NEW YORK STATE BAR ASSOCIATION

FORM FOR VERIFICATION OF PRESENCE AT THIS PROGRAM

Pursuant to the Rules pertaining to the Mandatory Continuing Legal Education Program for Attorneys in the State of New York, as an Accredited Provider of CLE programs, we are required to carefully monitor attendance at our programs to ensure that certificates of attendance are issued for the correct number of credit hours in relation to each attendee's actual presence during the program. Each person may only turn in his or her form—you may not turn in a form for someone else. Also, if you leave the program at some point prior to its conclusion, you should check out at the registration desk. Unless you do so, we may have to assume that you were absent for a longer period than you may have been, and you will not receive the proper number of credits.

Speakers, moderators, panelists and attendees are required to complete attendance verification forms in order to receive MCLE credit for programs. Faculty members and attendees, please complete, sign and return this form to the registration staff **before you leave** the program.

PLEASE TURN IN THIS FORM AT THE END OF THE PROGRAM.

Environmental & Energy Law Section Annual Meeting
Evolving Environmental & Energy Issues - 2019 & Beyond
January 18, 2019 | New York Hilton Midtown, New York City

Name:_____
(please print)

I certify that I was present for the entire presentation of this program

Signature:_____Date:_____

Speaking Credit: In order to obtain MCLE credit for speaking at today's program, please complete and return this form to the registration staff before you leave. **Speakers** and **Panelists** receive three (3) MCLE credits for each 50 minutes of presenting or participating on a panel. **Moderators** earn one (1) MCLE credit for each 50 minutes moderating a panel segment. Faculty members receive regular MCLE credit for attending other portions of the program.

NYSBA

Evolving Environmental & Energy Issues - 2019 & Beyond

Environmental & Energy Law Section

January 18, 2019

New York Hilton Midtown

New York, NY

This program is offered for educational purposes. The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials, including all materials that may have been updated since the books were printed or distributed electronically. Further, the statements made by the faculty during this program do not constitute legal advice.

ACCESSING THE ONLINE ELECTRONIC COURSE MATERIALS

Program materials will be distributed online in PDF format. It is strongly recommended that you save the course materials in advance, in the event that you will be bringing a computer or tablet with you to the program.

Printing the complete materials is not required for attending the program.

The course materials may be accessed online at:
www.nysba.org/EELSMaterialsAM2019

A hard copy NotePad will be provided to attendees at the live program site, which contains lined pages for taking notes on each topic, speaker biographies, and presentation slides or outlines if available.

Please note:

- You must have Adobe Acrobat on your computer in order to view, save, and/or print the files. If you do not already have this software, you can download a free copy of Adobe Acrobat Reader at https://get.adobe.com/reader/
- If you are bringing a laptop, tablet or other mobile device with you to the program, please be sure that your batteries are fully charged in advance, as electrical outlets may not be available.
- NYSBA cannot guarantee that free or paid Wi-Fi access will be available for your use at the program location.

MCLE INFORMATION

Program Title: **Environmental & Energy Law Section Annual Meeting Program**
Date/s:Friday, January 18, 2019 Location: New York, NY

Evaluation:

This evaluation survey link will be emailed to registrants following the program.

Total Credits: **4.0 New York CLE credit hours**

Credit Category:

2.0 Areas of Professional Practice
1.0 Ethics and Professionalism
1.0 Diversity, Inclusion & Elimination of Bias

This course is approved for credit for **both** experienced attorneys and newly admitted attorneys (admitted to the New York Bar for less than two years). Newly admitted attorneys participating via recording or webcast should refer to www.nycourts.gov/attorneys/cle regarding permitted formats.

Attendance Verification for New York MCLE Credit

In order to receive MCLE credit, attendees must:

1) **Sign in** with registration staff
2) Complete and return a **Form for Verification of Presence** (included with course materials) at the end of the program or session. For multi-day programs, you will receive a separate form for each day of the program, to be returned each day.

Partial credit for program segments is not allowed. Under New York State Continuing Legal Education Regulations and Guidelines, credit shall be awarded only for attendance at an entire course or program, or for attendance at an entire session of a course or program. Persons who arrive late, depart early, or are absent for any portion of a segment will not receive credit for that segment. The Form for Verification of Presence certifies presence for the entire presentation. Any exceptions where full educational benefit of the presentation is not received should be indicated on the form and noted with registration personnel.

Program Evaluation

The New York State Bar Association is committed to providing high quality continuing legal education courses, and your feedback regarding speakers and program accommodations is important to us. Following the program, an email will be sent to registrants with a link to complete an online evaluation survey. The link is also provided above.

ADDITIONAL INFORMATION AND POLICIES

Recording of NYSBA seminars, meetings and events is not permitted.

Accredited Provider

The New York State Bar Association's **Section and Meeting Services Department** has been certified by the New York State Continuing Legal Education Board as an accredited provider of continuing legal education courses and programs.

Credit Application Outside of New York State

Attorneys who wish to apply for credit outside of New York State should contact the governing body for MCLE in the respective jurisdiction.

MCLE Certificates

MCLE Certificates will be emailed to attendees a few weeks after the program, or mailed to those without an email address on file. **To update your contact information with NYSBA**, visit www.nysba.org/MyProfile, or contact the Member Resource Center at (800) 582-2452 or MRC@nysba.org.

Newly Admitted Attorneys—Permitted Formats

Newly admitted attorneys (admitted to the New York Bar for less than two years) may not be eligible to receive credit for certain program credit categories or formats. For official New York State CLE Board rules, see www.nycourts.gov/attorneys/cle.

Tuition Assistance

New York State Bar Association members and non-members may apply for a discount or scholarship to attend MCLE programs, based on financial hardship. This discount applies to the educational portion of the program only. Application details can be found at www.nysba.org/SectionCLEAssistance.

Questions

For questions, contact the NYSBA Section and Meeting Services Department at SectionCLE@nysba.org, or the NYSBA Member Resource Center at (800) 582-2452 (or (518) 463-3724 in the Albany area).

Environmental & Energy Law Section

Evolving Environmental & Energy Issues – 2019 & Beyond

Friday, January 18, 2019 | 8:30 a.m. – 12:30 p.m.

New York Hilton Midtown | Grand Ballroom West, Third Floor

4.0 Credits

1.0 Ethics | 2.0 Areas of Professional Practice | 1.0 Diversity, Inclusion and Elimination of Bias
This program is transitional and is suitable for all attorneys including those newly admitted.

8:30 a.m. – 12:30 p.m. | Grand Ballroom West, Third Floor

Agenda

8:30 a.m. – 8:45 a.m. **Welcoming Remarks**
Marla E. Wieder, Esq., Section Chair
U.S. Environmental Protection Agency, Region II, New York, NY

8:45 a.m. – 9:35 a.m. **Evolving Environmental Issues – Trashing the Old Solid Waste Regulations – Part 360 Series Regulatory Changes & Enforcement Update**

- NYSDEC Enforcement Discretion Memo and Proposed Changes to the Part 360 Regulations
- Permitting under the new Part 360 for previously only registration facilities (timing, facility design, and SEQRA)
- Beneficial Use Determinations (BUDs)/Historic Fill Material Management between the old Part 360 and new Part 360 Regulations
- DSNY/NYSDEC inter-agency coordination and likely changes to the DSNY regulations and programs in light of the new Part 360 sampling requirements for fill material and enforcement, and LL Intro 157-c

Panel Chair: **Michael S. Bogin, Esq.**, Sive Paget & Riesel PC, New York, NY

Speakers: **Robert D. Orlin, Esq.**, General Counsel, Department of Sanitation (DSNY), New York, NY
Richard Clarkson, NYSDEC, Division of Materials Management, Albany, NY
John H. Paul, Esq., Beveridge & Diamond PC, New York, NY
Robert A. LoPinto, P.E., Walden Environmental Engineering, Oyster Bay, NY

(1.0 Credit in Areas of Professional Practice)

9:40 a.m. – 10:30 a.m. **Evolving Energy Issue – Implementation of NY's Clean Energy Programs: Surmounting the Programs of Siting Clean Energy Projects**

- NYSERDA update on the Large Scale Renewable, Offshore Wind and Community Distributed Generation Programs
- NYS Department of Public Service update on the Public Service Law Article 10 process
- Environmental Design & Research will focus on the environmental and related impacts associated with siting wind and solar projects in New York, and how these impacts are playing out in PSL Article 10 proceedings.

Panel Chair: **Robert M. Rosenthal, Esq.**, Shareholder, Greenberg Traurig, LLP, Albany, NY

Speakers: **Noah C. Shaw, Esq.**, General Counsel, NYSERDA, Albany, NY
Sarah Osgood, NYS Department of Public Service, Director of Policy Implementation, Albany, NY
Benjamin R. Brazell, Environmental Design & Research (EDR), Principal & Energy Project Manager, Syracuse, NY

(*1.0 Credit in Areas of Professional Practice)*

10:30 a.m. – 10:45 a.m. Break

10:45 a.m. – 11:35 a.m. **Environmental Justice: Enforcement & Advocacy**

- Current environmental justice issues and enforcement matters in NYC
- Federal government's response to Hurricane Maria in Puerto Rico, and continuing issues on the island with respect electricity and climate resiliency needs.

Panel Chair: **Jose A. Almanzar, Esq.**, Periconi, LLC, New York, NY

Speakers: **Keith Brodock, PE, PP**, Senior Consultant, Integral Consulting, Inc., New York, NY
Ruben Diaz, Jr., Bronx Borough President, Bronx, NY
Stephan Roundgtree, Jr., Esq., WE ACT for Environmental Justice, New York, NY

(*1.0 Credit in Diversity, Inclusion & Elimination of Bias)*

11:40 a.m. – 12:30 p.m. **Evolving Ethics Issue – Interplay of Due Diligence Ethical Issues Between Environmental Engineers & Lawyers**

Panel Discussion on Three Ethical Case Studies
Petroleum spill reporting – who is responsible and what are the attorney's and engineer's ethical obligations under their respective Code of Ethics.
Attorney and environmental engineer ethics in relation to PFAS compounds in standard environmental due diligence.
Ethical disclosure of prior malpractice by attorney and engineer in relation to a prior Phase I or Phase II Due Diligence Investigation

Panel Chair: **Linda R. Shaw, Esq.**, Knauf Shaw LLP, Rochester, NY

Speakers: **Scott Salmon**, Senior Project Manager, PS&S, Warren, NJ
Kevin Kleaka, PG Executive VP, Impact Environmental, Bohemia, NY
Mark Johnson, Principal, Geosyntec Consutants, Inc., Columbia, MD
Mimi S. Raygorodetsky, Associate, Langan Engineering, New York, NY

(1.0 Credit in Ethics)

12:30 p.m. **Program Adjourns**

1:00 p.m. **Off-Site Lunch | Mastro's Steakhouse |** 1285 6th Avenue | New York, NY

SECTION CHAIR
Marla E. Wieder, Esq.
U.S. Environmental Protection Agency, Region 2
New York, NY

PROGRAM CO-CHAIRS
Steven C. Russo, Esq.
Greenberg Traurig, LLP
New York, NY

Linda R. Shaw, Esq.
Knauf Shaw LLP
Rochester, NY

Thursday, January 17, 2019 Section Events
New York Hilton Midtown | NYC
1:00 p.m. – 3:00 p.m. | Executive Committee Meeting
Murray Hill West, Second Floor
3:00 p.m. – 4:00 p.m. | Committee Meetings
Murray Hill West, Second Floor
4:00 p.m. – 5:00 p.m. | Agency Update Program
Murray Hill East, Second Floor
5:00 p.m. – 5:30 p.m. | Annual Business Meeting & Awards
Murray Hill East, Second Floor
5:30 p.m. – 7:00 p.m. | Cocktail Reception
Murray Hill East and West, Second Floor

Lawyer Assistance Program 800.255.0569

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

1.800.255.0569

NEW YORK STATE BAR ASSOCIATION

Join Our Section

☐ As a NYSBA member, **PLEASE BILL ME $35 for Environmental & Energy Law Section dues.** (law student rate is $17.50)

☐ I wish to become a member of the NYSBA (please see Association membership dues categories) and the Environmental Law Section. **PLEASE BILL ME for both.**

☐ I am a Section member — please consider me for appointment to committees marked.

Name _____

Address _____

_____

City _____ State _____ Zip _____

The above address is my ☐ Home ☐ Office ☐ Both

Please supply us with an additional address.

Name _____

Address _____

City _____ State _____ Zip _____

Office phone (_____) _____

Home phone (_____) _____

Fax number (_____) _____

E-mail address _____

Date of birth _____ /_____ /_____

Law school _____

Graduation date _____

States and dates of admission to Bar: _____

Please return this application to:
MEMBER RESOURCE CENTER,
New York State Bar Association, One Elk Street, Albany NY 12207
Phone 800.582.2452/518.463.3200 • FAX 518.463.5993
E-mail mrc@nysba.org • www.nysba.org

Join an Environmental & Energy Law Section Committee

Please designate in order of choice (1, 2, 3) from the list below, a maximum of three committees in which you are interested.

___ Adirondacks, Catskills, Forest Preserve and Natural Resource Management (ENVI1100)
___ Agriculture and Rural Issues (ENVI3600)
___ Air Quality (ENVI1200)
___ Brownfields Task Force (ENVI4200)
___ Coastal and Wetland Resources (ENVI1400)
___ Continuing Legal Education and Ethics (ENVI1020)
___ Corporate Counsel (ENVI3400)
___ Diversity (ENVI4400)
___ Energy (ENVI1600)
___ Enforcement and Compliance (ENVI3700)
___ Environmental Business Transactions (ENVI4100)
___ Environmental Impact Assessment (ENVI1800)
___ Environmental Insurance (ENVI3300)
___ Environmental Justice (ENVI1700)
___ Future of Federal Environmental Policy Task Force (ENVI4500)
___ Global Climate Change (ENVI1900)
___ Hazardous Waste/ Site Remediation (ENVI2100)
___ Land Use and Historic Preservation Parks and Recreation and Transportation and Infrastructure (ENVI2400)
___ Legislation (ENVI1030)
___ Membership (ENVI1040)
___ Mining and Oil and Gas Exploration (ENVI3900)
___ Pesticides (ENVI2500)
___ Petroleum Spills (ENVI4000)
___ Solid Waste (ENVI2800)
___ Toxic Torts (ENVI3000)
___ Water Quality (ENVI3200)

2019 ANNUAL MEMBERSHIP DUES

Class based on first year of admission to bar of any state. Membership year runs January through December.

