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STATE ENVIRONMENTAL REGULATION

Expert Analysis

Department Updates Endangered And Threatened Species Rules

Earlier this month, the New York State Department of Environmental Conservation (DEC) adopted changes to its Endangered and Threatened Species Regulations, codified at 6 NYCRR Part 182. The regulations, which took effect on Nov. 3, contain several significant changes, including the establishment of criteria for adding and removing endangered and threatened species from the state's listing and changes to the so-called "incidental take permit" requirements, which generally require a permit for any activity "that is likely to result" in the take or a taking of any endangered or threatened species. The latter changes set forth the application requirements for an incidental take permit and describe the standards and criteria the DEC will apply when determining whether to grant or deny such a permit.

As construction and development begin to pick up across the state, the incidental take permit regulations will garner increasing attention from developers, property owners and local governments. Already, there has been some concern expressed that the regulations impose new requirements (the term "incidental take permit" is new) that will severely burden or limit development, even though the law has long required a permit for activities that result in the "take" of endangered or threatened species, including where the "take" is incidental to, rather than the primary purpose of, an action.¹ A fair review of these rules, however, demonstrates that these new regulations should make the land use road clearer and more easily navigated for all involved.

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Permit Required

The new regulations provide that a permit is required for any activity (such as land use or construction) "that is likely to result" in the take or a taking of any endangered or threatened species, absent an exemption.² They also state that the DEC may, at its discretion, issue a permit that authorizes the incidental take of an endangered or threatened species.³ Such a permit "shall include" an endangered or threatened species mitigation plan approved by the DEC that results in a "net conservation benefit" to the listed species.⁴

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The key terms, "take" and "taking," are defined as "the pursuing, shooting, hunting, killing, capturing, trapping, snaring and netting" of any endangered or threatened species, and all "lesser acts."⁵ The new regulations define "lesser acts" as "harassing, harming, maiming, wounding or collecting" any endangered or threatened species, "any act which is likely to cause the death of or injury to any individual member" of an endangered or threatened species, "any adverse modification of habitat" of any such species, and "any interference with or impairment of an essential behavior" of any such species (including breeding, hibernation, reproduction, feeding, sheltering, migration and overwintering).⁶

"Net conservation benefit" also is defined in the new rules. As described in §182.2(n), it "means a successful enhancement of the species' overall population or contribution to the recovery of the species within New York." For an activity to be classified as a net conservation benefit, the rules require that the enhancement or contribution must benefit the affected endangered or threatened species or its habitat to a greater degree than if the applicant's proposed activity were not undertaken. Generally, a net conservation benefit is achieved when the adverse impacts of a proposed activity on a protected species or its occupied habitat will be outweighed by the positive impacts anticipated from the proposed mitigation measures.

Request for Determination

Any party can ask the appropriate DEC regional permit administrator for a determination as to whether a proposed activity is likely to result in the take or taking of any endangered or threatened species.⁷ The DEC has 30 days to respond in writing to this determination request.⁸ If the department determines that the proposed activity is subject to regulation under the new rules, the DEC is obligated to describe the take or taking that may result from the proposed activity.⁹ This step, while not mandatory, enables a developer to determine early in a project whether it needs an incidental taking permit.

The Application Process

Under the new rules, an application for an incidental take permit must provide a wealth of information to the appropriate DEC regional permit administrator, including a detailed description of the proposed activity and its location, the endangered or threatened species for which a take or taking is likely to occur in connection with the activity, the nature and expected extent of the take or taking and the impacts on the species that are likely to occur as a result of the proposed activity including but not limited to effects on essential behaviors and occupied habitat.¹⁰

In addition, the applicant must include an analysis of whether issuance of an incidental take permit would jeopardize the continued existence of the subject population of the species. The analysis must include any studies of current or past use of the occupied habitat by the species, maps or descriptions of any occupied habitat, consideration of the species' capability to survive and reproduce and a discussion of any adverse impacts of the taking on those capabilities based upon known population trends and known threats to the species. Moreover, the applicant must describe any efforts to modify the proposed activity to minimize or entirely avoid any take or taking of the species.

