

New York Law Journal



WWW.NYLJ.COM

VOLUME 244—NO. 103

©2010 ALM

An ALM Publication

MONDAY, NOVEMBER 29, 2010

ENVIRONMENTAL LAW

Expert Analysis

New York Environmental Legislation and Regulations in 2010

New laws were enacted in New York in 2010 concerning brownfields, pesticides, renewable energy, hazardous substances, recycling, the State Environmental Quality Review Act (SEQRA), and numerous other matters.

This annual survey describes new environmental laws that were signed into law in 2010, as well as two executive orders issued by Governor David A. Paterson and important new regulations from the New York State Department of Environmental Conservation (DEC) concerning endangered and threatened species.

Air Quality

Chapter 203 requires that, after July 1, 2012, all No. 2 heating oil sold for use in New York shall not have a sulfur content greater than 15 parts per million, unless there is not an adequate supply of such fuel to meet demand. No. 2 heating oil is the light oil that is used in most heating systems. As a related matter, New York City adopted Int. No. 194-A, which requires the use of bio-diesel in heating oil.

Brownfields

Chapter 153 amends the Private Housing Finance Law to give preference in the awarding of contracts for public housing to economically feasible projects that are located on a brownfield site that has received a certificate of completion.

In August 2010, New York City and DEC entered into a memorandum of agreement that creates the New York City Brownfield Cleanup Program.

Endangered Species

On Nov. 3, 2010, DEC adopted revisions to its State Endangered Species Act regulations (Part 182). Most importantly, the regulations require project applicants to obtain an "incidental take permit" for "any activity that is likely to result in the take or a taking" of any species listed as endangered or threatened. "Take" or "taking" is defined as "the

By
**Michael B.
Gerrard**



pursuing, shooting, hunting, killing, capturing, trapping, snaring and netting" of a listed species, and an "incidental take" is a taking "that is incidental to, and not the intended purpose of, an otherwise lawful activity." Thus, for example, a land development project that cuts down trees frequented by listed birds may require an incidental take permit.

Before DEC issues such a permit, the applicant must submit a mitigation plan and an implementation agreement, which must "result in a net conservation benefit to the species in question." DEC will deny the permit when it "determines

The final Commissioner Policy on Climate Change directs DEC staff to incorporate climate change considerations in all aspects of DEC activities.

that the proposed activity is likely to result in the loss of occupied habitat, loss of individuals, or interference with essential behavior" of a listed species "such that a net conservation benefit cannot be achieved."

This requirement somewhat resembles that under Section 9 of the Endangered Species Act, and is in addition to the preexisting review process under SEQRA.

Energy

Chapter 7 amends the Public Service Law with respect to net energy metering for certain solar and wind electric generating systems by changing the definition of "solar electric generating equipment" and "wind electric generating equipment." Chapter 81 requires public buildings to take measures to eliminate "wasteful artificial night lighting."

Chapter 203 allows gas corporations to charge additional fees for the installation of capital improvements and fixtures to promote energy efficiency upon the request and consent of the customer. Chapter 204 allows consumers to use "on-bill financing" to pay for energy efficiency improvements through their natural gas utility bills.

Chapter 212 adds kinetic energy storage devic-

es—flywheels and compressed air storage—with an electric generating capacity of under 80 megawatts to the statutory definition of alternative energy production facilities that are exempt from regulation by the Public Service Commission. Chapter 222 expands the types of appliances covered by the state's energy efficiency standards to include portable lighting fixtures, bottle-type water dispensers, commercial hot food holding cabinets, portable electric spas, and residential pool pumps.

Chapter 336 raises the amount of electric generating capacity for farm waste from 500 to 1,000 kilowatts pursuant to the state's net metering program. Chapter 366 extends a tax exemption granted to solar, wind energy, and farm waste energy systems from Jan. 1, 2011, to Jan. 1, 2015. Chapter 406 extends the special rebates and discounts provided pursuant to the Energy Cost Savings Program and the Lower Manhattan Energy Program.

Chapter 416 establishes an energy service company (ESCO) consumers bill of rights. An ESCO is an entity that sells energy services to end use customers using the transmission or distribution system of a utility. Among other things, the law sets out certain information that employees of ESCOs must communicate to customers when soliciting their business and prohibits requiring prepayment for such services.

