
"Net Conservation Benefit" Regulations And The Potential Impact On Land Use And Construction

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The New York State Department of Environmental Conservation has made draft regulations available for public comment, which, if adopted by NYSDEC, will significantly change the regulatory oversight of endangered and threatened species in New York State. The draft regulations, which amend 6 NYCRR Part 182, would require an applicant to provide a "net conservation benefit" in order to obtain a permit to "take" a protected species. Taking is broadly defined, and includes any disturbance of a protected species' habitat. The draft regulations would require an applicant to not only mitigate a project's potential impacts on a protected species, but to enhance the species' habitat above and beyond what it would be *even if the project were not built*.

The draft regulations define net conservation benefit as:

A successful enhancement of the species' overall population or contribution to the recovery of the species within New York. To be classified as a net conservation benefit, the enhancement or contribution must benefit the affected species listed as endangered or threatened in this Part or its habitat to a greater degree than if the applicant's proposed activity were not undertaken.

Proposed 6 NYCRR § 182.2(o) (emphasis added).

Until now, a project's potential impact on protected species has been largely evaluated and mitigated through the State Environmental Quality Review (SEQR) process; the NYSDEC has seldom issued endangered species permits (known as Article 11 permits) when a project's impacts have been addressed through SEQR. Nonetheless, the conservation of endangered species has long been a legislative policy of New York, and ever since the enactment of the State Endangered Species Act in 1972, NYSDEC has had the authority to require a permit for a take of protected species. But both the enabling legislation and the existing regulations do not provide NYSDEC with a standard to use in deciding whether to issue such a permit. The existing regulations merely provide NYSDEC with the discretion to issue

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such a permit, on conditions that it "may deem appropriate." 6 NYCRR § 182.4. The State Endangered Species Act simply provides that "the taking ... of any endangered or threatened species ... is prohibited, except under license or permit from the [NYSDEC]." ECL § 11-0535(2). The draft regulations create a new category of permit, called an "incidental take permit," which requires that an applicant provide not only a mitigation plan, but also a net conservation benefit for the species in order to obtain a permit. Proposed 6 NYCRR § 182.11(a).

By requiring an applicant to enhance the habitat of a protected species beyond the status quo ante, NYSDEC is attempting to shift the public goal of protecting endangered and threatened species onto individual applicants. Until now, individual applicants have had to address their own projects' impacts -- not enhance a species' wider viability. When considered broadly, the draft regulations would create a new paradigm for permitting standards: rather than addressing an applicant's own impacts, the applicant must improve the overall environment in order to obtain a permit.

NYSDEC is accepting public comment until September 20, 2010. Public comments can be emailed to wildliferegs@gw.dec.state.ny.us or mailed to Dan Rosenblatt, NYSDEC, 625 Broadway, Albany, NY 12233-4750.

With thanks to Patty Salkin for posting this in her blog, the Law of the Land.