

ENVIRONMENTAL LAW

Expert Analysis

New York Environmental Legislation and Regulations in 2013

New laws were signed by Governor Andrew Cuomo in 2013 regarding notice requirements in the Brownfield Cleanup Program, Bottle Bill enforcement, mercury thermostats, oversized lobsters, shark fins, and Eurasian boars, among other things. On the regulatory front, the state promulgated final regulations concerning New York's participation in the Regional Greenhouse Gas Initiative and regulatory relief for certain dairy farms, and proposed regulations for liquefied natural gas facilities and invasive species.

This annual survey describes new environmental laws that were enacted in New York in 2013, as well as several significant regulatory developments. The survey identifies the laws by their chapter number in the Laws of New York, 2013.

Air Emissions

The past year brought two new laws relating to vehicle emissions. A springtime budget bill (part U of chapter 58 of 2013) extended deadlines relating to requirements in section 19-0323 of the Environmental Conservation Law that any diesel-powered heavy-duty vehicle owned, operated or leased by a state agency or state or regional public authority with more than half of its governing body appointed by the governor, use best available retrofit technology for reducing the emission of pollutants. The deadlines for issuing regulations to implement the requirement and for the expiration of waivers for vehicle engines not meeting the requirements were extended from December 2013 to December 2014.

Then, at the end of June, Cuomo signed legislation (chapter 74 of 2013) extending through June 2019 a law enacted in 2007 that required the state education commissioner to promulgate regulations restricting the idling of the engines of school buses and other school district vehicles while parked on the grounds of or in front of schools. The 2007 law had been set to expire on June 30, 2013. The Department of Education's

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regulations adopted pursuant to this law in 2008 are codified at 8 N.Y.C.R.R. §156.3(h).

Regulatory developments in 2013 concerning air emissions included New York's adoption of revisions to its air resources regulations to incorporate federal Control Techniques Guidelines establishing Reasonably Available Control Technology for volatile organic compounds emitted by surface coating processes. These amendments affect provisions in 6 N.Y.C.R.R. Parts 200 and 201 and Subparts 228-1 and 228-2. The Department of Environmental Conservation (DEC) also adopted amendments to the transportation conformity rules in 6 N.Y.C.R.R. Part 240 to align the state regulations with federal requirements. The Clean Air Act requires transportation conformity to ensure that federally funded transportation projects are consistent with air quality goals and state implementation plans.

In November, DEC finalized its revisions to the regulations governing New York's participation in the nine-state Regional Greenhouse Gas Initiative (RGGI). The revisions make the state's RGGI program consistent with the Model Rule released by the RGGI parties in February 2013. Most significantly, the amendments reduce the annual cap on regional carbon dioxide (CO₂) emissions from the power sector by almost 45 percent in 2014, to 91 million tons. Between 2014 and 2020, the regional cap will decrease each year, reaching 78 million tons in 2020. New York's portion of the cap is 38.93 percent. DEC indicated that proceeds from the allowance auctions will continue to be used to promote energy efficiency and clean technology and for administrative costs associated with the CO₂ Budget Trading Program.

Brownfields

At the end of July, Cuomo signed into law (chapter 266 of 2013) an amendment to the brownfield cleanup program (BCP) statute that

adds the New York City community board for the district in which a brownfield site is located to the site contact list.

A regulatory development that will certainly affect the cleanup of brownfields and other contaminated sites was the New York State Department of Health's reduction of the guideline for tetrachloroethene (often called PERC) in air to 30 micrograms per cubic meter (mcg/m³), which is lower than EPA's 2012 reference concentration of 40 mcg/m³. The Health Department indicated that new toxicity studies since the department's former 100 mcg/m³ guideline was set in 1997—including the risk assessment performed by EPA in support of the 2012 reference concentration—required reevaluation of the health protectiveness of the old guideline. The department published a fact sheet in September 2013 to answer questions about PERC exposure and the new guideline.¹ PERC contamination is often found near old dry cleaning establishments.

In November, the Department of Environmental Conservation finalized its revisions to the regulations governing New York's participation in the nine-state Regional Greenhouse Gas Initiative

Energy

In May, Cuomo signed a bill extending the moratorium on the siting of liquefied natural gas (LNG) facilities or the certification of routes for transportation of LNG in New York City. The moratorium was originally enacted as a statewide moratorium in 1978 after a 1973 fire in Staten Island that originated in an LNG tank; the statewide moratorium was lifted in 1999 but has continued to apply in New York City. In September, DEC proposed regulations for siting, constructing, and operating LNG facilities elsewhere in the state.

LNG facilities either store LNG in a tank system or convert LNG into natural gas through vaporization. DEC indicated that the two types of facilities that it expects to permit most frequently include

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facilities to fuel trucks and facilities that store LNG as a backup heating fuel. The proposed regulations, which would be codified at 6 N.Y.C.R.R. Part 570, also address the transportation of LNG and the statutory requirement that intrastate transportation only occur along approved routes.

Other energy-related legislation included the Repower New York Farms Act (chapter 253 of 2013), which amended the Public Service Law to authorize the installation of solar energy systems of up to 100 KW on farms using residential meters. The legislation is intended to help reduce farmers' energy costs. The legislation also amended section 3-101 of the Energy Law to add protection of the state's "agricultural heritage" and encouragement of energy conservation in agricultural buildings to the enumeration of the state's energy policies. A law passed in July (chapter 272 of 2013) amends the Real Property Tax Law to exempt certain facilities used for composting or anaerobic digestion of agricultural materials from taxation, special ad valorem levies, and special assessments. The exemption extends to "any equipment necessary to the process of producing, collecting, storing, cleaning and converting biogas into forms of energy."

