

NEW YORK ENVIRONMENTAL PROTECTION FUND

I. Overview

In New York, the third most populated U.S. state,¹ development pressures and land use management decisions have led to severe habitat loss and threatened native biodiversity.² The state committed to “work with local governments, non-profit conservation organizations and private land owners to conserve [New York’s] outdoor legacy”³ by creating the Environmental Protection Fund (EPF) in 1993. The EPF provides funds to state and local environmental programs for the conservation of open land and historic sites, which includes the acquisition of priority projects identified in the New York State Open Space Conservation Plan.⁴ To date, the EPF has helped finance the protection of 900,000 acres through state land acquisition, as well as 7,000 acres for local parks.⁵

The EPF funds open space land conservation projects and biodiversity-focused stewardship and research projects. As required by law, land acquisition projects are prioritized according to New York’s Open Space Conservation Plan, which uses the following criteria: biodiversity, wildlife habitat considerations, recreational opportunity, and public access. The state’s 2005 Draft Open Space Conservation Plan specifically references the need for the New York Department of Environmental Conservation (NYDEC) and its partners to use the state’s wildlife action plan (formerly known as the Comprehensive Wildlife Conservation Strategy) as the primary guidance for biodiversity conservation in the state.⁶

II. The New York Environmental Protection Fund

New York passed legislation in 1990 that established guidance for state land acquisition decision-making, including conducting a natural resource inventory and creating a land acquisition plan (now known as the New York Open Space Conservation Plan).⁷ The legislation

¹ U.S. Census Bureau, *Cumulative Estimates of Population Change for the United States and States, and for Puerto Rico - April 1, 2000 to July 1, 2004*, at http://www.census.gov/popest/gallery/maps/Maps_State2004.xls (July 1, 2004).

² Environmental Law Institute, *New York State Biodiversity Project Needs Assessment (March 2001)*, available at http://www.elistore.org/reports_detail.asp?ID=10931, at i.

³ Letter from George Pataki, Governor, State of New York (Sept. 2002) (available at <http://www.dec.state.ny.us/website/opensp/2002/govletter.PDF>).

⁴ In addition to granting funds for the purchase of priority lands, the EPF provides funds for the State Farmland Protection Program, the Municipal Parks and Historic Preservation Grants Program, state land stewardship, and local waterfront revitalization grants. New York Department of Environmental Conservation, *Draft New York State Open Space Conservation Plan 2005 (Nov. 2005)*, available at <http://www.dec.state.ny.us/website/df/opensp/2005/osp2005.pdf>, at 2.

⁵ Total acreage includes lands acquired with \$150 million from the 1996 Environmental Bond Act. Telephone interview with Francis Sheehan, Director of Natural Resources Planning, New York Department of Environmental Conservation (Mar. 15, 2005).

⁶ New York Department of Environmental Conservation, *supra* note 4, at 341. See also: New York Department of Environmental Conservation, *State Releases 2005 Draft Open Space Conservation Plan*, at <http://www.dec.state.ny.us/website/press/pressrel/2005/2005132.html> (Nov. 10, 2005).

⁷ N.Y. LAWS, art. 49, tit. 2.

also created Regional Advisory Committees (RACs) and appointed a State Land Acquisition Advisory Council to inform and advise the state on land conservation issues.⁸ In 1992, the initial New York Open Space Conservation Plan was approved. A joint effort by the NYDEC, the New York Office of Parks, Recreation, and Historic Preservation (NYOPRHP), and nine RACs, the plan outlined goals and strategies for conserving open space in New York State.⁹ As required by law, the plan is updated every three years.^{10,11}

The EPF was created by the state legislature in 1993 to provide funds for the acquisition of priority projects identified in the New York State Open Space Conservation Plan.¹² EFP authorizing legislation states that “[t]he purpose of the land acquisition program...is to provide for the conservation, protection, and preservation of open space, natural, historic and cultural resources and the enhancement of recreational opportunities.”¹³ Legislation specifically provides the Commissioners of the NYDEC and NYOPRHP with authority “to undertake open space land conservation projects.”¹⁴ “Open space land conservation projects” are defined as “the purchase of conservation easements undertaken by the [NYDEC and/or NYOPRHP Commissioners] listed in the state open space land acquisition plan.”¹⁵ The EPF is administered jointly by NYDEC and NYOPRHP with a staff that includes scientists.¹⁶

