

ENVIRONMENTAL LAW

Expert Analysis

New York Environmental Legislation and Regulations in 2011

New laws were enacted in New York in 2011 concerning the withdrawal of large amounts of water; the siting of electric power plants; the sale of consumer products containing mercury; the funding of infrastructure projects; the design of safe streets; and numerous other matters. This annual survey describes new environmental laws that were signed into law in 2011 by Governor Andrew Cuomo.

Additionally, it should be noted that Jan. 1, 2012, was the effective date of a provision in the New York State Electronic Equipment Recycling and Reuse Act (enacted in 2010) that bars private and public waste haulers/transporters and solid or hazardous waste management facilities from disposing of electronic waste such as televisions, computers, and computer peripherals; they may only collect this waste for recycling or reuse. A ban on the disposal of most rechargeable batteries as solid waste went into effect on Dec. 5, 2011, under the New York State Rechargeable Battery Recycling Act of 2010.

Jan. 1, 2012, was also the effective date of a prohibition in the New York State Dishwasher Detergent and Nutrient Runoff Law (another 2010 enactment) against the use of fertilizer containing phosphorous on lawns.

Agriculture

Chapter 201 of 2011 amends the Agriculture and Markets Law, the Environmental Conservation Law (ECL), and the Soil and Water Conservation Districts Law in relation to the membership of county agricultural and farmland protection boards, authorization to hold conservation easements and funding agricultural nonpoint source abatement and control projects.

Corporations

Chapter 599 allows companies to be incorporated under New York law as “benefit corporations” with the legal purpose of benefiting the environment, the public, or society. The law

By
**Michael B.
Gerrard**



defines general public benefit as having “a material positive impact on society and the environment, taken as a whole, assessed against a third-party standard.” The law authorizes a benefit corporation to identify and include one or more specific public benefits in its charter, with the approval of shareholders.

In establishing fiduciary standards for directors and officers, the law essentially creates higher standards for accountability and transparency than a normal corporation by requiring that these individuals consider the effects of any action—or

Chapter 388, titled The Power NY Act of 2011, streamlines the siting process for new power plants in the state.

decision not to act—on shareholders, employees and the workforce, customers, the community and society, and the local and global environment. In addition, benefit corporations are required to prepare annual reports to shareholders that discuss, among other things, the ways in which the corporation pursued general and specific public benefits, an assessment of its performance measured against a third-party standard, and the compensation paid to each director. In his approval message, Governor Cuomo stated that he had some concerns with the bill and that an agreement was reached with the sponsors of the bill to introduce a measure in the next legislative session to make amendments to the law.

Energy

Chapter 388, titled The Power NY Act of 2011, streamlines the siting process for new power plants in the state, allows for financing of efficiency retrofits through customers’ monthly electric bills, and directs the New York State Department of

Environmental Conservation (DEC) to promulgate regulations to reduce carbon dioxide emissions from power plants. (The power plant siting provisions were the subject of this column on Sept. 8, 2011.) The law also directs the New York State Energy Research and Development Authority (NYSERDA) to undertake a study of the potential for increasing solar power in the state.

Chapter 503 authorizes NYSERDA to act as a central repository and clearinghouse for information on all energy and energy resource-related matters, including the availability and use of the most energy-efficient and environmentally sensitive outdoor lighting available for public and private use.

Chapter 10 extends, once again, the end date for moratoriums on the issuance of certificates of environmental safety for the siting of facilities and certification of routes for the transportation of liquefied natural gas or petroleum in New York City; the new date is April 1, 2013.

Chapter 5 requires NYSERDA to provide an annual report concerning the establishment of the energy efficiency portfolio standard.

Chapter 6 amends the definition of alternate energy production facilities to include energy storage devices utilizing batteries, flow batteries, flywheels or compressed air.

Chapter 35 allows farm and non-residential customer-generators to designate all or a portion of their net-metering credits to meters at any property owned or leased by that generator within the same service territory as long as the net meters are interconnected. Chapter 546 allows net energy metering for micro-hydroelectric generating equipment, which is defined as a hydroelectric system that has a capacity of not more than 25 kW for residential customers and 2,000 kW for nonresidential customers.

Government Agencies

Chapter 70 amends a law that created the New York State Environmental Facilities Corporation by extending the date by which the law would be repealed from Sept. 30, 2011, to Sept. 11, 2014. The corporation provides low-interest loans and technical assistance for environmental projects in the state.

Government Contracts

Chapter 277 provides that when certain contracts are entered into by either the Commis-

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 attorney and writer at Arnold & Porter LLP, assisted in the preparation of this article.

sioner of DEC or the Secretary of State, that such contracts include provisions to maximize public awareness that a source of funding for such project is the Environmental Protection Fund.

Hazardous Substances

Chapter 20 bans the sale of consumer products with mercury as of Jan. 1, 2012. The law authorizes DEC to grant a waiver from the law upon a request by its manufacturer, and lists the requirements for such a request.

Chapter 259 prohibits the manufacture, distribution, and sale of child products that contain the flame retardant chemical Tris in view of concerns that it is carcinogenic.

Infrastructure

Chapter 56 creates a \$1 billion infrastructure fund. The law will allow the state to bid the design and construction of infrastructure projects as a single contract. It will also streamline permitting and regulatory approvals for projects and procurements. The fund will be used for roads and bridges, parks, dams and flood control projects, water systems, educational facilities, and energy efficiency improvements.