Significantly, the application also must include an endangered or threatened species mitigation plan that reflects the measures the applicant will undertake to minimize and "fully mitigate" impacts to the endangered or threatened species for which the incidental take permit application is being submitted; all proposed measures have to be capable of successful implementation, and have to be legally, technologically, economically and biologically practicable.¹¹

The mitigation plan also must include sufficient data and information that will "ensure that the taking sought to be authorized by the incidental take permit will not reduce the likelihood of the survival or recovery of the species" in New York.¹² There must be a method for monitoring the effectiveness of the plan, and a description of the funding source, the level of funding and the guarantee or assurance of funding that the applicant will provide to implement the mitigation plan, including an explanation of whether it is relying on tools such as bonds, insurance or escrow.¹³

Mitigation measures designed to achieve a net conservation benefit are flexible, and include the option of improving or creating habitat off-site. Also, mitigation may include measures other than habitat management. For example, in appropriate situations acceptable mitigation measures could include critical research necessary to develop management guidance on the listed species, or development of innovative technologies or business practices that reduce or remove known threats to the species.¹⁴

The new rules also require that an "implementation agreement" be submitted. This agreement identifies all persons who will be involved in implementing the mitigation plan and the individuals responsible for funding and implementing the plan. It also includes a timeline for implementation of the measures required by the plan.¹⁵

The DEC's Obligations

The rules impose a variety of obligations on the DEC before it may issue an incidental take permit. For one thing, the rules specify that the DEC must follow the procedures and time frames set forth in the Uniform Procedures Act in reviewing an application for an incidental take permit.¹⁶

When considering an application for an incidental take permit, the DEC is required to determine whether the proposed activity is an otherwise lawful activity and whether the taking of the species is incidental to, and not the purpose of, the activity. The DEC must approve the mitigation plan and implementation agreement. Importantly, in order for the DEC to approve the permit request, the new rules require the DEC to find that the implementation of the conditions in the incidental take permit and the measures set forth in the mitigation plan will result in a "net conservation benefit" to the species in question.

This determination has to be based upon "the best scientific and other information" that is reasonably available to the DEC, and must include consideration of the species' capability to survive and reproduce, and any adverse impacts of the taking on those abilities based upon known population trends, known threats to the species and reasonably foreseeable impacts on the species from other related projects or activities.¹⁷

The new rules specifically provide that an application for an incidental take permit "will be denied" when the DEC determines that the proposed activity is likely to result in the loss of occupied habitat, loss of individuals or interference with essential behavior of an endangered or threatened species "such that a net conservation benefit cannot be achieved."¹⁸

The term of an incidental take permit runs concurrently with the duration of an approved implementation agreement, and it can be renewed by an application filed at least 60 days prior to its expiration. These permits are transferable at the DEC's discretion, upon its approval of the transferee's mitigation plan and implementation agreement.

Conclusion

The DEC's new rules provide a welcome clarification and amplification of the obligations of both private parties and the DEC in connection with efforts to protect endangered or threatened species as part of land use activities. Although the actual implementation of the rules might identify unexpected impediments that may require further refinements, at this point the new rules seem to be a workable plan for the DEC and the regulated community.

1. See ECL §11-0535.

2. See 6 NYCRR §182.8(a).

3. See 6 NYCRR §182.2(e) and (y) for the definitions of endangered and threatened species.

4. See 6 NYCRR §182.2(o).

5. See 6 NYCRR §182.2(x); see also ECL §11-0103.

6. The DEC has indicated that, in most cases, a single sighting of an endangered or threatened species in a particular area is insufficient to establish that area as occupied habitat. For example, a single observation of an endangered or threatened bird species flying over a field is not sufficient to classify that field as occupied habitat under these regulations. However, according to the DEC, if that same protected bird species is observed using the field for breeding, "it is likely that the field would be classified as occupied habitat." See "Frequently Asked Questions About New York's Endangered Species Regulations," available at <http://www.dec.ny.gov/animals/68645.html>.

7. See 6 NYCRR §182.9(a).

8. See 6 NYCRR §182.9(c)(1).

9. See 6 NYCRR §182.9(c)(2).

10. See 6 NYCRR §182.11.

11. See 6 NYCRR §182.11(d)(1).

12. See 6 NYCRR §182.11(d)(2).

13. See 6 NYCRR §182.11(d).

14. See "Frequently Asked Questions About New York's Endangered Species Regulations," available at <http://www.dec.ny.gov/animals/68645.html>

15. See 6 NYCRR §182.11(e).

16. See 6 NYCRR §182.10.

17. See 6 NYCRR §182.12.

18. See 6 NYCRR §182.12(b).