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Three Legal Visions of a 'Green New Deal'

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Environmental Law

Expert Analysis

Three Legal Visions Of a 'Green New Deal'

Rep. Alexandria Ocasio-Cortez (D-N.Y.), who has rocketed to such fame that she is now widely known simply as AOC, and Sen. Edward Markey (D-Mass.), co-father of Waxman-Markey, the cap-and-trade bill that narrowly passed the House in 2009 but died in the Senate, have introduced identical resolutions to create a “Green New Deal.” H. Res. 109, S. Res. 59.

A December 2018 survey found 81 percent of registered voters liked the basic concepts. No one expects today’s Republican President and Republican Senate to adopt this resolution (which we’ll call “AOC-Markey”); it’s more of an effort to shine light on the climate crisis and to look toward the possibility of a Democratic sweep in the November 2020 elections. In Albany, however, Democrats now firmly control the Assembly, the Senate and the Governor’s office, and

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thus climate legislation might well pass this year. Gov. Andrew Cuomo has introduced his own version of what he labels the Green New Deal

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(which we’ll call the Cuomo plan), portions of which are incorporated in the Governor’s budget bill, A2008/S1508.

In addition, 45 members of the Assembly and 28 members of the Senate are co-sponsoring a proposed New York State Climate and Community Protection Act (CCPA),

which has much the same spirit and overlapping content. A3876/S2992. Prior versions passed the Assembly in 2016, 2017 and 2018, and the Senate (whose new leadership is supportive) is now holding hearings on it.

This column compares and contrasts these three proposals.

AOC-Markey

This resolution begins by reciting the terrible consequences of unchecked climate change, and of the phenomena of “wage stagnation, deindustrialization, and antilabor policies,” income inequality, and “systemic racial, regional, social, environmental, and economic injustices.” It recalls how “the Federal Government-led mobilizations during World War II and the New Deal created the greatest middle class that the United States has ever seen,” and finds that “a new national, social, industrial and economic mobilization” in a similar scale could “create millions of good, high-wage jobs ... provide unprecedented levels of prosperity and economic security ... and ... counteract systemic injustices.”

AOC-Markey calls for “a 10-year national mobilization” to “achieve net-zero greenhouse gas emissions.” This would be accomplished through “goals and projects” that include “meeting 100 percent of the power demand in the United States through clean, renewable, and zero-emission energy sources,” upgrading of all buildings for energy efficiency, and the widespread electrification of vehicles and heating systems. It also calls for “removing greenhouse gases from the atmosphere and reducing pollution by restoring natural ecosystems through proven low-tech solutions that increase soil carbon storage, such as land preservation and afforestation.” Additional goals include providing all people of the United States with “high-quality health care,” “affordable, safe, and adequate housing,” and “economic security.”

The resolution is non-binding. It says nothing about how achieving its goals would be funded, enforced, or implemented, except that “a Green New Deal must be developed through transparent and inclusive consultation, collaboration, and partnership with frontline and vulnerable communities, labor unions, worker cooperatives, civil society groups, academia and businesses.”

CCPA

The CCPA also begins by describing the adverse impacts of climate change. It calls for statewide anthropogenic greenhouse gas emissions to ramp down every five years until they reach zero in 2050.

The New York State Department of Environmental Conservation (DEC)

is given the job of devising a “scoping plan” to outline the methods to achieve the CCPA’s objectives. (This resembles a task given the California Air Resources Board by that state’s landmark Global Warming Solutions Act of 2006.) DEC would receive advice from the existing Environmental Justice Advisory Group, a new 29-member State Climate Action Council, and a new Climate Justice Working Group. DEC is directed to “promulgate rules and regulations to ensure compliance with the statewide emissions reduction limits,” including “legally enforceable emissions limits, performance standards,” or other requirements.

DEC may consider “the use of market-based compliance mechanisms” such as a price on greenhouse gas emissions, or the sale of emission allowances with a declining cap. At least 40 percent of any funds collected must be “invested in a manner which will benefit disadvantaged communities.”

The Public Service Commission is directed to require that at least 50 percent of statewide electricity demand be met by renewable sources by 2030. (It is now about 30 percent—mostly hydroelectric.) The bill has extensive provisions regarding wages, labor and job standards and worker protection.

The CCPA expands the ability of citizens to sue by providing: “Review under this act may be had in a proceeding under article 78 of the civil practice law and rules at the instance of any person aggrieved.”

