

ENVIRONMENTAL LAW

Expert Analysis

New York Legislation And Regulations in 2009

Despite the political meltdown that immobilized the state Legislature for much of the summer, new laws were enacted in New York in 2009 concerning energy efficiency retrofits, green jobs, the expansion of the state's returnable container law, and numerous other matters.

This annual survey describes the new environmental laws that were signed into law in 2009, as well as executive orders signed by Governor David A. Paterson, state policies concerning the State Brownfield Cleanup Program, and a law enacted in New York City creating the Office of Environmental Remediation.

Brownfields

In November 2009, the New York State Department of Environmental Conservation (DEC) proposed two new policies and guidance that would streamline the application process for the state Brownfield Cleanup Program (BCP). One policy outlines the procedures and circumstances under which DEC will issue an opinion on eligibility for participation in the BCP relative to real property within a Brownfield Opportunity Area (BOA) study area or designated BOA.

The other policy sets forth the general terms and conditions for Brownfield Site Cleanup Agreements (BCAs) under the BCP. DEC also prepared technical guidance for site investigation and remediation under the State Superfund Program, BCP, Environmental Restoration Program, and Voluntary Cleanup Program (VCP) as well as a proposed policy for the selection of soil cleanup levels appropriate for each of these programs.¹

In May 2009, New York City enacted a law establishing a local brownfield cleanup program and creating a City Office of Environmental Remediation (OER).² The law is aimed at facilitating remediation of contaminated sites in the city that are not covered by the BCP.

Energy

New York enacted many laws in 2009 concerning energy siting, energy efficiency and renewable energy. Most importantly, Chapter 497 establishes

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the Property Assessed Clean Energy (PACE) law. The law allows municipalities to establish a PACE program to apply for federal funds to issue as loans to qualifying homeowners and businesses to install energy-efficient retrofits and renewable energy systems. A PACE bond is a debt instrument where the proceeds are loaned to property owners to finance energy efficiency retrofits; the owners then repay their loans over 15-20 years via an annual assessment on their property tax bill. The bonds can be issued by municipal financing districts or finance companies.

Chapter 84 extends the moratorium on the issuance of certificates of environmental safety for the siting of facilities and certification of routes for the transportation of liquefied natural or petroleum gas for two more years, until April 1,

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2011. Chapter 217 amends the Public Authorities Law and other laws relating to the provision of low-cost power by reauthorizing the New York Power Authority to make contributions to the general fund. The law extends the expiration of the Power for Jobs program and the Energy Cost Savings Benefits program, which provide low-cost power to businesses and not-for-profit corporations that commit to create or retain jobs in New York.

Chapters 334 and 336 create sustainable energy loan programs in the City of Binghamton and the Town of Bedford respectively by establishing a revolving loan fund from federal grants. Like the PACE law mentioned above, loans issued by the city and town from their respective funds will be repaid by borrowers through an annual assessment levied on the property where the loan was applied until repaid in full.

Chapter 355 amends the Public Service Law

and the Public Authorities Law in relation to net metering for micro-combined heat and power generating systems by adding residential customers who own, lease, or operate micro-combined heat and power generating equipment or fuel cell-generating equipment located on the customers' premises to the definition of "customer-generator."

Chapter 406 amends the New York State Urban Development Corporation Act by adding a section addressing energy conservation and efficiency projects. The amended law defines the different types of eligible energy conservation and efficiency projects, including, among other things, energy audits, building insulation, and increasing the energy efficiency of windows and doors. Chapter 409 amends the Town Law in relation to reducing energy losses from residential properties through the use of energy audits and energy efficiency improvements.

Under the amended law, town boards are authorized to set rates for residential energy audits and energy efficiency improvements by ordinance, rule or regulation. Chapter 410 amends the State Finance Law in relation to authorizing the aggregate purchases of energy for state agencies, institutions, local governments, public authorities and public benefit corporations. The law amends the term "centralized services" to include purchases of renewable energy and renewable energy credits as well as natural gas, hydrogen, and biofuels.

Chapter 433 reestablishes the State Energy Planning Board. Previous versions of Article 6 of the State Energy Law provided for such a board but contained a sunset provision. New Article 6 establishes the board, which has the power to adopt a state energy plan and to adopt appropriate rules and regulations, including considering policies and programs that improve the reliability of the state's energy systems, insulating consumers from volatility in market prices, reducing the overall cost of energy in the state, and minimizing public health and environmental impacts, in particular the environmental impacts related to climate change.

Chapter 477 allows the New York Power Authority to finance and otherwise develop energy efficiency and clean energy initiatives. Chapter 487, otherwise known as the "Green Jobs-Green New York Act," proposes to fund residential retrofits for at least one million residential units over five years. The law creates a \$70 million revolving loan

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fund for energy audits and retrofitting commercial and residential properties.

