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Rooftop Solar Systems Required by NYC Local Laws May Qualify for IRA's Renewable Energy Tax Credits

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New York City local law now requires new roofs (with some limited exceptions) to install a solar photovoltaic (PV) electricity generating and/or green roof system. While these requirements became effective in 2019, given the slow pace of construction in New York City,[1] many of the first roofs covered by the law have only recently been, or will soon be, installed. Meanwhile, the federal Inflation Reduction Act of 2022 (IRA) provides tax credits for qualifying renewable energy systems, including solar projects, provided that the project appears online after December 31, 2022, and that construction begins before January 1, 2025. Developers and property owners may be considering whether to install solar PV systems or green roofs to meet their obligations under local law and/or to take advantage of the availability of federal tax credits in the IRA. Although this has not yet been addressed through guidance by the Internal Revenue Service (IRS) or the U.S. Treasury Department, it appears that developers and property owners may be eligible for the IRA's renewable energy tax credits if they install rooftop solar systems as required by local law.

Local Law 92 and 94 of 2019

In 2019, the New York City Council passed Local Laws 92 and 94 as part of the Climate Mobilization Act (CMA). The CMA directs the City to reach carbon neutrality by 2050, in part through various policies and incentives targeted at improving energy efficiency in buildings. Effective November 15, 2019, Local Laws 92/94 require new buildings, new roofs resulting from the enlargement of existing buildings, and existing buildings replacing an entire existing roof deck or roof assembly to install a "sustainable roofing zone,"[2] the entirety of which must be a solar PV electricity generating system, a green roof system, or a combination of the two (with some limited exceptions). Solar PV systems must have a capacity of at least 4 kilowatts (kW) to qualify under the law. If the 4 kW capacity minimum cannot be met, a green roof system must be installed instead, unless the roof is too steep.

- For continuous roof areas greater than 200 square feet and with a slope of less than 2:12:
  - o A solar PV system, green roof, or combination of the two, must be installed.
  - o If the 4 kW capacity minimum cannot be reached due to roof size or other site conditions (like shading), a green roof must be installed instead.

[1] *See* Matthew Haag, *The Building Spree That Reshaped Manhattan's Skyline? It's Over*, N.Y. Times (Dec. 28, 2023), https://www.nytimes.com/2023/12/28/nyregion/manhattan-construction-drought-nyc.html (noting that the City is entering the most significant office construction drought since the savings and loan crisis of the 1980s and early 1990s, and that construction of large buildings can take years to complete).

[2] N.Y.C. Dept. of Bldgs., Buildings Bulletin 2019-010 (Oct. 24, 2019), https://www.nyc.gov/assets/buildings/bldgs_bulletins/bb_2019-010.pdf.

- For continuous roof areas less than 200 square feet and with a slope of less than 2:12:
  - A solar PV system must be installed.
  - If the 4 kW capacity minimum cannot be reached, a green roof must be installed instead.
  - Note that for these smaller, low-slope roof areas, a combination of solar PV system and green roof is not permitted.
- For continuous roof areas with a slope of greater than 2:12:
  - A solar PV system must be installed, because the high slope does not allow for a green roof.
  - If the 4 kW capacity minimum cannot be reached, the roof area is exempt from Local Law 92/94.

Inflation Reduction Act of 2022

Enacted on August 16, 2022, the IRA allows taxpayers to deduct a percentage of the cost of eligible renewable energy systems from their federal taxes through a Production Tax Credit (PTC) and/or Investment Tax Credit (ITC). The IRA extends the PTC and ITC through at least 2025, as long as projects are under 1 megawatt (MW) in size or meet prevailing wage and apprenticeship requirements. Qualified projects[3] include multiple solar and wind technologies, geothermal, tidal, energy storage technologies, microgrid controllers, fuel cells, biomass, landfill gas, hydroelectric, marine and hydrokinetic projects, and interconnection costs. Further, although not the focus of this article, both the PTC and ITC may be subject to bonus credits,[4] for projects achieving domestic content minimums, for siting in energy communities,[5] for siting in low-income communities or on Indian land, and for qualified low-income residential building projects or economic benefit projects.

The IRA's renewable energy tax credits are subject to the following requirements:

- The PTC is a 2.75 cent per kilowatt-hour (kWh) tax credit for electricity generated for the first 10 years of a qualifying system's operation.
  - The credit is available for renewable energy "produced by the taxpayer" from qualified resources, and "sold by the taxpayer to an unrelated person during the taxable year."[6]
  - Solar energy is included as a qualified resource. However, note that for solar facilities specifically, they must be "owned by the taxpayer."[7]
- The ITC is a percentage-based tax credit, amounting to 30% of a qualifying project's total cost basis for a system installed during the tax year.
  - Solar-generated electricity and energy storage technology both qualify for the credit, so long as "the construction, reconstruction, or erection … is completed by the taxpayer."[8]
  - Likewise, installation of interconnection property also qualifies for the ITC, if "paid or incurred by the taxpayer."[9]
  - Unlike the PTC, the ITC does not require that the facility be owned by the taxpayer.

The PTC is calculated on the basis of the electricity produced by a renewable energy system, while the ITC is calculated based on the cost of building the system itself. The ITC is calculated by multiplying the applicable tax credit percentage by the amount spent on "eligible property." Eligible property includes: solar PV panels, inverters, racking, balance-of-system equipment, and sales and use taxes on the equipment; concentrating solar power (CSP) equipment; installation costs; step up transformers, circuit breakers, and surge arresters; energy storage devices with a capacity of 5 kWh or more; and the interconnection property costs (for projects of 5 MW or less.[10] On November 17, 2023, the IRS and the U.S. Treasury Department issued long-awaited proposed regulations that would provide guidance on the determination of the ITC following the enactment of the IRA. Among other things, the proposed regulations clarify that the ITC for solar energy includes solar process heat, i.e., solar energy used to produce heat rather than electricity.

IRA Guidance

A June 2023 web post[11] from the U.S. Department of Energy's Solar Energy Technologies Office states that only the incremental costs of a roof installation are eligible for the ITC, citing a 2015

[3] *See Summary of Inflation Reduction Act Provisions Related to Renewable Energy*, U.S. ENV'T PROT. AGENCY [hereinafter *Summary of IRA Provisions*], https://www.epa.gov/green-power-markets/summary-inflation-reduction-act-provisions-related-renewable-energy (last updated Oct. 25, 2023).

