

## ENVIRONMENTAL LAW

## Expert Analysis

# New York Environmental Legislation in 2021

This annual survey of New York environmental legislation describes numerous new laws on single-use plastics, lead exposure, drinking water, fuel oil, climate resilience, solar energy, invasive species and other areas that were signed into law in 2021.



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### Constitutional Amendment

The most important development of the year was the approval by the voters on November 2, by a 70% to 30% margin, of an environmental rights amendment to the state Constitution. (This margin is especially notable since on the same day the voters rejected several other amendments that would have made it easier to vote.) The Constitution's Bill of Rights now includes a provision that reads in full: "§19. Environmental rights. Each person shall have a right to clean air and water, and a healthful environment." In the years to come the courts will no doubt be called upon to flesh out the meaning and applicability of this new right.

### Bond Issue

In 2021, the Legislature once again passed a measure (Chapter 59, Part

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TT) that could provide up to \$3 billion for improvements that "preserve, enhance, and restore New York's natural resources and reduce the impact of climate change." It will go before the voters in the Nov. 8, 2022 election. This measure—the Restore Mother Nature Environmental Bond Act—was originally enacted as part of the 2020-21 budget (as we have previously described in detail) but was removed from the 2020 general election ballot due to COVID-19's financial impact. The bond issue would provide funds for capital projects such as coastal rehabilitation and shoreline restoration, open space land conservation and recreation, green buildings, and water quality improvement and resilient infrastructure.

### Chemical Regulation And Pesticides

New York continued to enact measures to regulate potentially toxic substances in consumer and other products. On New Year's Eve, Governor Kathy Hochul signed the Family

and Fire Fighter Protection Act (Chapter 829), which will prohibit sale of upholstered furniture and mattresses and electronic displays containing certain flame retardant chemicals. The law also will bar custom upholsterers from using components that contain the regulated chemicals and will require electronic display manufacturers to submit reports identifying flame retardants used in the enclosure or stand of the displays. (The American Chemistry Council has taken the position that portions of this law are preempted by the federal Toxic Substances Control Act.) In November, Governor Hochul signed legislation banning the sale and application of pavement products containing coal tar, which contains high levels of carcinogenic polycyclic aromatic hydrocarbons (Chapter 596).

Two laws enacted at the end of the year addressed pesticides. Chapter 707, intended to provide more efficient access to pesticides data, amends New York's law on pesticides sales and use reporting to require that reports be submitted in electronic format or on scannable forms, and that the New York State Department of Environmental Conservation (DEC) provide information on product names and active ingredients in its annual reports and in responses to request from interested parties. Chapter 783 generally bars the application of pesticides to playgrounds or athletic

or playing fields at children's overnight and summer day camps.

### Lead

Laws to address risks of lead exposure were also enacted. Chapter 634 establishes a new requirement for warning labels on "seasonal and decorative lighting products" containing an electrical cord casing in which lead is present in a quantity greater than 100 parts per million. Chapter 771 amends the law requiring school water testing for lead to require that testing occur every three years and to reduce the lead action level at 0.005 milligrams per liter. The law also requires posting of laboratory reports from testing on school districts' websites and makes remediation expenses reimbursable through clean water infrastructure programs.

### Solid and Hazardous Waste

Lawmakers continued to enact waste reduction and recycling measures. New laws will require that local solid waste management plans characterize methods to increase waste diversion (Chapter 551); require adoption of policies to eliminate the use of certain single-use plastic items at State University of New York and City University of New York institutions (Chapter 553); prohibit hotels from providing personal care products in small plastic bottles (Chapter 734); require DEC to prepare a report on alternative municipal uses for recycled glass (Chapter 742); and extend through 2026 provisions requiring supermarkets to donate excess food "from time to time" to organizations that provide food to the needy (Chapter 791).

### Air Quality, Energy And Climate Change

Laws to address air pollution included amendments that extend biofuel heating

requirements to heating oil sold for use in any building in the state (Chapter 750). (Previously the requirement was limited to buildings in Nassau, Suffolk, and Westchester Counties.) The amendments also will ramp up the percentage requirements from 5% on July 1, 2022 to 20% in July 2030. Chapter 591 will require the statewide phase-out of the use of number 6 fuel oil to heat buildings and facilities. Chapter 505 will require white or beige/cream roofs on aboveground petroleum bulk storage tanks; this is intended to reduce emissions of hazardous air pollutants by reducing evaporation losses. Lawmakers also cited air pollution benefits from

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a law that increases penalties for illegal modifications to mufflers and exhaust systems (Chapter 527).

In September, just two weeks after taking office, Governor Hochul signed a law setting a goal that 100% of passenger cars and trucks sold or leased in New York be zero emission vehicles (ZEVs) by 2035 (Chapter 423). The law also set goals for medium- and heavy-duty vehicles and for off-road vehicles and equipment. (Federal action would be needed for these goals to become mandatory.)