As originally enacted, the law directs the commissioner of DEC to oversee the appropriation of \$112 million from New York's portion of the Regional Greenhouse Gas Initiative (RGGI) funds for this purpose. Chapter 488 amends the law to direct that the New York State Energy Research and Development Authority (NYSERDA) be the repository of these funds. In October 2009, Governor Paterson proposed to use the remaining \$90 million of New York's portion of RGGI funds to close New York's budget deficit, instead of for energy conservation and clean energy programs as originally planned.

Finally, in August 2009, Governor Paterson proposed a state energy plan. The plan establishes a number of policy objectives, including support for energy and transportation systems that will enable the state to reduce greenhouse gas emissions. The plan was finalized in December 2009.³

Green Buildings

Chapter 380 amends the Green Building Construction Act, which applies to the construction or substantial renovation of state buildings. Under the amended law, the Office of General Services (rather than DEC in the original law) is required to establish green construction requirements and procedures.

Greenhouse Gas Emissions

In August 2009, Governor Paterson signed Executive Order No. 24, which sets a goal of reducing greenhouse gas emissions in New York state by 80 percent by 2050.⁴ The order also creates a Climate Action Council comprising state agency heads to develop a plan by Sept. 10, 2010, for meeting the goal. The order sets a goal of reducing greenhouse gas emissions by 80 percent from the 1990 baseline level of 277 million tons. The state's current emissions are 290 million tons per year.

Chapter 613 amends the law that created the New York State Sea Level Rise Task Force by extending the deadline for preparing a report assessing the anticipated impacts of sea level rise on the state and recommendations the state should implement from Dec. 31, 2009, to Dec. 31, 2010.

Greening State Government

In May 2009, Governor Paterson signed Executive Order No. 18 to phase out the purchase of single-use bottled water by state agencies by May 1, 2010.⁵ The order will ban the purchase of single-use water bottles and certain larger bottles for water consumed at state facilities.

In August 2009, Governor Paterson signed Executive Order No. 25, establishing a regulatory review program to examine state regulations, rules, and paperwork requirements, including those covering the environment.⁶ According to the order, the purpose of the review process is to reduce the costs, burdens and inefficiencies of rules and paperwork requirements on all regulated entities and the general public, and to eliminate outdated, inadvisable or unwise

rules and paperwork. However, many in the environmental community regard the order as a device to weaken regulations.

Hazardous Substances

Chapter 14 requires that, as a condition of approval for a permit to operate a medical waste treatment, storage or disposal facility, an entity must provide proof of liability insurance or other form of financial security in case of release of such waste as well as certification that such activities conform to existing local zoning laws or ordinances.

Land Use

Chapter 311 amends the Real Property Tax Law in relation to establishing a conservation easement agreement exception in the Town of Elma. Pursuant to the law, if a property owner enters into a conservation easement with the town, that property will be partially exempt from local property taxes during the time the easement is in effect.

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Water

Chapter 59 expands the state's returnable container law to include water bottles, more commonly known as the "Bigger Better Bottle Bill." The legislation, which was part of the state's budget for the 2009-10 fiscal year, also includes an increase in fees for water pollution permits, air permits, and pesticide registration; creation of a new wetland permit application fee; and \$222 million in funding for the state's Environmental Protection Fund.

The provision of the law concerning water bottles was challenged by bottled water companies to delay implementation of the five-cent deposit on such bottles. The court granted a preliminary injunction in May 2009, but partially lifted it in August 2009, allowing implementation of certain provisions. However, the court continued to block implementation of a provision requiring the labeling of beverage containers with a universal product code limiting their sale in New York and requiring a five-cent deposit on bottled water.⁷ In October 2009, the court lifted the injunction and allowed most parts of the law to take effect as of Oct. 31, 2009, but permanently enjoining the state from implementing the universal product code provision.⁸

In May 2009, DEC issued revised dam safety regulations to provide more flexibility for dam owners, especially owners of small dams.⁹ The proposed regulations help ensure oversight of

the more than 5,000 dams in New York state by requiring dam inspections by owners, regular maintenance, better recordkeeping and emergency planning. The regulations also detail the responsibilities of dam owners to meet modern safety standards.

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1. The policies and guidance are available at <http://www.dec.ny.gov/regulations/2393.html>.
2. The legislation, 2009/027 (Intro. 21A-2006), is available at <http://legistar.council.nyc.gov/Legislation.aspx>.
3. The final version of the State Energy Plan is available at <http://www.nysenergyplan.com/stateenergyplan.html>.
4. Executive Order No. 24 is available at http://www.state.ny.us/governor/executive_orders/xeorders/eo_24.html.
5. Executive Order No. 18 is available at http://www.ny.gov/governor/executive_orders/xeorders/eo_18.html.
6. Executive Order No. 25 is available at http://www.ny.gov/governor/executive_orders/xeorders/eo_25.html.
7. *International Bottled Water Ass'n v. Paterson*, 09-CV-4672 (SDNY Aug. 13, 2009).
8. *International Bottled Water Ass'n v. Paterson*, 2009 U.S. Dist. LEXIS 71551 (SDNY Oct. 23, 2009).
9. The revised draft regulations and related documents are available at <http://www.dec.ny.gov/regulations/propregulations.html>.