

# THE DAILY RECORD

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## Environmental LAW

# Forecast 2009: Environmental law changes

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It's always difficult to predict future policies, but with the recent administration changes in Washington, D.C. and Albany, some themes appear to be at the forefront of federal and state environmental agendas in the coming months.

At the federal level, President Obama's administration is ushering in substantial shifts in environmental policy. Regardless of your personal politics, there is no doubt Obama's cabinet appointments have the potential to drastically change environmental priorities.

The new administration chose a group of long-term environmental advocates for key posts, including Lisa Jackson as administrator of the (she formerly headed up New Jersey's environmental agency); Steven Chu as Energy Secretary (former director of the Lawrence Berkley National Laboratory) and Sen. Ken Salazar as Interior Secretary (the former Attorney General of Colorado). Former EPA Administrator and Al Gore protégé Carol Browner was named the president's assistant on Energy and Climate Change or the "climate czar."

A number of major regulatory initiatives are being discussed by the new administration, and it seems clear that legislation to address climate change will be at the top of the legislative agenda this year. Cap and trade requirements for industry nationwide; support for energy markets and energy credit trading; funding for clean coal technology and energy efficiency, along with increased funding for energy efficient technologies all are likely to be debated.

Another critical component of the new administration's environmental agenda is the level and manner in which fuel efficiency and emission standards are applied to the auto industry, especially in light of the current economic situation in Detroit.

Under the Bush administration, the EPA denied California a waiver under the federal Clean Air Act to apply more stringent auto emission rules for vehicles sold there. On Jan. 26, the Obama administration advised that it will support California's waiver requirement and requested the EPA to re-evaluate it. If permitted, the waiver would allow the state to attempt to cut greenhouse gas emissions from new cars and light trucks by 30 percent by 2016.

The auto industry opposes such waivers because it would create different emissions standards on a state-by-state basis, complicating the vehicle manufacturing process with a variety of standards. At

the same time, President Obama has directed the Department of Transportation to revise rules for fuel efficiency and to direct the automakers to increase efficiency for cars and trucks by 2011.

In light of economic conditions, it is questionable whether Congress and the country can rationalize the adoption of significantly stricter industry regulations, which will carry with them substantial compliance costs and as-yet-unknown economic impacts.

The proposed stimulus package being debated in Congress also includes various environmental and energy efficiency components. Some of the package's proposals include new environmental infrastructure (e.g. water treatment facilities); greater federal building efficiency; waterfront and port infrastructure and brownfield cleanup money. As the debate continues, municipalities already are submitting requests for funding packages to address their own local projects.

At the state level, changes in the governor's office over the last year are continuing the evolution of environmental policy in Albany. While the former Gov. Spitzer was viewed as environmentally friendly, Gov. Paterson is taking the environmental agenda even further. A few of the key matters he has addressed in the last year include amending the Brownfield Cleanup Program; instituting the first auction of carbon dioxide allowances under the Regional Green-house Gas Initiative (RGGI); requiring property owners to notify tenants of soil vapor testing performed on the property and requiring retailers to collect and recycle plastic bags.

Some of Paterson's new "green" agenda items include establishing a Governor's Renewable Energy Taskforce and a new Sea Level Rise Task Force, ostensibly to assess potential impacts from sea level changes. Recently issued regulations regarding the Clean Air Act "new source review" matters will require power plants, factories and industrial facilities to install state-of-the-art pollution control technology if they expand or modify their operations in ways that increase emissions.

The state DEC budget proposal issued earlier this month also illustrates the new direction in which the agency is headed. The DEC commissioner recently listed agency priorities that include combating global climate change; fostering green and healthy communities; building a toxic-free future; connecting New Yorkers to

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nature; safeguarding New York's unique natural assets and working for environmental justice. In the commissioner's words, "despite our dire current circumstances, Gov. Paterson and I remain committed to advancing a comprehensive and progressive environmental agenda."

One of Paterson's budget initiatives is to expand the Bottle Bill in an effort to mandate recycling of non-carbonated beverage containers, in addition to the existing carbonated and alcohol beverages now subject to the law. A few other DEC budget proposals include a request for federal stimulus money to invest in wastewater and drinking water infrastructure and a request for \$300 billion to construct a new Alternative Fuel Research Lab, which would focus on research and development of alternative fuel vehicles, new vehicle engines and greenhouse gas reduction projects.

On the enforcement side, a new area of DEC emphasis appears to be watershed restoration and cost recovery actions to collect natural resource damages (NRDs) for alleged impairment of environmental resources. Under the federal Superfund statute, states and natural resource trustees are empowered to assess and seek recovery for

damages sustained by environmental resources (e.g. fish, birds, shellfish) as a result of the release of hazardous substances.

In 2008, DEC aggressively pursued NRD damages for the Hudson River ecosystem. Locally, DEC and the U.S. Fish and Wildlife Service recently served several Western New York companies with notices of intent to pursue a claim for NRD damages for the Buffalo River. NRD claims tend to cast a wide net and seek damages from all types of industrial facilities that historically operated along the body of water in question.

The coming year appears to be full of not only great fiscal but also regulatory challenges for New York businesses. Consequently, it will be important to stay informed and involved with various trade groups and business organizations in an effort to comment on and oppose new environmental regulations that will have a stifling effect on business Upstate.

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