ACTIVE/ASSOCIATE IN-STATE ATTORNEY MEMBERSHIP

Attorneys admitted 2011 and prior	$275
Attorneys admitted 2012-2013	185
Attorneys admitted 2014-2015	125
Attorneys admitted 2016 - 3.31.2018	60

ACTIVE/ASSOCIATE OUT-OF-STATE ATTORNEY MEMBERSHIP

Attorneys admitted 2011 and prior	$180
Attorneys admitted 2012-2013	150
Attorneys admitted 2014-2015	120
Attorneys admitted 2016 - 3.31.2018	60

OTHER

Sustaining Member	$400
Affiliate Member	185
Newly Admitted Member*	FREE

DEFINITIONS

Active In-State = Attorneys admitted in NYS, who work and/or reside in NYS
Associate In-State = Attorneys not admitted in NYS, who work and/or reside in NYS
Active Out-of-State = Attorneys admitted in NYS, who neither work nor reside in NYS
Associate Out-of-State = Attorneys not admitted in NYS, who neither work nor reside in NYS
Sustaining = Attorney members who voluntarily provide additional funds to further support the work of the Association
Affiliate = Person(s) holding a JD, not admitted to practice, who work for a law school or bar association
*Newly admitted = Attorneys admitted on or after April 1, 2018

NYSBA

Evolving Environmental Issues

Michael S. Bogin, Esq.
Sive Paget & Riesel PC | New York, NY

Robert D. Orlin, Esq.
Department of Sanitation (DSNY | New York, NY

Richard Clarkson
NYSDEC, Division of Materials Management | Albany, NY

John H. Paul, Esq.
Beveridge & Diamond PC | New York, NY

Robert A. LoPinto, PE
Walden Environmental Engineering | Oyster Bay, NY

Changes to Part 360 Series Regulations for Solid Waste Management Facilities

New York State Bar Association EELS Annual Meeting

John H. Paul

January 18, 2019

Beveridge & Diamond

bdlaw.com

Overview of Changes to Part 360

- Structural Changes – "Part 360" to Part 360 Series
- Changes to Exemptions, Registrations, and Permit requirements
- Some new industries covered
- Changes to requirements for specific facilities

Beveridge & Diamond

Background

- Major revision of "Part 360"
- Feb 2016 – Sept 2017: Public and stakeholder engagement
- Regulations Effective on November 4, 2017
- Transition Requirements
- 2 Enforcement Discretion Letters – March 2018 and October 2018
- Series "Clarifications" and Guidance Docs

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New Part 360 Series Structure

- Part 360 General Requirements
- Part 361 Material Recovery Facilities
- Part 362 Combustion, Thermal Treatment, Transfer, and Collection Facilities
- Part 363 Landfills
- Part 364 Waste Transporters
- Part 365 Regulated Medical Waste and Other Infectious Wastes
- Part 366 Local Solid Waste Management Planning
- Part 369 State Assistance Projects

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New Part 360 Series Coverage

- Navigational dredged material
- Oil and gas brine
- Historic Fill
- End-of-life vehicle dismantlers
- Wood debris (mulch facilities)
- Used cooking oil / yellow grease
- Biohazard incident waste / other infectious wastes

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Changes to General Part 360 Regs

- **Exempt Facilities**
  - Established in 360.14, no additional approval from DEC
  - Certain transfer, storage, treatment, processing, or combustion facilities on-site at generator
  - Certain transfer, storage, treatment, or combustion facilities at POTWs
  - Some On-Vehicle Storage (e.g., 10 days for non-putrescible waste)
  - Some pharmaceutical waste collection facilities
  - Sites with <1,000 waste tires at any one time

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Changes to General Part 360 Regs

- **Registered Facilities**
  - Facility types established in 360.15 and Parts 361—365
  - Operating requirements established by regulation
  - Before construction/operation: Notification & Validated Registration by DEC
  - Registration valid for 5 years
  - Ministerial Action: no SEQR or UPA
  - Financial Assurance may be required
  - Closure requirements

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Changes to General Part 360 Regs

- **Permitted Facilities**
  - Permit application reviewed by DEC
  - Facility-specific special conditions can be applied
  - SEQR and UPA apply

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Changes to General Part 360 Regs: Financial Assurance – 360.22

- Specific facilities required to provide financial assurance, and DEC has authority to require it of any registered or permitted facility
- Post-closure care and Custodial care cost estimates must be based on a rolling 30-year period
- Specific wording for trust funds, surety bonds, LOCs now included in regulation
- Contingency factor – staggered as cost estimate increased
  - 15% for < $1 million; 10% for $100,000 - $1 million; 5% for > $1 million

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360.12: Beneficial Use

- **Subdivisions:**
  (a) Applicability
  (b) Unacceptable Uses
  (c) Pre-determined Beneficial Uses (28)
  (d) Case-specific beneficial use determinations – general
  (e) Case-specific BUDs – navigational dredged material
  (f) Case-specific BUDs – gas storage or production brines
- **New 360.13**: management of fill material; criteria for on-site use, off-site use, and disposal of fill

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Part 361: Material Recovery Facilities

- Subpart 361-1 Recyclables Handling and Recovery Facilities
- Subpart 361-2 Land Application and Associated Storage Facilities
- Subpart 361-3 Composting and Other Organics Processing Facilities
- Subpart 361-4 Mulch Processing Facilities
- Subpart 361-5 Construction and Demolition Debris Handling and Recovery Facilities
- Subpart 361-6 Waste Tire Handling and Recovery Facilities
- Subpart 361-7 Metal Processing and Vehicle Dismantling Facilities
- Subpart 361-8 Used Cooking Oil and Yellow Grease Processing Facilities
- Subpart 361-9 Navigational Dredge Material Handling and Recovery Facilities

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Part 362: Combustion, Thermal Treatment, Transfer, and Collection Facilities

- Subpart 362-1 Combustion Facilities and Thermal Treatment Facilities
- Subpart 362-2 Municipal Solid Waste Processing Facilities
- Subpart 362-3 Transfer Facilities
- Subpart 362-4 Household Hazardous Waste Collection Facilities and Events

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Part 363: Landfills – Exempt Facilities

- Tree debris < 1 acre
- Recognizable, uncontaminated concrete or concrete products, asphalt pavement, brick, glass, rock and general C&D fill; < 5,000 cy
- State or municipal highway waste, on highway ROW or municipal land

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13

Part 363: Landfills - Notifications for inactive disposal facilities

- Waste acceptance ceased prior to October 9, 1993;
- Owner/operator must notify DEC in writing, of:
  - Any plan to disturb; or
  - The discovery of exposed waste, or surface discharge of leachate.

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14

Part 363: Landfills – Operating Requirements

- Radiation detectors required at landfills that receive MSW or authorized drilling and production wastes
- Prohibition on flowback water, brine, and residues from oil/gas production
- Alternative operating cover must be identified in the facility's permit as a separate annual tonnage and be reported to DEC

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Part 364 – Waste Transporters

- **Applicability:**
  - Raw sewage, Septage, and Sludges
  - Industrial-commercial waste
  - Waste tires
  - Waste oil
  - Regulated medical waste (RMW)
  - Household hazardous waste (HHW)
  - Infectious waste
  - Hazardous waste
- **Exemptions, Registrations, and Permits**

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Part 365 – Regulated Medical Waste

- Subpart 365-1 RMW Generators
- Subpart 365-2 RMW Treatment, Storage, and Transfer Facilities
- Subpart 365-3 Other Infectious Wastes
  - Addresses incidental infectious waste that is not RMW (e.g., Ebola, anthrax incidents)

Beveridge & Diamond

John H. Paul
Principal
New York City

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(212) 702-5456

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- The off-site reuse of any fill material generated in New York City in amounts greater than 10 cubic yards, or the off-site reuse of limited-use fill or restricted-use fill generated in locations in the state in amounts greater than 10 cubic yards, requires notification to DEC of at least 5 days prior to delivery [360.13(g)(2), (3)]. The form for this pre-notification can be found here: https://www.dec.ny.gov/chemical/8821.html. This is a one-time project notification which identifies the location of generation, the location of reuse, and the type and estimated amount of fill material to be reused among other information.

- Exempt fill, which is described in 360.12(c)(1)(ii), can be used on any site for any use. General fill and restricted-use fill, which are described in 360.13(f), can be used to level building sites so long as the appropriate requirements of Section 360.13 are met. For example, restricted-use fill can be used on sites where the existing site soils exhibit the criteria for either restricted-use fill or limited-use fill. Limited-use fill can only be used to level building sites where building footprints or pavement will cover them.

- The March 1, 2018 Enforcement Discretion Letter states in part that "Section 361-5.4(e) requires that all permitted construction and demolition facilities are required to perform certain sampling on any fill material or residue leaving the facility for reuse. The Department will utilize its enforcement discretion with respect to this provision to delay the enforcement of this sampling requirement regardless of the timing of the permit issuance to the facility." The implication of this decision is that fill material which moves through CDDHRFs does not require analytical sampling by any party prior to reuse under Section 360.13 until May 3, 2019 or until new regulations are promulgated. However, remaining requirements of Section 360.13, other than analytical requirements, continue to be applicable.

- Fill material outside of New York City which exhibits no evidence of historic impacts, such as spills, or exhibits no visual or other indication of chemical or physical contamination (e.g., odors, sheen, etc.) is not subject to the requirements of Section 360.13 (§360.12(c)(1)(ii)).

- A vehicle is exempt from waste transporter requirements in Part 364 if it is transporting a material which is no longer considered a waste under a BUD. The point at which the material ceases to be waste varies based on the BUD. For case-specific BUDs, that point occurs when the material is received at its point of use unless otherwise specified by DEC. For pre-determined BUDs, the point is specified in regulation. For example:

  - Some BUD materials cease being waste when they reach the location of use described in the BUD. Pre-determined BUDs of this type are located in §360.12(c)(2). In this case, a Part 364 authorization is required for transportation because the material remains a waste until it is delivered to the location of use.

  - Some BUD materials are no longer considered a waste when they meet the requirements of the intended reuse. Pre-determined BUDs of this type are located in §360.12(c)(3). For example, ground granulated blast-furnace slag which meets an industry standard is no longer considered a waste and therefore does not require transport under Part 364.

  - §360.13(b) describes the point at which fill material ceases to be waste. Any fill material generated in New York City continues to be considered a waste until it is delivered to the site of reuse; therefore, a Part 364 waste transporter is required for transport. The same is true of restricted-use fill, limited-use fill or contaminated fill generated anywhere in the state. For general fill generated outside of New York City, once the material has been determined to be general fill in accordance with §360.13(f), the material is no longer considered a waste and does not require transport by a Part 364 waste transporter.

  - Similarly, any fill material generated outside of New York City which shows no evidence of historical impacts or any visual or other indication of chemical of physical contamination is not considered a waste as per 360.12(c)(1)(ii) and does not require transport by a Part 364 transporter.

- As established in 360.13(b)(3), the pre-determined BUD for general fill generated in New York City does not attach until the material is delivered to the site of reuse. Therefore, it must be transported by a Part 364 registered or permitted transporter. However, general fill is a subset of C&D debris, so shipments of 10 cubic yards or less are exempt from Part 364 waste transporter requirements (§ 364-3.1(d)).

- Per the DEC's March 1, 2018 Enforcement Discretion Letter, asphalt pavement or asphalt millings of any size are exempt from Part 364 waste transporter requirements until May 4, 2019, unless an amendment to the rule is promulgated earlier. http://www.dec.ny.gov/regulations/81768.html

- Material which meets the requirements of the pre-determined BUDs found at § 360.12(c)(3)(viii), (ix), and (x) are exempt from Part 364 waste transporter requirements.

- To qualify for the pre-determined beneficial uses set forth in Part 360.12, the material intended for reuse cannot be mixed with any other material. However, in administering the program the Department acknowledges that small amounts of soil or other solid wastes which are present with material that would otherwise meet the requirements of a beneficial use determination (BUD) (e.g., small amounts of soil in a truckload of asphalt pavement or concrete) do not cause the material to

lose its BUD status; therefore, transport of these materials would not require a Part 364 waste transporter. This allowance is made by DEC to avoid unnecessary rejection of BUD material due to small amounts of material which are unavoidably included with BUD materials as they are generated. However, transportation anywhere in the state of mixed loads of C&D debris requires Part 364 authorization and may require waste tracking documents if the material is determined to be limited-use fill, restricted use fill or contaminated fill. DEC expects generators of BUD materials to make efforts to reduce the presence of soil in BUD materials.

- A Part 364 waste transporter registration is not required for transport of soil or fill material generated outside of New York City that has been determined to be general fill or has been determined to not have historical, visual, or other evidence of contamination. Please also see the discussion above about transportation of beneficial use materials.

- Mixed loads of C&D debris may be processed (i.e., stored, separated, sorted, etc.) at a permitted Part 361 C&D debris handling and recovery facility (CDDHRF). Source-separated loads of C&D debris may be processed at a registered CDDHRF as allowed under the specific registration as identified in §361-5.2(a).

- The March 1, 2018 Enforcement Discretion Letter states in part that "Section 361-5.4(e) requires that all permitted construction and demolition facilities are required to perform certain sampling on any fill material or residue leaving the facility for reuse. The Department will utilize its enforcement discretion with respect to this provision to delay the enforcement of this sampling requirement regardless of the timing of the permit issuance to the facility." The implication of this decision is that fill material which moves through CDDHRFs does not require analytical sampling by any party prior to reuse under Section 360.13 until May 3, 2019 or until new regulations are promulgated. However, remaining requirements of Section 360.13, other than analytical requirements, continue to be applicable.

Part 360 Solid Waste Management Facilities General Requirements

360.4 Transition

Question: With respect to the retrofit transition requirements, how do we separate design and operating requirements when they are together in the new regulations?

Response: 360.4(b)(4) states that, **"**Except for landfills, retrofitting of existing facilities that were exempt, registered or permitted prior to the effective date of this Part is not required in order to comply with the design and construction requirements of this Part and Parts 361, 362, and 365 of this Title. New structural components built after the effective date of this Part must comply with the applicable requirement of this Part and Parts 361, 362, and 365 of this Title."

360.4(o)(2) states that, **"**Retrofitting of existing landfill liners, buried pipes, leachate storage tanks and similar existing structural components is not required."

Together these two provisions mean that there is almost no retrofitting which will be required by the new 360 series Solid Waste Management Facilities Regulations. Installation of radioactive waste detection procedures and requirements under 363-7.1(a)(5) for landfills which accept MSW or drilling and production wastes is not considered retrofitting. Further guidance will be developed to ensure consistency across Subparts and regions.

Question: I have a question about the transition requirement of 360.4(b)(4). The requirement states that "except for landfills, retrofitting of existing facilities that were exempt, registered, or permitted prior to the effective date of this Part is not required to comply with the design and construction requirements of this Part and Parts 361, 362, and 365 of this Title."

Parts 361, 362, and 365 do not have any "construction" requirements, each part has "Design and Operating Requirements" so should this transition clause state "design and operating" instead of "design and construction?"

Response: No, 360.4(b)(4) does not apply to operating requirements. Existing facilities are required to comply with the operating requirements at the time of registration renewal under the new regulations or at the time of permit renewal.

Question: Part 360.4(f), is a complete application under this paragraph mean a formal notice of complete application from the NYSDEC Division of Environmental Permits?

Response: No. The phrase "complete application" is defined in 360.2 as meaning the same as defined in Part 621. The definition of complete application from Part 621 means "an application for a permit which is in an approved form and is determined by the department to be complete for the purpose of commencing review of the application but which may need to be supplemented during the course of review in order to enable the department to make the findings and determinations required by law."

