

## Environmental Law

## Expert Analysis

# New York Environmental Legislation in 2022

Several significant environmental bills were enacted by the New York legislature and signed by Gov. Kathy Hochul in 2022, and several others were vetoed. As a result of measures enacted last year, New York will see \$4.2 billion invested in environmental protection, restoration, climate resiliency and clean energy projects; potential disproportionate and inequitable impacts on disadvantaged communities will become a key factor in determining whether environmental permits are issued; and apparel containing intentionally added per- and polyfluoroalkyl substances (PFAS) will no longer be sold in the state. In addition, important changes were made to New York's brownfield and wetlands laws. These and many other new and amended laws are discussed in this article.

### Environmental Bond Act and Other Environmental Funding

In November, New York state voters approved the Clean Water,

MICHAEL B. GERRARD is a professor and Director of the Sabin Center for Climate Change Law at Columbia Law School, and senior counsel to Arnold & Porter. EDWARD MCTIERNAN, formerly general counsel of the New York State Department of Environmental Conservation, is a partner with Arnold & Porter. L. MARGARET BARRY of Arnold & Porter assisted in the preparation of this article.



By  
Michael B.  
Gerrard



And  
Edward  
McTiernan

Clean Air, and Green Jobs Environmental Bond Act of 2022 (Bond Act), with 59% of voters supporting the ballot proposal. Earlier in 2022, the budget legislation increased the amount of bonds authorized under the Bond Act from \$3 billion to \$4.2 billion. The funds are to be used for environmental restoration and flood risk reduction, open space land conservation and recreation, climate change mitigation, and water quality improvement and resilient infrastructure (Chapter 58, Parts NN and OO). The budget also included \$400 million for the Environmental Protection Fund, which provides funding for capital projects that protect the environment, and increased annual funding of the Environmental Protection Fund from the real estate transfer tax law to \$257.35 million from \$119.1 million (Chapter 58 of the Laws of 2022, Part PP). Environmental advocates also applauded

the budget legislation for not sending funds from the sale of carbon dioxide allowances under the Regional Greenhouse Gas Initiative to the State general fund.

### Cumulative Impacts Law

On December 30, Governor Hochul signed a “cumulative impacts” law (Chapter 840). It is the strongest environmental justice law in the country. (We wrote about other states’ laws in 2021.) However, it appears that it is about to be amended—exactly how, we do not yet know.

The bill is intended to address inequitable siting of polluting facilities. (We wrote about this legislation in July 2022.) The law amends the State Environmental Quality Review Act to require that environmental reviews consider a proposed action’s impacts—including any disproportionate or inequitable pollution burdens—on “disadvantaged communities” (as defined under the Climate Leadership and Community Protection Act (CLCPA)). The cumulative impacts law also amends the Uniform Procedures Act to require preparation of an “existing burden report” for projects that require a Department of Environmental Conservation

(DEC) permit and that may directly or indirectly affect any disadvantaged community. DEC will issue regulations specifying the form and content for the existing burdens report. Significantly, DEC may not approve or renew a permit if it may directly or indirectly cause or contribute to a disproportionate or inequitable pollution burden on any disadvantaged community. This substantive provision is highly unusual.

The bill was strongly supported by environmental and environmental justice groups, and strongly opposed by several business groups. Governor Hochul did not announce her decision until the last possible day—New Year’s eve—and on signing it she issued an approval memorandum indicating that she and the legislature have agreed to chapter amendments that “balance[e] the need for critical infrastructure such as affordable housing, hospitals, and renewable facilities ... and ensur[e] such critical infrastructure does not need to be removed, potentially harming a community in the long term.” The chapter amendments also will provide additional time for state and local governments to update their procedures and programs to implement the law. The exact import of the bill as amended will not be clear until the chapter amendment language is released and enacted.

### **Air Quality**

Another hotly contested law was signed by the governor in November. It imposes a two-year moratorium on issuance or renewal

of air permits for fossil fuel-fired electric generating facilities that provide behind-the-meter electric energy for use by cryptocurrency mining operations that use proof-of-work authentication methods to validate blockchain transactions, unless renewal would not result in an increase in the amount of electricity utilized. The law (Chapter 628) also requires preparation of a generic environmental impact statement on cryptocurrency mining operations that use proof-of-work authentication methods. Other laws with potential impacts on air quality included a law to deter thefts of catalytic converters (Chapter 574) and a tax credit for certain businesses that incur expenses to convert from No. 6 heating oil fuel to biodiesel heating oil or a geothermal system at any building outside New York City (Chapter 59, Part I).

