and that NYSDEC determines is responsible for more than one billion tons of covered greenhouse gas (GHG) emissions.

The CCSA applies a formulaic approach to determining the amount of GHGs attributable to a responsible party:

- 942.5 tons of CO_2 equivalent is treated as released for every million pounds of coal attributable to a responsible party
- 432,280 metric tons of CO_2 equivalent is treated as released for every million barrels of crude oil attributable to a responsible party; and
- 53,440 metric tons of CO_2 equivalent is treated as released for every million cubic feet of fuel gas attributable to a responsible party.

NYSDEC has until the end of 2025 to promulgate regulations implementing the CCSA. The legislation requires NYSDEC to create a climate change adaptation master plan for New York state by the end of 2026. CCSA is expected to face significant legal challenges on issues such as the scope of the legislation's reach, its retroactive application, federal preemption arguments, and due process concerns.

New York State PFAS Update

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Effective January 1, 2025, New York's Environmental Conservation Law (ECL) established a restriction of per- and polyfluoroalkyl substances (PFAS) in apparel applying specifically to apparel with intentionally added PFAS. According to that provision, no person shall sell or offer for sale in New York, any new, not previously used, apparel containing PFAS as intentionally added chemicals after January 1, 2025. After January 1, 2028, a new restriction will go into effect that applies specifically to outdoor apparel for severe wet conditions with intentionally added PFAS, such that no person shall sell or offer for sale in New York any new, not previously used, outdoor apparel for severe wet conditions containing PFAS: (a) at or above a level that the department shall establish in regulation, or (b) as intentionally added chemicals. Under the ECL, PFAS are defined as "a class of fluorinated organic chemicals containing at least one fully fluorinated carbon atom."

With respect to Environmental Remediation Programs, New York State Department of Environmental Conservation (NYSDEC) is in the process of establishing a rural background level of PFAS in soils for

purposes of developing soil cleanup objectives (SCOs). In the interim, NYSDEC has proposed *Soil Cleanup Guidance* values for perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS) for use in the environmental cleanup context.

NYSDEC's Division of Water is anticipated to finalize its draft *Technical and Operational Guidance Series (TOGS) 1.3.14: "Publicly Owned Treatment Works (POTWs) Permitting Strategy for Implementing Guidance Values for PFOA, PFOS, and 1,4-Dioxane"* in 2025. The TOGS 1.3.14 will establish Guidance Values (GVs) for certain PFAS as applied to State Pollutant Discharge Elimination System permits for POTWs. This guidance is anticipated to have a material impact on industrial wastewater dischargers into POTWs due to the low levels expressed by the GVs for these contaminants. As such, the introduction of any detectable amount of PFOA or PFOS would represent a substantial change in character of the wastewater discharge and would require notice to the NYSDEC. In addition, as part of the regularly required pollutant scan of industrial dischargers that POTWs conduct, the NYSDEC will require influent sampling for all 40 PFAS compounds available through EPA's Method 1633 and may raise additional concerns for impacted industrial users.

Under NYSDEC jurisdiction for issuance of air pollution control permits and registrations to sources of air pollution, NYSDEC previously published revisions to its *DAR-1: Guidelines for the Evaluation and Control of Ambient Air Contaminants Under Part 212,* which established *Annual and Short-term Guideline Concentration (AGC/SGC)* values for several PFAS in the context of air permitting. According to NYSDEC staff, the DAR-1 will be updated in early 2025 and is anticipated to contain several new additional PFAS. The DAR-1 updates will be developed in consultation with the New York State Department of Health toxicology section to revise and derive the ambient air values based on the latest science available.

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