Chapter 552 directs the state fire prevention and building code council to examine, evaluate and make recommendations concerning the standardization of state and local building codes and permit processes to facilitate installation of solar and wind energy generating systems.

Governor Paterson issued Executive Order No. 35, which rescinded the portions of Executive Order 142 issued by former Governor George Pataki in November 2005 that require that state agencies and authorities purchase and utilize bio-diesel in their fleets, that state vehicles use E85 to the greatest extent possible, and that the Governor's Clean Vehicle Council prepare a plan to meet this goal.

Emissions, Climate Change

In 2010, Governor Paterson vetoed three bills concerning climate change. One bill (S. 4917) would have set up the New York State Greenhouse Gases Management Research and Development Program. Mr. Paterson said that he opposed the bill because it did not provide a source of funding and because it would duplicate existing state efforts by New York State's Climate Action Council. A second bill (A. 3421) would have required DEC to develop a methodology for individuals and businesses to calculate their GHG

MICHAEL B. GERRARD is the Andrew Sabin Professor of Professional Practice and director of the Center for Climate Change Law at Columbia Law School, and senior counsel to Arnold & Porter LLP. J. CULLEN HOWE, an environmental law specialist at Arnold & Porter, assisted in the preparation of this article. They are the co-authors of "The Law of Green Buildings: Regulatory and Legal Issues in Design, Construction, Operations, and Financing," published by the American Bar Association.

emissions.

Mr. Paterson stated that the bill would “leapfrog” over the process underway to develop a statewide climate action plan. A third bill (A. 3419) would have required state agencies to report their GHG emissions annually as part of the state’s existing environmental compliance audit process. Mr. Paterson stated that he supported the purpose of the bill but was opposed to including GHG emissions as part of the compliance process.

In September 2010, DEC issued a final Commissioner Policy on Climate Change. The policy directs DEC staff, to the extent applicable and within their existing statutory and regulatory authority, to incorporate climate change considerations in all aspects of DEC activities.

The New York State Climate Action Plan was released on Nov. 9, 2010. It contains numerous recommendations for, among other items, accelerating the development of zero- or low-carbon sources of power; enhancing construction codes and appliance standards; encouraging low-carbon fuel standards; and promoting sustainable policies in the agriculture, forestry and waste sectors. Three days later, DEC released the draft report of the legislatively created Sea Level Risk Task Force.

Green Jobs

A provision in Chapter 59, a budget bill, included the enactment of the “Excelsior Jobs Program Act” to encourage the expansion in and relocation to New York of businesses such as clean-tech, renewable energy and biotechnology, among others. The legislation creates the excelsior jobs program, which has four components: a jobs tax credit, an investment tax credit, a research and development tax credit, and a real property tax credit.

Hazardous Substances

Chapter 42 creates an exemption from certain special assessments, fees and surcharges on hazardous waste generated by or at an elementary or secondary school if it is generated pursuant to a contract with a state agency, pursuant to an order of a state agency, or with the Environmental Protection Agency.

Chapter 205 limits the phosphorous content in household cleaning products to 0.5 percent by weight and prohibits the application of fertilizers containing phosphorus, except under certain conditions. Chapter 280 prohibits the sale of products containing bisphenol A (BPA) if they are intended for use by children 3 years old or younger and allows DEC to authorize the labeling of products that do not contain BPA. BPA is an organic compound used in the manufacture of some plastics; health concerns have been raised about it.

Chapter 543 allows the health commissioner of any county that has been approved by the DEC commissioner to administer and enforce a local law related to bulk storage of petroleum to bring an enforcement action for any violation of the local law. All fines and penalties collected are to be paid to the district or county, provided that one quarter of the fines shall be paid to the state’s general fund.

Land Use

Chapter 433 establishes a State Smart Growth Public Infrastructure Policy Act. New York’s seven infrastructure agencies are prohibited from approving, financing, or undertaking a “public

infrastructure project” unless it meets the 10 smart growth criteria specified in the law “to the extent practical.” Every such agency must issue a “written smart growth impact statement that the project, to the extent practicable, meets the relevant criteria set forth” in the law.