[4] *See Summary of IRA Provisions*, *supra* note 3.

[5] Kayley McGrath & Michael S. Bogin, *Energy Community Guidance for Brownfields Under the Inflation Reduction Act*, BLOG (SIVE, PAGET & RIESEL P.C.) (May 31, 2023), https://sprlaw.com/energy-community-guidance-for-brownfields-under-the-inflation-reduction-act/.

[6] 26 U.S.C. § 45(a)(2)(A)–(B).

[7] 26 U.S.C. § 45(d)(4).

[8] 26 U.S.C. § 48(a)(3)(B)(i).

[9] 26 U.S.C. § 48(a)(8).

[10] *Federal Solar Tax Credits for Businesses*, SOLAR ENERGY TECH. OFFICE, ENERGY.GOV [hereinafter *Federal Solar Tax Credits*], https://www.energy.gov/eere/solar/federal-solar-tax-credits-businesses (last updated Aug. 2023).

[11] *See Federal Solar Tax Credits*, *supra* note 10.

IRS Private Letter Ruling[12] that defines incremental costs as those which "exceed the cost of reroofing Taxpayer's building with a non-[solar] roof *allowed by local law*."[13] Given that New York City local law now requires solar roofs (in most cases), some might read the IRS ruling to mean that there would be no incremental costs that would qualify for the ITC, or that for roofs where a green roof is an option under LL 92/94, the incremental costs would only be the difference between the green roof and the solar roof. However, this concern appears not to have been borne out, and anecdotal evidence suggests that property owners and developers in New York City have successfully taken advantage of the IRA's renewable energy tax credits even though their expenditures were incurred in order to comply with local law.

Other Considerations

It makes sense that compliance with local law would not undermine eligibility for federal renewable energy tax credits; otherwise, that would create a disincentive for local governments to pass renewable energy requirements like Local Laws 92/94. Indeed, the federal government already allows for property owners to take advantage of "stacked incentives" such as state and local tax rebates without affecting the availability or amount of the federal tax credit. For example, most solar system rebates, tax credits, and tax exemptions provided by utilities or state governments do not reduce the federal tax basis when calculating the ITC.[14]

Rob Crauderueff, CEO and founder of Crauderueff Solar, said that developers can take advantage of multiple incentives at the local, state, and federal levels to improve the financial viability of their projects: "One of the big opportunities is that, for code and regulatory compliance, we now have a set of city, state and federal incentives that are able to help projects realize a strong financial return. So solar, even when required, is typically more of an economic opportunity than a burdensome cost."[15]

That said, although at this time it does not appear that the preexisting legal obligations of Local Laws 92/94 would disqualify taxpayers from receiving the IRA's renewable energy tax credits, this has yet to be explicitly addressed in proposed regulations or guidance from the IRS or the U.S. Treasury Department. It remains to be seen whether forthcoming guidance or regulations will provide more clarity to taxpayers interested in taking advantage of these incentives in the IRA.

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LEGAL DEVELOPMENTS

AIR POLLUTION

Defendant Who Modified Diesel Truck Emission Controls Pleaded Guilty to Conspiracy to Violate Clean Air Act

The U.S. Attorney's Office for the Northern District of New York and the U.S. Environmental Protection Agency's Criminal Investigation Division announced that the owner-operator of Southern Diesel Truck Co. and Southern Diesel and Off-Road LLC (together, Southern Diesel) pleaded guilty to conspiracy to commit violations of the Clean Air Act. Southern Diesel—located in the City of Oswego—is engaged in the business of buying, reselling, and performing after-market modifications of diesel vehicles. The defendant admitted that he conspired and agreed with others to violate the Clean Air Act by tampering with emission control monitoring devices and methods on diesel pickup trucks. The defendant and his employees did so through both software and hardware modifications. The press release announcing the guilty plea said Southern Diesel tampered with emission control monitoring devices and systems of approximately 244 vehicles between January 2018 and November 2022. Sentencing was scheduled for April 19, 2024. The maximum sentence for the conspiracy charge is five years in prison, a fine of $250,000, and a supervised release term of three years. *United States v. Talamo*, No. 5:23-cr-00484 (N.D.N.Y. Dec. 21, 2023).

ASBESTOS

Appellate Division Said Plaintiff Raised Fact Issue Regarding Specific Causation

In an asbestos personal injury action against a company that supplied an allegedly asbestos-containing putty used by the decedent in his woodworking shop, the Appellate Division, First Department affirmed the denial of the defendant's motion for summary judgment dismissing the complaint. The First Department found that the defendant made a prima facie showing of the absence of specific causation with an industrial hygienist's affidavit that calculated the decedent's cumulative dose of asbestos as being within the range of lifetime cumulative exposures to asbestos from breathing ambient air. The First Department further found, however, that the plaintiff raised an issue of fact with affidavits from a medical expert and an industrial hygienist. The medical expert concluded that the decedent's exposure range exceeded known causative levels for mesothelioma based on the industrial hygienist's report, which cited "simulation studies

[12] Internal Revenue Serv. (IRS), U.S. Dept. of Treasury, PLR 140237-14 (June 5, 2015), https://www.irs.gov/pub/irs-wd/201523014.pdf.
[13] IRS, *supra* note 12, at 3 (emphasis added).
[14] *See Federal Solar Tax Credits*, *supra* note 10.
[15] Mr. Crauderueff provided this quote in a telephone conversation and confirmed it over email (on file with authors).

that demonstrated that decedent's work mixing and sanding joint compound and putty would have released toxic concentrations of asbestos fibers into his breathing zone." The First Department found that the simulation studies satisfied the New York Court of Appeals requirement that a plaintiff in an asbestos action provide a "scientific expression" linking "actual exposure to asbestos to a level known to cause mesothelioma" and that the scientific expression be "specifically designed to capture asbestos fibers created by the simulated activity in the breathable zones of the participating worker." *Sason v. Dykes Lumber Co., Inc.*, 221 A.D.3d 491, 199 N.Y.S.3d 56 (1st Dept. 2023).