Program Funding

The EPF is funded by the state’s real estate transfer tax, as well as surplus land and conservation license plate sales. The EPF receives \$150 million annually, which includes monies for state land acquisition, farmland protection, and local parks.¹⁷ EPF funding for state land acquisition has grown steadily from \$9 million to \$40 million in the 2005-2006 state budget.¹⁸

⁸ The State Land Acquisition Advisory Council is composed of seven members: NYDEC Commissioner, the NYOPRHP Commissioner, the governor (or a designee), the majority leader of the senate (or a designee), the speaker of the assembly (or a designee), the minority leader of the senate (or a designee), and the minority leader of the assembly (or a designee). New York Department of Environmental Conservation, *supra* note 4, at 3. *See also* N.Y. LAWS, art. 49, tit. 2.

⁹ The Trust for Public Land, *State Funding Profile: New York*, at http://www.tpl.org/tier3_cdl.cfm?content_item_id=878&folder_id=706 (last visited Feb. 8, 2006).

¹⁰ N.Y. LAWS, art. 49, tit. 2, § 49-0207(5).

¹¹ The State of New York is currently in the final stages of formalizing an update of the plan for 2005, which has been subject to extensive public comment and will be completed for Governor Pataki’s approval in 2006. New York Department of Environmental Conservation, *State Releases 2005 Draft Open Space Conservation Plan*, at <http://www.dec.state.ny.us/website/press/pressrel/2005/2005132.html> (Nov. 10, 2005).

¹² In addition to state land acquisition, the EPF also provides funds for several other open space-related activities promoted in the Open Space Conservation Plan, including the State Farmland Protection Program and the Municipal Park and Historic Preservation Grants Program, state land stewardship, local waterfront revitalization, planning assistance for certain major resource areas, the implementation of the Hudson River Estuary Action Plan, and biodiversity stewardship. *Id.* *See also*: New York Department of Environmental Conservation, *supra* note 4, at 341; N.Y. LAWS, art. 6, § 92s.

¹³ N.Y. LAWS, art. 49, tit. 2, § 49-0203(1).

¹⁴ N.Y. LAWS, art. 54, tit. 3, § 54-0303.

¹⁵ N.Y. LAWS, art. 54, tit. 3, § 54-0301.

¹⁶ Telephone Interview with Francis Sheehan, Director of Natural Resources Planning, New York Department of Environmental Conservation (June 2, 2003).

¹⁷ N.Y. LAWS, art. 6, § 92s.

¹⁸ Of the 2005-2006 budgeted amount, \$500,000 will be administered through the Land Trust Alliance for grants to local land trusts. Sheehan, *supra* note 5.

III. Land Protection Strategies

Land Protection Tools

The EPF funds projects that use either fee title acquisition or conservation easements to protect open space.¹⁹

Prioritizing Land Acquisition

New York legislation mandates that NYDEC and NYOPRHP compile a comprehensive inventory of protected and unprotected resources that have statewide or regional environmental, historic, and/or cultural significance. The inventory includes, among other lands/resources, “lands which possess statewide or regional significance for historic, cultural, ecological, open space, outdoor recreation, resource protection or wildlife management purposes, including the purposes of restoring extirpated species.”²⁰ This inventory is used to prepare and update the New York Open Space Conservation Plan, which guides state land acquisition decision-making.²¹

NYDEC and NYOPRHP regional offices receive land protection requests from a variety of sources, including the public, RACs, conservation organizations, and local governments. The regional offices conduct an initial review and then forward proposals to the agencies’ central offices.²² The land protection prioritization process begins with a “resource value rating” for every proposed project. This includes project categorization and numerical scoring.²³ Project categories include: “Forest Protection,” “Water Resource Protection,” “Significant Ecological Areas,” “Recreational Opportunity,” “Distinctive Character,” “Enhancement of Public Lands,” and “Coastal and Estuarine Land Conservation Area.”²⁴ The “Significant Ecological Areas” category includes subcategories for: “Wildlife Habitat,” “Biodiversity,” “Exceptional Forest,” “Shoreline Protection,” “Unique Areas,” and “Wetlands.”²⁵