### **Chemical Regulation**

New York enacted new restrictions on chemicals in consumer products. Chapter 820 will prohibit the sale of apparel containing intentionally added PFAS. Chapter 754 will restrict the sale of cosmetic and personal care products containing mercury. Chapter 682 prohibits manufacturers from importing or selling cosmetics for which animal testing was conducted by or on behalf of the manufacturer or any supplier after Jan. 1, 2023.

In December, New York enacted a law (Chapter 795) requiring the establishment of an extended producer responsibility program for carpet. Carpet manufacturers will

be required to establish a program for the collection and recycling of discarded and unused carpeting. The law also will prohibit sale of carpet containing or treated with PFAS.

### **Solid Waste**

Laws to reduce solid waste included the carpet collection program mentioned above and the Digital Fair Repair Act (Chapter 810), which aims to reduce electronic waste and save consumers money by requiring original equipment manufacturers of digital electronic equipment to make documentation, parts, and tools available to owners and independent repair providers for diagnosis, maintenance, and repair of the equipment. In addition, the budget law extended until Dec. 31, 2025 the waste tire management program’s requirement that tire services accept waste tires from customers, as well as the waste tire management and recycling fee charged for each new tire sold (Chapter 58, Part MM).

### **Brownfields**

The budget law included a 10-year extension of the deadline by which sites must be admitted into the Brownfield Cleanup Program (BCP) to be eligible for tax credits (Chapter 58, Part LL). The deadline is now Dec. 31, 2032. The budget legislation included other updates to the BCP, including expanded opportunities for New York City sites to be eligible for tax credits, extensions of timelines for taking advantage of tax credits for certain sites, and a five-percent enhancement of the tangible property

credit component for sites located in a disadvantaged community or developed as renewable energy facility sites. In addition, the budget law added a requirement that BCP participants pay a \$50,000 nonrefundable program fee, to be waived upon a demonstration of financial hardship. Other brownfield-related measures in the budget legislation made certain items (e.g., renewable energy feasibility studies) eligible for state assistance for Brownfield Opportunity Areas (BOAs) (Chapter 58, Part U).

### **Wetlands**

The 2022 budget legislation made significant amendments to DEC's freshwater wetlands program (Chapter 58, Part QQ). The amended law authorizes DEC to regulate wetlands that are at least 12.4 acres, even if they are not mapped. Formerly, only mapped wetlands were regulated. The jurisdictional threshold will be reduced to 7.4 acres in 2028. (Before and now, wetlands formally determined to be of "unusual local importance" would also be regulated.) The amendments also create a rebuttable presumption that mapped and unmapped areas meeting the freshwater wetland definition are subject to permit requirements. We wrote about the law in May 2022.

### **Lead**

Chapter 532 requires primary health care providers to conduct a lead exposure risk assessment questionnaire for children between the ages of six months and six years at each routine well-child visit or at least annually. Primary health care providers will also have to provide

guidance on lead poisoning prevention as part of routine care. Pre-kindergartens and kindergartens (not just child care and pre-school, as previously required) will have to obtain evidence of lead screening from children's guardians.

### **Climate Change and Clean Energy**

New York enacted several laws intended to help implement the CLCPA's mandates to reduce greenhouse gas emissions and ensure a just and equitable transition for workers. The Advanced Building Codes, Appliance and Equipment Efficiency Standards Act (Chapter 374) requires greater energy savings from future updates of the State Energy Code and new efficiency standards for many product categories. The Utility Thermal Energy Network and Jobs Act (Chapter 375) addresses legal and regulatory barriers to utilities' development of thermal energy networks, which "have the potential to decarbonize buildings at the community and utility scale." Chapter 372 requires a prevailing wage for renewable energy projects of one or more megawatts (previously required only for projects of greater than five megawatts). Other laws require the New York State Energy Research and Development Authority (NYSERDA) to prepare a report on the potential establishment of a renewable energy laboratory (Chapter 396); establish a personal income tax credit of 25% of qualified geothermal energy system expenditures at residential property (Chapter 59, Part FF); and make fuel-flexible linear genera-

tors, which use an electromechanical process to produce electricity with low emissions, eligible for net metering benefits (Chapter 691). New York's "Green CHIPS" legislation that provides incentives for the semiconductor industry will require that projects include measures to mitigate greenhouse gas emissions over a project's lifetime (Chapter 494).