The Soil Health and Climate Resiliency Act (Chapter 735) directs the Department of Agriculture and Markets

to implement a "soil health initiative" and a "climate resilient farming initiative" to encourage agricultural producers to improve and maintain soil health and to mitigate both farming's impacts on climate change and climate change's impacts on farming. Another measure aimed at climate change adaptation is Chapter 786, which requires certain utilities to prepare climate change vulnerability studies and climate resilience plans that include storm hardening and resiliency measures, as well as other elements related to climate change preparedness. This law also requires utilities to reimburse customers for certain losses incurred during prolonged outages.

Measures to encourage renewable and clean energy included the Solar Rights Act (Chapter 342), which bars homeowners' associations from effectively prohibiting or imposing "unreasonable limitations" on installation or use of rooftop solar power systems with a rated capacity of 25 kilowatts or less, and amendments extending funding for municipal investment in clean vehicles and clean vehicle infrastructure projects (Chapter 55, Part CCC).

### Drinking Water

Chapter 716 requires the Department of Health to publish draft regulations that include a first list of emerging contaminants for which public water systems must test. The law specifies a number of chemicals that must be included on the list, including specific per- and polyfluoroalkyl substances, and requires that the list be updated at least once every three years.

### Wildlife and Natural Resources

New provisions in Article 9, Title 17 of the Environmental Conservation Law authorize DEC to establish

aquatic invasive species inspection stations in the Adirondack Park region, to issue inspection or decontamination certificates to owners of motorized watercraft that have been inspected, and to create a self-certification program for owners to demonstrate that “reasonable precautions” have been taken (Chapter 673). The law also removes the sunset date for a 2014 law that prohibits launching a watercraft or floating dock unless it can be demonstrated that reasonable precautions have been taken to avoid spread of aquatic invasive species. Chapter 352 increases penalties for certain violations of wildlife protection laws and requires DEC to provide information about the importance of protecting endangered species.

Chapter 728 provides for the designation of “geoparks” and other sites of geological significance and for the establishment of a state geological trail. Chapter 349 repeals a hunting prohibition in the Alcove Reservoir in Coeymans, with proponents citing a “major proliferation” of the deer population on reservoir property that threatened use of the land as a carbon sink.

### Land Use and Transportation

At the intersection of land use and transportation is Chapter 802, which will require (once modified per an agreement between the legislature and governor) development by the Metropolitan Transportation Authority of a strategic action plan to improve bicycle and pedestrian access at bridges, stations, and other facilities. Chapter 721 requires a study of the impacts of runways and air traffic at Kennedy and LaGuardia airports.

### Agriculture

Several laws relate to agriculture or community gardens. Chapter 635 makes

the convening of a community gardens task force mandatory, rather than merely giving the DEC commissioner authority to create it. The law also requires the task force to prepare reports on the status of community gardens in the state. Two other laws provide for creation of a task force on improving urban and rural consumer access to locally produced, healthy foods (Chapter 731) and require preparation of a report on urban agriculture (Chapter 747).

### Administrative Procedures

Amendments to the State Administrative Procedure Act authorize agencies to “utilize innovative techniques to enhance public participation in rule making,” such as organizing hearings as roundtable discussions and using teleconferencing technologies (Chapter 801). The law also allows people to submit petitions requesting that certain agencies, including DEC, hold public hearings on proposed rules where such hearings are not already required. In addition, Chapter 481 amends the Open Meetings Law to require that meeting documents of certain public bodies be posted on a website at least 24 hours prior to a meeting “to the extent practicable”.

### Miscellaneous

Other laws enacted include provisions to permit kelp cultivation on underwater lands of Gardiner’s and Peconic Bays (Chapter 656); a requirement that certain State agencies, including DEC, designate a small business liaison to serve as an initial point of contact for such businesses (Chapter 641); a CPLR provision reviving time-barred causes of action by members of the military who served in the Middle East on or after Aug. 2, 1990 and who allegedly suffer from chronic conditions caused by exposure to toxic burn pits

(Chapter 729); a requirement for preparation of a study of asthma in cities and towns with populations of more than 90,000, including recommendations for interventions to reduce “the high burden of asthma in each city and town included in the study” (Chapter 760); and a two-year extension of the tangible property credit component of the brownfield redevelopment tax credit if the requirements for the credit would have been met but for delays due to COVID-19 restrictions (Chapter 58, Part AA).

Governor Hochul vetoed bills that would have prohibited use of drilling fluids, brine, and flowback water from wells, pools, or fields on highways for purposes such as deicing; exempted enrolled citizens of an Indian nation or tribe from certain fishing and hunting restrictions; placed restrictions on material that could be used as fill in the Jamaica Bay borrow pits; and allowed the transfer of bill credits associated with electricity produced by community distributed generation facilities in one electric corporation territory to other territories.