The 2005 Draft Open Space Plan specifically defines the “Biodiversity” subcategory to include “the variety of life forms including the different plants, animals and microorganisms, the genes they contain, and the ecosystems they form. This subcategory emphasizes the interrelated nature of the living world and its processes. It considers the variety of living species; the genetic information contained in the individual plants, animals, and microorganisms; and the variety of habitats, biotic communities, and ecological processes, including the diversity present within ecosystems in terms of habitat differences and the variety of ecological processes.”²⁶

¹⁹ N.Y. LAWS, art. 49, tit. 2, § 49-0203(2).

²⁰ N.Y. LAWS, art. 49, tit. 2, § 49-0205(1).

²¹ N.Y. LAWS, art. 49, tit. 2, § 49-0207.

²² New York Department of Environmental Conservation, *supra* note 4, at 96-97.

²³ *Id.* at 2.

²⁴ *Id.* at 80.

²⁵ The “Biodiversity” subcategory was a new addition in the 2002 Open Space Plan. Sheehan, *supra* note 5.

²⁶ The plan specifically recognizes that the “Biodiversity” subcategory contains elements that overlap with other subcategories (e.g. “Wildlife Habitat” and “Wetlands”) and that the intent of the “Biodiversity” subcategory is to acknowledge the importance of the natural resource and biological benefits derived from the critical interaction of the various subcategories. New York Department of Environmental Conservation, *supra* note 4, at 83.

A project evaluated under the “Biodiversity” subcategory is assigned a value of up to 100 based on the biodiversity “resource value rating system,”²⁷ which includes the following criteria (and related sub-criteria): biodiversity potential,²⁸ overall habitat quality,²⁹ parcel design,³⁰ and management considerations.^{31,32} The list of properties that receive a rating above a specified threshold are submitted to the Program Executive and are evaluated against nine qualitative criteria.³³ If the Program Executive approves a project, it is forwarded to the Commissioner for review and prioritization.³⁴

The Governor must include a list of proposed projects in the annual EPF budget request. This list, once approved by the legislature as part of the budget process, is final list of projects that are eligible for funding in the given year. At that point, actual funding of the projects is undertaken, which depends on the readiness of the projects to be purchased (conducted on a willing seller-willing buyer basis).³⁵

²⁷ See: New York Department of Environmental Conservation, *supra* note 4, at C-16.

²⁸ Sub-criteria for “biodiversity potential” include whether the proposed area protects or contributes to the following: an animal listed as endangered, threatened or of special concern under state law; a plant listed as endangered, threatened, rare or exploitably vulnerable under state law; a natural community that is recognized by the New York Natural Heritage Program for its rarity, size, condition or landscape setting; an existing regional, state or multi-jurisdictional biodiversity conservation initiative; a species that is at the periphery of its range in New York or is restricted to narrow ecological zones; a rare wetland natural community; and/or an emergent marsh in which purple loosestrife and/or reed (*Phragmites*) constitute less than one third of the cover type.

²⁹ Sub-criteria for “habitat quality” include whether the proposed area protects or contributes to the following: high quality habitat for a species or combination of species; medium quality habitat for a species or combination of species; low quality, but restorable, habitat; and/or low quality, and not restorable, habitat for a species or combination of species.

³⁰ Sub-criteria for “parcel design” include whether the proposed area: expands an existing parcel (by at least 10 percent) that already protects a biodiversity conservation target; is large enough to adequately support the fauna and/or flora present at the site, taking into considerations the shape (area: perimeter ratio) of the parcel and surrounding land use(s); creates a buffer zone or otherwise enhances (e.g., reduces negative edge effects) the viability of the conservation target and ensures that the ecological processes upon which the species or habitat depends on may function properly; and/or links habitat(s) of animals or plants listed as endangered, threatened, rare, special concern, exploitably vulnerable, or protected under New York law to encourage gene flow between isolated populations or demes, or creates corridors for migration and/or dispersal of other fauna and flora species.