Question: Please clarify the Department's position related to "Subsequent Landfill Development" within the transition section of the new regulations (6 NYCRR Part 360.4(o)(1)):

The regulation requires that subsequent landfill development "comply with the construction requirements" of the new regulations. My understanding is that the Department has now expanded the scope of that to include materials, design and certification requirements in addition to the construction requirements. The transition section of the new regulations does not mention applicability of materials, design and certification requirements to a subsequent landfill development until the permit is renewed or modified. The new regulations specifically call out the construction requirements for landfill construction in subsections: 363-6.5(c), 363-6.7(b), 363-6.8(b), 363-6.9(b), 363-6.10(b), 363-6.11(c), 363-6.12(b), and 363-6.13(c).

These are the subsections that are applicable to subsequent landfill development according to the transition requirements. Landfill designs based on the prior versions of the regulations were among the most robust in the nation and were already very protective of the environment. While I understand that the intent of the new regulations was to increase that level of protection, it doesn't mean that prior designs were not protective. To the contrary, I think you will agree that the landfill liner systems constructed in New York state in the last several decades have performed extremely well. The transition requirements as written require existing facilities to make minor accommodations to their construction plans for subsequent landfill development until the permit is renewed or modified. I would like clarification about how the materials, design and certification requirements became applicable to subsequent landfill development in the transition requirements of the new regulations.

Response: The reference to compliance with construction requirements in the in 360.4(o)(1) speaks broadly to all necessary components of landfill construction, which include specifications for materials, design, certification requirements as well as construction requirements referenced in bullet form below. The Department allowed that any reports, plans, and drawings which were approved by the Department prior to the effective date of the new regulations are not required to be modified to meet new requirements. However, any adjustment to the previously approved documents, whether they be related to materials, design, construction or certification, must meet the new requirements.

360.9 Prohibited Activities

Question: What is the distinction between "dispose of waste" and "discard waste"?

Response: According to 360.2(a), a material is discarded if it is "spent, worthless, or in excess to the generator" and is either processed, disposed of, or accumulated or transferred prior to processing or disposal. Disposal in 360.2(a)(2)(ii) is described as placement, dumping, etc., of excess material "on the land…." So, for example, a person may not transfer excess material to a facility unless that facility is authorized (360.9(b)(4)), process excess material except at an authorized facility ((360.9(b)(4)), or dispose of excess material by placing it on land except at an authorized facility(360.9(b)(3)).

Question: What is the distinction between "construct and operate a facility" and "accept waste"?

Response: Construction of a facility does not equate to acceptance of waste. Further, operating a facility involves more activities than simply accepting waste.

Question: Section 360.9(b)(3) states that persons must not dispose of waste, beyond initial collection except at:

> (i) A disposal facility exempt from the requirements of Parts 360 or 363 of this Title; or
> (ii) A disposal facility authorized by the department to accept the waste

Section 360.9(b)(5) states that persons must not accept waste except at:

> (i) A facility exempt from the requirements of Parts 360, 361, 362, 365, or Subpart 374-2 of this Title; or
> (ii) A facility authorized by the department to accept waste pursuant to Parts 360, 361, 362, 365 or Subpart 374-2 of this Title or by a department-issued or court-issued order.

Since the first provision applies to a generator of waste and the second provision applies to solid waste management facilities, I'm assuming that Part 363 was inadvertently omitted from 360.9(b)(5) because the way these two regulations read right now is that people can dispose of waste at a landfill but the landfill cannot accept it.

Response: 360.9(b)(5) will be revised to include Part 363.

360.10 Variances

Question: What is the mechanism to issue a variance? Do all variances require a permit modification?

Response: Variances must be approved through the issuance of a new permit or as part of a permit modification.

Question: Would a permit modification to issue a variance be considered a minor modification?

Response: This will be determined on a case-by-case basis depending on the provision being varianced and other reasons for the modification.

Question: Do variances for inactive landfills follow these variance requirements?

Response: Requirements for inactive landfills are dependent on the regulations in effect at the time of closure.

360.12 Beneficial Use

Question: Can clean concrete alone or mixed with clean soil, be used without limit on properties for fill?

Response: No. An exemption in 363-2.1(h) allows concrete pieces, regardless of size or if mixed with other materials allowed in the exemption, on a private property up to 5000 cubic yards. Concrete and other specific wastes generated by state or municipal highway projects can be disposed on highway rights-of-way or municipally owned property without volume restriction (363-2.1(i)). General Fill (tested or untested) can be used in greater quantities, but this material cannot include any concrete.

If concrete is crushed to produce commercial aggregate as defined in the regulation, with this aggregate meeting a state or municipal specification, the aggregate could be used if appropriate as a subbase fill.

360.13 Special requirements for pre-determined beneficial use of fill material

Question: Section 360.13(b)(2) states that general fill generated outside of New York City ceases to be a waste once it is determined that it is general fill. My question is, how can we then regulate general fill in accordance with 360.13(f) Table 2? If the material is not a waste as soon as the general fill determination is made, why are the uses limited in Table 2?

Response: According to the definition found at 360.2(b)(121), "general fill" means fill material that meets criteria in subdivision 360.13(e) of this Part and 360.13(f) states that fill material can be beneficially used in accordance with Table 2 of 360.13(f).

Question: The applicability of section 360.13 states that the section does not apply to:

Fill material generated outside of New York City with no evidence of historical impacts such as reported spill events, or visual or other indication (odors, etc.) of chemical or physical contamination as identified in subparagraph 360.12(c)(1)(ii) of this Part.

However, section 360.13(d) requires testing of material that originates from a site with industrial land use. If material is excavated from an industrial site and the material has no evidence of contamination, how can we require testing of that material under a section that does not apply to that material?

Response: 360.13(a)(2) states that 360.13 does not apply to fill material generated outside of New York City with no evidence of historical impacts such as reported spill events, or visual or other indication (odors, etc.) of chemical or physical contamination as identified in subparagraph 360.12(c)(1)(ii) of this Part. Industrial land use constitutes an "evidence of historical impact", and thus fill material generated outside of New York City from industrial sites requires testing to be eligible for the predetermined beneficial use categories for fill.

Question: Section 360.13(d)(2)(iii) states that testing is required for material that originates outside of New York City if, during excavation, visual indication of chemical or physical contamination is discovered. To be consistent with the rest of this section should this be revised to say "visual or other indication (odors, etc.)"?

Response: Yes.

Question: What is the difference between fill material in 360.12(c)(1)(ii) – generated upstate with no indication of contamination – and 360.13(f) General Fill? Are these terms interchangeable?

Response: Fill Material in 360.12(c)(1)(ii) could be termed "Untested Fill Material". It can be used at any location not contravening another provision of the ECL. General Fill, on the other hand, has been tested (sampled and analyzed) and shown in this manner to meet General Fill criteria. Its use is prohibited on agricultural crop land and undeveloped land without a case-specific BUD.

Note General Fill also includes small quantities (less than 10 cubic yards per project) of soil generated in New York City with no indication of contamination. These fill materials do not require testing, but are subject to the limitations on use for General Fill in 360.13(f).

Question: In the definition of Fill Material in 360.2(b)(107), what is meant by "similar material" in "soil and similar material"?

Response: In the context of the fill material definition, "similar material" can mean any durable, granular material that contributes to the function of a material as fill – meaning that it can be excavated, transported, placed, and compacted for construction purposes and meets an engineering specification for the purpose for which fill is needed (grade adjustment, structural, barrier, berm, etc). No distinction is made in the definition whether the fill material is contaminated or uncontaminated. "Similar material" could include particles of crushed concrete or other human-made material, or slag or ash. Larger, recognizable particles of rock, demolition debris or waste would not constitute "similar material" for purposes of this definition. It is the purpose of Section 360.13 to allow contractors to further distinguish whether fill material contains chemical or physical contamination and based on this knowledge, to use the fill material appropriately.

Question: In 360.12(c)(1)(ii), does "physical contamination" include ash, slag, concrete, brick, or asphalt pavement?

Response: Yes, in addition to any other non-soil, non-rock, waste material. Buried vegetative material would not constitute physical contamination for purposes of Part 360 but may be considered deleterious material pursuant to a construction specification for fill.

Question: Do references to "General Fill" in Parts 361, 363 and 364 refer also to fill material in 360.12(c)(1(ii)?

Response: Yes, in general where general fill is referenced, "untested" fill material is also intended, for example as a component of exempt landfilling in 363-2(h).

Question: Does the prohibition on agricultural crop land use for General Fill in 360.13(f) stop General Fill from being used on urban community gardens?

Response: No. General Fill must meet Residential Public Health SCOs, and can be used for residential or community gardens.

Question: If I am sending excavated soil to a C&D debris handling and recovery facility, do I need to test or certify it as any certain type of fill material first?

Response: No. After May 3, 2019, the CDDHRF will be responsible to test fill material before it leaves the facility for use. The type of CDDHRF may vary depending on whether the fill material shows evidence of contamination or inclusion of materials other than soil, gravel or rock.

Question: Can the predetermined uses in 360.13 be applied to material excavated from a site in a Part 375 (DER) program?

Response: No. Case-specific determinations from DMM should be sought for these materials, unless all sample results are below unrestricted-use SCOs in 375-6.8(a) and no other materials are mixed with the soil.

Question: Can soils from a DER site be transported by exempt or registered Part 364 haulers?

Response: No. Vehicles transporting these soils (unless meeting the unrestricted criteria) must have Part 364 Waste Transporter permits.

Question: Can navigational dredged material be used pursuant to the 360.13 predetermined BUDs?

Response: No; a case-specific BUD must be obtained for NDM after it is dewatered or amended. However, this BUD can reflect the allowable concentrations and uses for any of the 360.13(f) types of fill material if the NDM will be marketed, or a case-specific BUD can be obtained for NDM from a particular source being used at a particular location.

Question: What happens if I test fill material and it cannot meet the criteria for the desired use?

Response: You can petition for a case-specific BUD under 360.12(d) for the material in the desired use. Depending on the material characteristics and analytical results, the BUD may restrict its use to a specific location.

Question: What if one or more of the testing samples exceed criteria for the Fill Material Type for which I hope to certify the material?

Response: All sample results must meet the criteria; results cannot be averaged or statistically manipulated. If the failing result is in a portion of the site that is visually (or by knowledge of site history) in an area of contamination, that portion could be excavated and separately managed, while the remaining soils are re-tested using the sample frequency in Table 1. A QEP must develop the sampling plan and document how segregation of contaminated material and retesting was performed.

Question: Can Table 1 sampling be performed before or after excavation?

Response: Sampling can be performed in-situ through test pits or borings prior to excavation, or after excavation. A QEP should design the sampling program to ensure the sampling is representative and that any visually contaminated portions of the site are excluded from excavated material intended for reuse.

Question: What about fill material that meets General Fill criteria upon testing, but has strong odors from petroleum contamination, organic matter decay or other cause?

Response: There is no prohibition against using this fill material as General Fill in 360.13, but contractors should exercise judgment concerning using material that will cause an odor nuisance.

Question: How does the March 1 2018 Enforcement Discretion effect sampling and analysis of fill material at CDDHFRs? (Same question asked and answered in 361-5 FAQ)

Response: The March 1, 2018 Enforcement Discretion Letter states in part that "Section 361-5.4(e) requires that all permitted construction and demolition facilities are required to perform certain sampling on any fill material or residue leaving the facility for reuse. The Department will utilize its enforcement discretion with respect to this provision to delay the enforcement of this sampling requirement regardless of the timing of the permit issuance to the facility."

The implication of this decision is that fill material which moves through CDDHRFs does not require analytical sampling prior to reuse under Part 360.13 until May 3, 2019 or new regulations are promulgated. However, remaining requirements of Part 360.13 other than analytical requirements continue to be applicable.

360.14 Exempt facilities

Question: Are facilities exempt if storing up to 1,000 waste tires? Storage means up to 12 months? This applies to storage but not illegal disposal?

Response: Correct. Facilities storing less than 1,000 waste tires are exempt. Storage is limited to 12 months as defined in 360.2(b)(262). Storage for greater than 12 months constitutes disposal. This applies to storage, not illegal disposal. If waste tires are illegally disposed of, this is not included in the exemption or storage definition. No waste tire piles can be located in excavations or below grade as stated in Section 361-6.5(e).

360.15 Registered facilities and collection events

Question: Do registration applications including the site plan and any additional required documentation need to be prepared by a PE?

Response: No, the registration submission does not need to be prepared by a Professional Engineer.

Question: When is a Certificate under Seal of the Department of State required?

Response: When the registrant is a corporation or limited liability corporation, it is required to submit the Certificate under Seal of the Department of State as part of their application for a registration. A Certificate of Seal is also referred to as a Certificate of Status, Certificate of Good Standing, or Certificate of Existence. Information regarding how to obtain a Certificate of Seal can be found on the following webpage:
https://www.dos.ny.gov/corps/faq_certificates_under_seal.page.asp

360.16 Permit application requirements and permit provisions

Question: The permit application requirements & permit provisions require that applications must include electronic format and print for engineering documents submitted under a PE stamp and signature. However, 360.16(a) states "Submission, signature and verification of applications for facility or waste transporter permits. All applications for permits must be submitted in either an electronic format acceptable to the department or print. They must be signed by the applicant as follows…" Which one is correct?

Response: Both are correct. 360.6(a) states "Engineering related documents, except quarterly and annual reports, submitted under any provision of this Part or of Parts 361, 362, 363, 365, or Subpart 374-2 of this Title for a permitted facility must be submitted under the stamp and signature of a professional engineer licensed and currently registered to practice in the State of New York. All documents submitted to the department must be submitted in print as well as in an electronic format acceptable to the department."

360.16(a) applies to all permit applications including waste transporter permit applications, while 360.6(a) is specific to submittal of engineering related documents.

Question: Is this provision in the old regulations [360-1.11(b)] regarding Transferability of a Solid Waste Permit in the new regs? If it is, where is it addressed?

360-1.11(b) is the following:
(b) Transferability.

(1) All permits issued pursuant to this Part are transferable only upon prior written approval of the department and a demonstration that the prospective transferee will be able to comply with applicable laws and regulations, permit conditions, and other requirements to which the prospective transferor is subject.
(2) Upon transfer of ownership of all or part of a site used as a landfill, a provision must be included in the property deed indicating the period of time during which the property has been used as a landfill, a description of the solid waste contained within, and the fact that the records for the facility have been filed with the department. The deed also must reference a map, which must be filed with the county clerk, showing the limits of the areas in which solid waste is disposed within the property. In addition, inactive sites must meet the requirements of subdivision 360-2.150 of this Part.