Appellate Division Affirmed Denial of Defendant's Summary Judgment Motion in Asbestos Personal Injury Action

In an asbestos personal injury action, the Appellate Division, First Department affirmed the denial of a defendant's motion for summary judgment dismissing the complaint. The First Department found that the defendant's employee affidavit concerning the time period during which the defendant distributed the allegedly asbestos-containing products was based on the employee's "review of unspecified documents between unspecified entities." The appellate court found the affidavit was not sufficient to meet the defendant's prima facie burden and that the defendant's attempt to correct the deficiency on reply was "improper and insufficient." The First Department further found, in any event, that even if the defendant established that it did not have liability for products distributed prior to 1984, the decedent's testimony would allow the inference of work on the defendant's asbestos-containing products in 1984 and beyond, and testimony of the decedent's coworker raised questions of fact as to whether the decedent worked with the defendant's products as late as 1988. *Carboni v. Alfa Romeo USA*, 220 A.D.3d 591, 197 N.Y.S.3d 62 (1st Dept. 2023).

LAND USE

Second Circuit Revived Orthodox Jewish Religious School's Claims Against Town of Clarkstown

The Second Circuit Court of Appeals reversed the dismissal of an Orthodox Jewish religious educational institution's lawsuit against the Town of Clarkstown, the Town Supervisor, and an organization of local residents in connection with the institution's unsuccessful efforts to purchase a property owned by a church to establish an Orthodox Jewish school for girls. The plaintiff asserted a Religious Land Use and Institutionalized Persons Act claim against the Town, a claim under 42 U.S.C. § 1983 against the Town and its Supervisor alleging First and Fourteenth Amendment violations, a conspiracy claim under 42 U.S.C. § 1985 against all defendants, a claim against the Town and its Supervisor of violations of freedom of worship and assembly under the New York Constitution, and a claim of tortious interference with a contract against all defendants. The Second Circuit concluded that the district court improperly dismissed the plaintiff's religious discrimination and civil rights claims as unripe. The appellate court found that a letter from the Town's counsel to the plaintiff stating that the Zoning Board of Appeals would not entertain any appeal by the plaintiff made clear that it would not revisit a building inspector's decision and that the decision was intended to be final. The Second Circuit further noted that after the church terminated its contract with the plaintiff and the Town purchased the property, the plaintiff "had no further avenues of review." The Second Circuit said these events amounted "at a minimum to *de facto* finality, which is all that is required." The Second Circuit also found that the plaintiff had sufficiently alleged standing for its tortious interference claim against the Town defendants, disagreeing with the district court's conclusion that the plaintiff's loss of its contract with the church was not traceable to the Town defendants. The Second Circuit noted that the requirement that a plaintiff's injury be "fairly traceable" to the challenged action and not to a third party's action "does not create an onerous standard." The Second Circuit found that "no more than *de facto* causality" was required, "a standard that is, of course, lower than for proximate causation." The Second Circuit found that the plaintiff met this standard with allegations that the Town defendants "took steps to frustrate its planned acquisition" of the property that "predictably prevented" the plaintiff from securing necessary approvals, cut off access to financing, and led to termination of the contract. *Ateres Bais Yaakov Academy of Rockland v. Town of Clarkstown*, 88 F.4th 344 (2d Cir. 2023). [*Editor's Note:* This case was previously covered in the October 2022 issue of *Environmental Law in New York*.]

Appellate Division Upheld Determination that Planned Commercial Plaza's Encroachment on Public Walkway Easements Did Not Implicate Public Trust Doctrine

The Appellate Division, Fourth Department affirmed a trial court's declaration after a non-jury trial that the public trust doctrine was inapplicable to Town of Brighton easements over a 10-foot strip of land for maintenance of a pedestrian pathway for public use. The petitioners challenged a 93,000-square-foot commercial plaza that would encroach on the strip of land. The Fourth Department also affirmed the trial court's declaration that the Town did not constructively abandon the easements in violation of Town Law § 64(2). The Fourth Department concluded that there was "a fair interpretation of the evidence supporting the court's well-reasoned determinations." *Clover/Allen's Creek Neighborhood Association LLC v. M&F LLC*, 2023 N.Y. App. Div. LEXIS 6729 (4th Dept. Dec. 22, 2023). [*Editor's Note:* This case was previous covered in the March 2023 and June 2023 issues of *Environmental Law in New York*.]

State Supreme Court Held that Town of Southampton's Rejection of Mixed-Use Golf Club Project Violated Developer's Due Process Rights

The Supreme Court, Suffolk County ordered the Town of Southampton Town Board to approve a mixed-use commercial golf club and residential resort community known as the Hills at

Southampton. The court found that the plaintiffs had a property interest in the project's approval because there was a "strong likelihood" that the project would be approved since it was consistent with the Town's comprehensive plan; the completed environmental review under the State Environmental Quality Review Act had found no significant adverse impacts; and the Town Board's discretion was "narrowly circumscribed" due to earlier approvals and environmental reviews that permitted residential use with an accessory golf course. The court concluded that "the only infinitesimal bit of apparent administrative discretion left … was whether the golf club, not the golf course, was to be approved." The court noted that the record was "utterly devoid" of remarks concerning the commercial golf club use by the two members who voted against the project. In addition, the court found that the two members "clearly disregarded" their own prior votes accepting the final environmental impact statement (EIS) and in favor of the draft EIS, as well the Town Board's approval of the findings statement. In addition, "they also acted in derogation of the Comprehensive plan." The court therefore concluded that the members' nay votes were "egregious and shocking" and that they appeared to have "acceded to the community voices in opposition to the project rather than basing their votes on a dispassionate and reasoned review." The court found that the nay votes violated the plaintiffs' substantive due process rights. The court further found that the members appeared to have decided to vote nay prior to a public hearing on the application, which also established a violation of procedural due process. In addition, the court ruled that no notice of claim was required under Section 50-e of the General Municipal Law for federal constitutional claims and coextensive state constitutional claims. The court also rejected the defendants' contention that under the Town Code the Town Board had "complete discretion" as to whether to approve the project. In addition to voiding the votes against the project, the court directed that an inquest be held regarding the issue of damages and reasonable attorneys' fees. *DLV Quogue, LLC v. Town of Southampton*, 2023 NYLJ LEXIS 3491 (Sup. Ct. Suffolk County Dec. 15, 2023).