Infrastructure

This 2013 budget (chapter 57 of 2013) included \$40 million in capital appropriations for DEC under the New York Works statewide capital infrastructure program. The DEC funding was for the Brownfields Environmental Restoration grant program, recreational facility improvements, wastewater treatment infrastructure, the plugging and remediation of abandoned oil and gas wells, and e-business initiatives to allow DEC customers to have updated online services. The budget also provided \$90 million in capital funding for the Office of Parks, Recreation and Historic Preservation under the New York Works infrastructure program to address the backlog of capital rehabilitation and improvement projects at parks and historic sites.

Land Preservation

On June 19, 2013, Cuomo signed a bill (chapter 66 of 2013) that added the United States, acting through the Department of Interior, to the definition of "public body" in the state's conservation easement statute (N.Y. Env'tl. Conserv. Law §§49-0301-49-0311). The statute now explicitly permits federal entities such as national parks to enforce conservation easements.

Solid and Hazardous Waste

The 2013 budget legislation contained the Cleaner, Greener New York Act of 2013 (part F of chapter 58 of 2013), which was intended to increase revenues to the Environmental Protection Fund (EPF) by redirecting \$15 million from unredeemed "Bottle Bill" collections from the General Fund to the EPF. The legislation also included measures to strengthen Bottle Bill enforcement, resulting in an anticipated additional \$4 million for the EPF in 2013-14 and \$8 million in subsequent years. The EPF was created in 1993 to provide permanent funding for programs such as open space and farm land protections, land acquisition, estuary management, waterfront

revitalization, and recycling.

The spring budget bills also extended through 2016 the \$2.50 fee for waste tire management and recycling that is collected on each new tire sold, as well as the requirement that tire services accept waste tires from customers purchasing new tires (part G of chapter 58 of 2013). The funds from the tire fees are intended to ensure that DEC had adequate funds for the regulation of waste tire storage facilities and abatement of noncompliant waste tire stockpiles, and will also be used for the administration and enforcement of other laws regulating the collection, treatment, disposal, and management of solid and hazardous wastes.

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In December, Cuomo signed the Mercury Thermostat Collection Act (chapter 550 of 2013), which requires the establishment of a statewide product stewardship program for mercury thermostats. The law, codified as a new title 29 in the Environmental Conservation Law, mandates that thermostat manufacturers individually or collectively establish a program—with input from DEC—to collect, transport, recycle, dispose, and properly manage out-of-service mercury thermostats. By July 1, 2015, manufacturers must provide collection containers to thermostat wholesalers in New York as well as to contractors, thermostat retailers, and local governments who request them. Manufacturers must also create educational and outreach materials. The new mandatory program is an enhancement of the current voluntary mercury thermostat collection program run by Thermostat Recycling Corporation. The collection goal for 2015 is 15,500 thermostats.

Water Pollution

In May, DEC finalized amendments to Part 750 of its regulations to exempt non-discharging animal feeding operations with 200 to 299 mature dairy cows from obtaining coverage under the State Pollutant Discharge Elimination System (SPDES) General Permit for Concentrated Animal Feeding Operations. (DEC also modified certain portions of its Part 360 regulations on land application, solid waste storage facilities, composting, and organic processing facilities.) In July, DEC finalized modifications to the SPDES permit itself. DEC indicated that it intends the regulatory changes to provide regulatory relief to a segment of the dairy community to assist it in meeting the demands of the yogurt industry. A coalition of environmental groups led by

Riverkeeper is challenging the new regulations and revised permit in court.

Wildlife

As of Aug. 30, 2013, oversized lobsters legally caught outside of New York State may be imported into and sold in New York, under a new law enacted over the summer (chapter 305 of 2013). DEC Commissioner Joe Martens said that "[b]y allowing the possession and sale of oversized lobsters, we are supporting our seafood dealers and restaurants while preserving New York's lobster fishery." The legislation also established a Sept. 8 through Nov. 28 closed season for lobster harvest and landings from Long Island Sound.

On July 26, 2013, Cuomo signed a bill (chapter 171 of 2013) that as of July 1, 2014, will ban the possession, sale, offering for sale, trade or distribution of shark fins. It is already illegal to fin a shark in New York. "Shark fin" is defined as "the raw, dried or otherwise processed detached fin including the tail." The law makes an exception for "any shark fin that was taken from a spiny dogfish (*Squalus acanthias*) or a smooth dogfish (*Mustelus canis*) lawfully caught by a licensed commercial fisherman." It also permits possession of a shark fin "by any person if the shark was lawfully caught and the person has a recreational marine fishing registration or a license or permit...for bona fide scientific research or educational purposes."

In invasive species news, on Oct. 21, 2013, Cuomo signed a law (chapter 417 of 2013) prohibiting the importation, breeding, or introduction into the wild of Eurasian boars, effective immediately. Starting Sept. 1, 2015, the law will also bar the possession, sale, offer for sale, distribution, transportation, or other marketing or trading of live Eurasian boars.

Also in October, DEC and the Department of Agriculture and Markets jointly published proposed new regulations to control invasive species—a new Part 575 in DEC regulations would identify "prohibited invasive species" that no person may sell, import, purchase, transport, introduce, or propagate, and "regulated invasive species" that may not knowingly be introduced into a "free-living state," i.e., unconfined and outside the control of a person. Labeling and other requirements would apply to the sale of regulated invasive species. The proposed regulations define "invasive species" as "a species that is nonnative to the ecosystem under consideration, and whose introduction causes or is likely to cause economic or environmental harm or harm to human health." The harm caused by the species must significantly outweigh any benefits.

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1. The fact sheet is available at <http://www.health.ny.gov/environmental/chemicals/tetrachloroethene/docs/perc.pdf>.