

[Latham & Watkins Environment, Land & Resources Practice](#)

November 15, 2019 | Number 2547

## NY Legislation Sets Bold Climate Change Goals

### ***Examining the regulatory framework of New York's legislative climate change initiative — the Community Leadership and Community Protection Act.***

On Thursday, July 18, 2019, New York Governor Andrew Cuomo signed into law the [Climate Leadership and Community Protection Act](#) (CLCPA), which sets aggressive climate change goals and associated renewable electricity, energy storage, and energy efficiency mandates that are intended to put New York State on a path to becoming a net-zero carbon economy by 2050.

The CLCPA requires New York State to implement measures aimed to reduce emissions of greenhouse gases (GHG) by 40% below 1990 levels by 2030 and by 85% below 1990 levels by 2050.<sup>1</sup> To achieve net-zero emissions by 2050, the CLCPA allows the state to reduce the remaining 15% of emissions through carbon offsets.<sup>2</sup> In doing so, the CLCPA expressly aims to reduce 100% of the electricity sector's GHG emissions by 2040, with an interim goal of 70% by 2030.<sup>3</sup> To achieve this goal, the CLCPA mandates the deployment of: 6,000 MW of solar generation by 2025; 3,000 MW of energy storage capacity by 2030; and 9,000 MW of offshore wind generation by 2035.<sup>4</sup> In addition, the CLCPA also seeks to increase energy efficiency by 23% from 2012 levels by 2030.<sup>5</sup>

How these goals will be accomplished remains unclear. The CLCPA establishes a 22-member Climate Action Council (the Council) that will, over the next two years, develop a "Scoping Plan" to identify and recommend regulatory measures and other state actions designed to meet the reduction targets.<sup>6</sup> During that time, the New York State Department of Environmental Conservation (DEC) will begin reporting on statewide emissions annually and consider whether to establish a mandatory registry and reporting system.<sup>7</sup>

This *Client Alert* summarizes the background that led to the adoption of the CLCPA and discusses the following elements of the law: (1) the forthcoming rulemaking process for the promulgation of regulations implementing the CLCPA targets; (2) the creation of the Climate Action Council and Just Transition Working Group, and the preparation of a Scoping Plan; (3) the provision of limited compliance options, including offsets; and (4) the definition of environmental justice goals.

### **Background to the CLCPA**

The CLCPA's predecessor bill, the Climate and Community Protection Act (CCPA), was first introduced in 2016 and subsequently reintroduced in each of the following two years, when it failed to obtain legislative approval. The CCPA was reintroduced in 2019 following an election in which members of the Democratic

Party obtained majorities in both the State Assembly and the State Senate. In early 2019, Governor Cuomo proposed his own Climate Leadership Act, or “New York’s Green New Deal,” which was widely viewed as more moderate.<sup>8</sup>

To increase support, early proponents of the CCPA agreed to certain concessions in the final CLCPA. Some of the key changes are summarized in the chart below. Notably, with respect to renewable energy generation, the goals set forth in the CLCPA are more ambitious than those set forth in the CCPA. For comparison purposes, this chart also includes a column summarizing the reduced GHG emissions and the increased renewable energy generation goals currently in force under California law.

Goal	CCPA	CLCPA	California
Reduced GHG Emissions	50% below 1990 levels by 2030	40% below 1990 levels by 2030	40% below 1990 levels by 2030 <sup>11</sup>
	100% below 1990 levels by 2050 <sup>9</sup>	85% below 1990 levels by 2050, the remaining 15% to be reduced by offsets <sup>10</sup>	80% below 1990 levels by 2050 <sup>12</sup>
Increased Renewable Generation	50% by 2030 <sup>13</sup>	70% by 2030	50% by 2026
		100% by 2040 <sup>14</sup>	60% by 2030  100% by 2045 <sup>15</sup>

