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NY Cap-and-Invest Program faces delays amid legal challenges

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News reports, social media feeds and client alerts are full of the latest dramatics and developments around New York State's Climate Leadership and Community Protection Act (CLCPA), so much so that it's often difficult to cut through the noise to determine when real-world consequences may result.

THE HISTORY

The CLCPA was signed into law in 2019 and is intended to position New York State at the forefront of climate action and the clean-energy transformation. The CLCPA put the following mandates in place:

- Achieve 100% carbon-free electricity by 2030.
- Increase renewable energy sources to 70% by 2050.
- Reduce statewide greenhouse gas emissions (GHG) by 85% by 2050.
- Implement additional environmental actions to offset the remaining 15% of emissions, reaching net-zero overall.

Following the passage of the CLCPA, New York State completed a Scoping Plan that solicited input from various stakeholders and the public to determine how to achieve the goals of the CLCPA. Among the Scoping Plan's recommendations was the creation of a Cap-and-Invest Program, which, when put in place, will establish a cap on the annual amount of greenhouse gas that can be emitted by certain large-scale sources who exceed a certain threshold of emissions. Under the program, if an emitter exceeds its annual cap, it will be required to purchase allowances to offset certain of its GHG emissions, and there will be a secondary market to allow businesses to sell and purchase these allowances.

Governor Kathy Hochul has directed the New York State Department of Environmental Conservation (NYSDEC) and the New York State Energy Research and Development Authority (NYSERDA) to create and implement the Cap-and-Invest Program. In addition, it falls to NYSDEC to establish regulations to implement the CLCPA more broadly. The statute set a deadline of January 1, 2024, for NYSDEC to complete its regulations for the CLCPA, including the Cap-and-Invest Program, which is a deadline initially (optimistically?) believed would provide sufficient time for implementation ahead of the first mandatory emissions limit under the CLCPA in 2030.

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To date, the NYSDEC and NYSERDA have yet to establish any final regulations or implement the Cap-and-Invest Program.

THE LAWSUITS

In March 2025, Earthjustice, Sierra Club and other environmental groups (Petitioners) filed an Article 78 petition in the Albany County Supreme Court against NYSDEC in an attempt to force NYSDEC to promulgate the long-delayed regulations.

In October 2025, the Supreme Court granted the petition and directed NYSDEC to promulgate regulations that comply with the CLCPA no later than February 6, 2026. In November 2025, NYSDEC filed a motion requesting that the Supreme Court modify its order to allow NYSDEC a "reasonable time to promulgate regulations." After the Supreme Court denied that motion, NYSDEC appealed to the Appellate

Division, Third Department, seeking to overturn the Supreme Court's decision and order that required NYSDEC to issue final regulations by February 6, 2026.

The Supreme Court determined that NYSDEC's filing of this appeal triggered an automatic stay on any deadlines, and rendered NYSDEC's request to extend those deadlines moot. Therefore, NYSDEC does not have to promulgate any regulations relating to the CLCPA until the Appellate Division, Third Department orders NYSDEC to do so. In response, the Petitioners have filed a motion to the Appellate Division, Third Department to modify the automatic stay to apply only to the adoption of final regulations, such that NYSDEC would still be required to publish draft regulations for public comment by approximately April 2026.

As of February 11, 2026, the case remains on appeal before the Appellate Division.

WHAT'S NEXT

The ongoing litigation layers even more uncertainty on top of the massive unknown effects of implementing the CLCPA on property owners and tenants alike. However, we do know that there will be regulations, and even though the specifics remain opaque, proactive parties should already be considering their own actions to deal with the likely impacts from the CLCPA.

Property owners and commercial tenants should consider tracking emissions and energy usage from their properties, as any regulations promulgated under CLCPA will likely require future reporting. Commercial tenants should consider whether their business is considered a "large-scale source of gas emissions" or a "large-scale distributor of heating and transportation fuels," as this will likely require those businesses to purchase or obtain allowances for the emissions associated with their activities under New York's Cap-and-Invest Program.

Property owners should also consider utilizing any existing NYSERDA or other energy incentives to upgrade their existing energy systems. Such upgrades could significantly reduce a user's emissions, which will in turn reduce or eliminate the need to procure allowances under Cap-and-Invest.

Commercial tenants should also work with their landlords to discuss ways to upgrade the energy efficiency of existing systems, especially HVAC and lighting, prior to the implementation of the regulations under the CLCPA; systems that are not in compliance with regulations under the CLCPA may be subject to increased fines and utility surcharges.

In the context of commercial real estate leasing, cost will be a major issue that landlords and tenants will need to address. Future lease negotiations will likely include lengthy discussions, splitting up responsibility for the various costs associated with CLCPA compliance. For now, landlords should consider updating their lease forms to ensure that CLCPA-related costs fall under the definition of Common Area Maintenance (CAM) fees and are therefore passed through to tenants. As for existing leases, as they come up for renewal, landlords may want to introduce amendments to capture costs in the future.

On the other hand, instead of signing a landlord-friendly form as-is, commercial tenants should closely read the CAM provisions and ensure they are willing to pay what is listed. Otherwise, they must negotiate different cost-sharing agreements with landlords before they sign on the dotted line. The time to argue about these matters is before the lease is signed, not after.

In addition, commercial tenants should be aware that their energy usage and emissions will be very closely monitored and may be explicitly limited. In the near future, energy usage could become a major factor in a landlord's choice of tenant (or vice versa). If a particular user causes a property to exceed an applicable cap, it may kill the deal right there. Both landlords and tenants will need to get smart about the mechanics of measuring energy usage and emissions, as this skill will only become more valuable with time.

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