Several laws were enacted to move New York towards its vehicle electrification goals, including zero-emission vehicle mandates for school buses (Chapter 56, Part B) and the state's fleet (Chapter 789). Another law requires that state procurement standards for zero-emission vehicles include made-in-America requirements (Chapter 836). The Electric Vehicle Rights Act (Chapter 627) prevents homeowners' associations from imposing unreasonable restrictions on charging stations, and Chapter 809 requires that certain construction projects that receive state capital funding and that include parking facilities be capable of supporting electric vehicle charging stations for at least 10% (for facilities of 50 to 200 parking spaces) or 20% (for facilities of more than 200 parking spaces) of available spaces.

Governor Hochul vetoed a bill (A7696) that would have prohibited development of renewable energy projects through NYSERDA's Build-Ready Program on viable agricultural land. She signed a law to raise awareness of "agrivoltaics" (the use of land for both solar energy and agriculture) (Chapter 629), as well as a law to use mitigation payments for conversion of certain

agricultural lands for solar energy projects to fund agricultural and farmland protection activities (Chapter 652).

Laws addressing climate change impacts included one requiring DEC to conduct a study on the impacts of the urban heat island effect on disadvantaged communities (Chapter 563). Another law requires that the State Uniform Fire Prevention and Building Code include standards to protect buildings on or near coastlines from sea level rise, flooding, and other coastal hazards (Chapter 831).

### **Drinking Water**

Chapter 774 allows owners of land in mapped subdivisions not located on a public road to install public water lines across mapped but unimproved roads, eliminating the need to obtain permission from other landowners to gain access to the public water system. Other drinking water-related legislation included a law explicitly reviving public water systems' claims involving emerging contaminants that were otherwise barred as of the Oct. 5, 2022 effective date because the applicable limitation period had expired (Chapter 566).

### **Natural Resources and Agriculture**

Governor Hochul signed a bill that sets a "thirty by thirty" goal of supporting and contributing to national efforts to conserve at least 30% of U.S. lands, inland waters, and ocean areas by 2030 (Chapter 747). DEC and the Office of Parks, Recreation and Historic Preservation must develop a plan to achieve this goal. Another law

requires the Department of Transportation to develop policies and procedures to encourage use of pollinator-friendly native plant species in medians along highways and to reduce the area within medians that is mowed (Chapter 763).

In the fall, Governor Hochul signed laws that promote fiber farming and other activities to support New York's textile manufacturing industry (the New York Textile Act, Chapter 572) and establish a New York State Council on Food Policy that will, among other things, provide assistance and input on building infrastructure and using public lands for local farm and food products (the Local Food, Farms, and Jobs Act, Chapter 645).

### **Miscellaneous**

A law signed in December adds a disclosure regarding indoor mold conditions to the property condition disclosure form for residential real property sales (Chapter 690).

Other 2022 laws permanently extended the revival of time-barred actions brought by veterans of the Vietnam War era for injury or death caused by exposure to Agent Orange and other phenoxy herbicides (Chapter 506) and extended the sunset date of a 2010 law that requires creation of environmental facility and cancer incidence maps (Chapter 197).

### **Environmental and Energy Vetoes**

Governor Hochul vetoed bills that would have made Class C streams (i.e., streams that support fisheries and are suitable for non-contact activities) subject to DEC regulation (A6652) and that would

have required air quality standards for toxic air pollutants and fence-line monitoring standards for major sources (S4371-D). Other vetoed measures included requirements for lead standards for dust, soil and air (S8050-A); restrictions on materials that may be used to fill the Jamaica Bay borrow pits (S8816); authorization of leasing of state-owned underwater lands for seaweed cultivation (A9938); a ban on non-essential helicopter use from Hudson River Park in Manhattan (A8473-A); preparation of a report on replacing decommissioned or dormant electric generating facilities with renewable energy or energy storage projects (A340-B); setting a goal of source-reducing, reusing, recycling, or composting at least 85% of solid waste by 2032 (A4117); establishment of the New York Seawall Study Commission (A5557); and a requirement that NYSERDA develop recommendations regarding establishment of microgrids (A8418-A).