OIL SPILLS & STORAGE

Federal Court Said Timeliness of Lawsuit Alleging Injuries from Greenpoint Oil Spill Could Not Be Determined

The federal district court for the Eastern District of New York denied ExxonMobil Corporation's motion to dismiss a lawsuit brought by two residents of Greenpoint, Brooklyn, who sought damages for personal and property injuries allegedly arising from an oil spill first discovered in the 1970s. The court found that it could consider extrinsic materials submitted by ExxonMobil—publicly available documents and reports from DEC, the U.S. Environmental Protection Agency, and the Coast Guard; newspaper articles about the spill; and a complaint in another lawsuit related to the spill—only for the purpose of taking judicial notice "of the *fact* that [the documents] contain information related to the oil spill" and not for the truth of matters asserted in the materials. The court found that it could not properly consider affidavits submitted by the plaintiffs in response to the motion to dismiss in which the plaintiffs attested to their diagnoses with acute myeloid leukemia. The court found that neither the complaint's allegations nor the judicially noticed materials established that the plaintiffs' claims were untimely. With respect to the plaintiffs' claims of materially deceptive and misleading business practices under General Business Law § 349, the court said the dates of the plaintiffs' alleged injury were not ascertainable, that it was possible the alleged injury occurred within the three-year statute of limitations, and that the claim therefore could not be dismissed since the plaintiffs were not required to "affirmatively plead facts in avoidance" of a statute-of-limitations defense. With respect to the plaintiffs' Oil Spill Act and common law claims, the court found that it could not determine from the complaint and the judicially noticed materials when the plaintiffs should have been aware through exercise of reasonable diligence of their injuries from the spill. Based on the record of materials properly considered at the motion to dismiss stage, the court found it was "too early" to determine whether the claims were time-barred. *Auriemma v. ExxonMobil Corp.*, 2023 U.S. Dist. LEXIS 176484 (E.D.N.Y. Sept. 30, 2023).

Appellate Division Affirmed Denial of Summary Judgment Motions in Homeowners' Oil Spill Case Against Oil Supplier

The Appellate Division, Second Department issued three decisions regarding motions for summary judgment in a lawsuit brought by homeowners seeking to recover damages from a heating oil supplier under Navigation Law § 181 for allegedly causing an oil spill from a tank in the basement of their home. In the first decision, the Second Department found that neither the homeowners nor the defendant had established prima facie entitlement to judgment as a matter of law. Regarding the homeowners' motion, the Second Department found that their submissions failed to eliminate all triable issues of fact as to the cause of the oil spill and whether the defendant was a discharger under Navigation Law § 181, and whether the plaintiffs caused or contributed to the oil spill. Regarding the defendant's motion, the Second Department found that its submissions were speculative and that one of its witness's affidavits was not in admissible form. In the second decision, the Second Department found that the defendant failed to establish that evidence submitted in support of a second motion for summary judgment was not available to the defendant when it submitted its first summary judgment motion. The Second Department further found that due to conflicting expert opinions, there were triable issues of fact regarding the second motion, which sought dismissal of the homeowners' claims for damages relating to diminution in value of certain real property and artwork. In the third decision, the Second Department found that the defendant's motion to renew or reargue the second motion for summary judgment was properly construed as a motion to reargue. Because the denial of a motion to reargue is not appealable, the court dismissed the defendant's appeal. *Brilliantine v. East Hampton Fuel Oil Corp.*, 2023 N.Y. App. Div. LEXIS 6163 (2d Dept. Nov. 29, 2023); *Brilliantine v.*

East Hampton Fuel Oil Corp., 221 A.D.3d 949, 199 N.Y.S.3d 690 (2d Dept. 2023); *Brilliantine v. East Hampton Fuel Oil Corp.*, 198 N.Y.S.3d 606 (2d Dept. 2023).

State Supreme Court Held Upper East Side Building Owner/Manager Liable for Oil Spill Harm to Neighboring Building

The Supreme Court, New York County ruled that the owner of an apartment building on the Upper East Side of Manhattan and its managing agent were liable under Navigation Law § 181(2) for all cleanup and removal costs and direct and indirect damages incurred by a neighboring building resulting from oil released from a storage tank in the apartment building. The apartment building owner commenced this lawsuit against two companies involved in the building's conversion from #4 heating oil to a combination of #2 heating oil and natural gas. A third defendant was a company that delivered fuel oil to the converted tank. The plaintiff alleged that these defendants caused the spill by failing to detect one or more corrosion holes exposed when the #4 heating oil was removed from the bottom of the storage tank. The neighboring building owner asserted a counterclaim and cross-claim against the apartment building owner and managing agent and the company hired to do the conversion. The court granted partial summary judgment to the neighboring building owner on the Navigation Law claim against the apartment building owner and managing agent. The court rejected the owner and managing agent's argument that they were not in control of the events that led to the spill and therefore could not be "dischargers." The court also found no basis for the contention that the neighboring building owner contributed to the spill's harm by interfering with cleanup and further found that evidence of such interference would be relevant to damages, not liability. The court also noted that its finding of liability did not preclude the apartment building owner and managing agent from seeking contribution from other allegedly responsible parties. The court also rejected the argument that the court should stay this proceeding under the doctrine of primary jurisdiction due to an ongoing administrative proceeding before the Oil Fund. The court directed that the parties proceed with discovery regarding the remaining claims, including damages incurred by the neighboring building. *East 66th Street Associates #1 LLC v. New York Heating Corp.*, 2023 N.Y. Misc. LEXIS 10333 (Sup. Ct. New York County Oct. 5, 2023).

SEQRA/NEPA

State Supreme Court Said Municipalities Had Standing to Challenge Exclusion from List of "Disadvantaged Communities" that Receive Funding Priority Under Climate Law

The Supreme Court, Albany County denied a motion to dismiss a lawsuit brought by a town and village to challenge the village's exclusion from the list of "disadvantaged communities" (DACs) designated by the Climate Justice Working Group pursuant to the Climate Leadership and Community Protection Act (CLCPA). The CLCPA requires that at least 35% of the benefits of investment in clean energy, energy efficiency, and other programs go to DACs, with a goal of 40%. The town and village asserted that the exclusion of the village from the list of DACs was arbitrary and capricious and unsupported by substantial evidence; that the New York State Department of Environmental Conservation had arbitrarily departed from its own designation of the village as a disadvantaged community for the purposes of other programs; and that the respondents failed to comply with the State Administrative Procedure Act, the New York Constitution, and the State Environmental Quality Review Act. The court agreed with the petitioners that inclusion on the DAC list "creates a benefit for certain communities to the detriment of communities … that are excluded." The court therefore concluded that the petitioners had alleged a harm-in-fact sufficient for standing. The court also agreed with the petitioners that denying standing would "create an impenetrable barrier" to review of the issue raised by the petitioners: "the consequences of the race-based determinations inherent in the DAC criteria." *Town of Palm Tree v. Climate Justice Working Group of the New York State Department of Environmental Conservation*, No. 907000-23 (Sup. Ct. Albany County Dec. 26, 2023).