Response: In place of the old provision above, Transferability of a solid waste permit is now regulated by Uniform Procedures Regulations in 621.11(c):

(c) Transfers.
Applications for the transfer of permits in effect, or pending permit applications, to a different permittee or applicant, or to change the name of the permittee or applicant, must be submitted on a form prescribed by the department and must be done in consideration of the following:

(1) Applications should be submitted at least 30 days prior to transfer, unless a different time period is required by specific program statute or regulation.
(2) Transfer of permits is not allowed for water withdrawal permits or waste transporter permits including LLRW transporter permits. These activities require the submission of a new application by the proposed new permittee.
(3) The applicant for permit transfer proposes no significant change in the design or operation of the previously approved project that was permitted.
(4) The new permittee must satisfy required financial obligations and insurance coverage.
(5) A new permittee may be subject to a record of compliance review before a decision on permit transfer is rendered.
(6) Any noncompliance by the existing permittee, associated with the permits proposed to be transferred, must be resolved to the department's satisfaction.

In addition, the owner or operator of a landfill must comply with the new Operating requirements provisions of 363-7.1(r):

(r) All landfills must submit to the department a deed description within one year of the effective date of the permit. The deed description must include a discussion of the planned site life for the landfill operation with a general description of the types of waste received and description of the proposed landfill end use. Upon facility closure, an updated property deed description must be submitted to the department. This updated deed description must indicate the period of time during which the property has been used as a landfill, describe the wastes contained within the

landfill, and must note that records for this facility have been filed with the department. The deed description must include a survey and a map, all of which must be filed with the county clerk. The survey must clearly indicate the limits of the disposal areas within the property boundary. The deed description must indicate that the closed landfill is subject to a post-closure care plan and a custodial care plan filed with the department.

The links to the application documents can be found on the NYSDEC webpage:
http://www.dec.ny.gov/docs/permits_ej_operations_pdf/trsfer.pdf
http://www.dec.ny.gov/docs/permits_ej_operations_pdf/trsfrescrow.pdf
http://www.dec.ny.gov/docs/materials_minerals_pdf/360permitapp.pdf

Question: When is a Certificate under Seal of the Department of State required?

Response: When the permittee is a corporation or limited liability corporation, it is required to submit the Certificate under Seal of the Department of State as part of their application for a permit. A Certificate of Seal is also referred to as a Certificate of Status, Certificate of Good Standing, or Certificate of Existence. Information regarding how to obtain a Certificate of Seal can be found on the following webpage:
https://www.dos.ny.gov/corps/faq_certificates_under_seal.page.asp

360.17 Nonspecific facilities

Question: Will an application for a used oil storage or transfer station facility fall under the Nonspecific facility category? And will it be required to meet the requirements in 374.2?

Response: Yes, a used oil storage or transfer station facility will be issued a Part 360 permit under Section 360.17 Nonspecific facilities. The facility will be required to comply with the requirements of 374-2.

360.18 Research, development, and demonstration registrations and permits

Question: With respect to RD&D facilities, what is the definition of commercial quantities?

Response: Definition is determined based on application, which must justify that the amount of waste managed is appropriate for research purposes only.

360.22 Financial assurance

Question: Many existing registered facilities now require financial assurance under the new regulations. How are we to proceed with requesting the financial assurance from registered facilities?

Response: There are specific transition requirements for financial assurance in the new regulations (360.4(j)).

If financial assurance is now required for a registered facility under the new regulations, and the registered facility does not have a valid mechanism in place on the day before the effective date, the registered facility must comply with section 360.22 within 3 years.

If the registered facility has a valid mechanism in place prior to the effective date, but is required to obtain additional financial assurance on the effective date, the registered facility must comply with section 360.22 within 5 years.

The existing registered facilities must apply for a new registration by May 3, 2018 (except for C&D debris processing facilities which have until May 3, 2019). This would be an appropriate time to educate these facilities about the requirements in the new regs and remind them of the financial assurance transition requirements.

Question: For small transfer stations or smaller facilities with unchanged operations, can we do anything to make updating the cost estimates and mechanisms easier?

Response: While the cost estimate should be updated annually in accordance with 360.22(b)(3), regional discretion can be used for smaller facilities to allow for the updating of the financial assurance mechanism on an every-other-year or every-third-year basis. Please note that an increase in the amount of a Letter of Credit is typically done through an amendment and an increase in the amount of a Surety Bond is typically done through a rider. The process to obtain the amendments and riders is much more straightforward for the owner/operator than the process to obtain the original mechanism.

Question: The surety bond language in 360.22(e)(4) requires a standby trust agreement to be in place. Does this need to be revised for surety bonds $\leq$ $50,000?

Response: Yes, this language is being revised.

Question: The acknowledgements required in the surety bond language in 360.22(e)(4) appear to be the acknowledgements that are required for a trust fund. Is this correct?

Response: No, the acknowledgements in the surety bond language are incorrect. A corrected version of the language is available at: ftp://ftp.dec.state.ny.us/dshm/SWMF/Information_Solid Waste Management Facility\Financial Assurance Mechanism templates

Part 361 Material Recovery Facilities

361-1 Recyclables Handling and Recovery Facilities

Question: There are two registrations in 361-1. Is there a difference other than the quantities that can be received?

Response: In accordance with 361-1.3(b), facilities that qualify for the registration requirements in 361-1.3(a)(1) do not have to meet the operating requirement in 361-1.5(g) to weigh and record all recyclables and waste delivered to or leaving the facility.

Question: A waste collection company is seeking authorization to accept 10-15 tons of source-separated recyclables per week. The recyclables will be brought in by individual trucks under the facility operator's control, consolidated into as few loads as possible, and shipped out weekly. The initial thought was that this facility would qualify for a recyclables handling and recovery facility registration under 361-1.3(a)(1), which states:

Recyclables handling and recovery facilities that accept no more than five tons per day of source-separated, nonputrescible recyclables based on a weekly average and have residue below 15 percent of their intake base on a full year of operation.

While I believe the facility in question would qualify for this registration, I do not see anything in the regs that would not require this facility to have a permit for a transfer station. The applicability section of 361-1 states that "This Subpart applies to facilities that process source-separated nonputrescible recyclables." Additionally, the definition of recyclables handling and recovery facility is "a facility that processes source-separated nonputrescible recyclables." There is no mention of "transfer", so my question is does this facility need a transfer station permit? The way the facility is operated they will not be able to meet any of the exemption or registration requirements of 363-2.

Response: The intent was for Subpart 361-1 to apply to facilities that "manage" (whether processing or transferring) source-separated recyclables. In this case, if the facility is only handling source-separated recyclables, then this would be eligible for a registration under Subpart 361-1 and would not need authorization under Subpart 362-3.

361-5 Construction and Demolition Debris Handling and Recovery Facilities

Question: Why are pile size and separation distance requirements listed in 361-4 for mulch processing facilities but not listed in 361.5 for C&D debris handling and recovery facilities?

Response: The expectation is that most mulch processing will be handled by mulch processing facilities and not C&D debris handling and recovery facilities. However, C&D facilities are not prohibited from processing mulch.

Question: A landscaper/ developer that is clearing top soil from properties, bringing it back to his own site where he screens only topsoil. He is not separating it from a mixture, and there is no evidence of contamination. Is Part 361-5.2 (a)(6) stating that landscapers or developer only screening topsoil at any quantity less than 500 tpd need to register?

Response: Yes. 361-5.1 and 361-5.2 apply to the processing (e.g. screening) and storage of soil, sand, gravel or rock in order to extract recyclable or reusable materials. If the landscaper/developer does not own the property that is being cleared, the landscaper/developer's site would require a registration under 361-5.2(a)(6). However, if the landscaper/developer owns both the property that is being cleared and the site where the soil is being screened, this would be an exempt activity under 360.14(b)(1).

Question: A registered facility experiences occasional project-specific events where they receive in excess of 500 tons per day based on a weekly average of one of these streams for a period of 2-3 weeks. Throughout the remainder of the calendar year, they do not receive material in excess of 500 tons per day based on a weekly average.

Can we average the daily quantities across the entire year (52 weeks)? Would this scenario require a permit pursuant to Section 361-5.3, rather than a registration under the revised regulations?

Response: The averaging must be done on a weekly basis, not an annual basis. The scenario would require a permit.

Question: The definition of storage means the temporary holding or containment of waste in a manner which does not constitute disposal. What is temporary holding?

Response: Temporary holding means to reserve or put away waste for later disposal. It is another way of stating that the material is managed on a short-term basis, and has not been discarded or disposed.

Question: We are dealing with an ECO and C&D waste. The property owner states he is storing the C&D waste. The C&D waste is on the ground. Does this meet the definition of storage? Does dropping C&D waste on the ground constitute temporary holding?

Response: If the property owner generated the C&D debris onsite or at another site under their ownership or control, then this would be exempt under 360.14(b)(1).

If the property owner accepted the C&D debris from a third party, then this would be authorized under 361-5 and have to meet the storage requirements of 361-5.4(f). The storage requirements in 361-5.4(f)(4) require storage area floors to be constructed of concrete or asphalt paving material and to be equipped with adequate drainage and retention structures. However, concrete or asphalt storage area floors are not required for the separate storage of processed or

unprocessed uncontaminated concrete, other masonry waste, asphalt pavement, asphalt millings, unadulterated wood, brick, fill material or rock. So as long as the facility is authorized under 361-5, depending on the type of material, the regulations may allow for the storage on the ground.

Question: How does the March 1 2018 Enforcement Discretion effect sampling and analysis of fill material at CDDHFRs? (Same question asked and answered in 360.13 FAQ)

Response: The March 1, 2018 Enforcement Discretion Letter states in part that "Section 361-5.4(e) requires that all permitted construction and demolition facilities are required to perform certain sampling on any fill material or residue leaving the facility for reuse. The Department will utilize its enforcement discretion with respect to this provision to delay the enforcement of this sampling requirement regardless of the timing of the permit issuance to the facility."

The implication of this decision is that fill material which moves through CDDHRFs does not require analytical sampling prior to reuse under Part 360.13 until May 3, 2019 or new regulations are promulgated. However, remaining requirements of Part 360.13 other than analytical requirements continue to be applicable.

361-6 Waste Tire Handling and Recovery Facilities

Question: A towing company collects waste tires from auto body shops as part of their business. The tires are brought back to their shop and sorted. Some of the waste tires are kept for resale, while the remaining are placed directly into a 364 permitted trailer. When full, the trailer is transported to an authorized facility. The total quantity of waste tires on the property approaches 1000 but does not exceed 1000. Regarding the company in question, would they fall under the exemption or would they require a registration? More generally, does the act of receiving (collecting) waste tires trigger the registration requirement or can a business conduct one of the listed registered activities (such as our facility in question) but remain exempt provided the total quantity of waste tires remains less than 1000? Can you please clarify whether or not a facility can receive offsite generated waste tires, and either store them for up to 12 months, or sort and transfer them, while remaining exempt from requiring authorization, provided the onsite quantity remains under 1000?

Response: According to 360.14(b)(9) and 361-6, all facilities storing less than 1,000 waste tires at any one time are exempt. It doesn't matter where the waste tires are generated or what they are doing with the waste tires, even if it is one of the listed registered activities, so long as the quantity never equals or exceeds 1,000 waste tires. Storage as defined by 360.2(b)(262) is for 12 months and anything longer than that would be considered disposal.

361-7 Metal Processing and Vehicle Dismantling Facilities

Question: In 361-7.4(c), what is a "other permanent surface"?

Response: The phrase refers to any surface constructed of permanent material which will impede the flow of fluids. Asphalt and concrete surfaces are permanent surfaces, for purposes of these provisions in 361-7. They are typically constructed to last the life of the facility with proper maintenance and repair.

Question: Tank Requirements in 360.19(n)(1)(ii) and (iii) state that all tanks must:

(ii) be equipped with an overfill prevention systems in good working order and
(iii) have double-walled construction with leak detection, if deemed necessary by the department.

Does this mean that a VDF which receives more than 25 ELV and stores used oil in a tank, that tank must at a minimum, be equipped with an overfill prevention system?
Possibly be required to be double-walled construction with leak detection?
Is this more stringent than the Part 613 regulations which were revised in 2015?

Response: A VDF that requires a permit or registration such as one that receives more than 25 ELVs per year or stores more than 50 ELVs at one time (361-7.3(b)) would need to comply with 360.19(n) for any permanent tanks they have. However, portable containers such as drums would have to comply with only 361-7.4(e). A permanent tank holding used oil would potentially be regulated under 613 as well as 360.19.

Part 362 Combustion, Thermal Treatment, Transfer, and Collection Facilities

362-1 Combustion Facilities and Thermal Treatment Facilities

Question: 362 – 1.5(c)(9) says that registered medical waste can be disposed in a combustor, how does this affect 219?

Response: If specifically authorized by the combustion facility's Part 360 Permit and Part 219 permit, Regulated Medical Waste or Treated Regulated Medical Waste can be combusted at the Combustion Facility and must be managed in compliance with specified conditions.

Question: Upon triggering a radiation detection alarm, does a facility/transporter need permission from the Department for the truck to go offsite/back to where waste was generated? (362-1.5(c)(7))

Response: Facility/transporter staff must comply with the response procedures identified in the Radioactive Waste Detection Plan (362-1.4(e)) approved by the Department. Within this plan, the facility will describe the steps to be taken to determine the appropriate handling of the waste. If the material is determined to be a regulated radioactive waste, then it must get approval from the Department to be transported to either the site of generation or an authorized facility.

Question: Is putrescible waste coming in by rail cars considered external storage? (362-1.5(c)(4))

Response: No. The containerized waste received by rail at a facility must be handled onsite in accordance with the permit and permit documents approved by the Department. However, if a container has putrescible waste, then it must be immediately placed in the waste pit to be combusted.

362-3 Transfer Facilities

Question: Section 362-3.5(b) states "all tipping, sorting, processing, compaction, storage, loading, and related activities, with the exception of those at residential drop-off locations for non-commercial customers, must be conducted in an enclosed building with adequate odor controls to effectively control off-site nuisances. Nonputrescible waste may be stored in outdoor areas if it is stored in closed containers or covered trailers."

There is no mention of putrescible waste being stored outside in closed containers or covered trailers. This implies that storing putrescible waste in outdoor areas in closed contained or covered trailer is not allowed.

However, 360.14(b)(4) exempts the overnight storage of putrescible waste on vehicles provided certain criteria are met. Among those criteria is that containers, trailers, and roll-offs that are

used must remain attached to the vehicles that transported them. Under the definition of transport vehicle, it says "in the case of a semi-trailer combination, the trailer is considered to be the transport vehicle."

Given the above requirements, can a transfer station that handles putrescible waste have that waste stored outside overnight in a trailer that is not attached to the truck that will be transporting it?

Response: The vehicle parked overnight (storage) exemption 360.14(b)(4) allows for storage of putrescible waste as long as certain criteria are met. If these criteria are met, vehicles parked overnight (storage) can occur at both registered and permitted transfer facilities. However, a transfer facility that stores putrescible waste in a trailer that is not attached to the truck that will be transporting it cannot store the putrescible waste overnight.

Question: Does the exempt condition for transfer facilities not allowing for containers to be placed on the ground conflict with the hazardous waste regs?

Response: Part 360 may be the more restrictive regulation of the two. If so, the requirements of Part 360 must be adhered to for solid wastes.

