

ENVIRONMENTAL LAW

Expert Analysis

## New York Environmental Legislation And Regulations in 2015

In 2015, long-awaited reform of New York's Brownfield Cleanup Program (BCP) emerged from the annual budget process. The BCP amendments extended the availability of tax credits for 10 years and also changed the eligibility criteria for tax credits, including by restricting the eligibility of New York City sites for the historically lucrative tangible property credit. In 2015 Governor Andrew Cuomo also signed new laws regarding the Oil Spill Fund, water pollution controls, energy, and hazardous waste program fees.

This annual survey reports on these developments and other environmental laws enacted in 2015, as well as significant regulatory developments.

### Brownfield Cleanup Program

On April 13, 2015, Governor Cuomo signed budget legislation that included amendments to the brownfield law (chapter 56 of Laws of 2015, part BB). The amendments extended the tax credits available for remediating and redeveloping contaminated real property to March 31, 2026. The legislation also changed how the tangible property

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and site preparation components of the tax credit are calculated.

While all sites outside New York City remain eligible for the tangible property credit, this component of the tax credit will only apply to New York City sites that meet one or more of the following criteria:

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Chapter 521 provides for notices to landowners prior to construction of fuel gas transmission lines and other utility transmission facilities.

(1) at least half the site is located in a designated environmental zone; (2) the property is "upside down," defined as a site at which the projected costs to investigate and remediate contamination exceed 75 percent of the independent appraised value of the property; (3) the property is "underutilized"; or (4) an affordable housing project is planned for the site.

The new law left the New York State Department of Environmental Conservation

(DEC) with the job of defining the contours for "underutilized" and "affordable housing project." In June, DEC proposed definitions,<sup>1</sup> but did not meet the legislation's Oct. 1, 2015, deadline for adopting them. DEC's proposed definition of "underutilized" would exclude sites where the proposed development is residential or restricted residential. A site would also have to be certified by the municipality as meeting other criteria, including that the site would not be developed without "substantial government assistance." The proposed definition of "affordable housing project" included both home ownership and rental residential projects subject to federal, state, or local affordable housing programs or other mechanisms by which units are set aside based on income.

The legislation changed the definition of "brownfield site" to make eligibility dependent upon the presence of contamination that exceeds soil cleanup objectives or other applicable standards "based on the reasonably anticipated use of the property." The legislation also authorized the creation of a BCP-EZ program for sites that do not pose a significant threat and for which applicants waive tax credits. DEC has indicated that it intends to propose regulations for the BCP-EZ program in 2016.<sup>2</sup>

### Other Remediation Programs

The 2015–16 budget extended the State Superfund Program for 10 years and

provided it with a \$100 million appropriation. The Environmental Restoration Program, which supports the cleanup of contamination at municipally owned sites, was amended to authorize funding from bonds issued by the Environmental Facilities Corporation.<sup>3</sup>

### **Movement of Crude by Rail**

In response to growing safety and environmental concerns related to increased transportation of crude oil, the budget included funding to support Governor Cuomo's Executive Order 125, issued in January 2014.<sup>4</sup> The legislation (part X of chapter 58) raised the cap on the Navigation Law's Oil Spill Fund to \$40 million from \$25 million. To support the increase, the budget bills increased fees on oil transported through the state.<sup>5</sup>

### **Hazardous Waste and Fees**

The budget legislation (part BB of chapter 58) expanded the exemption from hazardous waste generator fees<sup>6</sup> to encompass waste that is generated (1) under an order from or agreement with the U.S. Environmental Protection Agency (EPA), (2) under a court order, (3) from a facility being addressed under the Comprehensive Environmental Response, Compensation, and Liability Act, or (4) under New York City's local brownfield cleanup program. Hazardous waste from cleanups conducted under New York City's local program was also exempted from hazardous waste program fees.<sup>7</sup>

### **Water Pollution**

Another component of the 2015–16 budget (part G of chapter 60) created a three-year \$200-million fund for water supply or sewage treatment infrastructure. In addition, chapter 326 extends the Clean Water State Revolving Fund's 50 percent state subsidy, first added in 1992, for financing of municipal projects until Sept. 30, 2018. The budget legislation (part Y of chapter 58) also increased fees for the state

pollutant discharge permits for the first time since 2009.

