

ENVIRONMENTAL LAW

Expert Analysis

New York Environmental Legislation and Regulations in 2012

New laws were enacted in New York in 2012 concerning invasive species, protection of seagrass, watershed protection improvement districts, and tax breaks for solar energy systems. New regulations concern carbon dioxide emissions, environmental justice, water withdrawals and environmental assessment forms, and regulations are under consideration for hydraulic fracturing and for revisions to the impact assessment process.

This annual survey describes new environmental laws that were signed into law in 2012 by Governor Andrew Cuomo, plus one that he vetoed, and several significant final or proposed regulations.

Air Pollution

The Department of Environmental Conservation (DEC) has issued regulations limiting carbon dioxide emissions from major new electric generating facilities, and certain expansions of existing facilities. These rules are slightly more stringent than those proposed by the U.S. Environmental Protection Agency (EPA) for new power plants. Both the DEC rules and the

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EPA proposal would effectively bar new coal-fired power plants, barring major new technological advances.

As part of the same rule, DEC also requires new or expanded power plants to undergo a review to evaluate potential disproportionate impacts on nearby environmental justice communities, and to avoid, minimize or offset any significant adverse environmental impacts to the maximum extent practicable.

Energy

Chapter 51 of 2012, a budget bill, includes \$16.2 million to the New York State Energy Research and Development Authority (NYSERDA) for research and development programs and the development of the 2013 State Energy Plan, which is part of the Governor's Energy Highway Initiative. The Initiative resulted in the release of a Energy Highway Blueprint, which sets forth proposals to enhance system reliability and efficiency, minimize environmental impacts, and generate long-term customer benefits.

The state expects the proposals to result in approximately \$5.7 billion in public and private investments over the next five to 10 years, providing as much as 3,200 megawatts of additional electric generation and transmission capacity, including renewable power generation.¹

Chapter 59, also a budget bill, extends the sunset date on alternative fuel incentives from Sept. 1, 2012 to Sept. 1, 2014. The following incentives or tax credits were extended: clean energy enterprises eligibility for empire zone benefits; the alternative fuel vehicle refueling property corporation tax credit; the motor fuel tax exemption and refund for E85 ethanol, B20 biodiesel, and compressed natural gas (CNG) or hydrogen fuel; the petroleum business tax exemption and reimbursement; and the sales tax exemption for E85, CNG, and hydrogen fuel. In addition, the sunset date on the biofuel production credit was extended from Jan. 1, 2013, to Jan. 1, 2020.

Chapter 193 extends the provisions of the clean heating fuel personal income tax credit for five years, from Jan. 1, 2012, to Jan. 1, 2017. The tax credit is available to taxpayers who use bioheat for space heating or hot water production for residential purposes.

Three laws were enacted that promote solar energy through tax breaks for residential, commercial, and certain industrial properties. Chapter 406 provides an exemption from state sales taxes for

the installation and purchase of solar energy systems for commercial properties.² The law, which took effect Jan. 1, 2013, also allows local governments to approve exemptions from local sales taxes. Chapter 375 establishes a state tax credit for homeowners for the lease of solar equipment or for the purchase of solar power through an agreement with a third party. The legislation requires that leases and purchase agreements span at least 10 years to qualify for the credit. The credit is limited to \$5,000 per year per individual. Chapter 401 extends New York City's real property tax abatement for solar equipment through 2014. The tax abatement, which was first established in 2008, covers residential, commercial, and industrial properties.

Green Buildings

Chapter 188 allows municipalities to provide a real property tax exemption for improvements to real property meeting certification standards for green buildings. In particular, the law allows municipalities to provide a real property tax exemption for improvements to real property meeting the U.S. Green Building Council's Leadership in Energy and Environmental Design (LEED) certification standards, the Green Building Initiative's Green Globes rating system, or substantially equivalent standards for certification.

Hazardous Substances

Chapter 305 authorizes DEC to exempt "minimum risk pesticides" from registration and certification requirements. EPA defines certain pesticides as "minimal risk" because their ingredients are demonstrably safe for the intended use.