Chapter 522 removes the restriction from New York Town Law §276(7)(c) that a final plat can only be approved for a 180-day period with a maximum of two 90-day extensions. The amended statutory section now allows a planning board to extend conditional final approval for additional 90-day periods “if such extension is warranted by the particular circumstances.”

Governor Paterson issued Executive Order No. 39, which seeks to promote sustainable local farms and protect agriculture lands. It requires state agencies, when adopting rules and regulations or taking other administrative actions, to consider the state constitutional mandate to promote and expand demand for the state’s agricultural prod-

New York’s seven infrastructure agencies are prohibited from approving, financing, or undertaking a ‘public infrastructure project’ unless it meets the 10 smart growth criteria specified in the law ‘to the extent practical.’

ucts, including locally grown food and, when feasible, to increase the proportion of their total food purchases comprised of locally grown food.

Pesticides

Chapter 85 requires the DEC commissioner, in consultation with the commissioners of the Departments of Health and Education, to develop guidance on pesticides alternatives. (DEC did so on Oct. 27, 2010.) In addition, the law prohibits schools or day care facilities from applying any pesticides to any playgrounds, turf, athletic or playing fields, except in emergencies.

Chapter 324 requires owners, owners’ agents, or other persons in positions of authority for multiple family dwellings to provide written notice to the building occupants regarding when commercial pesticides are applied on the property.

Public Health

Chapter 77 concerns the environmental facility and cancer incidence map. The definition of “environmental facility” has been amended to include certain facilities or sites. In addition, the maps are now required to include updated data concerning the incidence of certain cancer types. The Department of Health is required to make available to the public information on cancer identified on the maps by March 1, 2011.

Recycling

Chapter 99, a budget bill, includes a provision that enacts an electronic recycling program in the state. Pursuant to the law, beginning April 1, 2011, a manufacturer of covered electronic equipment must accept for recycling one piece of electronic waste of any manufacturer’s brand if offered by a consumer with any purchase of covered electronic equipment. Covered equipment includes computers, small electronic equipment, small-scale

computer servers, televisions, and cathode-ray tubes, but does not include, among other things, motor vehicles, cameras or video cameras, radios, household appliances, or telephones.

SEQRA

Chapter 122 amends the Town Law, the Village Law, and the General City Law in relation to generic environmental impact statements (GEISs). Pursuant to the law, a GEIS is required to be prepared by the appropriate municipal body for any zoning district in which the granting of incentives or bonuses has a significant impact on the environment pursuant to SEQRA.

Solid Waste

Chapter 527 requires the Commissioner of Agriculture to identify establishments and practices most susceptible to threats from out-of-state food products and promulgate rules and regulations for the proper disposal of such products.

Transportation

Chapter 59, a budget bill, includes a provision empowering the Legislative Commission on Critical Transportation Choices to, among other things, assess the transportation needs of localities with respect to various modes of moving people and goods and their energy efficiency and environmental sustainability, identify and study long-term transportation needs, and assess the relationship between transportation, the environment and long term, sustainable economic development.

Wetlands

Chapter 16 permits a freshwater wetlands map of a particular area filed with a local government, at the local government’s request, to be either a physical copy of the map, or, if available, a digital file that represents it.

Wildlife

Chapter 84 authorizes DEC to adopt rules and regulations with respect to migratory game birds that are no less restrictive than those pursuant to the federal Migratory Bird Treaty Act. The law also requires that notice of open seasons for such birds be provided by DEC press releases and on the DEC Web site. Chapter 483 authorizes DEC to promulgate standards authorizing hunting with a crossbow.

Chapter 485 permits certain vessels being used to take food fish, shellfish and crustacea to be replaced one time without loss of exemption, allows vessels that were taking fish prior to July 1, 1997 to not comply with the registered length requirement, and allows vessels 63 feet in length or greater to be replaced one time by a new vessel of up to 10 percent greater registered length. Chapter 507 allows for a transfer of a lifetime license for hunting, fishing, and trapping under certain circumstances.

These developments and others will be explored at a program at the New York City Bar in February.