Question: Subpart 362-3 has an exemption for transfer facilities operated by a municipality, or contracted by or on behalf of a municipality that accepts no more than 20 cubic yards of waste per day. A condition of this exemption is that "the municipality provides for the collection of source-separated recyclables at the facility." Does this mean they have to register as a RHRF under Subpart 361-1? If that is the case it defeats the purpose of the 362-3 exemption as I believe the intent was not to regulate these small municipally owned/operated transfer facilities and RHRF's.

Response: The intent was not to require a registration under 361-1. A complementary exemption will be added to 361-1 to clarify this. We should operate in this way pending the upcoming revisions.

Question: Many facilities accept source separated recyclables from the public. Most are located at transfer stations and some are at landfills. There is no processing of these recyclables. The public comes in, takes the recyclables out of their vehicle and places them in a roll off. Once the roll off is full, the facility transports the recyclables to a facility for further processing. Is this type of activity exempt or does it need a registration or permit? 361-1.1(a) – applicability for RHRF says it applies to facilities that PROCESS source separated non putrescible recyclables. The argument could be made that since there is no processing of the recyclables, this type of activity does not fall under the jurisdiction of 361-1. Is this type of activity regulated under 362-3? It is only the transfer of recyclables and thus should be regulated under 362-3.

Response: The intent was for Subpart 361-1 to apply to facilities that "manage" (whether processing or transferring) source-separated recyclables. In this case, the collection, handling and transfer of source-separated recyclables would be eligible for a registration under Subpart 361-1. This registration would be in addition to any other applicable authorizations for the landfill or transfer facility activities.

Question: Does the tonnage limit in 362-3.2(b) take into account recyclables or only solid waste? Under 362-3.3(a)(1), the tonnage limit excludes source separated recyclables. One would think that if a registered facility excludes source separated recyclables, that an exempt facility should also. As an example, a facility that takes in 19 yards of waste per day and 2 yards of recyclables per day would have to be a registered facility (if the recyclables count towards the tonnage at an exempt facility). However, under the registered facility requirements, this facility can exclude counting their recyclables, so then their total tonnage per day is 19 yards of waste.

Response: The 362-3.2(b) exemption includes source separated recyclables, as originally drafted. However, after discussion it was decided that we want to exclude source separated recyclables. Language will be added to the subdivision. We should apply in this way pending the upcoming revisions.

Question: Does a contractual agreement qualify as being "under control" re: 362-3.2?

Response: The definition (287) of "under the control" means subject to the full or partial power to manage or cause a change in the policies of a facility, directly or indirectly, whether through the ownership of voting securities, by contract or lease, or otherwise.

Question: In the case of a transfer facility that is currently permitted, but able to obtain a registration under the revised regulations, the amount of recyclables they can receive under a TF/RHRF registration is of particular importance.

A municipal transfer facility is allowed to register under 362-3.3 provided they receive less than 50 tons of waste per day, and provided…in part, that the municipality is authorized as an RHRF under 361-1. RHRF facilities that are registered under 361-1 are allowed to accept up to 250 TPD of SS recyclables. If a registered TF maintains a registration in order to accept recyclables, are they allowed to accept up to 250 TPD of SS recyclables? Or, is the facility still limited by the 50 TPD "waste" limit imposed by the transfer facility registration?

I know that previous discussions pertaining to the 20 TPD transfer facility exemption suggested that recyclables count toward that TPD limit. However, the exemption does not have a separate requirement for obtaining authorization to receive recyclables. Requiring a registered transfer facility (which has one throughput limit) to also register as an RHRF (which contains a separate throughput limit) is conflicting.

Response: The registered transfer facility would need to meet the requirements of 362-3.3 and the registered RHRF would need to meet the requirements of 361-1.3. There would be two separate registrations, one for each registered activity.

362-4 Household Hazardous Waste Collection Facilities and Events

Question: Is a Part 364 permit required for an HHW sponsor transporting waste? Are there limits on this?

Response: The event sponsor is not required to have a Part 364 Waste transporter permit when transporting HHW waste from a satellite collection event to the permitted HHW facility. There are no limits to this exemption.

Question: Is HHW leaving a facility considered hazardous waste?

Response: Yes

Question: What are the transition requirements for HHW Collection Events?

Response: There are no specific transition requirements for Registered HHW events. However, 362-4.2 requires notification to the regional office 30 days before the collection event is initiated. Notification to the department entails the submission of the Solid Waste Management Facility registration form, site plan, and collection event plan as required by 360.15 and 362-4.2 respectively.

Question: Is there a standard 360 'registration' form that the sponsor needs to submit to us with details of HHW dates/locations, or do they need to write a letter detailing upcoming events?

Response: The sponsor will need to fill out the Solid Waste Management Facility Registration form, which can find at http://www.dec.ny.gov/docs/materials_minerals_pdf/360regform.pdf.

This form will be used for the registration of all SWM facilities. The registration form must meet the requirements of Section 360.15 and 362-4.2, which entails that the form be accompanied by a site plan and a collection event plan. The dates and locations for the collection events that would take place within the year of the registration also need to be included in the collection event plan.

Question: Do they need to attach the collection event plan to their notification to us?

Response: Yes, the registration form must be accompanied by a site plan and a collection event plan.

Question: Do we send a response letter back to them 'approving' the collection events?

Response: The procedure should be the same as with any other registration. The validated registration is the approval.

Part 363 Landfills

Question: Is there a provision in the new regulations for the registration of a land clearing debris landfill? I see that tree debris disposal facilities under one acre are exempt if they meet the conditions of 363-2.1(g). Any such facility over one acre (including those currently registered) will require a permit as of May 3, 2018?

Response: There is no registration provision for LCD landfill under the revised regulations. After May 3, 2018, they would either operate as an exempt facility (under one acre meeting the conditions of 363-2.1(g)) or submit complete application for a permit by 11/4/18 (365 days of the effective date of this Part) as per 360.4(f).

Question: We had some discussions about the disposal/transportation of waste from a burnt house. For state-wide consistency, we'd like to know CO's interpretation of the 363 exemption in a situation where someone bought property that included a burnt house and wanted to bury it.

Response: An owner-occupied, single-family residence itself is part of the waste that is allowed to be disposed under 363-2.1(a). As always, local zoning may restrict this activity. Part 360 does not trump local laws or regulations.

Question: Also based on the discussions, the waste from a burnt house can be considered as C&D according to past CO's guidance. If there is any changes, please let us know.

Response: Burnt material from a dwelling would be considered C&D debris.

Question: The old Part 360-7.5(h) calls for permit revocation and closure of a C&D landfill if documented violations regarding unauthorized waste occur. Was this provision carried over into the new regs?

Response: No, this specific provision is not in the new regs. However, this is covered by the standard general condition "Permit Modifications, Suspensions and Revocations by the Department" that should be included in all solid waste management facility permits which gives the Department the right to exercise all available authority to modify, suspend or revoke the permit. The grounds for modification, suspension, or revocation include (among others) failure by the permittee to comply with any terms or conditions of the permit and exceeding the scope of the project as described in the permit application.

Question: Section 363-2(h) limits the exempt disposal of general fill to 5,000 cubic yards for the life of the facility. Section 360.13(b)(2) states that general fill generated outside of New York City ceases to be a waste once it is determined that it is general fill. How can we limit the disposal volume of a material that is not a waste?

Response: If any material is disposed of, it is a waste – even if it has potential value or can be beneficially used as is the case with general fill. The materials referred to in 363-2.1 are waste. The disposal of these materials is exempt from Subpart 363-2 if done so in compliance with the conditions included in 363-2.1.

Question: 363-7.1(b) requires that an intermediate cover must be applied and maintained on all external slopes for every 20 feet of vertical rise. What is meant by "every 20 feet of vertical rise?" If an external slope has a vertical rise of 90 feet, is only the bottom 80 feet required to have intermediate cover?

Response: Actually only a little more than 60 vertical feet of intermediate cover would be required. The vertical rise which did not have intermediate cover would still be a little less than 20 feet. Once it exceeded 20 feet, additional intermediate cover would have to be applied.

Question: What is the time frame requirement for intermediate cover to be installed?

Response: As soon as there is 20 feet or more of vertical rise without intermediate cover, additional intermediate cover would have to be applied. The regulation does not currently specify how soon the intermediate cover must be placed, however, operating cover must be placed within 30 days of the last placement of waste. This is a reasonable time frame for application.

Question: There is no mention that intermediate cover must be a minimum of 12 inches of compacted cover, is this the intent?

Response: Section 363-6.14 requires that intermediate cover must consist of 12 inches of soil. In addition, 360.2(b)(148) defines "Intermediate cover" as "a geomembrane or soil layer which will inhibit precipitation from entering the waste mass, contain leachate outbreaks, and inhibit migration of decomposition gases. Although there does not seem to be a requirement for soil intermediate cover to be compacted, compaction would be expected to enhance the functions of intermediate cover identified in the above definition.

Question: On external slopes where waste will not be placed for 30 days is it required that 12 inches of operating cover be placed and then an additional 12 inches of intermediate cover be placed on top of that? 363-7.1(b)(3) requires a minimum of 12 inches of compacted operating cover be applied and maintained on all landfill surfaces where no additional waste has been or will be placed within 30 calendar days of the last placement of waste. Also, 363-7.1(b) requires that an intermediate cover must be applied and maintained on all external slopes for every 20 feet of vertical rise.

Response: No, the cover on the slopes must be 12 inches for every 20 feet of vertical rise. If 12 inches of operating cover has just been placed on the slope an additional 12 inches of intermediate cover is not needed. The 12 inches of operating cover will act as the intermediate cover and must be maintained.

Question: Is intermediate cover meant to be used only on external slopes?

Response: Yes, in accordance with 363-7.1(c), an intermediate cover must be applied and maintained on all external slopes for every 20 feet of vertical rise.

- Mixed loads of construction and demolition debris (C&D debris) may be transported under a Part 364 registration or permit. Transportation of C&D debris generated in New York City also requires a waste tracking document.

- C&D debris which is transported in loads greater than 10 cubic yards to a Part 361 authorized facility must be transported by a registered or permitted Part 364 waste transporter. In addition, transportation of C&D debris generated in New York City also requires a waste tracking document.

- Waste tracking documents must accompany individual loads of restricted-use fill, limited-use fill, and contaminated fill generated anywhere in the state and any C&D debris generated in New York City including all fill materials. Blank waste tracking documents are available at this location: http://www.dec.ny.gov/chemical/52706.html.

- All limited-use fill, restricted-use fill and contaminated fill require transport by a Part 364 waste transporter. However, these materials are defined as a subset of C&D debris, so shipments of 10 cubic yards or less are exempt from Part 364 waste transporter requirements (§364-3.1(d)).

- Transport of C&D debris generated anywhere in the state requires a registration or permit under Part 364 waste transporter requirements. In addition, a waste tracking document is required for individual loads of C&D debris generated in New York City. Outside of New York City, a waste tracking document is only required for restricted use fill, limited use fill, and contaminated fill.

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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OCT 12 2018

To Whom It May Concern:

This is to advise you that, subject to the terms set forth in this letter, the New York State Department of Environmental Conservation ("DEC" or "Department") will exercise its authority to utilize enforcement discretion with respect to certain provisions of 6 NYCRR Part 360, 361 and 362. The DEC will exercise this authority regarding the provisions outlined below until either January 31, 2020, or until an amendment to the present rule is promulgated, whichever is earlier. All other provisions of the Part 360 Series remain in effect and will be enforced.

I. Regulatory Flexibility for Recyclables Handling and Recovery Facilities

Due to the decrease in available recyclables commodities markets, tip fees charged by some recyclables handling and recovery facilities ("RHRFs") are increasing. In order to decrease contamination in recyclables processed through single-stream facilities and increase the marketability of the resultant recyclables, some RHRF operators have slowed sorting lines resulting in material backlogs and increasing stockpiles of recyclables. In order to relieve regulatory impacts that have arisen due to these circumstances:

- DEC will utilize enforcement discretion and waive the 15 percent residue threshold found at 6 NYCRR § 361-1.3(a)(1) and (2) on a case-by-case basis for registered RHRFs. Requests under this provision must be directed to the appropriate DEC Regional Office.
- DEC will utilize enforcement discretion to allow, with DEC approval, storage of unprocessed or processed non-putrescible recyclables at locations owned or under the control of an owner or operator of a solid waste management facility. Requests under this provision must be directed to the appropriate DEC Regional Office.
- DEC reminds owners and operators of RHRFs that storage of unprocessed and processed non-putrescible recyclables longer than 180 calendar days is allowed with DEC approval. Requests for extensions for recyclables storage must be directed to the appropriate DEC Regional Office.

II. Metal Recovery from Municipal Waste Combustors

Efforts are in place across New York State to increase and enhance recycling collection systems and markets, including those associated with residential metal recycling. Curbside collection of recyclables is the primary means of separating metals from municipal solid waste (MSW), however, some recyclable metals still find their way into the disposal stream. When MSW is combusted at a municipal waste combustion (MWC) facility, a second opportunity to recover those metals presents itself. Metal in the MSW stream is not combusted, but instead passes through the process relatively unscathed. Many MWC facilities are designed to separate metal from the combustion ash residue, further reducing the waste that must be landfilled and redirecting valuable material to recycling.

In the past, DEC had considered metal in the MSW stream received at a MWC facility to be a part of the facility's permitted throughput capacity. However, because the metal is not combusted and because it is extracted for recycling rather than disposal, this practice should be strongly encouraged. Therefore, DEC will utilize enforcement discretion to allow for metal extracted from an MWC facility subsequent to combustion to not be considered part of the facility's throughput capacity.

III. Regulatory flexibility for the transfer of non-putrescible solid wastes on a vehicle for 10 days or less during transport

Presently, regulation of 10-day permit exempt transfer facilities is inconsistent with the regulatory requirement for hazardous waste transporters and for solid waste transporters. Recent updates to 6 NYCRR Part 360 eliminated one inconsistency by establishing a 10-day exemption from storage for non-putrescible solid wastes to match the permitting exemption found in 6 NYCRR Part 373 for hazardous waste transporters. However, the permit exemption in 6 NYCRR Part 360 remains more stringent than that in 6 NYCRR Part 373. In order to simplify the handling of both hazardous waste and solid waste at 10-day permit exempt transfer facilities, the Department is expanding the 6 NYCRR Part 360 permit exemption to more closely match that required by the exemption in 6 NYCRR Part 373 and other specific conditions, including secondary containment and U.S. Department of Transportation packaging requirements, established in 6 NYCRR Part 372 for 10-day exempt facilities.

Specifically, DEC will utilize enforcement discretion to waive the requirements of 6 NYCRR § 360.14, provided that the management of solid wastes by transporters meets the requirements of 6 NYCRR § 372.3(a)(6) and § 372.3(a)(7)(iii).

