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ENERGY & ENVIRONMENT (/POLICY/ENERGY-ENVIRONMENT)

Cuomo pushes to weaken ban on toxic foam burning

The governor proposed chapter amendments allowing DEC to reinstate the practice, according to bill sponsors.

By LEE HARRIS (/author/lee-harris) | NOVEMBER 9, 2020

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A bill to stop the burning of toxic foam has become a flashpoint between Gov. Andrew Cuomo and its sponsors, as the governor's office pushes to retain the authority to greenlight the practice in the future.

Residents of Cohoes, a small city in Albany County, learned in February (<https://www.ci.cohoes.ny.us/DocumentCenter/View/1300/PR-Cohoes-Mayor-Keeler-Urges-Moratorium-on-AFFF-Incineration-at-Norlite-February-25-2020>) that a hazardous waste incinerator owned by Norlite LLC, an industrial materials manufacturer, had been burning shipments of toxic firefighting foam. In response to public concern about the health risks and national press attention, a bill banning the incineration of the foam in Cohoes passed (<https://www.timesunion.com/news/article/State-legislation-bans-toxic-foam-burning-in-15329887.php>) the Senate and Assembly unanimously in June.

Lawmakers and advocates familiar with the negotiations said Gov. Andrew Cuomo has proposed “chapter amendments” – a short bill amending an already-passed bill – turning the permanent ban on burning toxic firefighting foam into a moratorium, which could be lifted at the state Department of Environmental Conservation’s discretion.

Last month, a group of environmental lawyers and groups including Riverkeeper, 350Brooklyn and the Natural Resources Defense Council sent the governor a letter urging him (<https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2020/10/28/environmentalists-urge-cuomo-to-sign-norlite-bill-banning-toxic-foam>) to sign the bill without adding proposed changes.

The bill’s lead sponsors, Assembly Member John McDonald and state Sen. Neil Breslin, who both represent the affected district, insist that it should be signed in its current form. “I’m not going to support a moratorium. I support the ban,” McDonald said.

Toxic foam burned near public housing complex

Joe Ritchie, a 20-year-old Syracuse University student who founded the group Saratoga Sites Against Norlite Emissions, grew up with his mom, brother, and grandmother at a public housing complex steps from the Norlite kiln. His neighbors are used to seeing black snow during the winter and soot on their walls and windows, he said, and visitors to his home have gotten “random nosebleeds.” The air, Ritchie said, smells “like if you put all your household chemicals in a bucket and light it on fire and inhale it.”

Although he has long been concerned about the health risks of living near an industrial incinerator, Ritchie said, he and other Saratoga Sites residents were alarmed when they learned that Norlite had burned more than 2 million pounds (<https://www.wsj.com/articles/company-linked-to-toxic-forever-chemicals-loses-defense-contract-11592520413>) of aqueous film forming foam, a fire suppressant.

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By ZACH WILLIAMS ([/author/zach-williams](#))

The foam contains toxic perfluoroalkyl and polyfluoroalkyl substances, or PFAS, which are commonly referred to as “forever chemicals (<https://chemtrust.org/pfas/>)” since they are designed not to break down. Exposure to PFAS has been linked with (<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7530144/>) health conditions including cancers, metabolic syndrome and low birth weight, among others.

Because of these risks, firefighting squads and military bases have been phasing out the use of the foam. But storage facilities retain large stockpiles of the foam, which had been used during training exercises, for example, to put out jet fuel fires (<https://theintercept.com/2015/12/16/toxic-firefighting-foam-has-contaminated-u-s-drinking-water-with-pfcs/>). The U.S. Department of Defense has paid to incinerate foam at facilities like Norlite in a handful of states.

Without city officials’ knowledge, Norlite LLC received and incinerated shipments of PFAS-laden foam throughout 2018 and 2019. Shipment logs provided by the Cohoes mayor’s office show that foam concentrate and rinsate was sent to the facility from military bases, airplane hangars, and even a community college in Troy, New York.

In February, Earthjustice and the Sierra Club sued (https://earthjustice.org/sites/default/files/files/ filed_complaint_-_pfas_incineration_suit.pdf) the Department of Defense over contracts to burn PFAS at sites including the Norlite facility. The City of Cohoes enacted a temporary moratorium on burning the foam this spring, which is still in effect, and the state Legislature unanimously passed McDonald and Breslin’s permanent ban two months later.

“Hell-bent on proving that it can be incinerated”

The governor’s office is now pushing to amend the permanent ban to a temporary moratorium, McDonald and Breslin say. The amendment would leave open the door for the DEC to restart incineration in the future, if the agency deems it a safe disposal method.