## Promulgation of Regulations

Within one year of the CLCPA’s signing, the DEC must establish a statewide GHG emissions limit equal to a reduction of 40% below 1990 emissions by 2030 and 85% below 1990 emissions by 2050.<sup>16</sup> Under the CLCPA, a GHG is defined as carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride, and any other substance emitted into the air that may be reasonably anticipated to cause or contribute to anthropogenic climate change.<sup>17</sup> These GHG emissions limits will be measured in tons of carbon dioxide equivalents for each type of GHG.<sup>18</sup> The DEC is further charged with promulgating rules and regulations within four years of the CLCPA’s signing to ensure that these limits are enforced and to implement the recommendations of the Scoping Plan.<sup>19</sup>

## Climate Action Council, Just Transition Working Group, and Scoping Plan

The Council includes the heads of New York state agencies and other members appointed by the governor, the Senate, and the Assembly. The DEC Commissioner and the President of the New York State Energy Research and Development Authority (NYSERDA) will serve as co-chairs.<sup>20</sup>

Within two years of the bill’s signing, the CLCPA directs the Council to publish a draft scoping plan (Scoping Plan) that will “identify and make recommendations on regulatory measures and other state actions” to meet the reduction targets set forth in the CLCPA.<sup>21</sup> Thereafter, the draft Scoping Plan will be subject to public hearing and comment.<sup>22</sup> By the third year, the Council must submit a final Scoping Plan to the New York Legislature. In developing the Scoping Plan, the Council will convene and consult advisory panels that will contribute industry expertise on specific topics and will be chaired by heads of the relevant agencies.<sup>23</sup> The Scoping Plan will be updated at least once every five years.<sup>24</sup>

Additionally, the Council will collaborate with a “Just Transition Working Group” (the JTWG).<sup>25</sup> The JTWG will be chaired by the New York State Commissioner of Labor and the President of NYSEERDA, and will advise on issues pertaining to workforce development and impact on industry.<sup>26</sup> The JTWG will publish recommendations on how to address workforce development and other issues related to energy-intensive and trade-exposed entities, disadvantaged communities and underrepresented segments of the population, and measures to minimize carbon leakage risk and any anti-competitive impacts of the policies.<sup>27</sup> The CLCPA further directs the JTWG to conduct a study of the CLCPA’s anticipated effect on jobs and potential workforce disruption.<sup>28</sup>

The approach involving the preparation of a Scoping Plan to identify and develop regulatory measures to meet the emissions targets appears to be modeled on California’s landmark climate legislation, the Global Warming Solutions Act of 2006, which is also known as Assembly Bill 32 (AB 32).<sup>29</sup> Indeed, in August 2006, AB 32 directed the California Air Resources Board to develop another “scoping plan” before January 1, 2009 to meet the objectives of AB 32. The initial preparation and the subsequent five-year updates to California’s scoping plan have been a massive undertaking involving a large team of environmental and climate professional at the Air Resources Board and numerous agencies on each occasion. Whether the DEC has the necessary internal capabilities to develop a similar document remains unclear.

## Compliance Flexibility

To comply with future measures intended to meet the reduced GHG emissions goals in the CLCPA, the CLCPA provides that GHG sources may reduce their emissions directly or utilize an “alternative compliance mechanism” (ACM) for up to 15% of an entity’s own compliance obligation.<sup>30</sup> However, the use of ACMs is subject to stringent limitations. For example, the DEC will establish an ACM application process that, at a minimum, requires a source to sufficiently demonstrate that compliance with the GHG limits is “not technologically feasible, and that the resource has reduced emissions to the maximum extent practical.”<sup>31</sup> In turn, the DEC will reevaluate the participation of a source in the ACM every four years and determine whether the source still needs an ACM, considering the extent to which the source is utilizing the “best available technology standards.”<sup>32</sup> Sources in the electric generation sector will not be eligible to participate in the ACM.<sup>33</sup>

