

## STATE ENVIRONMENTAL REGULATION

## Expert Analysis

# State DEC Proposes Conservation Easement Regulation

Conservation easements are legal agreements between a landowner (the grantor)<sup>1</sup> and an organization (the grantee), such as a government entity or non-profit group, that restrict future activities on the land to protect its conservation values. Title 3 of Article 49 of the Environmental Conservation Law (ECL), enacted in 1985, is the statutory authority recognizing the validity of conservation easements in New York State.

ECL Section 49-0303(1) contains the definition of a conservation easement. It is “an easement, covenant, restriction or other interest in real property created under and subject to [Title 3 of Article 49] which limits or restricts development, management or use of such real property for the purpose of preserving or maintaining the scenic, open, historic, archaeological, architectural, or natural condition, character, significance or amenities of the real property in a manner consistent with the public policy and purpose set forth in Section 49-0301.”<sup>2</sup>

One of the government entities in New York that frequently is the grantee of a conservation easement is the New York State Department of Environmental Conservation (NYSDEC). In fact, the NYSDEC manages about 902,000 acres of conservation easement lands across New York State. More than 785,000 acres, or 87 percent, of these lands are located within the Adirondack Park.<sup>3</sup>

The ECL provisions governing conservation easements are not extensive. The statute has somewhat generic procedures, found in ECL Section 49-0307, to modify or extinguish conservation easements held by not-for-profits and public bodies. There are three different ways to modify or extinguish such easements. They are the methods found in the instrument creating the easement, proceedings brought pursuant to Section 1951 of the Real Property Actions and Proceedings Law, and eminent domain actions.

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By  
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In certain cases, public bodies also can modify or extinguish conservation easements when they interfere with major utility transmission or steam generating facilities. Public bodies also can modify or extinguish conservation easements for properties located within the Adirondack and Catskill parks if they can establish the easement no longer substantially accomplishes its purpose.

ECL Section 3-0301(2) gives the NYSDEC the power to enact regulations to manage real prop-

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erty under its jurisdiction with the goal of preserving, protecting and enhancing these parcels. ECL Section 49-0305(7)(b) permits the NYSDEC to promulgate regulations that establish standards and procedures to modify conservation easements held by public bodies. The NYSDEC has never promulgated such regulations on conservation easements, that is, until now.

The NYSDEC has proposed a regulation to modify or extinguish conservation easements.<sup>4</sup> The proposed regulation would provide standards and procedures for NYSDEC staff to use when modifying or extinguishing a conservation easement administered by the NYSDEC. It also would provide the public with an opportunity to participate in the conservation easement amendment process. The comment period for this proposed regulation expires Feb. 13, 2016.

The balance of this column discusses the proposed regulation. If adopted, it would be added as 6 NYCRR Part 592.

### The Proposed Regulation

The NYSDEC's proposed regulation consists of four parts.

The first part (Part 592.1) contains the purpose of the new regulation—to set forth procedures to be followed by the NYSDEC when it modifies or extinguishes a NYSDEC conservation easement. The proposed regulation does not apply to conservation easements owned or held by either not-for-profit conservation organizations or other public bodies.

The second part (Part 592.2) contains 11 definitions, including “grantor” (meaning the person or entity owning the underlying fee lands subject to the NYSDEC conservation easement at the time of the grant of the easement or, as applicable, the grantor's successors, heirs, and assigns); “grantee” (meaning the NYSDEC as owner and holder of a NYSDEC conservation easement); and “property” (meaning the underlying fee lands subject to the NYSDEC conservation easement).

The proposed regulation also defines “DEC conservation easement,” which mirrors the definition in ECL Section 49-0303(1). Specifically, the proposed regulation at Part 592.2(c) provides that a NYSDEC conservation easement is “an easement, covenant, restriction or other interest in real property which is owned and held by the People of the State of New York” under the NYSDEC's jurisdiction that “limits or restricts development, management or use of such real property for the purpose of preserving or maintaining the scenic, open, historic, archaeological, architectural, or natural condition, character, significance or amenities of the real property in a manner which provides for the maintenance, enhancement and improvement of recreational opportunities, tourism, community attractiveness, balanced economic growth and the quality of life in all areas of the state.”

Two other definitions are worth noting. “Modification” is defined to mean a “change, addition, deletion, correction or amendment” to a NYSDEC

conservation easement. “Third-party enforcement right” is a right that may be granted in a NYSDEC conservation easement that empowers a public body or a not-for-profit conservation organization that is not a holder of the NYSDEC conservation easement to enforce any of the terms of the easement.

The third part of the proposed regulation, found in Part 592.3(a), would establish standards to modify a NYSDEC conservation easement. These include the following:

1. A modification that does not modify the stated purpose “must not alter, and must be consistent with” the stated purpose of the easement;
2. A modification “must not affect the perpetual nature” of the easement;
3. A modification “must comply with all other existing policies, laws or regulations” including Section 49-0307; and
4. A modification must “not result in any net loss of benefits to the state,” as determined by the NYSDEC “in its sole discretion.” This would include considering changes in or to the level of public recreational opportunity or limitations or restrictions on development, management or use of the property, or any other real property owned by or under the control of the grantor, for the purpose of preserving or maintaining the scenic, open, historic, archaeological, architectural, or natural condition, character, significance or amenities of the area where the property is located.