Chapter 379 amends the Public Health Law to address the growing problem of pharmaceutical residuals in surface water by allowing certain pharmacies to voluntarily begin accepting controlled substances without any prior regulatory approvals.

On the regulatory side, DEC also belatedly published proposed rules to implement the 2012 Sewage Pollution Right to Know Act,<sup>8</sup> which requires publicly owned treatment works and operators of publicly owned sewer systems to report sewage discharges to DEC, the local health department, and the municipality in which the discharge occurred, as well as any adjoining municipalities and in some cases to the general public. DEC's proposed rules would require notification each day until the discharge terminates.

To meet the Clean Water Act's requirements and to avoid possible intervention by EPA, DEC also issued regulations that require Class I and Class SD saline surface waters to be swimmable.

### **Energy**

Chapter 521 provides for notices to landowners prior to construction of fuel gas transmission lines and other utility transmission facilities. The law also requires that the Public Service Commission, when approving the construction of a transmission facility, make a finding that there will be minimal adverse impacts on agricultural operations.

The budget legislation included provisions requiring the New York State Energy Research and Development Authority (NYSERDA) to direct \$1 million of its funds from assessments on certain gas and electric corporations to DEC—these funds were originally intended only for DEC's climate change program. In addition, NYSERDA was directed to contribute \$41 million generated by the Regional Greenhouse Gas Initiative cap-and-trade program to the state treasury (part I of

chapter 60). EPL/Environmental Advocates characterized this action as a "raid" on clean energy and carbon reduction funds.<sup>9</sup>

Regulatory developments concerning energy included final rules governing liquefied natural gas (LNG) facilities.<sup>10</sup> The rules, which went into effect in February, establish a permitting process for LNG fueling stations and other facilities that store LNG or convert LNG to natural gas. New York will now permit LNG facilities with capacities of up to 70,000 gallons, which DEC said would be adequate for the LNG fueling stations expected to be the predominant type of facility proposed in the next five years. The new regulations do not affect the statutory moratorium on LNG facilities within New York City, which was extended until April 1, 2017 (chapter 275).

### **Air Quality**

The budget legislation increased Title V program fees (part Y of chapter 58), adding a base fee for all sources subject to the program as well as a fee per ton of emissions of regulated air contaminants. The per-ton fee is now higher for sources with higher total emissions. The fee increases were intended to ameliorate shortfalls in Title V program funding identified in a report by EPA's Office of Inspector General in 2014.

### **Solid Waste**

The sunset date was extended from April 1, 2015, to April 1, 2017, for a provision of the Cleaner, Greener NY Act of 2013 which allows New York City and Nassau and Suffolk counties to retain 25 percent of fines and penalties collected in their enforcement of the bottle bill.<sup>11</sup>

### **Mold**

Beginning Jan. 1, 2016, licenses are required to conduct mold assessments or remediation. New work standards for these activities went into effect on July 28, 2015, based on a law signed by Governor Cuomo in January (chapter 551 of Laws

of 2014). In July, the governor signed legislation amending the law to fix technical and substantive issues (chapter 90). Anyone conducting mold assessment, remediation, or abatement on a project must have a valid license issued by the Commissioner of the Department of Labor.

Licenses are not required for routine cleaning, for areas measuring 10 square feet or less, or for construction, maintenance, repair, or demolition undertaken for a purpose other than mold remediation or abatement. The law requires preparation of project-specific mold remediation work plans as well as post-remediation reports.

### Superstorm Sandy

Three years after Superstorm Sandy, legislation continued to address the storm's impacts. Chapter 410 requires the Department of Financial Services to examine the potential impacts of prohibiting the use of "anti-concurrent causation" clauses in homeowner insurance policies to deny coverage for losses caused by sewer backups. Chapter 411 authorizes adoption of tax relief by Nassau County to mitigate the cost of increased assessments due to repair and reconstruction work after Sandy. Chapter 541 restricts the use of properties in Staten Island acquired by the state pursuant to the NY Rising buy-out program. Such properties must be "dedicated and maintained in perpetuity as open space for the conservation of natural floodplain functions."