Cuomo Plan

Governor Cuomo announced his plan on Jan. 17, 2019 as part of his

proposed 2019 Executive Budget. It includes a new Climate Leadership Act. It would statutorily mandate that 70 percent of statewide electricity demand be met by renewable sources by 2030, and 100 percent of New York’s electricity be “carbon free” by 2040 (that’s now 65 percent, including nuclear), and that “as soon as practicable, the state must sequester or offset a greater quantity of atmospheric greenhouse gases than are emitted within the state.”

A new Climate Action Council would develop a “roadmap” of ways to achieve the objectives, such as a fee per ton of carbon dioxide equivalent emitted, and “beneficial electrification” of personal and freight transport, and of water and space heating in buildings. “Verifiable, enforceable, and voluntary emissions reduction measures” are to be set forth. The existing Environmental Justice and Just Transition Working Group would be codified.

DEC would promulgate a statewide greenhouse gas emissions limit for 2030 of a 40 percent reduction from 1990 levels. DEC would issue regulations “to support compliance with” this limit. They may include “legally enforceable emissions reduction measures or greenhouse gas emission levels.”

Though not in the bill, Governor Cuomo’s announcement said that the state’s implementation of his plan will include a quadrupling of New York’s offshore wind target to 9,000 megawatts by 2035; doubling distributed solar deployment to 6,000 megawatts by 2025, deploying 3,000 megawatts

of energy storage by 2030, and other measures.

Assessment

A goal of 100 percent of U.S. electricity from “clean, renewable, and zero-emission energy sources” within 10 years, as suggested by AOC-Markey, is more ambitious than the most aggressive scenario that has been widely discussed, a proposal by Stanford’s Mark Jacobson for 80 percent renewables by 2030 and 100 percent renewables by 2050 (a proposal that several prominent experts have questioned). Achieving a goal of net-zero greenhouse gas emissions in 10 years is probably impossible, given the multiplicity of non-electricity sources of greenhouse gases. However, the wording in AOC-Markey is somewhat ambiguous about whether these goals must be finished or merely advanced by the “10-year national mobilization.”

The Cuomo plan would have 70 percent of New York electricity coming from renewables in 2030, and 100 percent from “carbon-free” sources (presumably including nuclear) by 2040. The CCPA plan is the least ambitious on this count—50 percent of New York electricity from renewables in 2030, with provisions to suspend the requirement if necessary.

With respect to the total amount of greenhouse gas emissions in New York, the Cuomo plan would have levels down to 60 percent of their 1990 levels in 2030, with carbon neutrality “as soon as practicable.” Some emissions could continue but they would be sequestered or offset. The CCPA would ramp them down from

50 percent of 1990 levels in 2030, progressively to zero in 2050. The only explicit exclusion is emissions from livestock. Achieving zero greenhouse gas emissions in New York by 2050 seems to be physically impossible. For example, even if New York could require all New York-based vehicles to be electric (which current federal law does not allow), the state cannot exclude out-of-state vehicles. There is little prospect of zero-emission commercial aircraft by 2050. Though significant strides could be made in

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the electrification of space heating and industry by 2050, the complete conversion of all systems by 2050 also seems beyond reach. Moreover, there is no allowance for sequestration or offsets, making the goal even harder to achieve. However, some flexibility may be found in the language in the CCPA allowing DEC to exclude sources that it deems cannot be “monitored for compliance” or whose participation in the program will not “enable [DEC] to effectively reduce greenhouse gas emissions.”

Both the CCPA and Cuomo plan would give DEC rulemaking and enforcement powers, and allow for imposition of a carbon tax or similar

charges. Only CCPA specifies where some of the proceeds would go.

Clearly bold action is needed to meet the goal of the Paris Climate Agreement to “achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century.” Of the three plans, Cuomo’s is the most specific in how its objectives would be met; AOC-Markey the least, as it does not purport to be binding legislation, only a statement of aspirations covering a broad array of social issues. AOC-Markey and CCPA call for the swiftest reductions in greenhouse gas emissions, but few specifics on how to do that. If AOC-Markey passes the House, it will be the most significant federal legislative action on climate change since the Waxman-Markey bill of a decade ago.

Regardless of the high cost of meeting the Paris goal, recent scientific studies establish that the cost of failure to meet it would be immensely higher.