

ENVIRONMENTAL LAW

Expert Analysis

New York Environmental Legislation: 2016 in Review

While 2016 did not bring major environmental legislation in New York state, laws were enacted that could have significant impacts in coming years, including a law that allows plaintiffs to bring toxic tort claims in connection with newly designated Superfund sites that might otherwise be barred by existing statutes of limitations. Gov. Andrew M. Cuomo also signed laws requiring lead testing of drinking water in schools, establishing a task force to study ocean acidification, and creating a program to fund local climate change mitigation and adaptation projects.

This annual survey reports on these developments and other environmental laws enacted in 2016.

Toxic Torts

The New York State Legislature responded to the discovery of

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unregulated perfluorinated compounds in drinking water sources by passing a law allowing plaintiffs in personal injury lawsuits arising from contact with or exposure to substances found within a designated state or federal Superfund site to bring their claims within three years of designation of the Superfund site or within the period allowed by CPLR 214-c's discovery rule, whichever ends later. The law's sponsors said that the new CPLR provision (Chapter 128 of Laws of New York, 2016, codified at CPLR 214-f) would address the "inequity" of claims related to "previously unexplained illnesses" expiring long before discovery of the contamination that potentially caused the illnesses.

Drinking Water

Another new law (Chapter 296) that responds to recent incidents

of drinking water contamination requires periodic testing of potable water in school buildings for lead. Initial testing was to be conducted in September and October pursuant to New York State Department of Health (DOH) emergency regulations. Sampling must occur again in 2020 and at least every five years thereafter. Where sampling reveals lead levels above 15 parts per billion (ppb), school districts must prohibit use of the water outlet and provide

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school occupants with safe drinking water until remediation is implemented and testing results indicate lead levels are below 15 ppb. The law and regulations also require reporting to state and local agencies and written notification to parents and staff. In addition, all testing results must be posted on school district

websites. A number of districts had already posted results by the end of 2016, and a report from DOH and the Department of Education on the initial results, with recommendations for short- and long-term measures to address lead contamination, is expected in 2017.

On New Year's Eve, Gov. Andrew Cuomo signed a law (Chapter 516) requiring owners and operators of community water systems to update vulnerability assessments to analyze threats presented by potential cyberattacks. The governor said in an approval memorandum that he had reached an agreement with the legislature to address implementation issues with the law in the upcoming legislative session.

Climate Change and Energy

Late in November, Gov. Cuomo signed legislation (Chapter 464) that mandates establishment of a New York State Ocean Acidification Task Force. The memorandum supporting the bill noted that increased levels of atmospheric carbon dioxide have contributed to oceans becoming more acidic. The memorandum cited research indicating that the Atlantic Ocean along the Northeast shore is especially vulnerable to acidification and that the marine fisheries industry might experience adverse impacts. The 14-member task force must prepare a report by the end of 2018 assessing ocean acidification's impacts; considering how ocean acidification may affect commercially harvested and grown species along the coast; and identifying and

monitoring factors contributing to ocean acidification. The report must also include recommendations for state and local actions to address ocean acidification and for measures to increase public awareness of ocean acidification.

Other climate change legislation included budget legislation provisions establishing a Climate Smart Communities Projects program (Chapter 58, Part U, codified at N.Y. Env'tl. Conserv. Law §§54-1501-54-1523), funded through a new climate change mitigation and adaptation account within the Environmental Protection Fund. Climate Smart Community Projects

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include flood mitigation and coastal and riparian resiliency projects, projects that reduce greenhouse gas emissions outside the power sector, climate change adaptation projects, and clean vehicle projects. The budget legislation also required the New York State Energy Research and Development Authority (NYSERDA) to establish a Zero Emissions Vehicle and Electric Vehicle Rebate Program (chapter 58,

part AA) to provide rebates of up to \$2,000 for eligible purchases of vehicles. In addition, the School Energy Efficiency Collaborative Act of 2016 (Chapter 403), requires NYSERDA to develop a program to promote implementation of public school energy projects in the state.

Public Participation

A law signed by Gov. Cuomo in November addressed quirks in the Environmental Conservation Law (ECL) that required only 30 days of notice prior to public hearings for some major environmental regulations rather than the 45 days required by other agencies' rulemaking procedures. The new law (Chapter 412) mandates 45-day notice periods for rules issued under the New York State Department of Environmental Conservation's (DEC's) general rulemaking authority under ECL §3-0301(2)(a) and also for air pollution control rules, solid waste management and resource recovery rules, rules concerning labeling of ingredients of detergents and other household cleaning products, and rules pertaining to storage and release of hazardous or acutely hazardous substances. Three other laws (Chapters 304, 305, and 490) imposed standard requirements for posting proposed rules and other regulatory documents on agency websites.

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cancer incidence and environmental facility maps on its public website and to update them in consultation with DEC at least every five years (Chapter 59, Part D). The sunset date for the law requiring these maps was extended from March 31, 2016 to March 31, 2022.

Historic Resources

In September, Gov. Cuomo signed legislation (Chapter 310) authorizing the DEC Commissioner to undertake projects to protect designated National Historic Landmarks from shore erosion. The law is intended to enable DEC to enter into financial agreements with non-profit organizations to protect privately owned landmarks such as the Montauk Lighthouse, which was designated as a National Historic Landmark in 2012 and which is owned and managed by the non-profit Montauk Historical Society.

Air Quality

The annual budget legislation postponed the deadline for compliance with the Diesel Emissions Reduction Act of 2006, which requires that diesel-powered heavy-duty vehicles used by State agencies use best available retrofit technology to reduce air emissions. The deadline, originally December 31, 2010, was extended to December 31, 2017 (Chapter 58, Part X).

Waste and Hazardous Substances

DEC's waste tire management program was extended for three more years, through the end of 2019 (Chapter 58, Part T).

The effectiveness of statutory provisions permitting New York retailers to sell pesticides in containers accidentally damaged during handling where the damage has been repaired in compliance with a U.S. Environmental Protection Agency-approved "minor repair program" was extended for two years, to July 1, 2018 (Chapter 77).

Environmental concerns related to disposal of unused medications were cited by the Legislature as one justification for a program authorizing donations of unused prescription drugs by DOH-authorized entities for redispensing (Chapter 480).

In December, Gov. Cuomo signed a bill (Chapter 499) that changed the sunset date from June 30, 2017 to June 30, 2022 for a 2014 law banning deposit of contaminated fill from dredging projects in New York waterways in the Jamaica Bay "borrow pits" (underwater areas from which sand and other material was dredged for construction projects).

Beginning in April 2018, the use, sale, and distribution of wheel weights containing intentionally-added mercury will be prohibited (Chapter 312).

Wildlife

Gov. Cuomo signed a law (Chapter 457) that he had previously twice vetoed concerning mute swans, which DEC has identified as a prohibited invasive species. The law requires public review of any management plan developed by DEC and requires DEC to provide responses

to all substantive public comments. The law also establishes substantive criteria for mute swan management plans, including a mandate to "give priority to non-lethal management techniques." The memorandum submitted in support of the law cited a lack of consensus among wildlife experts, rehabilitators, and environmentalists regarding the justification for extermination of mute swans. DEC has said that mute swans, which were brought to New York more than 100 years ago to serve ornamental purposes, can cause a number of environmental problems. Pursuant to the law, any mute swan management plan must document the scientific basis for future population projections and for current and projected environmental damage and must include a public education component.

Gov. Cuomo also signed a law extending for two years, through Dec. 31, 2018, the statutory requirements that only non-stainless steel non-offset circle hooks be used for shark fishing (Chapter 121).