

ENVIRONMENTAL LAW

Expert Analysis

New York Environmental Legislation And Regulations in 2014

Governor Andrew Cuomo signed new laws in 2014 regarding climate change adaptation, invasive species, chemical regulation, wildlife, and hazardous substances. However, there was no comprehensive legislative reform of the Brownfield Cleanup Program. In March, the Legislature was unable to agree on a reform bill in time for the annual budget, and at the end of December, Cuomo vetoed the short-term extension of the program that the Legislature sent to his desk.

This annual survey discusses these legislative developments and other environmental laws enacted in 2014, as well as several significant regulatory developments.

Climate Change

On Sept. 22, 2014, at the outset of Climate Week NYC, Cuomo signed the Community Risk and Resiliency Act (CRRA) (chapter 355 of Laws of 2014), probably the most significant environmental enactment by the New York Legislature in several years. The new law requires consideration of future physical climate risks due to sea level rise, storm surges, and flooding in a number of state-administered programs.¹

Among other things, CRRA makes climate risk an element of smart growth impact statements prepared under the

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Smart Growth Public Infrastructure Policy Act, a 2010 law that aims to reduce sprawl. Consideration of climate risk must also be incorporated into decisions regarding the Clean Water and Drinking Water Revolving Funds; the siting of industrial hazardous waste treatment, storage, and disposal facilities; standards for storage facilities for petroleum and hazardous substances; state acquisitions of land under the land acquisition program administered by the New York State Department of Environmental Conservation (DEC) and the Office of Parks, Recreation and Historic Preservation (OPRHP); certain major projects approved under the Uniform Procedures Act²; and permits for oil and natural gas wells. Consideration of climate risk will also be a condition of state assistance for certain open space land conservation projects in urban areas and metropolitan park projects; for closure of municipal landfills; for local waterfront revitalization plans and coastal rehabilitation projects; and for local agricultural and farmland protection plans.

In addition, DEC must establish official sea level rise projections by Jan. 1, 2016. CRRA requires DEC to base the projections on, among other possible sources, reports by the Intergovernmental Panel on Climate Change, the National Oceanic and Atmo-

spheric Administration Climate Assessment, New York's Sea Level Rise Task Force report, and projections prepared by the New York City Panel on Climate Change. CRRA also requires the Department of State, in cooperation with DEC, to develop model local laws that include consideration of climate risk. DEC must develop guidance for implementation of CRRA, and DEC and the Department of State must also develop guidance on the use of resiliency measures that make use of natural resources and natural processes.

The Rockland Bergen Flood Mitigation Act (part CC of chapter 57), referring to Bergen County, N.J., and Rockland County, N.Y., formally establishes a "bi-state cooperative effort," headed by a 12-person task force, "to identify and remediate potential flood hazards and to protect the natural, scenic and recreational opportunities of the tributaries and watersheds of the Hackensack River, Mahwah River, Ramapo River, Saddle River, and Sparkill Brook/Creek."

Energy

The most significant development in the energy arena was the announcement on Dec. 17, 2014, that New York State would not permit the controversial practice of high-volume hydraulic fracturing (HVHF). The New York State Department of Health completed its study of the potential public health impacts of HVHF and found that significant questions remained concerning its risks. In light of this uncertainty, the Health Department commissioner said it would be "reckless" to permit HVHF "until more authoritative research is done." As a result of this finding, the DEC commissioner will issue a findings statement that will prohibit

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HVHF. There has already been considerable litigation about HVHF, and these decisions will likely spur new lawsuits.

Another energy-related regulatory development was DEC's release in late October 2014 of a revised proposal for regulating liquefied natural gas (LNG) facilities. The revised proposal would impose a 70,000-gallon limit on the amount of LNG that facilities may store. DEC said it made this change in response to concerns about facility size expressed in comments on its September 2013 proposal. DEC also said the 70,000-gallon maximum capacity would be adequate for heavy-duty truck fueling stations, which are the type of facility most likely to seek permits under the LNG regulations.

A budget bill directed the Department of Public Service and the New York State Energy Research and Development Authority to review existing energy efficiency programs to determine whether at least \$15 million can be made available to assist residential and multifamily buildings in the installation of heating and cooling systems that will increase energy efficiency or reduce fuel usage by at least 10 percent (part EE of chapter 57).

Invasive Species

There was a great deal of activity in 2014 to control invasive species. In September, Cuomo signed a bill (chapter 330) that imposes requirements to control the spread of aquatic invasive species. The new law, which goes into effect on Sept. 2, 2015, will prohibit launching any watercraft or floating dock into any public water body or any inlet or outlet connecting to a public water body unless it can be demonstrated that reasonable precautions were taken to remove aquatic invasive species.

The governor said that the law would complement state agency efforts to stem the spread of aquatic invasive species. DEC, for example, instituted requirements in 2014 for watercraft launched from boat launches and fishing access sites under its jurisdiction.³ Watercraft launching from or departing from such sites must have been drained and have no visible plant or animal life attached to them. DEC's regulations also prohibit departure from boat launch sites unless visible plant and animal life are removed (with exceptions for certain species that are difficult to remove) and the watercraft is drained.