Land Use

Chapter 257 allows municipalities to create land banks to convert vacant properties into uses that support community revitalization. Land banks are local entities authorized to take control and redevelop vacant or abandoned properties so they can better serve the public interest.

Chapter 135 defines "community housing" in the Adirondack Park to include a dwelling unit not exceeding 1,500 square feet, located on one contiguous parcel, and meeting several other requirements.

Pesticides

Chapter 526 amends the requirement that lawn care companies provide information to the property owner prior to any commercial lawn application. The information may be provided in either a written, digital or electronic format provided that the applicator also has a written copy in his or her possession.

Transportation

Chapter 398 enables safe access to public roads by utilizing "complete street" design principles, which are features that accommodate and facilitate convenient access by all uses, particularly pedestrians, bicyclists, and individuals of all ages and abilities. These features include sidewalks, paved shoulders suitable for use by bicyclists, lane striping, bicycle lanes, "share the road" signage, crosswalks, curb cuts, raised crosswalks, and ramps and traffic calming devices.

The law requires consideration of these design features for projects undertaken by the New York State Department of Transportation (DOT) or by municipalities and public authorities that receive state or federal funding and are subject to DOT oversight. The law also requires that if these design features are not considered, a publicly available document must set forth the reason or reasons why they were not considered.

Water

Chapter 401, one of the year's most important enactments, regulates water withdrawals of 100,000 gallons or more per day. The law requires DEC to promulgate regulations establishing a water-permitting program for large users. Most of the covered entities are already required to report their withdrawals, but now they will require permits. To obtain a permit, water users will be required to demonstrate they have incorporated environmentally sound and economically feasible water conservation methods. According to DEC, the law at the outset will apply to approximately 400 industrial, commercial and agricultural users. Previously, the state's authority to protect water withdrawals was largely limited to public water supplies to ensure an adequate amount of potable water. The law will enable DEC to comply with commitments under the Great Lakes-St. Lawrence River Basin Water Resources Compact. It will also be an important means to regulate natural gas drilling in the Marcellus Shale should DEC lift the moratorium on that practice.

Chapter 401, one of the year's most important enactments, regulates water withdrawals of 100,000 gallons or more per day. The law requires DEC to promulgate regulations establishing a water-permitting program for large users.

On Nov. 16, 2011, DEC issued a notice concerning proposed regulations to implement this new law. The rules would expand the permit program to include withdrawals for purposes beyond public water supply, such as those for commercial, agricultural, manufacturing, industrial, and other purposes. Withdrawals below the size threshold must still comply with water pollution control laws (ECL article 17), the New York State Department of Health regulations and State Environmental Quality Review Act requirements, as applicable. Comments on the proposed rulemaking are being accepted until Jan. 22, 2012.

Chapter 33 amends a law that created the Bi-State Long Island Sound Marine Resources Committee by replacing references to "marine resources" with "natural resources" and by broadening the duties of the committee.

Chapter 363 expands the membership of the New York Ocean and Great Lakes Ecosystem Conservation Council.

Chapter 577 requires DEC to modify the New York State Stormwater Management Design Manual. The manual will need to include provisions concerning signage in a stormwater retention pond, define a reasonable slope past the aquatic bench to limit the immediate drop off to the deeper end of the retention pond, require aquatic vegetation to be established before the retention pond is

considered in-service, and ensure that maintenance plans include a requirement for examining the status of safety features by the maintenance authority concerning retention ponds.

Wildlife

Chapter 76 amends the ECL in relation to the management of migratory game birds. The law, which was to be repealed on May 1, 2011, has been extended until Oct. 1, 2013.

In August 2011, a number of laws were enacted that extend the regulations concerning the management of certain fish and aquatic species under the ECL, typically to 2013, 2014 or 2015, as follows: crabs (ch. 289), American eel (ch. 290), hickory shad (ch. 291), Atlantic herring (ch. 292), Atlantic Cod (ch. 293), American shad (ch. 294), Atlantic and shortnose sturgeon (ch. 295), alewife (ch. 296), squid (ch. 297), and blueback herring (ch. 298).

That same month, several laws were enacted concerning the management of certain species of fish and sea creatures concerning size limits, catch and possession limits, open and closed seasons, etc. The species of fish or sea creature covered by each law are as follows: weakfish (ch. 418); winter flounder (ch. 419), whelks and conchs (ch. 420), fluke and summer flounder (ch. 421), black sea bass (ch. 422), monkfish (ch. 423), scup (ch. 426), scallops (ch. 427), sharks (ch. 428), bluefish (ch. 429), oysters (ch. 431), lobsters (ch. 439), and clams (ch. 481).

Chapter 435 prohibits the taking of striped bass from the Hudson River for commercial (but not recreational) purposes, extending a ban that has existed since the 1970s. Chapter 425 extends the authorization for DEC to fix by regulation open seasons, size and catch limits, and manner of taking of all species of fish in New York waters (with some exception) to Dec. 31, 2014.

Chapter 437 extends DEC's authorization to set open seasons, open areas, bag limit, manner of taking, and the intentional and incidental feeding of bears to Oct. 1, 2015.

On Feb. 15, the New York City Bar will host the annual New York Environmental Law in Review program, co-sponsored with the Environmental Law Institute; many of the developments reported in this column (and others) will be explored.