

2023 Environmental and Energy Law Forecast

NEW YORK

New York Lower Courts Give Green Light to Green Amendment Lawsuits, for Now ***Stephen D. Daly, Esq.***

As reported in last year's forecast, as of January 1, 2022, New York became one of the few states to have incorporated an environmental rights amendment into its Bill of Rights. The New York Amendment, proverbially known as the "Green Amendment," provides that, "Each person shall have a right to clean air and water, and a healthful environment."

Judicial decisions interpreting the new Amendment have now started trickling in, offering a glimpse into how the rights protected by the Amendment might be enforced. In *Fresh Air for the Eastside, Inc. v. State of New York*, Index No. E2022000699 (Monroe Cnty. Dec. 7, 2022), a Monroe County Supreme Court held that the Amendment affords a cause of action by a private party against the government for violations of the Amendment, but not against another private party. The lawsuit concerned a landfill located outside of Rochester, New York. The plaintiffs, a group of neighboring residents, sued the landfill's operator, a private entity, along with the State of New York and other government entities, seeking declaratory and injunctive relief on the basis that the operation of the landfill violated the plaintiffs' constitutional rights to a healthful environment.

In a ruling on motions to dismiss, the court dismissed the claim against the landfill operator but allowed the claim against the State to proceed. The court held that the Amendment "makes no reference to private entities" and therefore imposes a restriction only on the government. As for the State, the court rejected the argument that the plaintiffs' claims had to be pursued as an administrative challenge to final agency action under CPLR Article 78. The court held that it was well within its authority "to compel the State to comply with the Constitution" in a declaratory judgment action, seeking injunctive relief, when the harm from the landfill was allegedly ongoing and unabated. The court also rejected the State's argument that the lawsuit called into question the Department of Environmental Conservation's enforcement discretion, which is not typically subject to judicial review. While the State may exercise its discretion under various environmental statutes as to when and how it implements its enforcement authority, the court reasoned, "the State lacks the discretion to violate the Constitution." Thus, assuming the allegations in the complaint were true, the court held that it was apparent that "more needs to be done to protect [plaintiffs']

constitutional rights to clean air and a healthful environment.” The court therefore denied the State’s motion to dismiss.

A related lawsuit involving many of the same parties, *Fresh Air for the Eastside, Inc. v. Town of Perinton*, Index No. E2021008617, was an Article 78 proceeding challenging various local approvals issued the landfill. The court denied the defendants’ motions to dismiss the plaintiffs’ constitutional challenge based on the Amendment, allowing the claim to move forward. There, the court noted that “constitutional inquiries of government action are more rigorous” than the usual “arbitrary and capricious” standard and suggested that it was improper for the court to afford the same deference to the agency as was usually afforded in Article 78 proceedings. The court ultimately denied the motions to dismiss the constitutional claim based on the Amendment, allowing it to proceed as a basis for overturning the Town’s and the Zoning Board of Appeals’ decisions.

If the first judicial decisions are any indication, both private and public parties will want to closely track developments concerning the Amendment in these and similar cases. While private parties like the landfill operator may not be subject to direct lawsuits for violations of the law, they will undoubtedly feel the force of the Amendment if the government is obligated to do “more” – possibly above and beyond their statutory prerogatives – to ensure New Yorkers’ rights to a healthful environment are not infringed, as the Monroe County Supreme Court’s decisions suggest. Suffice it to say that these decisions are just the opening salvo in this developing area of the law.

New York Poised to Pursue Aggressive Agenda to Curb Greenhouse Gas Emissions

Stephen D. Daly, Esq.

New York’s 2019 Climate Leadership and Community Protection Act (the “Climate Act”) mandates that by 2030, New York must achieve 70 percent renewable energy generation, and by 2040, must achieve 100 percent zero-emission electricity. The Climate Act also created the Climate Action Council (the “Council”) and tasked it with developing a scoping plan to serve as the initial framework for how the State will achieve the Climate Act’s ambitious goals.