TOXIC TORTS

Federal Court Dismissed Claims that Maker of Dental Floss Misled Consumers Regarding Presence of PFAS; Plaintiff Granted Leave to Amend

The federal district court for the Southern District of New York found that a class action plaintiff failed to state claims against the maker of Oral-B Glide Dental Floss products for deceptive marketing, false advertising, or fraud for marketing the product as "Pro-Health" when it was allegedly "associated with high levels of [per- and polyfluoroalkyl substance (PFAS)] chemicals." The court found that the plaintiff failed to state claims for deceptive marketing and false advertising under General Business Law §§ 249 and 250 because the plaintiff did not "plausibly allege Oral-B Glide in fact contains PFAS or causes harm to consumers." The court said neither a third-party study (which screened the product for non-organic fluorine, a proxy for PFAS) nor testing conducted by the plaintiff (which screened for organic fluorine, a better proxy for PFAS) in fact identified the presence of PFAS in the product. Moreover, the plaintiff did not plausibly plead that PFAS in the product would migrate into a consumer's saliva or onto their hands. The court concluded that the plaintiff's "inferences" regarding the presence of PFAS and the likelihood that PFAS causes adverse health outcomes failed "to nudge the claims 'across the line from conceivable to plausible.'" In addition, the court found that the plaintiff's testing was unsubstantiated, "rendering key allegations implausible." Because the plaintiff failed to allege a material misrepresentation of fact or omission, the plaintiff's fraud claim also failed. The court granted the plaintiff leave to amend, noting that any amended

pleadings must provide additional information about the organic fluorine testing such as information about the methodology, time and place of testing, and who conducted the testing. *Dalewitz v. Procter & Gamble Co.*, 2023 U.S. Dist. LEXIS 172160 (S.D.N.Y. Sept. 22, 2023).

NEW YORK NEWSNOTES

State Finalized 10-Year Solid Waste Management Plan

On December 27, 2023, New York State Department of Environmental Conservation (DEC) Commissioner Basil Seggos announced the release of the final 2023-2032 New York State Solid Waste Management Plan, "Building the Circular Economy Through Sustainable Materials Management." The plan is intended to guide actions over the next decade to achieve an 85% total waste stream recycling rate by 2050. The plan sets forth six Focus Areas: (1) Waste Reduction and Reuse; (2) Recycling and Recycling Market Development and Resiliency; (3) Product Stewardship and Extended Producer Responsibility; (4) Organics Reduction and Recycling; (5) Toxics Reduction in Products; and (6) Advanced Design and Operation of Solid Waste Management Facilities and Related Activities. For each Focus Area, the plan sets 2–10 Goals. There are a total of 31 Goals, and between one and 17 Action Items are associated with each Goal, for a total of 175 Action Items. The plan identifies several legislative priorities that are required to achieve the plan's vision: (1) developing extended producer responsibility (EPR) for paper and packaging, and an EPR framework that can be extended to additional products; (2) expanding and amending the existing Food Donation and Food Scraps Recycling Law; and (3) requiring a per-ton disposal disincentive surcharge on all waste landfilled or combusted in the state or generated in the state and sent for landfilling or combustion out of state. The surcharge would fund municipal reduction, reuse, and recycling programs. The final plan is available at https://on.ny.gov/48KyxJo.

Governor Signed Law Restricting Neonicotinoid Pesticides

On December 22, 2023, Governor Kathy Hochul signed the Birds and Bees Protection Act into law (Chapter 755). The law establishes restrictions on neonicotinoid pesticides to protect pollinators, birds, and other wildlife. The law prohibits sale, distribution, and purchase of corn, soybean, and wheat seeds coated or treated with neonicotinoid pesticides starting in 2027 (though the governor's approval memorandum indicated that forthcoming chapter amendments will provide additional time—the Natural Resources Defense Council (NRDC) press release regarding the law's enactment indicated that the prohibitions will take effect in 2029). As enacted, the law authorizes DEC to grant a temporary suspension of the ban in circumstances where "there is an insufficient amount of commercially available seed to adequately supply the agriculture market" that has not been treated with neonicotinoid ingredients and the ban "would result in undue financial hardship to agricultural producers." The governor's approval memorandum indicated that the chapter amendments would authorize development of a waiver process for farmers to address "problem pests." The law also prohibits application of pesticides containing certain neonicotinoid ingredients to outdoor ornamental plants and turf immediately and other neonicotinoid pesticides starting July 1, 2025. (NRDC indicated that chapter amendments would extend the effective date of the prohibition to January 1, 2027.) DEC may allow such applications where there is a "a valid environmental emergency" and there is no other pesticide or pest management practice that would be effective in addressing the emergency. In addition, the law allows certified applicators to use neonicotinoid pesticides to treat against invasive species in woody plants. Other provisions of the law include a requirement that DEC and other agencies conduct "a study to identify practicable and feasible alternatives" to neonicotinoid pesticides by January 1, 2026.

New York Law Makes Wildlife Killing Contests Illegal

Amendments to Section 11-0901 of the Environmental Conservation Law make it unlawful "for any person to organize, sponsor, conduct, promote, or participate in any contest, competition, tournament, or derby with the objective of taking or hunting wildlife for prizes or other inducement, or for entertainment." The law (Chapter 762) takes effect on November 1, 2024. Remains of wildlife killed in such contests are forfeited and become property of DEC, and violations of the law are punishable by a fine of at least $500 and no more than $2,000. The provision does not apply to competitions involving white-tailed deer, turkeys, or bears, or to special dog training areas or field trials or other similar canine performance events. The memorandum in support of the legislation reported that "thousands of animals—including coyotes, foxes, bobcats, rabbits, crows, woodchucks and squirrels—are killed in these events every year" in New York State. The memorandum stated that "[w]ildlife killing contests are a wanton waste of New York's wildlife resources, which belong to all state residents," and "counterproductive to modern, science-based wildlife management principles." The memorandum noted that California, Vermont, Massachusetts, Colorado, New Mexico, Washington, and Arizona have banned such contests.