### Storage Tanks

New regulations governing petroleum bulk storage, chemical bulk storage, and management of used oil went into effect in the fall.<sup>12</sup> The regulations, which are part of a two-phase rulemaking process, incorporated a number of state and federal statutory changes, including operator training requirements and restrictions on deliveries to tank systems that are not in compliance with regulations. DEC

expects to issue an information "draft for consideration" of the second phase of this program in 2016, which will include changes to implement recently adopted EPA regulations for underground storage tanks.<sup>13</sup>

### Climate Change

In October in a ceremony at Columbia University, Governor Cuomo signed the Under 2 MOU, a memorandum of understanding among states, provinces, and cities to take action to limit the increase in global temperature to less than 2 degrees

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DEC published proposed rules to implement the 2012 Sewage Pollution Right to Know Act, which requires publicly owned treatment works and operators of publicly owned sewer systems to report sewage discharges to DEC, the local health department, and the municipality in which the discharge occurred, as well as any adjoining municipalities and in some cases to the general public.

Celsius. One hundred twenty-three jurisdictions worldwide have signed or endorsed the MOU, including 58 jurisdictions that signed on during the United Nations climate change conference in Paris in December. The MOU does not specify particular actions that participating jurisdictions will take, but parties to the MOU agree to set forth in an appendix to the MOU the actions they will take to meet interim goals in 2030.

DEC took a step toward implementing the Community Risk and Resiliency Act (CRRA) enacted in 2014 by proposing regulations to establish a common set of sea-level rise projections for New York.<sup>14</sup> The proposed rule establishes projections for three regions in the state: the Mid-Hudson Region, the New York City/Lower Hudson Region, and the Long Island Region. For each region, the proposed regulations specify various projections for sea-level

rise above the baseline level in four time intervals (2020s, 2050s, 2080s, and 2100).

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1. Environmental Remediation—Brownfield Cleanup Program, NYS Register, vol. XXXVII, issue 23, at 7 (June 10, 2015).

2. See David J. Freeman and Lawrence P. Schnapf, "New York Amends Its Brownfield Cleanup Act," 26 *Envtl. L.* in N.Y. 181, 184 (November 2015).

3. N.Y. ENVTL. CONSERV. LAW §56-0501; N.Y. PUB. AUTH. LAW §1285-q.

4. Exec. Order No. 125 (Jan 28, 2014), [http://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO125\\_0.pdf](http://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO125_0.pdf).

5. License fees for major facilities were increased from one cent per barrel transferred to 9.5 cents per barrel transferred. The license fee surcharge on oil transferred and then exported for use outside of New York was increased from 1.5 cents to 13.75 cents per barrel.

6. N.Y. ENVTL. CONSERV. LAW §27-0923.

7. N.Y. ENVTL. CONSERV. LAW §72-0402.

8. Rule Making to Implement Environmental Conservation Law Section 17-0826-a, NYS Register, vol. XXXVII, issue 24, at 10 (June 17, 2015).

9. EPL/ENVTL. ADVOCATES, ENVIRONMENTAL SCORECARD (2015), <http://eplvotersguide.org/wp-content/uploads/2015/11/2015-SCORECARD-FINAL.pdf>.

10. Liquefied Natural Gas (LNG), NYS Register, vol. XXXVII, issue 6, at 1 (Feb. 11, 2015).

11. N.Y. ENVTL. CONSERV. LAW §27-1005.

12. Petroleum Bulk Storage and Used Oil Management, NYS Register, vol. XXXVII, issue 39, at 8 (Sept. 30, 2015); Chemical Bulk Storage, NYS Register, vol. XXXVII, issue 39, at 14 (Sept. 30, 2015).

13. DEC also issued a final program policy setting forth guidelines and procedures for operator training required under the regulations. DEC, DER-40, Operator Training (Oct. 9, 2015), [http://www.dec.ny.gov/docs/remediation\\_hudson\\_pdf/der40.pdf](http://www.dec.ny.gov/docs/remediation_hudson_pdf/der40.pdf).

14. Science-Based State Sea-Level Rise Projections, NYS Register, vol. XXXVII, issue 45, at 29 (Nov. 10, 2015).