IV. Regulatory flexibility for the portion of any solid waste management facility subject to regulation under 6 NYCRR Subpart 374-2

Portions of solid waste management facilities subject to 6 NYCRR Subpart 374-2, Standards for the Management of Used Oil, are exempted from meeting certain standards found in 6 NYCRR Part 360. As part of a previous rulemaking for used oil, the exclusion for 6 NYCRR Subpart 374-2 facilities meeting the standards found in 6 NYCRR § 360.14 was unintentionally removed from 6 NYCRR Part 360. The absence of this exclusion causes transporters of used oil to be subject to two separate, but conflicting, sets of requirements when storing solid wastes at 10-day transfer facilities. It is DEC's intention that only the 6 NYCRR Subpart 374-2 conditions are to be in effect for these transporters.

To resolve the inconsistency, DEC will utilize enforcement discretion by waiving the requirements of 6 NYCRR § 360.14, as long as the transporter is in compliance with the applicable provisions of 6 NYCRR § 374-2.5 and 6 NYCRR § 374-2.10.

V. Continued operation of municipal land clearing debris landfills

Previous Part 360 regulations allow certain registered facilities to dispose of land clearing debris, concrete, asphalt and other similar materials without a liner. In order to help ensure that groundwater is protected from unauthorized disposal of solid waste, the current Part 360 regulations removed the allowance for registration for land clearing debris landfills, requiring that those facilities obtain permits and construct landfill liners for their continued operation. However, some municipalities have raised concerns that the continued use of these facilities is provided as a public service to their communities, that the municipality charges only a nominal fee which covers the cost of operation, and that the closure of the facilities will force these materials into MSW landfills thereby reducing airspace at those facilities.

In recognition of these circumstances, DEC utilizes its enforcement discretion by allowing the continued operation of municipally-owned landfills which prior to November 4, 2017 held a 360-7.2(a) registration and which accepts only tree debris, concrete, asphalt pavement, brick, rock, and soil which meets with the definition of general fill or the requirements of 6 NYCRR 360.12(c)(1)(ii).

Very truly yours,

Thomas S. Berkman
Deputy Commissioner
& General Counsel

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MAR 0 1 2018

To Whom It May Concern:

This is to advise you, that subject to the terms set forth in this letter, the New York State Department of Environmental Conservation ("DEC" or "Department") will exercise its authority to utilize enforcement discretion with respect to certain provisions of 6 NYCRR Part 360, Part 361, Part 364 and Part 365 of the newly enacted Part 360 Series. The DEC will exercise this authority regarding the above provisions until either May 3, 2019 or an amendment to the present rule is promulgated, whichever is earlier. All other provisions of the Part 360 Series remain in effect and will be enforced.

I. Materials used in cement, concrete and asphalt pavement.

On September 5, 2017, the 6 NYCRR Part 360 Solid Waste Management Facilities regulations were revised, replaced and enhanced, creating a new Part 360 Series. The revisions modified beneficial use determinations for recognizable, uncontaminated concrete and concrete products, asphalt pavement, brick, glass, soil and rock. Under the new Part 360 Series several pre-determined beneficial uses (BUDs) were created to deal with the reuse of these materials (6 NYCRR 360.12 (c)(3)(viii), (ix) and (x)). Pursuant to these BUDs these materials cease to be a solid waste when the material meets the requirements for the intended use.

The Department will utilize its enforcement discretion with respect to facilities subject to the requirements of 6 NYCRR 361-5 and for materials that are destined for and/or stored and maintained at these facilities under the control of the generator or the person responsible for the generation, prior to processing or reuse, in conformance with 6 NYCRR 360.12 (c)(3)(viii), (ix) and (x).

In addition, these materials (i.e., materials under the control of the generator or the person responsible for the generation which are destined for and/or managed prior to reuse under 6 NYCRR 360.12(c)(3)(viii), (ix) and (x)) destined for and/or managed at facilities subject to the requirements of 6 NYCRR 361-5 may be managed as a commercial product or raw material and are not subject to Part 360 or Part 361.

The transporters handling these materials (i.e., materials destined for a facility under the control of the generator or the person responsible for the generation which are destined for and/or managed prior to reuse under 6 NYCRR 360.12(c)(3)(viii), (ix) and

(x)) are also not subject to the otherwise applicable provisions of 6 NYCRR 360.4, 360.15, and Part 364.

Recognizable, uncontaminated concrete, asphalt, rock, brick and soil used for reclamation at a facility permitted pursuant to the Mined Land Reclamation Law, will not be subject to the otherwise applicable provisions of Parts 360, 361 and 364, if the material has been reviewed, approved and incorporated into the mined land reclamation permit issued to the facility. No fee or any form of consideration may be received by the operator for use of this material. Any material transported to a mine site for such reclamation purposes is subject to monitoring and enforcement by the Department to ensure no unapproved wastes are accepted or disposed of during mining and reclamation activities. The Department reserves the right to disapprove use of such materials if placement of these materials at a mine site may constitute an environmental hazard.

II. Waste tires used to secure tarpaulins.

The new Part 360 Series, which addresses the use of waste tires to secure tarpaulins in common weather protection practices, requires adjustments to better suit the needs of the agricultural community. The Department will utilize its enforcement discretion with respect to the enforcement of 6 NYCRR Subpart 361-6, as long as the use of waste tires to secure tarpaulins is done in accordance with the pre-determined beneficial use found at Part 360.12(c)(2)(iv) or BUD 1137-0-00, dated December 4, 2014, which permits the use of waste tires to anchor plastic film or other cover material for corn silage, haylage or other agricultural feeds if certain conditions are met.

III. Construction and demolition facility fill material sampling requirements.

Section 361-5.4(e) requires that all permitted construction and demolition facilities are required to perform certain sampling on any fill material or residue leaving the facility for reuse. The Department will utilize its enforcement discretion with respect to this provision to delay the enforcement of this sampling requirement regardless of the timing of the permit issuance to the facility.

IV. Storage Requirements for Regulated Medical Waste (RMW).

6 NYCRR 365-1.2(b)(8) prohibits storage of untreated RMW as follows: "RMW, except sharps, may be held in patient care areas for a period not to exceed 24 hours and at a laboratory or other generation area for a period not to exceed 72 hours, at which time the RMW shall be moved to an RMW storage area. Not-withstanding these time frames, RMW that generates odors or other evidence of putrefaction must be moved to a storage area as soon as practicable." Additionally, 6 NYCRR 365-1.2(b)(7) states "sharps containers must be removed from the patient care or use areas to a room or area designated for RMW storage when: the container has reached the fill line indicated on the container; the container generates odors or other evidence of putrefaction; or within 90 days of use, whichever occurs first."

Based on concerns raised by small generators (dental offices, etc.) the Department will exercise its enforcement discretion with respect to these provisions and will require that sharps and RMW containers be removed from patient care or use areas to a room or area designated for RMW storage when the container has reached the fill line indicated on the container, is otherwise filled, or the container generates odors or other evidence of putrefaction, whichever occurs first.

Thank you for your cooperation in this matter. If you have any questions, please call Richard Clarkson of the Division of Materials Management at (518) 402-8678.

Sincerely,

Thomas S Berkman
Deputy Commissioner
& General Counsel

Evolving Energy Issue

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New York's Article 10 Siting Process

A Brief Perspective from an Industry Representative

Ben Brazell
Director of Environmental Services

Environmental Design & Research,
Landscape Architecture, Engineering
& Environmental Services, D.P.C.

January 18, 2019

Renewable Energy is Well Established in New York

- The first utility-scale renewable energy project became operational in 1999 (Madison Wind, Madison County)
- Since, there has been significant review, approval, construction, and operation of utility-scale renewable energy projects (over 2,000 MW of wind and solar)
- All of this has been reviewed and approved under SEQRA and various local approvals

Article 10 Activity

0 MW of installed capacity

• August 2011	-	Article 10 signed into law
• July 2012	-	Rules and Regulations issued
• Sept. 2012	-	First project to initiate the Article 10 process (project was subsequently withdrawn)
• January 2018	-	First project to receive a Certificate (process initiated in November 2014)
• 2018	-	First project to initiate compliance filing phase
• 2019?	-	First project to initiate construction under A10

Article 10 and SEQRA

- Significantly more data, analyses, studies, etc. required for Article 10 record
- Longer timeframe
- More costly
- Requires Applicant's to fund intervenors
- Decision made by the state
- Detailed engineering and design must occur prior to approval

Suggestions for Process Improvement

- **Application completeness**: despite all pre-application activities designed to specify content of an Application, none have been deemed complete following initial submittal
  - Communication between Staff and an Applicant during 60-day review
  - Deficiencies should be limited to material issues
  - Second round of review should be limited to 30 days and to previously identified deficiencies only
  - This phase appears to be improving (e.g., Bluestone)

Suggestions for Process Improvement

- **Stipulations**: optional step under Article 10 meant to further clarify content of an Application
  - Regulations do not specify a timeframe, and this has been the longest component of pre-application phase
  - As more Applications are deemed complete, less emphasis should be placed on this step (should be truly optional)
  - Should be limited to scope and methodology of studies and content of an Application, not adopting an agency position

Suggestions for Process Improvement

- **Predictable and consistent agency consultations and improved communication**:
  - Comments on PSS/stipulations should all be project specific
  - Seemingly productive agency meetings sometimes conflict with written agency comments
  - Conflicting issues/directives from sister agencies
  - Answers to questions can be obtained outside of formal written documents

Suggestions for Process Improvement

- **Adjudicatory Phase and Compliance Phase**:
  - Resolution of issues to minimize testimony and hearings should be a priority for all parties
  - A more efficient process to adjust components of the proposed facility in response to issues
  - Reduce the number of post-certification compliance filings
  - Understand that reviewing a compliance filing is not an opportunity to further negotiate a resolved issue

From the Siting Board's Website

The Power NY Act of 2011 established a process for the siting of electric generating facilities and repowering projects. As part of the process, a multi-agency Siting Board is charged with ***streamlining*** [emphasis added] the permitting process for power plants for 25 megawatts (MW) or greater. The Power NY Act also encourages investments in clean power plants and affords communities more opportunities to participate in the siting process.

Conclusions

- New York has been a leader in renewable energy development and generation for 20 years
- All success to date occurred outside the confines of Article 10
- It is doubtful New York would have 2,000+ MW of installed wind and solar capacity if certification under the current Article 10 regulations was required
- If New York is to achieve it's state energy policy goals (e.g., 50% renewable electricity generation by 2030) the Article 10 process must be improved

Questions?

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NEW YORK STATE OF OPPORTUNITY. | Department of Public Service

Public Service Law (PSL) Article 10: Process, Status and Priorities

January 18, 2019

Sarah Osgood
Director of Policy Implementation

Public Service Law Article 10

- Provides a unified and streamlined regulatory review and approval process for siting of major electric generating facilities with proposed capacity ≥ 25 MW
- Replaces a variety of state and local permits
- Includes environmental justice, environmental, public health and safety considerations
- Ensures that public involvement opportunities occur throughout the planning & review process
- Makes funds available to local parties and municipalities so they can make an effective contribution to the proceedings
- Establishes the Board on Electric Generation Siting and the Environment (“Siting Board”) as the decision maker in the Article 10 process

Overview

- Enacted in 2011
- Intended to strike a balance of:
  - Certainty for developers
  - Community involvement
  - Consistency with State policy
- Provides a fair and effective process to responsibly permit good and appropriately sited projects
- Supports State energy policy goal of 50% of New York's electricity to be generated by renewable sources by 2030 as part of a strategy to reduce statewide greenhouse gas emissions by 40% by 2050

Siting Board

- The “Permanent” Board includes NYS Agency heads:
  - Chair of Public Service Commission
  - Commissioner of Empire State Development
  - Commissioner of Department of Environmental Conservation
  - Commissioner of Department of Health
  - Chair of NYSERDA
- Each individual project Siting Board also includes two appointed residents of a project area
- The Siting Board can issue a Certificate of Environmental Compatibility and Public Need for a generating project

Process

5 Key Phases:

- Public outreach process is initiated
- Methodology and scope of studies are identified

- Detailed project information
- Analysis of environmental and health impacts

- Parties review the application and develop their cases

- Environmental impacts (including public health and safety)
- Electric system benefits
- Consistency with energy plans
- Compatibility with State and local laws

- Post certification compliance reviews and filings

Pre-Application Phase

- Applicants file a Public Involvement Program (PIP) Plan summarizing activities it will use to educate, inform and involve the public in the planning process
- Department of Public Service (DPS) staff review draft PIP Plan to determine its adequacy and provide comments
- Applicant responds and files a revised PIP Plan
- After minimum 150 day outreach period, the Applicant files a Preliminary Scoping Statement (PSS) describing:
  - Proposed facility and its environmental setting
  - Potential significant and adverse impacts
  - Proposed studies to evaluate potential impacts
  - Measures to avoid or mitigate adverse impacts
  - Reasonable alternatives
  - List of Local, State and Federal requirements
  - Other required information
- Applicant submits an initial intervenor fee with the PSS ($350 per MW, up to $200,000) which intervenors can request funds to hire expert witnesses, consultants or lawyers to assist in efforts that will contribute to a complete record
- Siting Board Secretary provides direct notification of the opportunity for the chief officer of any municipality to nominate four residents of the municipality to serve as Ad Hoc Siting Board appointees
- Intervenor funds are awarded
- Parties attempt to reach agreements (“stipulations”) on the scope and methodology of application studies

Application Phase

- A minimum of 90 days must pass between the filing of a PSS and an Application
- Application is filed with the Siting Board, municipalities, and parties, and made publicly available online and at libraries in the project vicinity
- Must include:
  - Project description
  - Details of up to 41 required Exhibits
  - Evaluation of expected environmental and health impacts, environmental justice issues, and any reasonable and available alternative locations
  - Application phase intervenor fund fee ($1,000 per MW, up to $400,000)
- Siting Board Chair has 60 days to determine if the application complies with regulations and final scoping stipulations

Hearing Phase

- Public hearing is scheduled
- Pre-hearing conference to:
  - Award intervenor funds
  - Identify issues for hearing
  - Establish a case schedule
- Discovery, evidentiary hearings and briefing process
- Presentation of the record to the Siting Board for consideration

Siting Board Decision Phase

- The Siting Board must make decisions & findings:
  - Environmental Impacts (including public health and safety) are minimized or avoided
  - Electric system benefits and consistency with energy plans & policies
  - Compatibility with State and local laws and other requirements

Compliance Phase

- Post-certification compliance:
  - Pre-construction filing, review and approval of engineering plans, final design documents, permits or other approvals
  - DPS on-site inspections during construction
  - Long-Term operational Compliance over facility lifetime
  - Decommissioning and restoration at end of facility lifespan

Status

- Currently, 34 active projects:
  - 1 Project approved – Compliance Filings pending; 126 MW Wind
  - 7 Applications filed – 5 deemed compliant, 2 pending review; all are wind (1,414 MW)
  - 13 projects have PSS documents filed – 5 projects wind (1,301 MW), 7 projects solar (456 MW), 1 gas (up to 970 MW)
  - 13 projects in outreach phase - PIP Plans; 2 wind (305 MW), 7 solar (905 MW), 1 solar plus storage (195 MW), 1 WTE (up to 80 MW), 2 gas (up to 1,185 MW)
- Total 6,937 MW Generating Capacity Proposed:
  - 3,146 MW Wind (15 projects)
  - 1,361 MW Solar (14 projects)
  - 195 MW Solar plus storage (1 projects)
  - 80 MW waste-to-energy (1 project)
  - 2,155 MW gas-fired (3 projects)