New York Issued Final Guidance for Banking and Mortgage Institutions' Management of Climate-Related Risk

On December 21, 2023, Governor Hochul announced that the New York State Department of Financial Services (DFS) had adopted guidance for banking and mortgage institutions to manage material financial and operational risks associated with climate change. The guidance applies to New York State-regulated banking organizations, New York State-licensed branches and agencies of foreign banking organizations (FBOs),

and New York State-regulated mortgage bankers and servicers (together, Regulated Organizations). DFS did not set a timeline for implementation of the guidance and said it expects to issue a request for information (RFI) in 2024 regarding steps Regulated Organizations are taking to assess and manage climate-related risks. DFS will use the RFI responses to assess Regulated Organizations' progress and determine appropriate timelines. DFS also said it would coordinate with federal banking regulators to determine when and how to incorporate assessment of Regulated Organizations' implementation of the guidance into supervisory examinations. The guidance sets forth details for how Regulated Organizations should manage climate-related risks with respect to (1) corporate governance; (2) internal control frameworks; (3) risk management processes; (4) data aggregation and reporting; and (5) climate scenario analysis. The guidance identifies three "overarching themes" that Regulated Organizations should account for in their assessment and management of climate-related financial and operational risks: (1) physical and transition risks that give rise to climate-related financial risk; (2) the centrality of operational resilience to an institution's safety and soundness; and (3) the requirement to ensure compliance with all applicable consumer protection considerations—including fair lending—in adapting risk management frameworks to account for climate-related risk to minimize and affirmatively mitigate disproportionate impacts on low- and moderate-income communities. In addition, the guidance counsels Regulated Organizations to take a "proportionate approach" to management of climate-related financial risks that is "appropriate to each organization's exposure to these risks." The guidance describes criteria for determining when Regulated Organizations may leverage the policies, procedures, and processes of affiliated entities. The guidance also provides information on how FBOs with risk management functions performed outside the U.S. should ensure appropriate coordination and communication. DFS said the final guidance reflected careful consideration of feedback received on the proposed guidance published in December 2022. In conjunction with the publication of the final guidance, DFS also published resources in areas such as insurance, materiality, operational resiliency, physical and transition risk, and risk assessment and management to assist organizations working to adopt measures to address climate-related risk. The list of resources is available at https://on.ny.gov/3vvul1Q. The final guidance is available at https://on.ny.gov/3HfaEht.

New York City Issued More Rules Detailing Compliance Requirements and Enforcement Frameworks for Local Law 97 of 2019 and Local Law 88 of 2009

In the December 21, 2023 issue of the *City Record*, the New York City Department of Buildings (DOB) published notice of its adoption of two final rules for implementation of Local Law No. 97 of 2019. The first rule establishes penalties for noncompliance with Local Law 97's annual greenhouse gas emissions limits for buildings and establishes a credit for "beneficial electrification" to incentivize building owners to undertake electrification efforts early. The rule defines criteria for "good faith efforts" for the law's first compliance period (2024-2029). To qualify for mitigated penalties, owners of buildings who have not yet completed work necessary to comply with applicable emissions limits may demonstrate good faith efforts by satisfying the criteria. Good faith efforts requires that owners submit annual building emissions reports, upload benchmarking information, upgrade lighting systems, and either submit a decarbonization plan certified by a registered design professional by May 1, 2025 or comply with other pathways to demonstrate that work necessary for compliance is underway. The rule also sets forth the enforcement framework for resolution of penalties, including a framework for mediated resolutions. The first rule also establishes an emission factor for certain natural gas fuel cells and makes other technical amendments. The second rule establishes reporting requirements and penalties for Local Law 97's requirements for rent-regulated residential buildings, certain other affordable house buildings, and houses of worship (i.e., "covered buildings"). By May 1, 2025, owners of covered buildings must submit a report demonstrating compliance with either the building emissions limit that would apply if the building were not a "covered building" or demonstrating that the building has fully implemented prescriptive energy conservation measures as required by Local Law 97. The penalty for failing to file a report or for failing to demonstrate compliance is $10,000.

In the December 21 issue of the *City Record*, DOB also published notice of its adoption of regulations implementing Local Law 88 of 2009, which, as amended, requires that buildings of 25,000 square feet or more upgrade their lighting systems and install electrical sub-meters in tenant spaces by January 1, 2025 to promote energy efficiency. The regulations set forth requirements for submitting reports on compliance with these mandates and the annual penalty for failure to submit such reports.

DEC Released Outline for CLCPA Cap-and-Invest Program and Recommendations for Containing Consumer Costs

On December 20, 2023, DEC and the New York State Energy Research and Development Authority (NYSERDA) released a pre-proposal outline for a potential cap-and-invest program to be implemented to achieve the greenhouse gas emission reduction mandates and other requirements and goals of the Climate Leadership and Community Protection Act (CLCPA). DEC and NYSERDA also released a Climate Affordability Study to consider how to deliver the proceeds of the cap-and-invest program that are allocated to a Consumer Climate Action Account (CCAA) established by the Fiscal Year (FY) 2024 budget law.

The FY 24 budget created a Climate Action Fund to receive revenues generated under the CLCPA. The budget law requires that at least 30% of the funds go into the CCAA to be used to reduce potential increased costs for consumer goods and services. The budget law also required NYSERDA and DEC to conduct a study and issue a report with recommendations for use of the CCAA funds, with consideration given to structure and distribution

of benefits in an equitable manner; implementation of a variety of mechanisms such as direct payments, tax credits, transit vouchers, and utility assistance; ensuring that financial benefits do not constitute income for individuals receiving means-tested government assistance; and limiting the administrative effort required of benefit recipients. The Climate Affordability Study recommends that benefits be delivered "primarily via a refundable tax credit" but also recommends exploration of a "waterfall" approach that would use additional channels to deliver benefits to individuals who do not file taxes. The recommendations incorporate distribution considerations (including regional adjustments based on exposure to energy costs and a progressive phase-out of benefits based on income); tax and eligibility considerations (including exploring options for preventing the benefits from counting as income for at least some populations); and considerations to reduce administrative costs and effort.

The cap-and-invest pre-proposal outline sets forth a framework for three core regulatory components of a cap-and-invest program: (1) a DEC mandatory greenhouse gas reporting program rule that identifies the types of greenhouse gas emissions sources that would be required to report, establishes emissions or activity thresholds for reporting, and sets forth how sources must report; (2) a DEC cap-and-invest rule that identifies sources that have compliance obligations, establishes those obligations, defines how non-obligated emissions would be addressed, explains how energy-intensive and trade-exposed industries would be considered, describes measures to ensure program stability and cost containment, and creates emission allowances; and (3) a NYSERDA auction rule that describes how the allowance auctions will operate and provides for mechanisms to ensure market integrity and to provide cost containment and program stability.