Chapter 375 requires DEC to establish universal signage regarding the threat of invasive species for posting at points of access to navigable waters. Other agency developments concerning the spread of aquatic species included proposed regulations from OPRHP for boats and watercraft at launch sites under OPRHP jurisdiction. These regulations, which were published in the July 9, 2014, issue of the NYS Register, would complement DEC's final regulations. DEC also published a draft aquatic invasive species management plan that identifies more than 50 actions to prevent, detect, and respond to aquatic invasive species.⁴

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In addition to its new rules for controlling aquatic invasive species, DEC adopted more broadly applicable invasive species regulations.⁵ The regulations identify "prohibited invasive species" and prohibit their sale, importation, purchase, transportation, introduction, and propagation. The regulations forbid any person from knowingly possessing any prohibited invasive species with the intent to sell, import, purchase, transport, or introduce it. The regulations also identify "regulated invasive species," which are legal to possess, sell, buy, propagate, and transport subject to conditions set forth in the regulations, but which may not be knowingly introduced into a "free-living state," which the regulations define (in part) as "unconfined and outside the control of a person, and in the case of animals other than fish, includes the ability to fly, walk, or swim outside of human control."⁶

In addition, Chapter 293 authorized New York's 58 soil and water conservation districts to implement measures to control the spread of invasive species.

Brownfields

Under the current Brownfield Cleanup Program (BCP) law, brownfield sites must

obtain their certificates of completion (COCs) by Dec. 31, 2015 to be eligible for tax credits. Cuomo's 2014-2015 executive budget proposed to extend and reform the BCP, and both houses of the Legislature proposed their own BCP reform packages.⁷ After the opportunity passed to include comprehensive reform measures in the annual budget, both the Assembly and Senate passed a bill (A10135/S7878) that would have extended the COC deadline to March 31, 2017.

The bill also would have authorized additional bonding authority and appropriated \$100 million in the current year for the state Superfund program. Just before the end of the year, Governor Cuomo vetoed this bill. His memo accompanying the veto indicated that the legislation would have an "unplanned, direct impact" on the state's fiscal plan since it was not part of the enacted budget. The memo stated: "This is not the way to enact such legislation."⁸ The governor said he would again propose reform measures in the 2015-2016 budget.

Shortly before the veto, the Environmental Law Section of the New York State Bar Association issued a detailed set of recommendations for reform of the BCP.⁹

Air Pollution

The 2014-2015 budget bills (part DD of chapter 57) once again extended deadlines for requiring any diesel-powered heavy-duty vehicle owned, operated, or leased by a state entity to use best available retrofit technology for reducing the emission of pollutants.¹⁰ The deadline for complying with this mandate was extended from December 2014 to December 2015, while the expiration date for waivers from the mandate was extended from December 2014 to December 2016. The original deadline set by the Diesel Emissions Reduction Act of 2006 was December 2010.

On the regulatory side, the U.S. Environmental Protection Agency (EPA) redesignated some portions of New York from being in nonattainment with the National Ambient Air Quality Standards to being in attainment as to fine particulates.¹¹ In May 2014, however, EPA proposed to rescind the attainment status for portions of the state for an ozone standard based on recent monitoring data.¹² The attainment status of an area affects the stringency of the air

pollution regulations that apply there.

Pesticides

Chapter 10 extends until July 1, 2016, the effectiveness of statutory provisions permitting New York retailers to sell pesticides in containers that have been accidentally damaged during handling where the damage has been repaired in compliance with a “minor repair program” approved by EPA under its 2009 “Pesticide Container Repair Interim Policy.”¹³ The law is intended to reduce the unnecessary disposal of consumer pesticide products.

In addition, the budget bills (part H of chapter 57) extended from July 1, 2014, to July 1, 2017, the sunset date for a statutory provision regarding applications for pesticide registration. The bill also provided that fees for registration of pesticides would remain the same for three more years.

Solid Waste

The scope of New York’s statute that requires certain retail establishments to accept plastic carryout bags for recycling¹⁴ was expanded to include “film plastic,” which the law defines as “uncontaminated non-rigid film plastic packaging products composed of plastic resins, which include, but are not limited to, newspaper bags, dry cleaning bags and shrink-wrap” (chapter 481).

Wildlife

Chapter 307 prohibits animal dealers and exhibitors from allowing the public to have “direct contact” with a “big cat” such as a lion, tiger, leopard, jaguar, or mountain lion. “Direct contact” means “physical contact or proximity where physical contact is possible, including, but not limited to, allowing a photograph to be taken without a permanent physical barrier designed to prevent physical contact between the public and big cats.” Photos with big cats had reportedly become prevalent on Internet dating sites, a practice that wildlife advocates denounced as detrimental to the animals and potentially dangerous to humans.¹⁵

Chapters 326 and 327 generally prohibit transactions involving ivory articles and rhinoceros horns, but allow the DEC commissioner to permit such transactions in certain situations, such as when the ivory article or rhinoceros horn is part of a bona

fide antique or musical instrument.