Priorities

- Providing a fair, professional, and transparent process
- Getting it right – developing projects that are:
  - Good for the environment
  - Provide benefits to local communities
  - Consistent with other policy goals of the state
- Being appropriately protective of local concerns while pursuing state goals

Approach

- Improving clarity on how to engage and respond
- Streamlining process mechanics – to focus on potential issues and potential remedies/mitigation approaches
- Prioritizing most challenging topical areas
- Improving coordination with sister agencies

Embracing an overriding philosophy of pragmatic flexibility while still strongly protecting community and environmental interests

Progress

- Pre-application
  - Providing more direct outreach to local elected officals on the nomination of ad-hoc members
  - Preparing exhibit checklist
  - Exploring general standards/templates to exhibits
- Application
  - Striving to complete reviews and provide compliance/deficiency letters in less time that is required by statute
  - Encouraging staff to informally communicate with applicants on non-substantive issues
  - Communicating clearly how deficiencies can be addressed
  - Avoiding raising “new issues” after an initial deficiency letter has been issued
  - Engaging with outside support to assist staff in technical reviews

Progress

- Administrative Hearings
  - Improving coordination with sister agencies to avoid inconsistent or competing positions
  - Exploring opportunities to narrow scope of litigated issues
- Siting Board Decision/Compliance
  - Providing clear certificate conditions
  - Minimizing the number of compliance filings that require Board/Commission approval

1

NY's Clean Energy Standard: Status & Progress Report

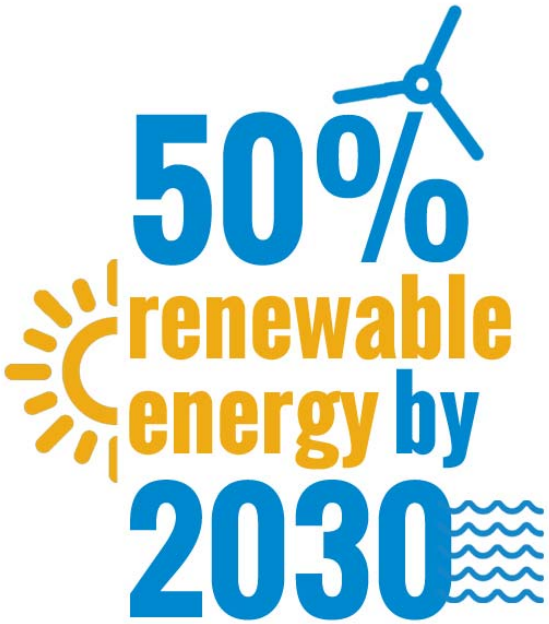
January 18, 2019

Noah C. Shaw
NYSERDA General Counsel

NEW YORK STATE OF OPPORTUNITY. | NYSERDA

2

New York Clean Energy Standard



3

New York's Clean Energy Standard (CES)

- By Order issued August 1, 2016, the New York Public Service Commission adopted the State Energy Plan (SEP) goal.
- The CES includes obligations upon LSEs and opportunities for voluntary contributions.
- The Order provides for two mandated requirements:
  - a Renewable Energy Standard (RES) requirement, and
  - a Zero-Emissions Credit (ZEC) requirement.
- The RES component and the ZEC component goals are additive.
  - ZECs will not count toward satisfying the 50% by 2030 goal.
- Order Establishing Offshore Wind Standard and Framework for Phase 1 Procurement was issued July 12, 2018.

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4

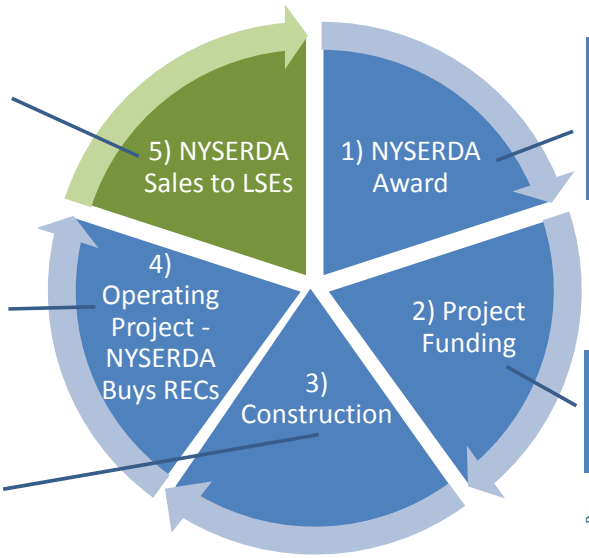
Tier-1 REC Cycle:

Sales to LSEs fund the procurement of Tier 1 renewable energy in NYS

NYSERDA sells to jurisdictional LSEs the Tier 1 RECs for compliance as Ordered by the PSC. NYSERDA sells Tier 1 RECs to LSEs at an average price of the produced RECs from Step 4. NYSERDA (+$)

Upon CO, NYSERDA purchases Tier 1 RECs at Bid Prices determined by the competitive solicitation in Step 1. The RECs are generated by the project per the Agreement resulting from the original Procurement Award in Step 1 . NYSERDA (-$)

Project is built and applies for NYGATS Statement of Qualification and Operational Certification (OpCert); Seller declares Commercial Operation (CO)



NYSERDA holds competitive procurement and makes project-specific award to developer

Project uses RES Agreement to obtain Financing from another party

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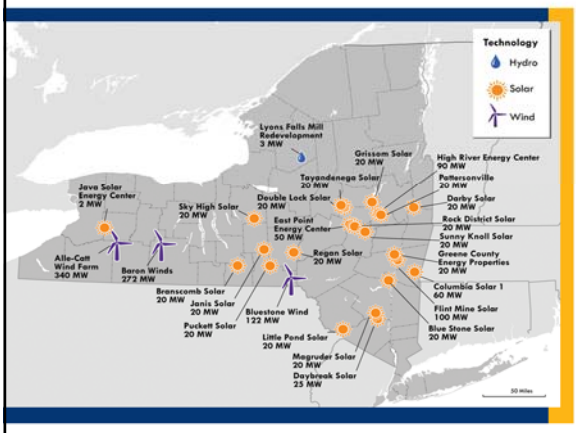
5

2017 Solicitation Awards



$1.4 billion
single largest commitment to renewable energy by a state in the U.S.

26 large-scale renewable energy projects across New York
- > **22 solar farms**
- > **3 wind farms; one features energy storage**
- > **1 hydroelectric facilities**

Generate enough energy to power **more than 430,000 homes**

Reduce carbon emissions by **1.6 million metric tons**, equivalent to taking nearly **340,000 cars off the road**

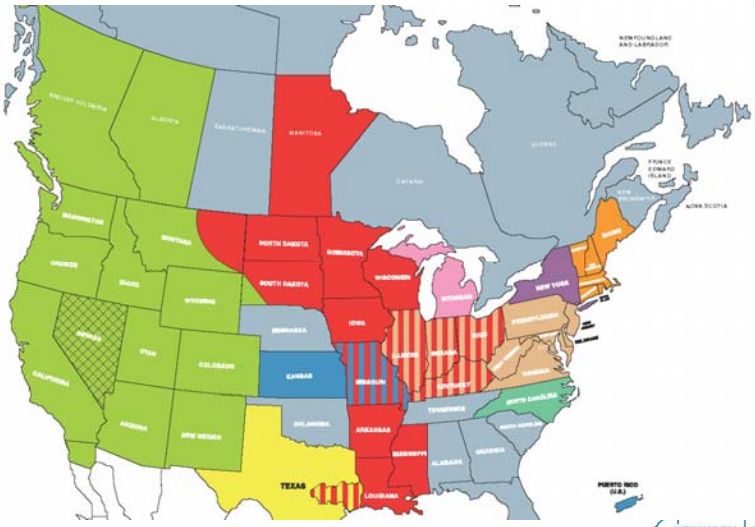
Create **over 3,000** short- and long-term **well-paying jobs**

6

North American Tracking Systems

KEY

- **ERCOT**: Electric Reliability Council of Texas
- **MIRECS**: Michigan Renewable Energy Certification System
- **M-RETS**: Midwest Renewable Energy Tracking System
- **NAR**: North American Renewables Registry
- **NC-RETS**:North Carolina Renewable Energy Tracking System
- **NEPOOL-GIS**: New England Power Pool Generation Information System
- **NVTREC**: Nevada Tracks Renewable Energy Credits
- **NYGATS**: New York Generation Attribute Tracking System
- **PJM-GATS**: PJM EIS's Generation Attribute Tracking System
- **WREGIS**: Western Renewable Energy Generation Information System
- **No tracking system formally adopted.** NAR allows registration from generators located anywhere in the U.S. and Canada. Other tracking systems may allow registrations from outside their geographic territory.



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2017, Center for Resource Solutions https://resource-solutions.org/wp-content/uploads/2017/03/Tracking-System-Map.pdf

7

NYGATS and the RES

- Resources apply for Tier 1 certification through NYGATS
- Only Certified resources can:
  - create Tier 1 RECs in NYGATS (Operational)
  - Submit proposals to RES RFP (Operational and Provisional)
- RECs procured through RES RFPs are transferred to NYSERDA through NYGATS
- Procured REC sold to LSEs via a sales platform built in NYGATS
- LSEs retire Tier 1 RECs to demonstrate RES compliance
- NYGATS data is used in the CES progress reporting
  - Annual statewide fuel mix calculation
  - Compliance activities

8

Building Public Support

Host communities experience:	Which leads to:
• Lack of information to evaluate projects • Diminished negotiating position • Fear of Article 10 and loss of control	• Distrust of developer • Sense of powerlessness in the process • Erosion of support for LSR development

NYSERDA Initiatives to increase citizen awareness and engagement

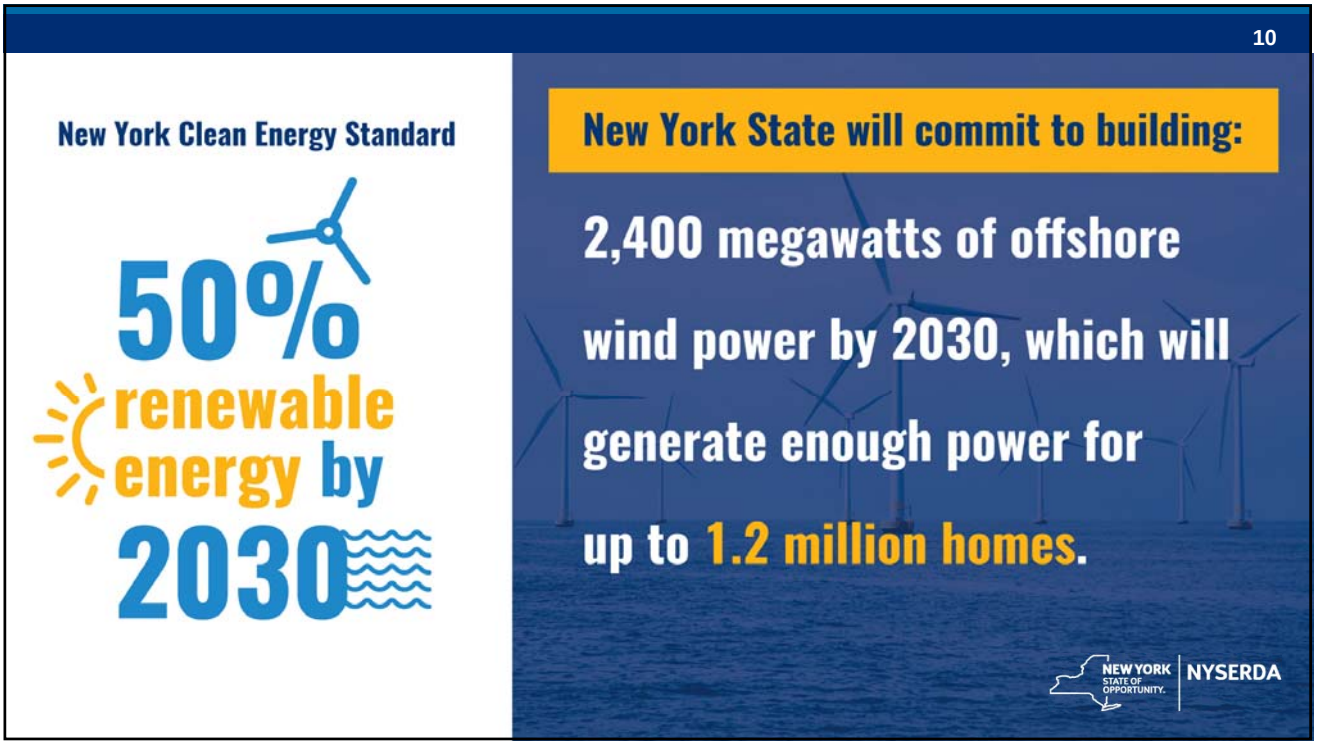
- Provision of Information Resources
  - Broadly applicable, Coordinated with NY Sun, CEC, and Clean Energy Siting
- Community Engagement
  - Direct Assistance, Targeted approach, Local Workshops on Wind and Solar
- Direct Economic Benefits
  - Community Ownership/Investment, Energy benefits through a CCA

9

2018 RES RFP – New Siting Requirements

- Threshold Requirements to demonstrate engagement with host communities
  - Community Outreach Plan – Proposers will include a comprehensive plan that addresses localized support/opposition (including local ordinances, prohibitions, or moratoria) that could impact the project and an overview of outreach activities.
  - Public Release of Bid Proposal Information – Proposers will populate a standardized form providing a public project overview and basic information.
- New Site Character subcategory encourage solar development that avoids prime agricultural areas or parcels that hold an agricultural tax assessment
- NYSERDA Outreach:
  - Public Release forms on CES website and Staff engaged host communities
  - Host community local governments contacted to inform about the project and NYSERDA's solicitation, offer NYSERDA's siting tools and resources, and to gauge local sentiment.
  - Performed jointly with new Clean Energy Siting team
  - Follow up workshops on local law development and property taxes are being scheduled