DEC and NYSERDA scheduled stakeholder meetings for January 2024 to discuss the role of cap-and-invest, the pre-proposal outline, and preliminary analysis. The agencies said they would publish preliminary analysis regarding potential price levels for emission allowances in January. The pre-proposal outline is available at https://on.ny.gov/41YV2be. The Climate Affordability Study is available at https://on.ny.gov/47sP6Zq.

DEC Issued New Penalty Policies for Air Violations

In the December 20, 2023 issue of the *Environmental Notice Bulletin*, DEC published notice of its issuance of two penalty policies for air violations. Program Policy DAR-23, "Article 19 Violation Penalty Policy for Short Form Orders on Consent," addresses penalties for violations where the potential for harm and any actual harm to public health, the environment, or the regulatory system is minor. It supersedes Program Policy DEE-23, a 2005 policy, and Program Policy DEE-5, a 1985 policy, and DEE-5 Appendices I-VIII. Program Policy DAR-24, "Calculation of Penalties for Article 19 Violations at Stationary Sources," provides guidance for calculation of recommended civil penalties for air violations at stationary sources for purpose of administrative settlement of DEC enforcement actions involving major violations of New York State and federal air laws and regulations. The policies are available at https://on.ny.gov/3RTP4E9.

New York Enacted Law Requiring Inventories of Drinking Water System Service Lines

On December 19, 2023, Governor Hochul signed the Lead Pipe Right to Know Act (LPRTKA) into law (Chapter 730). The law adds a new Section 1114-b to the Public Health Law that requires covered public water systems to conduct inventories of all service lines that connect to their distribution systems. Service lines are defined as "any piping connecting a water main to a building inlet." The LPRTKA is intended to codify U.S. Environmental Protection Agency (EPA) requirements and New York State Department of Health (DOH) guidance for development of comprehensive inventories of all service lines by October 2024 and to update the inventories with new information. The LPRTKA is also intended to gather information to ensure that State and federal funds for replacing lead service lines are spent efficiently and equitably. Surveys must be completed in compliance with both EPA requirements and LPRTKA requirements. The LPRTKA requires that inventories include location information, as well as information about the material composition of the public and customer portions of the services lines and whether lead has ever been present. Other required information includes the verification method used to determine the material composition and whether a point of use or point of entry treatment system is present. Covered systems must also submit an inventory summary form in a format to be developed by DOH. These forms will aggregate information obtained in the survey, describe how the inventory will be accessible to the public, and include a certification of the accuracy of the information. The inventories and summary information will be published on the DOH website, including with interactive mapping for larger water systems, and on the websites of the public water systems. The initial inventories are due in October 2024, and public water systems whose inventories include service lines classified as lead, galvanized, or unknown must update the inventories at least annually. The governor indicated that amendments would be necessary to ensure that the law exceeds but does not conflict with federal requirements.

Roundup of Other New State Laws Addressing Littering in State Park Lands, Waste Tire Uses, Clean Energy, Deer Management, and Digital Billboards

Other environmental and energy-related laws enacted in the final weeks of the year included the following:

- Chapter 640 adds a new section to the Parks, Recreation and Historic Preservation Law that prohibits the throwing, placing, or disposal of "refuse, trash, garbage, rubbish, litter or any nauseous or offensive matter" on park lands or private lands adjacent to park lands. The law also established fines and service requirements for violations of the prohibition. In addition, it increased the fines for an existing prohibition on depositing or leaving waste on lands

under the jurisdiction of the Office of Parks, Recreation and Historic Preservation (OPRHP). The existing prohibition was amended to clarify that it applies to "dumping" on park lands. Governor Hochul's approval memorandum indicated that chapter amendments would be necessary to modify provisions requiring OPRHP staff to enforce the law's provisions on land that OPRHP does not have jurisdiction over and creating duplicative provisions in law.

- Chapter 651 amended the waste tire program law to authorize use of funds for demonstration projects for waste tire reuse projects in agricultural settings and analysis of waste tire reuse opportunities. The governor's approval memorandum said she had reached an agreement with the legislature to amend the law to ensure that there is no redundancy with work already underway by DEC in partnership with the University at Buffalo to conduct an updated market analysis of outlets for waste tire utilization.
- Chapter 683 and Chapter 704 established deer management pilot programs, one in Syracuse and one in Southold on Long Island, and established qualifications for certified nuisance wildlife specialists. Governor Hochul wrote in her approval memorandum that the legislation, as drafted, would create "an unnecessary inefficient two-tier permitting process for wildlife management, without an appreciable benefit to the community." She said that chapter amendments would align the pilot programs with current permitting and license structure.
- Chapter 712 established an agrivoltaics research program to be run by Cornell's College of Agriculture and Life Sciences. The program's goal is "to develop innovative science-based solutions to facilitate the co-location of crops and photovoltaics while promoting the biodiversity of endemic flora and fauna." In her approval memorandum, the governor wrote that she supported the goals of the legislation, "which would expand research into this evolving area of study and could provide unique solutions to the land use issues related to solar siting on agricultural land," but that technical amendments were necessary to reference an "existing appropriation for this work."
- Chapter 756 adds new restrictions on digital billboards and other billboards that use flashing, intermittent, or moving lights in the vicinity of Mitchell-Lama housing in New York City. Governor Hochul said that chapter amendments would reduce the minimum distance between the billboards and large Mitchell-Lama buildings to 1,000 feet from 1,500 feet as enacted. The legislation was a response to the erection of several illuminated digital billboards near Co-op City.
- Chapter 759 gave NYSERDA authority to develop a clean energy outreach and community planning program to provide information and assistance to communities to facilitate "sustainable and equitable development of local clean energy." Governor Hochul's approval memorandum said the law would be amended in 2024 to incorporate the program into existing initiatives.