³¹ Sub-criteria for “management considerations” include whether or not the proposed area: requires active management to sustain biodiversity conservation target; requires active management to sustain biodiversity conservation; and/or creates a buffer zone or otherwise enhances (e.g. reduces negative edge effects) the viability of the conservation target and ensures that the ecological processes upon which the species or habitat depends on may function properly.

³² New York Department of Environmental Conservation, *supra* note 4, at C-16.

³³ Qualitative Review criteria are: impact of the location of the project on its ability to achieve the objective; compatibility of the project with Statewide Comprehensive Outdoor Recreation Plan and other state environmental plans; compatibility of the project with regional and/or local environmental plans; multiple benefits afforded by the project; availability of alternative or additional funding for purchase of the project; post acquisition management needs and the availability of post acquisition management support; extent to which the project encompasses agricultural lands; fiscal and economic benefits and burdens resulting from the project, including those on the local government and on the local economy; and compatibility of the project with the Coastal and Estuarine Land. *Id.* at 101-102.

³⁴ In addition to the resource value rating and qualitative review criteria, the Commissioner also considers other factors, such as the cost of the project. *Id.* at 105.

³⁵ *Id.* at 106.

Protection in Perpetuity

New York law outlines pre-requisites to the sale or conversion of land acquired under the EPF. Lands can only be converted if other lands of “equal environmental value and fair market value and reasonably equivalent usefulness and location” are provided in exchange. Similarly, real property acquired by a non-profit organization with EPF monies cannot be “sold, leased, exchanged, donated or otherwise disposed of without the express authority of an act of the legislature.”³⁶

Long-term monitoring and stewardship of lands acquired through the EPF is a recognized component of open space protection in New York. Since 1999, a total of \$68 million in EPF resources have been devoted to the stewardship needs of NYOPRHP and NYDEC. However, increased public holdings and public demand, coupled with declining assistance from traditional federal and state sources, has challenged the ability of land managers to provide long-term monitoring and stewardship of EPF-acquired lands. Funding for stewardship work is not legislated and is unstable; in recent years, annual funding has ranged from \$5.75 million to \$12 million.³⁷

IV. State Wildlife Action Plan

New York’s wildlife action plan (formerly known as the Comprehensive Wildlife Conservation Strategy) was submitted to the U.S. Department of Fish and Wildlife in the fall of 2005. The plan, developed by NYDEC’s Division of Fish, Wildlife, and Marine Resources,³⁸ addresses species of greatest conservation need; critical habitats; stressors/impacts to natural resources; research, survey, and restoration needs; and priority conservation actions.³⁹

The 2005 Draft Open Space Conservation Plan references the wildlife action plan in its section on new recommendations for protecting fish, wildlife, and plants. The Open Space Plan specifies that NYDEC and its partners should implement the wildlife action plan and recognizes that it is New York’s primary vehicle for biodiversity conservation.⁴⁰ To facilitate the integration of the two plans, NYDEC has shared information from the wildlife action plan with the RACs and the public.⁴¹

V. Summary

New York’s Environmental Protection Fund has statutory authority to conserve open space for a number of purposes, including biodiversity protection. New York’s Open Space Conservation Plan provides a project rating system that includes biodiversity-related criteria for land

³⁶ N.Y. LAWS, art. 54, tit. 3, § 54-0909.

³⁷ Sheehan, *supra* note 5.

³⁸ New York Department of Environmental Conservation, *New York State Comprehensive Wildlife Conservation Strategy (CWCS)*, at <http://www.dec.state.ny.us/website/dfwmr/swg/cwcsmainpg.html#top> (last visited Feb. 8, 2006).

³⁹ New York Department of Environmental Conservation, *supra* note 4, at 378.

⁴⁰ *Id.* at 341.

⁴¹ Sheehan, *supra* note 5.

acquisition decision-making. The 2005 Draft Open Space Conservation Plan recommends that the NYDEC implement the state wildlife action plan to help protect state biodiversity.