The governor’s proposed changes would also expand the regulation beyond Cohoes to a statewide measure, McDonald said, a change which he supports but says is largely beside the point. “They make a change to make it look like they’re strengthening the bill, but it’s irrelevant, because the only one that matters is Norlite,” Judith Enck, a former EPA regional administrator, said.

The governor’s push to retain authority over future foam incineration partly stems from disagreement between the state environmental agency and some researchers over whether incineration is a safe disposal method. Environmental advocates believe incineration is an imperfect disposal technique because PFAS are designed to be resistant to combustion. A recent study (<https://news.bloomberglaw.com/environment-and-energy/new-york-incinerator-releasing-not-destroying-pfas-study-finds>) found that burning may disperse molecules of the poisonous chemical into the air.

“Because of the strength of their chemical bonds, PFAS do not readily burn,” the Earthjustice complaint reads (https://earthjustice.org/sites/default/files/files/filed_complaint_-_pfas_incineration_suit.pdf). “Instead, uncombusted PFAS are emitted into the air along with other hazardous chemicals.”

The DEC says more research is needed. “Our understanding of high-temperature incineration is that for many compounds, that is the right way to achieve total destruction and get them out of the environment,” DEC Chief of Staff Sean Mahar told City & State. “We need better science, obviously, on the perfluorinated compounds side, about how they behave in high-temperature incineration environments, and what comes out of the stacks.”

The DEC’s on-site monitor at the Norlite kiln, Joe Hadersbeck, expressed skepticism toward environmentalists who oppose the incineration of PFAS. “I’ve been using that stuff on my furniture, and my car seats, and my camping equipment, since I was a kid,” he told City & State.

“It’s like a lot of things in the environment – we all use them for decades, until somebody decides to spotlight them, and then we look into them a little more, from an environmental perspective, and decide that, well, nobody cared back when Teflon came out. So we’ve all used them,” Hadersbeck said. “Have you ever used Scotchgard?” he asked, referring to the common water repellent spray, which once contained the chemicals.

“This stuff isn’t new,” he added. “It’s been around for 60, 70 years. And now, everybody and their brother wants to test for it.”

Hadersbeck said he believes the Environmental Protection Agency is still working to figure out how to safely burn aqueous film forming foam, by determining, for example, at what temperature incineration becomes fully effective. But environmentalists’ efforts to ban incineration makes it difficult for regulatory agencies to run tests, he said, which requires burning the foam.

“It’s kind of hard to burn it when all of a sudden it becomes a cause célèbre of every environmentalist,” Hadersbeck said.

Asked whether trial burns should be run outside of public housing complexes, Hadersbeck shrugged off the concern, saying there is nowhere it wouldn’t meet resistance. “You think you’re going to find somewhere where people say, ‘Yeah, bring it here, burn it here, we don’t care’? I don’t think that’s going to happen,” he said.

Cohoes Mayor William Keeler said that burning the foam in his city should be permanently banned. “This is an urban area. This is no place to be incinerating fire foam,” Keeler said. “We can’t have millions of pounds of firefighting foam being incinerated in an urban area if the effectiveness of the incineration is only 95%, or 99%.”

The DEC has issued statements leaving open the possibility of future PFAS incineration. “DEC will also require a new, comprehensive review process, with opportunities for public review and comment, before considering any proposed future thermal treatment or disposal of materials containing PFAS chemicals,” the agency website reads (<https://www.dec.ny.gov/chemical/121118.html>).

The agency’s internal processes and communication channels about Norlite’s foam burning raise questions about whether it will adequately conduct these review processes, lawmakers and advocates said.

Hadersbeck, the agency’s on-site monitor, said that he was aware that the foam was being burned in 2018. But in a statement to The Intercept, the agency said (<https://theintercept.com/2020/04/28/toxic-pfas-afff-upstate-new-york/>) it was not aware the foam was being burned until “late 2019.”

“When we first met with DEC, they did not mention at all that they knew this was going on. They seemed as surprised as I was,” Keeler said, referring to his meetings in 2020 with senior DEC officials including Mahar and Commissioner Basil Seggos.

Asked why he did not inform higher-ups in the agency, Hadersbeck said that “they were free to burn it when they did.”

Mahar, the agency’s chief of staff, said the agency is currently investigating Hadersbeck’s handling of the issue. “That monitor doesn’t speak for the agency,” Mahar said. “It is something we take seriously, though, because we need to ensure that our staff are grounded in the same scientific principles that we have.”

Environmental advocates also pointed to DEC’s record of lax oversight at Norlite. Norlite has previously paid fines for air pollution violations, including mismanagement (<https://www.timesunion.com/tuplus-business/article/Norlite-plant-in-Cohoes-pays-air-pollution-fine-10646142.php>) of pollution sensors and leaking (<https://www.timesunion.com/business/article/State-fine-for-incinerator-5734782.php>) a chemical irritant, the Times-Union has reported.