On December 19, 2022, the Council announced the approval and adoption of the New York State Climate Action Council Scoping Plan (“the Plan”). The Plan includes a sweeping list of recommendations that touches upon practically every sector of the economy. Its recommendations include:

- an aggressive transition to renewable energy sources, including new and upgraded transmission and distribution systems so that renewable energy generated upstate can be moved to more populated areas downstate;
- the implementation of an economy-wide cap-and-invest program; improved monitoring, reduction, and capture of methane emissions from solid waste management facilities and water resource recovery facilities;
- the timed phase-out of gasoline vehicles so that by 2030, nearly all light-duty vehicle sales are zero-emission; and
- the timed phase-out of fossil fuel heating and cooking appliances so that when they are retired, they are replaced with electric alternatives.

With the Plan finalized, the next phase for implementing the Climate Act will fall on the New York State Department of Environmental Conservation (DEC). DEC has until January 1, 2024 to draft and promulgate enforceable regulations to ensure the State meets the Climate Act's statewide greenhouse gas emission limits as outlined in the Plan. Given the breadth of the Plan, and a newly elected Governor in place who is committed to fighting Climate Change, these forthcoming regulations will likely propose sweeping changes that may affect virtually every industry in the State. Stakeholders will therefore want to closely monitor any opportunity for public input.

DEC Set to Renew and Add Climate Change Requirements to the Multi-Sector General Permit for Industrial Stormwater (GP-0-23-001)

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The New York State Department of Environmental Conservation (DEC) is expected to finalize its renewed Multi-Sector General Permit (MSGP) for stormwater associated with industrial activities in early 2023. The existing MSGP is set to expire on February 28, 2023 with the new permit anticipated to go into effect on March 1, 2023 for another 5-year term. Existing MSGP permit holders will need to submit a Notice of Intent (NOI) for coverage under the renewed MSGP within 90-days of the MSGP being renewed (*i.e.*, on or before May 30, 2023), in order to maintain permit coverage and authorization to discharge stormwater associated with industrial activities. Permittees will also need to update their Stormwater Pollution Plan (SWPPP) which contains a regulated facility's best management practices (BMPs) for preventing industrial activities from polluting stormwater.

Facilities that are currently exempted from stormwater permitting through a Conditional Exclusion for No Exposure (NEC) are anticipated to be able to maintain their NEC status as the NEC will remain valid until the expiration date identified on the letter from DEC that approved the NEC.

The renewed MSGP is substantially similar to the existing MSGP, with a few notable changes. For instance, pursuant to the Climate Leadership and Community Protection Act and related guidance, the new MSGP contains a requirement for permittees to implement enhanced stormwater control measures for facilities that have a potential to be impacted by future physical climate risks. Regulated facilities will need to evaluate the potential to be impacted by future physical climate risks due to major storm events, storm surge, seiche, sea-level rise and flood events pursuant to the Community Risk and Resiliency Act (CRRRA), 6 NYCRR Part 490, and associated guidance (e.g., "State Flood Risk Management Guidance" (SFRMG) and "Estimating Guideline Elevations"). The new MSGP specifically identifies enhanced BMPs which these permittees must consider, including but not limited to:

- Reinforcing interior and exterior material storage structures to withstand flooding;
- Delaying delivery of raw materials when a major storm event is expected within 48 hours;
- Elevating or securing semi-stationary structures to prevent floating;
- Permanently storing materials and waste above expected flood level;
- Permanently reducing or eliminating exterior storage; and
- Relocating company vehicles to higher ground.

Permittees must evaluate these measures and then update their SWPPP to identify which enhanced stormwater control measures were selected for implementation and which were not, along with an explanation as to why certain control measures were not selected, where applicable.

The new MSGP will require the electronic submittal of the NOI and related materials, as well as the Annual Certification Report (ACR) and Discharge Monitoring Reports (NetDMR) through DEC's nFORM portal. The new MSGP also clarifies industrial sector requirements for Sectors engaged in dismantling of used motor vehicles for resale of parts (Sector M) and facilities primarily engaged in dismantling of motor vehicles for scrap (Sector N), with separate and specific BMPs and monitoring requirements for each activity. Finally, other changes include overall organizational and formatting changes, as well as duplicative language removal.

Covered facilities should review the new MSGP and discuss the enhanced BMP climate-related requirements to gain a full understanding of the complexities that may be encountered when addressing any climate-related risks for its covered facility.

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