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## Another spring, another state parks smoking fight

by Jessica String

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Gov. Andrew Cuomo announced last week that New York's smoke-free areas will be expanded to state parks and historic sites to allow New Yorkers and visitors the enjoyment of clean air without secondhand smoke. The expansion will take effect for the 2013 peak summer season and will carry a fine of up to \$250 plus surcharges if individuals fail to comply.

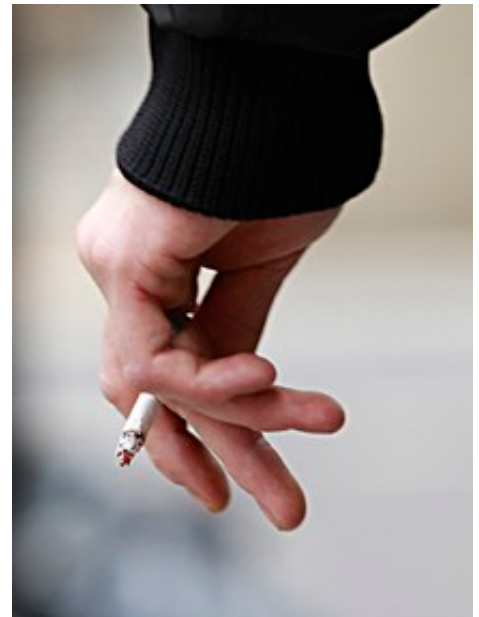
But a smokers' rights advocate who successfully stopped a similar ban from being implemented last year, says not so fast. Audrey Silk, of New York City Citizens Lobbying Against Smoker Harassment, or NYC CLASH, filed a lawsuit in early April to stop the most recent efforts to limit smoking in state parks.

"Our state parks embody the rich, natural beauty that New York has to offer, and our residents should be able to enjoy them free of pollution for second hand smoke," Cuomo said. "Today's announcement of the expansion of smoke-free zones in our state parks is an important step forward in ensuring New York's families can enjoy our great outdoors smoke-free, in a healthy environment. I encourage all New Yorkers to visit our unmatched state parks this summer and take advantage of the variety of recreational activities available to them."

Last week's announcement by the governor comes one year after NYC CLASH objected to the same proposal, requiring the New York State Office of Parks, Recreation and Historic Preservation to hold a comment period before the ban went into effect. Now that the comment period and regulatory process has ended, with 91 percent public approval for the ban, the Office of Parks is going forward with the no smoking expansion.

The smoke-free areas do not encompass the entirety of the parks, but are limited to beaches, bathhouses, shelters, playgrounds, and places that hold educational programs.

But Silk, the founder of NYC CLASH, still believes the state agency is going outside its jurisdiction in regulating and banning tobacco smoking.



With the governor's announcement that smoking bans will be expanded to designated areas of state parks and historic sites comes objection from the same opponent of a proposed smoking ban last year. *Photo by AP.*

Silk stands firm that, "in the state agency's unilateral undertaking of the rule-making process in any form, for the purpose of banning smoking beyond what the state Legislature has already enacted, OPRHP has fixed nothing."

She says the court decision in *Boreali v. Axelrod* — most recently cited by Justice Milton Tingling in his ruling against New York City Mayor Michael Bloomberg's soda ban and relevant to her case — and the separation of powers doctrine "are clear that only lawmakers may enact such a ban, something it has declined to do when multiple bills to do so have arisen every year for over ten years now," Silk said.

In *Boreali v. Axelrod*, a case from 1987 that involved a challenge to the Public Health Council's declaration of an antismoking code, the appeals court found the health council overstepped its authority when it issued a code to govern tobacco smoking in public areas.

"The obstinate posture by Parks Commissioner Rose Harvey and her staff in the celebratory announcement about this ban as if nothing is amiss is abhorrent," Silk said. "They are allowed to make rules, but not in this case. Only rules can be made by agencies on laws that already exist ... They are expanding their authority by doing any rule making."

She noted that New York's Clean Indoor Air Act does not allow for regulation that would further restrict or expanding smoking limitations. However, since the Act is part of the Public Health law, the provision only applies to the commissioner of the Health Department and not the Office of Parks, Recreation and Historic Places.

But an assessment of the smoking ban comments by the Office of Parks states that the agency, and the State Legislature's Administrative Regulations Review Commission, believe this authority is afforded to the agency under the Parks, Recreation and Historic Preservation Law.

A statement by the agency regarding its authority says "OPRHP has independent general authority delegated from the state Legislature... to manage its facilities and manage use conflicts at its facilities for the benefit of the public's health, safety and general welfare. Managing use conflicts from exposure to secondhand smoke at its facilities by designating no-smoking areas where large numbers of people congregate outdoors is authorized by the [law]."

During the public comment period 369 out of 404 comments agreed with the ban.

"We've heard loud and clear from the public that they want expanded smoke-free areas to better enjoy New York State's natural and breathtaking parks," said Parks Commissioner Rose Harvey. "We take the public's concerns seriously; ensuring the comfort and non-smokers, protecting the health of children and families from second-hand smoke and promoting healthy lifestyles."

But Silk believes these numbers are not accurate enough to show the millions of people, including tourists, who will be visiting the state parks this summer. Simply because the majority of New Yorkers like the idea, she said, doesn't mean the state should infringe on a legal habit.

"In this country its equal protection of the minority, it's not mob rule," Silk said. "Those 369 people are not representative of the parks' public."

According to the New York State Office of Parks, Recreation and Historic Preservation's website, the smoke-free areas will include swimming areas, beach areas, bathhouses, concessions, pavilions, shelters, playgrounds, picnic shelters and places that hold educational programs.

Outdoor historic parks are completely smoke-free with the exception to a few sites and all state parks in New York City are now designated smoke-free parks. The new areas will have a sign designating it as non-smoking and certain locations, such as individual campsites, open air picnic areas, parking lots, and undeveloped areas, will still be open to those who wish to smoke. In addition, the OPRHP's assessment noted that after the adoption of the smoking bans, a review should decide if there needs to be a smoking or non-smoking designation for certain campground areas.

While many parks and public areas currently have designated smoking areas, Silk says this is not enough of a compromise.

"There should not need to be a designated smoking area. Every area should be open to smoking," Silk said. "We've given up the middle ground; there is no compromising with these people."

The expanded tobacco smoking bans comes along with the states action in narrowing the scope of where smoking is allowed in public areas. According to the OPRHP, more than 300 municipalities in the state restrict tobacco use in outside recreational areas.

"New Yorkers visit state parks, playgrounds, beaches and other recreational areas to breathe fresh air and enjoy the outdoors," said State Health Commissioner Nirav Shah. "Eliminating smoking in outdoor public places, especially where families gather, is an important strategy towards changing social norms and reducing the social modeling of smoking by children and youth."

Last year, CLASH's lawsuit against the agency was rejected because no rule had yet been implemented and, directly due to CLASH's objection to the smoking ban, the department was required to go through the full regulatory process, which included the comment period. But Silk says now that the department has enough to enact the regulations, she is filing a similar lawsuit.

"We've refined the same suit once they adopted this rule," Silk said. "We served them with the papers maybe a week or two before the announcement... Our lawsuit is making its way to the courts."

According to a report from U.S. Surgeon General in 2010, any level of secondhand smoke can expose

individuals to the cancer causing chemicals in cigarettes, cause lung cancer in non-smokers and studies have shown a correlation between secondhand smoke and breast cancer.