“Norlite has, in the past, had numerous other environmental violations regarding their incineration processes,” said Rob Hayes, an associate at Environmental Advocates NY. “So Norlite may not, during this process, be following every environmental protocol and standard.”

Asked about these claims, Mahar said that “DEC is not satisfied with this facility’s track record, which is why we are treating their permit renewals as new applications to fully examine the current permits and the impacts of Norlite’s entire scope of operations on this community.”

Asked to comment, a Norlite spokesperson noted that the firm uses technology and “diligent human oversight” to monitor its operations. “When we have been out of compliance, we have alerted regulatory authorities ourselves and taken corrective measures immediately.”

“Nrlite handled and disposed of the (aqueous film forming foam) pursuant to a contract with the U.S. Government and in compliance with all regulations and our permits,” the spokesperson said. “We have no interest in any activity that federal and state regulatory agencies believe, based on sound science, would adversely affect the environment, our workforce or the local community.”

McDonald, for his part, does not trust DEC to impartially conduct a review process. “I think the department is hell-bent on proving that it can be incinerated,” he said.

“The executive branch flexing its muscle”

Environmental advocates say Cuomo’s chapter amendment recalls previous fights in which the governor has held up bills passed by the Legislature in an attempt to keep control within the executive branch’s regulatory agency.

Chapter amendments, short bills to amend already-passed legislation, are often used to consolidate executive power, said Blair Horner, legislative director at the New York Public Interest Research Group. The process, he said, “spares the governor’s office the hassle of having to veto a bill” in order to get the Legislature to change it.

Once a bill passes the Legislature, it must be sent to the governor by the end of the calendar year. Legislative staffers typically wait until the governor’s office signals that it is ready to receive a bill. The governor’s staff may transmit suggestions before the bill is sent and negotiate with sponsors over amendments to the bill. Any resulting chapter amendment is technically separate legislation that must go through the Legislature for approval.

Chapter amendments are proposed, Horner said, “often in response to pressure from industry, which would rather be in a regulatory process with the executive than have to live with a legal ban.”

“It’s usually the executive branch flexing its muscle over how the law will be implemented,” Horner said.

McDonald stressed that the ability to ban the foam incineration should rest with the Legislature. “If at some point science proves otherwise, then the agency, or whoever it may be, could come back to the Legislature to remove a ban,” he said.

“We appreciate the intent and we want a law that can be enforced,” Cuomo spokesperson Rich Azzopardi said in response to criticism of the governor’s actions on the bill to ban firefighting foam incineration. “We’re working through that and sure – the advocates don’t care about reality and only care about silly purity tests. Bully for them.”

The governor would need cooperation from the Legislature to pass chapter amendments. Speaker Carl Heastie and Majority Leader Andrea Stewart-Cousins did not respond to requests for comment on whether they would support the proposed changes.

Several advocates said the last-minute push to reclaim executive authority from a bill before it crosses the finish line is a familiar strategy. Both Hayes and Horner cited a similar battle in 2019, when the Legislature passed a bill (<https://news.bloomberg.com/environment-and-energy/new-yorks-cuomo-to-ban-pesticide-chlorpyrifos-but-vetoes-bill>) to phase out the use of chlorpyrifos, a toxic pesticide. Cuomo vetoed that bill, but then directed (<https://www.governor.ny.gov/news/governor-cuomo-directs-dec-ban-use-chlorpyrifos#:~:text=DEC%20will%20also%20have%20regulations,health%20impacts%2C%20especially%20for%20children.>) the DEC to ban chlorpyrifos on a faster timetable.

“I do not agree that a pesticide should be banned by legislative decree,” the governor wrote in that veto notice (<https://aboutblaw.com/NrI>).

As a result, “Cuomo could potentially weaken or delay a ban on chlorpyrifos, even though it looked at first that he was taking stronger action than the Legislature,” Hayes said. DEC has not yet proposed regulations to implement a ban, which Cuomo had said would go into effect in 2020.

The controversy over toxic foam, meanwhile, is shaping up to be a standoff between the governor and the legislative sponsors.

“The really interesting thing here is, you have McDonald and Breslin pushing back and saying no. That doesn’t happen a lot,” Enck said. “What happens a lot is, the governor’s office holds onto these bills for months. And here we are, over four months out, and the governor’s office essentially says, ‘take it or leave it. Either make my changes, or I’m going to veto the bill.’”

“McDonald and Breslin are in this gut check moment where they’re kind of daring the governor to veto the bill.”

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This story has been updated to include an additional comment from DEC.

Lee Harris is a reporter with New York Focus.

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