Under the CLCPA, GHG emission offset projects that result in localized benefits to disadvantaged communities will be prioritized.<sup>34</sup> Also, carbon offsets must not disproportionately harm disadvantaged communities and must:

- Be located in the same county within 25 miles of the source of the emissions (to ensure the benefits are local)
- Be designed to provide a discernable benefit to the environment rather than to the source
- Enhance the conditions of the ecosystem or geographic area adversely affected by the source emissions; and
- Substantially reduce or prevent the generation or release of pollutants through source reduction<sup>35</sup>

Permissible offset projects include, but are not limited to, carbon capture and sequestration, natural carbon sinks, greening infrastructure, and anaerobic digesters. Biofuels and waste-to-energy projects are *not* eligible for credit.<sup>36</sup>

Initial impressions suggest that the restrictions on the creation and use of offsets in the CLCPA are so stringent that they appear to render the use of the compliance mechanism completely illusory. If industry really wants to use offsets in the future, changes may have to be made to the CLCPA going forward.

## Environmental Justice

Detailed provisions in the CLCPA mirror elements of the conceptual-level Green New Deal as proposed at the federal level in its attempt to protect disadvantaged communities. The CLCPA provides for the creation of a “climate justice working group,” which will include representatives from environmental justice communities to develop criteria to identify which geographic areas qualify as disadvantaged communities disproportionately burdened by pollution.<sup>37</sup> The working group’s conclusions will guide the application of the many directives in the CLCPA geared toward aiding such communities.<sup>38</sup> The CLCPA also provides that no less than 35% of clean-energy funding will be spent in such communities, with a goal of 40% spending.<sup>39</sup>

On or before October 1, 2022, the DEC and the climate justice working group will prepare a program of advanced sensing monitoring equipment that will measure and record air pollutant concentrations in ambient air at or near sensitive receptor locations in disadvantaged communities.<sup>40</sup> Thereafter, pursuant to an assessment and identification of disadvantaged communities with high cumulative exposure burdens, the DEC will select certain communities for emissions reductions programs.<sup>41</sup> This process appears to follow the approach included in California’s Assembly Bill 617 (AB 617).<sup>42</sup> AB 617 was part of the compromise forged in 2017, whereby California’s cap-and-trade program was extended through 2030 with a 40% reduction target below a 1990 baseline.

To measure the value of the reductions intended to occur pursuant to CLCPA, the DEC — in consultation with NYSERDA — will establish a social cost of carbon in terms of dollars per ton of carbon dioxide equivalent.<sup>43</sup>

## Conclusion

The ambitious and aggressive decarbonization goals set forth in the CLCPA will require a significant transformation to all sectors of New York’s economy. If these goals are met, the transformation will include a completely decarbonized electricity sector, a largely if not fully electrified transportation sector, and large-scale reduction if not elimination of the use of fossil fuels, such as natural gas, in other sectors. At this point, the difficulties, complexities, and costs for New Yorkers associated with implementing such a transformation are unclear. All eyes will turn to how the Council will shape the details of the Scoping Plan in the coming years and which sectors will experience the greatest impacts. Whatever form the Scoping Plan takes, New York’s milestone law is nonetheless a major addition to the handful of states that have committed to “ambitious” clean energy policies.