Chapter 474 extends the availability of tax credits under New York State's Brownfield Cleanup Program (BCP) for nine months, from March 31, 2015, to Dec. 31, 2015.

Hydraulic Fracturing

The most contentious environmental issue in New York is whether and if so, how, to allow extraction of natural gas through hydraulic fracturing and horizontal drilling techniques (collectively

called "fracking"). DEC has issued a series of versions of its environmental impact statement (EIS) and its draft regulations. In November 2012, DEC proposed its latest revision to the hydraulic fracturing regulations to allow for further review of the practice's health impacts.³ The comment period concerning the new regulations ends on Jan. 11, 2013.

The revised regulations retain limits that were included in the earlier proposed rules, including a ban on fracking in the New York City and Syracuse watersheds and within 500 feet of the state's 18 primary aquifers. Similarly, the proposed regulations limit well pads within 4,000 feet of unfiltered surface drinking water supply watersheds; within 100-year floodplains; and within 2,000 feet of public drinking water supply wells, reservoirs, natural lakes, man-made impoundments, or springs. However, the revised regulations include an additional 500-foot setback requirement from inhabited dwellings and places of assembly.

The revised regulations also remove a cap on the financial security that well operators must provide in the form of a bond to cover the possible cost of plugging and abandoning wells. Under the previous proposal, the bond was capped at \$250,000 for wells greater than 6,000 feet and \$2 million for multiple wells. The revised regulations also provide a two-year term for permits to drill, deepen, plug back, or convert a well. The previous regulations allowed permits for only six months. The revised regulations also create a number of additional recordkeeping requirements for drill operators, including a requirement that operators submit a plan detailing the planned disposal or disposition of drill cuttings.

Land Use

Chapter 46 establishes the Historic Hudson-Hoosic Rivers Partnership to replace and expand the territory of the former Historic Saratoga-Washington on the Hudson Partnership.

Chapter 262 authorizes and validates the alienation of the Empire Fulton Ferry State Park from the New York State Office

of General Services to the Brooklyn Bridge Park Development Corporation.

Recycling

Governor Cuomo vetoed a bill that would have required New York State to put revenues from unclaimed bottle deposits into the state's Environmental Protection Fund. If enacted, the bill would have added \$10 million to the fund next year and \$20 million in 2014. In his veto message, Cuomo said he favored strengthening the fund as part of state budget planning, but he objected to the bill because it was not included as part of the state's financial plan.

The Department of Environmental Conservation has issued regulations limiting carbon dioxide emissions from major new electric generating facilities.

SEQRA

In July 2012, DEC proposed revisions to the regulations under the State Environmental Quality Review Act (SEQRA).⁴ One proposed revision would require a public scoping process for all EISs; this is now optional. Other proposed changes include allowing for the electronic filing of EISs, and extending the time frame for filing a final EIS once a draft EIS has been filed (up to 180 days). The proposal would expand the "Type II" list—actions that are exempt from further SEQRA review—to include actions to encourage development on previously disturbed sites in municipal centers and to encourage green infrastructure projects; installation of solar energy arrays; the sale, lease or transfer of property; the creation of minor subdivisions; the disposition of land by auction; and the renovation and reuse of existing structures.

DEC also proposed expanding certain classes of "Type I" actions, which normally require the preparation of an EIS, including reducing the number of units that trigger the Type I threshold for proposed residential subdivisions, and lowering the

threshold for the number of new parking spaces that trigger the Type 1 threshold. In addition, for unlisted actions occurring in or next to historic resources, Type I thresholds would no longer be triggered automatically, but would be required to exceed 25 percent of any threshold in the Type I list, such as acreage disturbed by or housing units created by the residential development.

In September 2012, DEC published a final rule that updates the short form and full environmental assessment form (EAF).⁵ The new forms take effect April 1, 2013. The full form has not been revised since 1978, while the short form has not been revised since 1987. The forms now include consideration of emerging environmental issues such as climate change, and have been changed to better address planning, policy, and local legislative actions, which can have greater impacts on the environment than individual physical changes.