Governor Vetoed Bills Viewed as Duplicative, Costly, or Burdensome

Citing fiscal impacts, Governor Hochul vetoed several bills that would have required development of reports and recommendations to support the State's climate change and clean energy goals. The vetoed bills would have required preparation of an annual expenditure report regarding funds needed and funds spent to achieve the State's climate change goals (A1191-B/S288-C); preparation of a report on replacing dormant electric generating sites with renewable energy facilities (A4386/S3439); and development of recommendations for establishing microgrids (S4854/A6009). The governor directed State agencies to address the issues addressed in the bills and indicated it would be more appropriate to consider the bills during the budget process. The governor also vetoed several bills related to electric vehicles (EVs), including a bill that would have required NYSERDA to develop an interactive EV charging station map (A5687/S5253-A), which the governor said would duplicate existing work. She also vetoed a bill directing the New York State Public Service Commission (PSC) to develop standards for EV charging stations (A1721-B/S5120-B), indicating that the PSC was not the appropriate entity to undertake this work. In addition, she vetoed a bill requiring commercial garages that receive State funding to install EV charging stations to provide public access to charging (A1122/S110). The governor contended that such a requirement would discourage participation in State incentive programs for EV charging. The governor's other vetoes included bills requiring a study of groundwater and stormwater issues in southeast Queens (S1449/A2608) and ecological restoration needs in Jamaica Bay (A2825). The governor cited their cost in her veto message covering these and other bills. In addition, she vetoed a bill requiring collection of recyclables in New York City parks (A3933-A/S727), which the governor described as an unfunded mandate. She also vetoed (for a second time) a bill to expand protected streams to include "Class C" waterways (S1725/A4601-A), citing the legislation's regulatory impacts. In addition, the governor vetoed a bill to authorize localities with freshwater wetlands programs to ban applications of pesticides to the locally regulated wetlands (S5957/A5949). The governor said the legislation would "undermine the integrity of DEC's robust pesticide program, its wetland protection program and its protections for freshwater wetlands" and "lead to confusion and the inconsistent application of State laws." In addition, she vetoed the New York Tropical Deforestation-Free Procurement Act (S4859-A/A5682-A), which would have created a more expansive and stringent program to ensure that the State does not contract with companies contributing to tropical deforestation. The governor noted the "significant burdens" the law would impose on businesses, especially small businesses.

DEC Issued Final Stormwater SPDES General Permit for Small MS4s

On December 13, 2023, DEC announced issuance of the final State Pollutant Discharge Elimination System (SPDES) General Permit for Stormwater Discharges from Municipal Separate Storm Sewer Systems (MS4s). The permit took effect on January 3, 2024 and applies to small MS4s. It is the first MS4 general permit issued with significant changes in more than 10 years. It requires MS4 operators to develop stormwater management programs to reduce pollutant discharges and protect water quality. DEC noted that actions required under the permit include routine inspections of monitoring locations to detect illegal discharges and structural concerns; mapping of stormwater infrastructure; and prioritization of efforts geared towards improving water quality and increasing efficiency.

New York City Adopted Citywide Zoning Amendments to Facilitate Decarbonization

On December 6, 2023, New York City Mayor Eric Adams, New York City Council Speaker Adrienne Adams, and New York City Department of City Planning Director Dan Garodnick announced the City Council's approval of the City of Yes for Carbon Neutrality proposal, which makes citywide zoning changes intended to help reduce New York City's greenhouse gas emissions and increase resiliency. The initiative encompasses 17 policies, including the removal of zoning obstacles that unnecessarily limit the amount of rooftop space that can be covered by solar panels; modifying restrictions on height and thickness of walls to enable building electrification and energy efficiency retrofits; doubling commercially zoned land where electric vehicle charging facilities may be located; and expanding use of permeable pavement and rain gardens.

Comptroller's Office Reported on DEC Implementation of Recommendations for Improved Oversight of Forest Tax Programs

On December 5, 2023, the Office of State Comptroller issued a letter following up on its audit of New York State forest tax programs. The audit—for which a report was issued in April 2022—concerned DEC's oversight of a tax incentive program for private forest landowners that was created in 1974 by Real Property Tax Law (RPTL) § 480-a (480A Program) and of an older, less stringent forest tax program under RPTL § 480 (480 Program). The programs provide for local property tax exemptions when certain requirements are met. The audit found monitoring and enforcement weaknesses in DEC's oversight of the 480A program and found that DEC in most cases was not aware of which properties were enrolled in the 480 Program. The follow-up assessment found that DEC had partially implemented the two audit recommendations. With respect to a recommendation that DEC improve communication and partnerships with local assessors, the Comptroller's Office found that DEC had collaborated on a course for the New York State Assessors Association's October 2023 conference to help assessors understand the requirements of the 480A and 480 Programs. DEC also had presented at local assessor meetings. In addition, DEC had proposed regulations, including a requirement for use of DEC-provided forest management plan templates to help ensure plans include all necessary elements. Regarding the audit's recommendation that DEC develop and maintain a centralized statewide database for the programs, DEC had submitted a proposal to the Office of Information Technology Services (ITS) and was now pursuing federal funding after ITS responded that it lacked resources for the project.

WORTH READING

Ezra Dyckman & Charles S. Nelson, *Here Comes the Sun: New Solar Tax Credit Rules Benefit Rental Property Owners*, N.Y.L.J. (Dec. 26, 2023), https://bit.ly/48ve1fM

Michael B. Gerrard, *New York Environmental Legislation in 2023*, N.Y.L.J. (Jan. 10, 2024), https://bit.ly/3OalnNZ

N.Y. League of Conservation Voters, *2023 State Environmental Scorecard* (2023), https://bit.ly/48pyliQ

Danielle Spiegel-Feld & Katrina M. Wyman, *Local Action, Global Problem: Why and How New York City Is Tackling Climate Change*, 50 Fordham Urb. L.J. 1187 (2023), https://ir.lawnet.fordham.edu/ulj/vol50/iss6/1

Amy E. Turner, *The Legal Case for Equity in Local Climate Action Planning*, 50 Fordham Urb. L.J. 1245 (2023), https://ir.lawnet.fordham.edu/ulj/vol50/iss6/2

UPCOMING EVENTS

April 12, 2024

Pace Environmental Law Review, Virtual Symposium on Sustainable Business Law, Hosted by the Elisabeth Haub School of Law at Pace University. To register, go to https://pace.zoom.us/webinar/register/WN_JLIpT8WdTvurvghlrSchxg#/registration.

April 16–18, 2024

10th Annual New York State Organics Summit, Hyatt Regency Buffalo, Buffalo. For information, see https://www.nysar3.org/page/events-3.html.

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