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## Endnotes

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- <sup>1</sup> Community Leadership Climate Protection Act (CLCPA), §2, amending Environmental Conservation Law (ECL) §75-0107 (1), available at: <https://www.nysenate.gov/legislation/bills/2019/s6599>.
- <sup>2</sup> *Id.* at §2, amending ECL §75-0107(4).
- <sup>3</sup> *Id.* at §4, amending Public Service Law (PSL) §66-p(2).
- <sup>4</sup> *Id.*, amending PSL §§66-p(5), (6). Some of these mandates codify goals originally proposed by Governor Cuomo as enhancements to New York State's regulation-based Clean Energy Standard as adopted and administered by the New York Public Service Commission.
- <sup>5</sup> *Id.*, amending PSL §66-p(6).
- <sup>6</sup> *Id.* at §2, amending ECL §75-0103.
- <sup>7</sup> *Id.* at §2, amending ECL §75-0105.
- <sup>8</sup> Rachel Cohen, How Unions and Climate Organizers Learned to Work Together in New York, June 17, 2019, TruthOut, available at: <https://truthout.org/articles/how-unions-and-climate-organizers-learned-to-work-together-in-new-york/>.
- <sup>9</sup> New York governor legislature reach compromise on omnibus climate bill, Carbon Pulse, available at: <https://carbon-pulse.com/76814/>.
- <sup>10</sup> CLCPA at §2, amending ECL §75-0107(1).
- <sup>11</sup> SB 32 California Global Warming Solutions Act of 2006, adding §38566 to the Health and Safety Code, available at [https://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=201520160SB32](https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB32).
- <sup>12</sup> Executive Order S-3-05, June 1, 2005, available at: [https://www.climatechange.ca.gov/state/executive\\_orders.html](https://www.climatechange.ca.gov/state/executive_orders.html).
- <sup>13</sup> New York governor legislature reach compromise on omnibus climate bill, Carbon Pulse, available at: <https://carbon-pulse.com/76814/>.
- <sup>14</sup> CLCPA at §4, amending PSL §66-p(2)
- <sup>15</sup> SB-100 California Renewables Portfolio Standard Program: emissions of greenhouse gases (2018), §1(b), amending Public Utilities Code §399.11(a).
- <sup>16</sup> *Id.* §2, amending ECL §75-0107(1).
- <sup>17</sup> *Id.* at §2, amending ECL §75-0101(7).
- <sup>18</sup> *Id.* at §2, amending ECL §75-0101(8).
- <sup>19</sup> *Id.* at §2, amending ECL §75-0109(1).
- <sup>20</sup> *Id.* at §2, amending ECL §75-0103(1), (4).
- <sup>21</sup> *Id.* at §2, amending ECL §75-0103(11) - (13).
- <sup>22</sup> *Id.* at §2, amending ECL §75-0103(12).
- <sup>23</sup> *Id.* at §2, amending ECL §75-0103(7)
- <sup>24</sup> *Id.* at §2, amending ECL § 75-0103(15).
- <sup>25</sup> *Id.* at §2, amending ECL § 75-0103(8).
- <sup>26</sup> *Id.*
- <sup>27</sup> *Id.* at §2, amending ECL §75-0103(8)(f).
- <sup>28</sup> *Id.* at §2, amending ECL §75-0103(8)(g).
- <sup>29</sup> California Global Warming Solutions Act of 2006, available at: [https://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=200520060AB32](https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=200520060AB32).
- <sup>30</sup> CLCPA at §2, amending ECL §§ 75-0107(4), 75-0109(4).
- <sup>31</sup> *Id.* at §2, amending ECL §75-0109(4)(e).
- <sup>32</sup> *Id.*
- <sup>33</sup> *Id.* at §2, amending ECL §75-0109(4)(f).
- <sup>34</sup> *Id.* at §2, amending ECL §75-0109(4)(j).
- <sup>35</sup> *Id.* at §2, amending ECL §75-0109(4)(h).
- <sup>36</sup> *Id.* at §2, amending ECL §75-0109(4)(g).
- <sup>37</sup> *Id.* at §2, amending ECL §75-0111(1).

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at §2, amending ECL §75-0117.

<sup>40</sup> *Id.* at §2, amending ECL at §75-0115(2).

<sup>41</sup> *Id.* at §2, amending ECL §75-0115(4).

<sup>42</sup> AB-617 Nonvehicular air pollution: criteria air pollutants and toxic air contaminants (2017), available at:  
[https://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=201720180AB617](https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB617).

<sup>43</sup> CLCPA at §2, amending ECL §75-0113.