In addition, subsection (b) of this part of the proposed regulation provides that a modification of the purpose or an extinguishment of a NYSDEC conservation easement requires a finding by the NYSDEC that the easement “can no longer substantially accomplish” its original purpose or purposes or, in fact, any of the purposes set forth in ECL Section 49-0301.<sup>5</sup>

The final part of the proposed regulation, Part 592.4, sets forth the procedures the NYSDEC must follow to modify or extinguish a NYSDEC conservation easement. First, it must provide written notice of the proposed modification or extinguishment to the grantor and entities designated in the conservation easement as having third-party enforcement rights. This notice must be sent by certified mail, return receipt requested, to the address on file with the NYSDEC for the respective entities.

If the NYSDEC is seeking to modify a conservation easement (but not change the stated purpose), it must provide public notice in the Environmental Notice Bulletin (ENB)—an official publication of the NYSDEC produced since 1976 as required by ECL section 3-0306(4)—allowing for a 30-day period for the public to submit written comments. If the NYSDEC is seeking to modify the purpose or extinguish a conservation easement, the public notice must be published in the State

Register, the ENB and a local newspaper, and provide for a public comment period. The department must conduct a non-adjudicatory public hearing held during the public comment period that is at least 30 days after the notice is published.

For any proposed modification to the purpose or the extinguishment of a NYSDEC conservation easement, the commissioner must make a written determination that the conservation easement can no longer substantially accomplish its original purpose. The commissioner must consider why the NYSDEC conservation easement can no longer substantially accomplish its original purpose or any of the purposes set forth in ECL Section 49-0301, and determine if it should be extinguished or modified. A proposed modification to the purpose must be consistent with the policies and objectives set forth in ECL Section 49-0301.

The proposed regulation would make the standards and procedures necessary for the NYSDEC to modify or extinguish a NYSDEC conservation easement clearer than under the current statutory standard.

Finally, the commissioner must publish the determination and a summary of the determination in the NYSDEC’s ENB. There also must be an appropriate filing in the county clerk’s office where the NYSDEC conservation easement is located no earlier than 120 calendar days after the notice of the commissioner’s determination appears in the ENB.

### Conclusion

In the three decades since ECL Article 49 first was adopted, the NYSDEC has modified only four NYSDEC conservation easements in accordance with the authority set forth in ECL Section 49-0307. The NYSDEC has stated that two of these modifications were completed primarily to provide the public with additional recreational opportunities, such as the establishment of additional campsites on the property or the right to provide the public with access to the property to ice fish, and two others were modified to further limit the permissible uses of the property by the landowner, such as requiring the use of sustainable forestry practices on the property or to restrict the subdivision of the property from four lots to only two lots.<sup>6</sup> The NYSDEC, to date, has never extinguished a NYSDEC conservation easement.<sup>7</sup>

Why, then, is the DEC now proposing a first conservation easement regulation relating to modification or extinguishment of easements? The DEC’s answer is that, “[d]ue to the large volume of acreage subject to [NYS]DEC conservation easements, and the ongoing need to address changing conditions, natural disasters, new information not available when the conservation easement was drafted; development of new technologies; or

new understandings in conservation science,” it is “anticipating an increase to the number of requests” to modify NYSDEC conservation easements in the future.<sup>8</sup> It added that it is “not proposing to extinguish a [NYS]DEC conservation easement.”

Certainly, the proposed regulation would make the standards and procedures necessary for the NYSDEC to modify or extinguish a NYSDEC conservation easement clearer than under the current statutory standard. The proposed regulation also makes it clear that the public will have an opportunity to participate in the modification or extinguishment of a NYSDEC conservation easement.

As noted above, interested parties and their counsel who might be concerned about the proposal or who would like to offer input have until Feb. 13, 2016, to provide comments to the NYSDEC.

### Update

The microbead issue I examined in my prior column<sup>9</sup> recently was addressed by a federal law banning microbeads, so the problem will no longer be dealt with in New York on a county-by-county basis.<sup>10</sup>

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1. Among the benefits to grantors of conservation easements is the conservation easement tax credit (CETC), enacted in 2006, which generally offers New York State taxpayers a refundable income tax credit of 25 percent of their school district, county, and town property taxes paid during the year up to a maximum of \$5,000. See, “NYS Conservation Easement Tax Credit,” available at <http://www.dec.ny.gov/lands/26428.html>.

2. Conservation easements conveyed prior to the 1985 enactment of ECL Article 49 are referred to as “common law easements.” Generally, common law conservation easements were established for similar purposes as ECL Article 49 conservation easements.

3. See, NYSDEC, “Proposed Part 592 Conservation Easements Regulation—Public Comment Period,” available at <http://www.dec.ny.gov/lands/41156.html>.

4. See, NYSDEC Proposed Regulation, “Part 592 Conservation Easements Express Terms,” available at <http://www.dec.ny.gov/regulations/104540.html>.

5. Section 49-0301 provides:

The Legislature hereby finds and declares that in order to implement the state policy of conserving, preserving and protecting its environmental assets and natural and man-made resources, the preservation of open spaces, the preservation, development and improvement of agricultural and forest lands, the preservation of areas which are significant because of their scenic or natural beauty or wetland, shoreline, geological or ecological, including old-growth forest, character, and the preservation of areas which are significant because of their historical, archaeological, architectural or cultural amenities, is fundamental to the maintenance, enhancement and improvement of recreational opportunities, tourism, community attractiveness, balanced economic growth and the quality of life in all areas of the state.

6. See, NYSDEC Proposed Regulation, “Part 592 Conservation Easements Express Terms,” supra n. 4.

7. See, NYSDEC, “Draft Regulation for Conservation Easement Modifications,” available at <http://www.dec.ny.gov/lands/82814.html>.

8. Id.

9. Charlotte A. Biblow, “Suffolk County Acts on Microbeads as New York State Lags Behind,” NYLJ (Nov. 24, 2015).

10. See, <https://www.congress.gov/bill/114th-congress/house-bill/1321>.