Chemical Regulation

Chapter 354 bans the flame retardant TRIS (1,3-dichloro-2-propyl) phosphate (TDCPP) in child care products intended for use by children 3 years of age or younger. The ban goes into effect on Dec. 1, 2015. The new law expands the scope of the TRIS-Free Children and Babies Act,¹⁶ which originally applied only to TRIS (2-chloroethyl) phosphate (TCEP).

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This new law continues New York’s practice of regulating toxic substances in consumer products on a chemical-by-chemical basis.¹⁷ In both 2013 and 2014, the Assembly passed a more comprehensive bill (A6328) to promote the use of safer chemical alternatives in children’s products, but the proposed legislation has so far foundered in the Senate.

Hazardous Substances

Two laws addressed hazardous substance concerns at specific sites in New York. Chapter 288 bars DEC from granting permits for the deposit of fill in the Jamaica Bay “borrow pits” (underwater areas from which sand and other material has been removed) from dredging projects in New York waterways. This ban does not apply if the fill material has been tested and meets DEC’s Class A criteria (“no appreciable contamination (no toxicity to aquatic life”).¹⁸ The borrow pits were created when Jamaica Bay was dredged for construction projects, and the pits have been identified as attractive alternatives for disposal of dredged materials from current projects aimed at deepening channels, berthing areas, and harbors for bigger vessels.

Chapter 543 directs DEC to prepare a study for the Legislature on options

to intercept and remediate a ground-water plume of contaminants in Nassau County. The plume is emanating from the former Naval Weapons Industrial Plant and Grumman Aircraft Engineering Corporation facilities in Bethpage in the Town of Oyster Bay. The law mandates that DEC focus on remediation methods that, instead of well head treatment—i.e., treating the contamination after it has reached actual wells—rather, treat the underground plume before it reaches the wells. The report must also estimate the cost, scope and timetable for the remediation project, and address how DEC will compel the U.S. Navy to pay for the remediation. The law also emphasizes that the remediation must be accomplished in a timely manner to prevent the plume from reaching the public water supply wells of the Massapequa and South Farmingdale water districts and the New York American Water Corporation wells.

1. See Michael B. Gerrard, “New Statute Requires State Agencies to Consider Climate Risks,” at 3, NYLJ (Nov. 13, 2014).

2. Major projects in some of DEC’s largest programs are excluded from the requirement that climate risk be considered, including the programs for water supply and water transport; wild, scenic and recreational rivers; water quality certifications; State Pollutant Discharge Elimination System; air pollution; and solid and hazardous waste collection, treatment, and disposal.

3. See 6 N.Y.C.R.R. §§59.4, 190.2.

4. The draft plan is available at <http://www.dec.ny.gov/animals/99053.html>.

5. 6 N.Y.C.R.R. part 575.

6. 6 N.Y.C.R.R. §575.2(m).

7. See Evtl. Law Section, N.Y. State Bar Ass’n, Memorandum regarding proposed extension and reform of the Brownfield cleanup program (May 22, 2014), available at <http://www.rpelawalert.com/wp-content/uploads/sites/240/2014/05/Environmental-Memorandum-13.pdf>.

8. Veto No. 578 of 2014.

9. www.environmental-law.net/wp-content/uploads/2014/12/Environmental-Memorandum-2.pdf.

10. See N.Y. Evtl. Conserv. Law §19-0323.

11. Approval and Promulgation of Air Quality Implementation Plans; New York State; Redesignation of Areas for 1997 Annual and 2006 24-Hour Fine Particulate Matter and Approval of the Associated Maintenance Plan, 79 Fed. Reg. 21857 (April 18, 2014).

12. Rescission of Determination of Attainment and Call for Attainment Plans for New York, New Jersey and Connecticut for the 1997 8-Hour Ozone National Ambient Air Quality Standard for the NY-NJ-CT 1997 Ozone Nonattainment Area, 79 Fed. Reg. 27830 (May 15, 2014).

13. See N.Y. Evtl. Conserv. Law §33-1301[1][b].

14. See N.Y. Evtl. Conserv. Law §27-2701 to 27-2713.

15. See “NY Law Protects Big Cats, Bans ‘Tiger Selfies,’” N.Y. Times (Aug. 12, 2014), <http://www.nytimes.com/aponline/2014/08/12/us/ap-us-big-cat-selfies.html>.

16. Chapter 259 of the Laws of 2011 (codified at N.Y. Evtl. Conserv. Law §37-0703).

17. See generally N.Y. Evtl. Conserv. Law Art. 37.

18. Division of Water, DEC, In-Water and Riparian Management of Sediment and Dredged Material, TOGS 5.1.9 (November 2004), http://www.dec.ny.gov/docs/water_pdf/togs519.pdf.