

Implications Of NY Climate Case For Generating Facilities

By **Michael Hecker, Jeffrey Stravino and John Dax** (December 10, 2024)

On Nov. 14, the Supreme Court of the State of New York, County of Yates, ruled that Section 7(2) of the Climate Leadership and Community Protection Act, or CLCPA, not only requires that state permitting agencies consider whether an action is consistent with the law's environmental goals, but also authorizes agencies to deny a permit based solely on its determination that the action is inconsistent with those goals.

In doing so, however, the court also ruled that an agency's discretion is limited, and must be supported by a proper analysis.

Regardless of how *Greenidge Generation LLC v. New York Department of Environmental Conservation* develops on remand, this decision has immediate implications for generating facilities seeking permit applications and renewals in New York. The ruling indicates that almost every aspect of permitting and permit renewals for fossil fuel facilities in New York will likely involve CLCPA considerations.

The decision in *Greenidge* — hailed as a victory by both sides — marks the latest addition in a line of cases exploring the New York Department of Environmental Conservation's, or DEC's, regulatory authority and obligations to consider New York's emissions and climate goals under Section 7(2) of the CLCPA.

In a partial win for the petitioner, New York Supreme Court Judge Vincent Dinolfo annulled the DEC's denial of *Greenidge's* application to renew its Clean Air Act Title V permit for its generating facility, and remanded the matter to the agency for further administrative proceedings.

But in a partial win for the DEC — on the larger issue — the court reaffirmed that the agency has the authority to deny the issuance or renewal of an air permit when a facility's operations would be inconsistent with CLCPA emissions goals.

The court, however, also ruled that the DEC's denial in this case was procedurally deficient, and that the agency's final action to deny the renewal was arbitrary and capricious, and affected by an error of law because the DEC misinterpreted the scope of its obligations when making its determination.

Greenidge began operating a natural gas power plant and bitcoin mining facility in Yates County in 2016, to supply power to its own bitcoin mining operations — an arrangement known as "behind-the-meter" power.

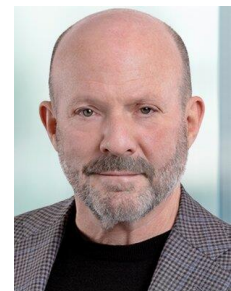
In 2022, the DEC denied *Greenidge's* application for renewal of its Title V air permit, stating that "renewal of the Title V permit would be inconsistent with or would interfere with the attainment of the Statewide greenhouse gas emission limits established in Article 75 of the Environmental Conservation Law," and citing its authority under the CLCPA as justification.



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Specifically, the DEC's denial determined that Greenidge's increased greenhouse gas emissions resulting from its cryptocurrency mining were inconsistent with the greenhouse gas limits under CLCPA Section 7(2). In response, and operating under a temporary injunction that delayed expiration of its existing permit, Greenidge filed a petition seeking to annul the DEC's final denial.

Greenidge's petition argued, among other things, that: (1) the DEC lacked the authority to deny Greenidge's permit renewal application under CLCPA Section 7(2); (2) the agency's inconsistency determination was arbitrary and capricious; and (3) the agency failed to assess justification and alternatives/mitigation as required by CLCPA Section 7(2).

CLCPA Section 7(2) provides that:

in considering and issuing permits, licenses, and other administrative approvals and decisions ... all state agencies ... shall consider whether such decisions are inconsistent with or will interfere with the attainment of the statewide [GHG] emissions limits established in article 75 of the Environmental Conservation Law. Where such decisions are deemed to be inconsistent with or will interfere with the attainment of the statewide emissions limits, each agency ... shall provide a detailed statement of justification as to why such limits/criteria may not be met, and identify alternatives or mitigation measures to be required where such project is located.

The court held against Greenidge's first two arguments attacking the DEC's authority to deny its permit renewal application on the one hand, and the adequacy of the agency's consistency determination on the other.

The court first explained that the CLCPA's legislative history and a plain reading of the statute "grant the DEC the requisite authority to deny a permit when the grant of the permit would be inconsistent with or interfere with the attainment of the goals of the CLCPA."

The court next reviewed the administrative record, and found that the DEC's reasoning for its inconsistency finding was "rational, reasoned, and made with due regard," and thus entitled to due deference.

These holdings are consistent with and reaffirm another notable case that examined the regulatory effect of the CLCPA — *Danskammer Energy LLC v New York Department of Environmental Conservation* — in which the Supreme Court of the State of New York, Orange County, rejected an appeal of the DEC's denial of a Title V permit for a new generating facility on similar grounds.[1]

But having the authority to deny and properly executing that authority are separate things. The court agreed with Greenidge's contention that the final denial was defective because the DEC failed to assess potential justification for the project pursuant to the second and third criteria listed in CLCPA Section 7(2).

First, the court rejected the DEC's assertion that the CLCPA only requires it to assess whether there is sufficient justification for finding an inconsistency if the agency is inclined to grant the permit despite the inconsistency.

In line with *Danskammer*, the court held that the CLCPA grants the DEC the authority to deny a permit "when the grant of the permit would be inconsistent with or interfere with the attainment of the goals of the CLCPA, and the grant cannot otherwise be justified or the adverse effects mitigated."

However, the court found that the CLCPA obligates the DEC to conduct this justification inquiry, even if the agency opposes the ultimate issuance of the permit. Accordingly, the court deemed the DEC's failure to conduct the inquiry arbitrary and capricious, and affected by an error of law.

The court further held that the DEC's failure to bring the issue of justification to adjudication during its administrative proceedings was similarly defective. In its final denial, the agency held that the question of justification was not "substantive and significant," and therefore not entitled to an adjudicatory hearing.

The court found that the DEC overlooked a provision in its regulations that states that an issue is "adjudicable" if "it relates to a matter cited by the department staff as a basis to deny the permit application and is contested by the applicant."

The court concluded that "it is unavoidable that Greenidge cleared the bar for the factual predicate to raise justification as an adjudicable issue." The court found that the DEC had no rational basis for its decision to omit this justification analysis, and that this omission was an error of law and arbitrary and capricious.

Due to these issues, the court annulled the agency's denial of the renewal application, and remanded the justification issue back to the administrative hearing process. Both sides in the Greenidge case have hailed this decision as a victory.

Opponents of the facility's continued operation claim the ruling upholds the principle that the DEC has the authority to deny permits based on the state's climate goals, and characterize the move to send the case back to the agency as a procedural inconvenience.

Greenidge claims that the ruling calls out environmental advocates for overreach, arguing its operation has a negligible effect on the state's overall climate and emissions goals.

Insights

As the latest case considering the effects of Section 7(2) of the CLCPA, the ruling further strengthens the precedent that the DEC has the authority under the CLCPA to deny permit applications and renewals solely on the grounds that the granting of the application is inconsistent with the state's ambitious climate goals.

In turn, however, the ruling explains for the first time that Section 7(2) also mandates that the DEC provide both a written justification analysis for this denial and that the determination is subject to a formal adjudication process.

An appellate court has also held that the New York Public Service Commission must consider the CLCPA in the context of a transfer of a gas-fired plant, confirming the broad applicability of the CLCPA to permitting activities.[2] Thus, virtually all aspects of permitting or renewals of permits related to any fossil fuel facility are likely to require CLCPA considerations.

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[1] 76 Misc.3d 196 (Sup. Ct. 2022).

[2] Clean Air Coal. of W. New York Inc. v. New York State Pub. Serv. Comm'n, 226 A.D.3d 108 (3d Dept. 2024).