Boards and Commissions

Chapter 51, a budget bill, eliminates the following boards within DEC: the Solid Waste Management Board, the Freshwater Wetlands Appeals Board (see below), the State Environmental Board, the Regional Forest Practice Boards, the State Forest Practices Board, and the Surf Clam/Ocean Quahog Management Advisory Board. It also eliminates the Long Island Sound Coastal Advisory Commission within the Department of State and the New York State Conservation Corps Advisory Council within the Office of Parks, Recreation, and Historic Preservation.

Water

Chapter 51, a budget bill, contains funding for flood control projects. DEC maintains 106 flood control projects, of which 91 have been rated “minimally acceptable” or “unacceptable” by the U.S. Army Corps of Engineers. DEC also owns 577 dams statewide, of which 24 are deemed “high” and “intermediate” hazard structures. The bill designates \$102 million to repair aged and otherwise failing structures, including levees, flood walls, dams, pumps and channels.

Chapter 65 extends the State Water Pollution Control Revolving Fund 50 percent subsidy through September 30, 2015.

Chapter 272 establishes the Seagrass Protection Act. It defines “seagrass” as rooted, vascular, flowering marine plants that are submerged in the state’s bays and coastal waters. The law directs DEC to designate seagrass management areas and then to develop and adopt a management plan for each area.

Chapter 368 requires publicly owned sewage treatment plants and systems to notify the general public of discharges of untreated or partially treated sewage. Current law only requires notification of a discharge to certain public officials.

Chapter 378 amends the Town Law to allow the creation of watershed protection improvement districts, which allow towns to raise funds to install and maintain storm water treatment, drainage and infiltration projects, septic system upgrades, alternative septic systems, conservation landscaping, storm water collection devices, and natural shorelines and shoreline buffers.

In November 2012, DEC released final regulations requiring a state permit for the withdrawal of large volumes of water, which will be effective April 13, 2013. Approval will be needed for a system with the capacity to withdraw 100,000 gallons or more per day of surface and groundwater. Some withdrawals are exempt from permitting. For example, agricultural withdrawals that were properly registered or reported to DEC on or before Feb. 15, 2012 need only to continue to annually register and report these withdrawals. The new rules bring the state into compliance with the Great Lakes-St. Lawrence River Basin Water Resources Compact.

Wetlands

Chapter 51, a budget bill, eliminated the Freshwater Wetlands Appeals Board (FWAB). The FWAB was established in 1976 to provide a specialized forum for the expeditious review of DEC decisions involving freshwater wetlands, as an alternative to Article 78 proceedings. The bill repeals the FWAB’s enabling legislation but authorizes

it to decide its pending cases. No new cases can be heard.

Wildlife

Chapter 267 requires DEC to restrict the sale, purchase, possession, introduction, importation and transport of invasive species. The law further requires that DEC jointly promulgate regulations with the Department of Agriculture and Markets, and in consultation with the Invasive Species Council, to do the following: develop permits for prohibited species disposal, control, research and education; issue a list of prohibited species unlawful to knowingly possess with the intent to sell, import, purchase, transport or introduce except under a permit for disposal, control, research, or education and a list of regulated species that would be legal to possess, sell, buy, propagate and transport but may not be knowingly introduced into a free-living state; if deemed necessary, set grace periods for prohibited and regulated species so businesses can plan the management of existing stock; and establish penalties for violations of invasive species regulations.

Chapter 326 makes it illegal for anyone to intentionally release any wild animal, authorized for use as a pet, from the location where the animal is permitted to be possessed or harbored. The law amends current language stating that any costs associated with seizing, transferring, or recapturing the animal shall be borne by the person who owned or harbored the animal.

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1. The Blueprint is available at <http://www.nyenergyhighway.com/PDFs/BluePrint/EHBPPT/#?page=0>.

2. The Department of Taxation and Finance has issued a memo explaining this new exemption. It is available at http://www.tax.ny.gov/pdf/memos/sales/m12_14s.pdf.

3. These proposed regulations are available at <http://www.dec.ny.gov/regulations/77353.html>.

4. These revisions are available at <http://www.dec.ny.gov/permits/83389.html>.

5. The final rule is available at <http://www.dec.ny.gov/permits/70293.html>.