10



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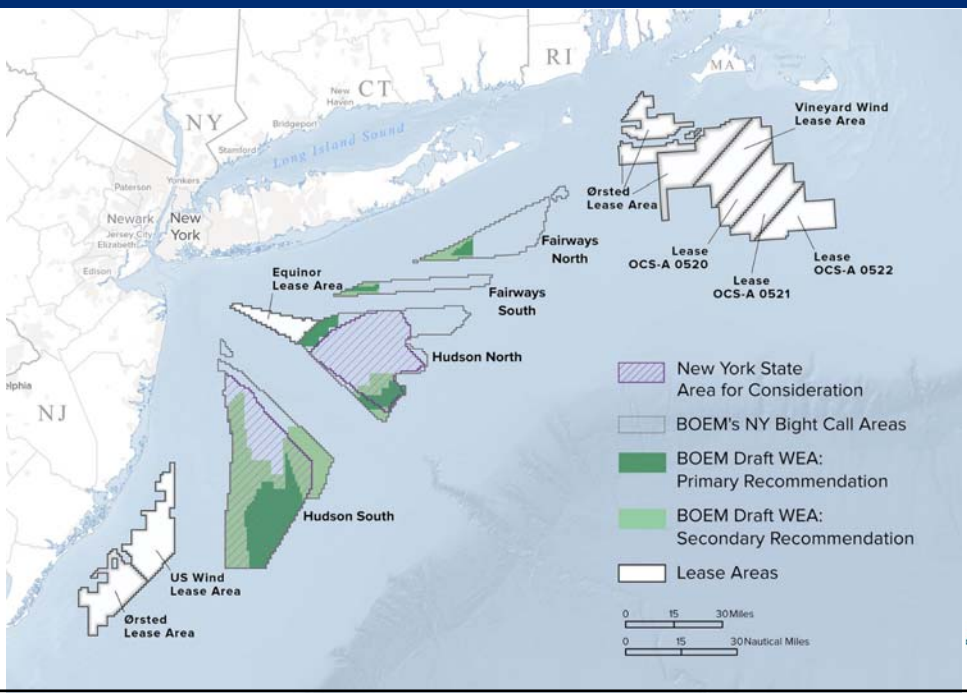

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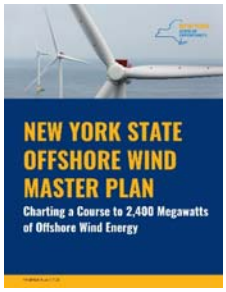
12

Responsible and Cost-Effective Development of OSW



Master Plan + 'POP'

2y — **Jan 2018**

- +20 Studies
- Economic & Environmental Benefits
- NYS Area for Consideration
- OREC Market Structure
- Costs and Cost-reduction pathways

Offshore Wind Standard

July 2018

- Are located off the coast of the United States
- Become operational on or after January 1, 2015
- Deliver electricity directly or indirectly into New York
- Have obtained a lease from the Bureau of Ocean Energy Management

OREC RFI OSW-2018

Aug 2018

ORECRFP18-1

Fall 2018

- GHG reduced by **5M short tons = 1M cars** removed from the road
- ~$1.9B in Health Benefits related to GHG and Air Quality improvements
- 8-18 fewer premature deaths annually
- $6B in infrastructure benefits
- ~5,000 new jobs in installation, O&M, and manufacturing

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13

Phase 1 Procurement Order

NYSERDA provided the New York Public Service Commission (PSC) options regarding Phase I generation and transmission, and on March 3 the PSC issued a notice commencing a rule-making process.

The comment period closed June 4, and on July 12 the PSC issued its Order Establishing Offshore Wind Standard and Framework for Phase 1 Procurement (Case 18-E-0071).

Among other items, the Order:

- Establishes the 800 MW Phase goal;
- Describes an "OREC" mechanism for the procurement of attributes;
- Identifies NYSERDA as the state entity to administer Phase 1;
- Establishes the LSE obligation (similar to the CES);
- Provides NYSERDA discretion in the RFP and contracting process, including with respect to economic benefits, labor and other issues; and,
- Identifies wet transmission as an issue that will be further considered in Phase 2.

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14

NYS' First RFP – Issued November 8

Scoring Criteria

- 70% Bid Price
  - Same weighting as Renewable Energy Standard Tier 1
  - Both Index OREC and Fixed REC bids required
- 20% Economic Baenefits
  - Must include a local content requirement, but has discretion in designing
- 10% Project Viability
  - Increase weight from Renewable Energy Standard Tier 1 solicitations to account for expiring federal tax credits

Contract Requirements

- Project labor agreement and prevailing wage requirement
- Submit a fisheries and environmental mitigation plan
- Participate in New York's technical working groups (TWGs)
- Consult with relevant State agencies around fishing, wildlife, and the environment
- Make environmental data collected during site

Next Steps

- Proposals Due: February 14, 2019
- *Spring 2019: NYSERDA notifies awardees*
- *Late Spring / Early Summer 2019: Contract(s) executed*

RFP, Form Contract and Additional Appendices available at:
https://portal.nyserda.ny.gov/CORE_Solicitation_Detail_Page?SolicitationId=a0rt000000UTbqS

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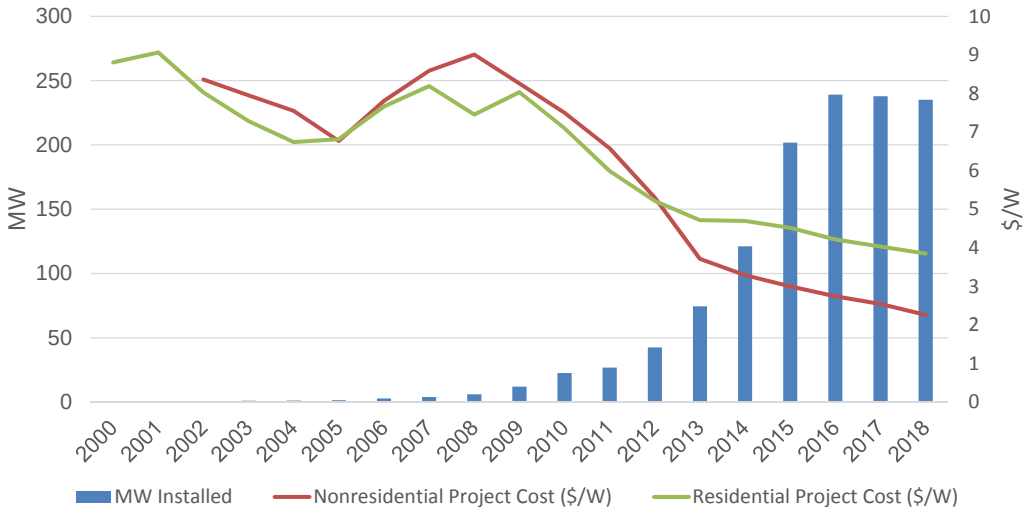
15

NYS Solar MW Installed by Year



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16

Where Are We Now?

- The State's overall pipeline is at 935MW, this includes more than 711 MW of community solar
- 24 Community solar projects completed with over 100MW currently under construction
- Since VDER went into effect, there has been heavy pipeline activity but there are delays in building projects. Developers have been working though
  - Newness of CDG model
  - Siting/local government approvals
  - Interconnection issues – much improved due to DPS/NYSERDA Interconnection Policy & Technical Working Groups
  - Developer structuring: buying and selling of projects

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17

New York State Solar Market Update

NY is picking up steam

- 60MW DC of new CDG added to tranches in first 2 weeks of July
- NY has one of the largest solar pipelines in history and 2018 was the strongest year for project completions in MW.
  - July & August 2018 were the top months in NYSERDA history for project completions in MW
  - More PV installed in 1st half of 2018 (127.6 MW) than any other half in NY's history
- National trends are dipping and NY is bucking the trend
  - NYS is currently the #3 state in fulltime Solar Jobs (9,012 in 2017). This is an **increase** from our #6 position in 2016, with 8,135 jobs
  - 2017 NY was ranked 12th in capacity built. In 2018 for Q1 & Q2 we are 5th

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18

Thank you!

https://www.nyserda.ny.gov/Clean-Energy-Standard



NEW YORK STATE OF OPPORTUNITY. | NYSERDA

Environmenal Justice: Enforcement & Advocacy

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Ruben Diaz, Jr.
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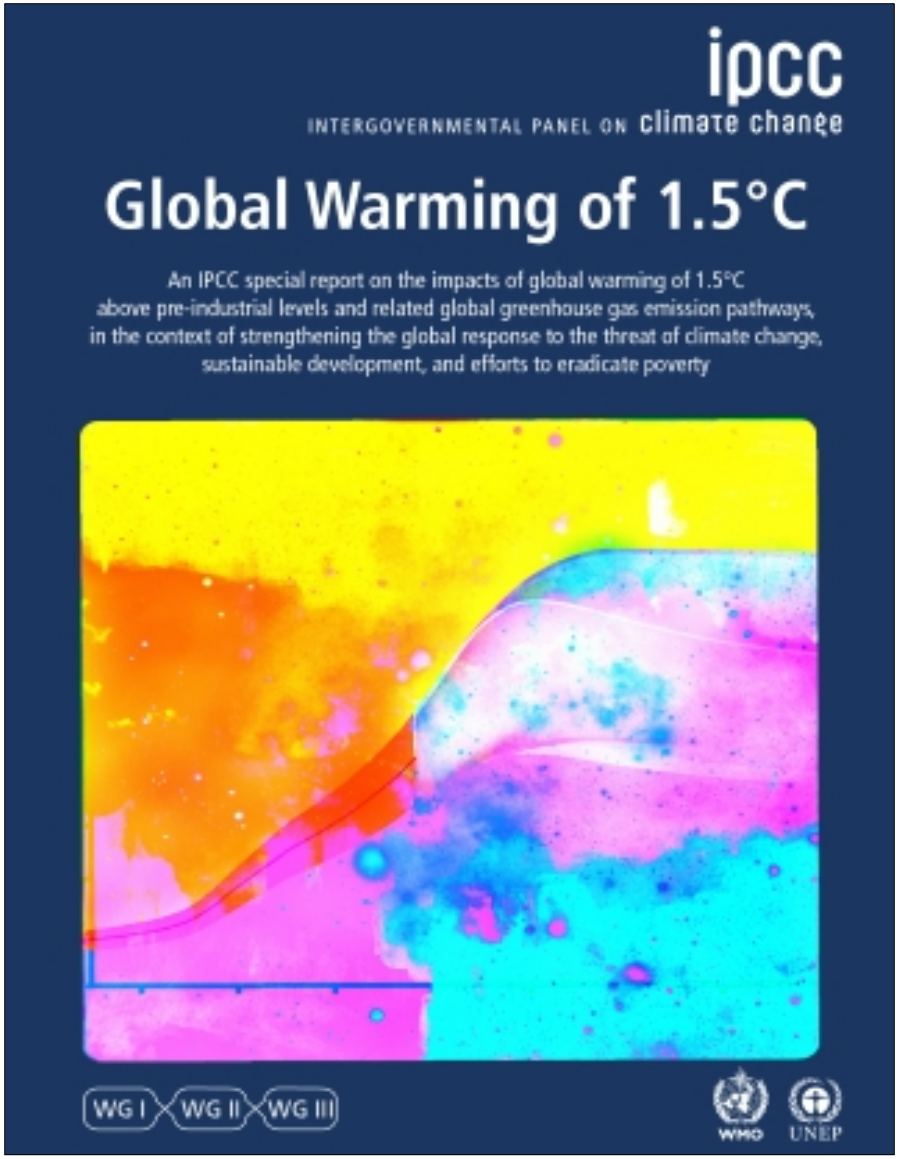
WE ACT for Environmental Justice | New York, NY

Climate Change and Environmental Justice

NYSBA Environmental & Energy Law Section
2019 Annual Meeting

Keith Brodock, PE, PP

January 18, 2019



"An IPCC special report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty"

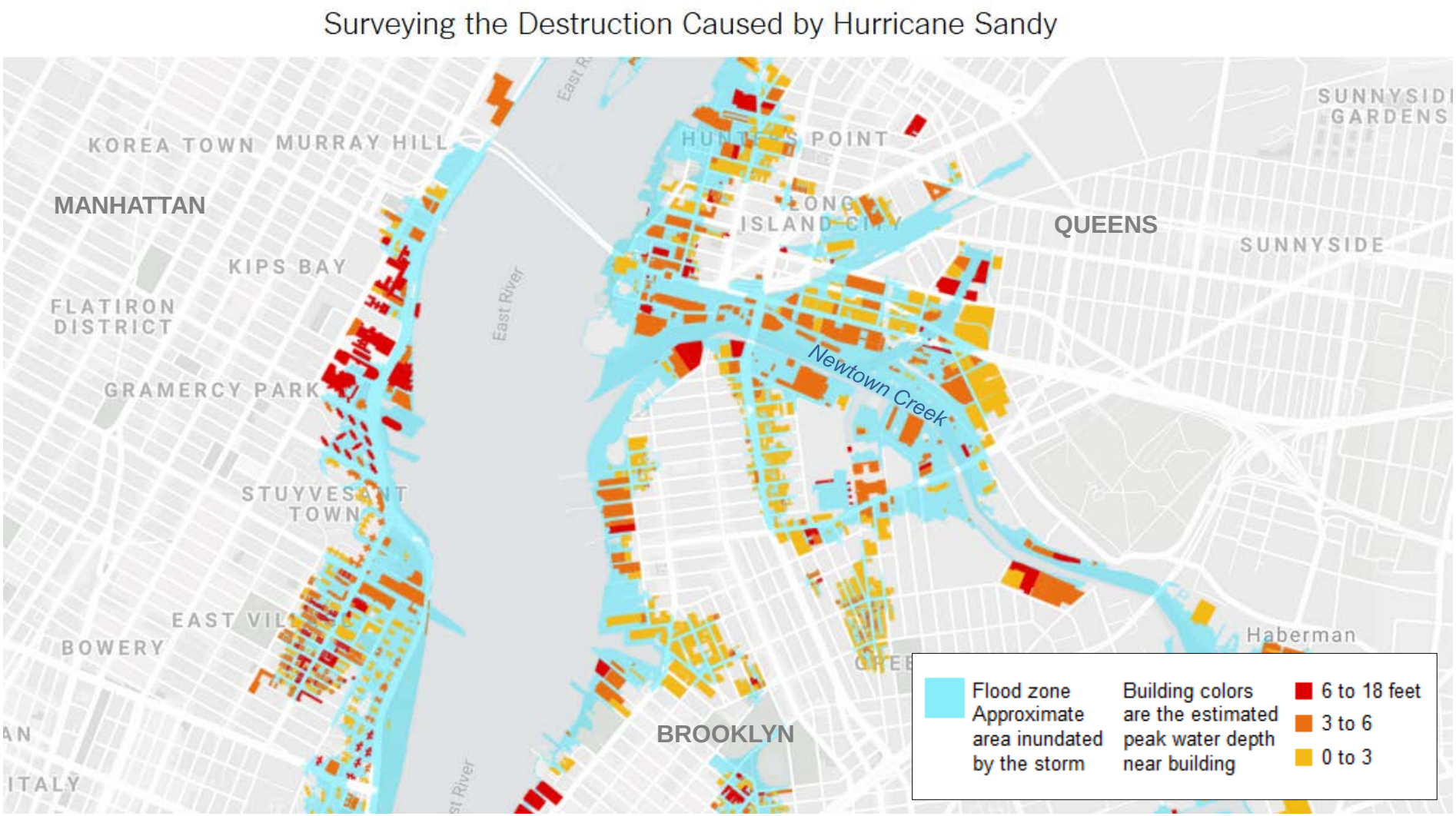
Intergovernmental Panel on Climate Change, October 6, 2018

Source:
IPCC: http://ipcc.ch/report/sr15/

Major Climate Report Describes a Strong Risk of Crisis as Early as 2040

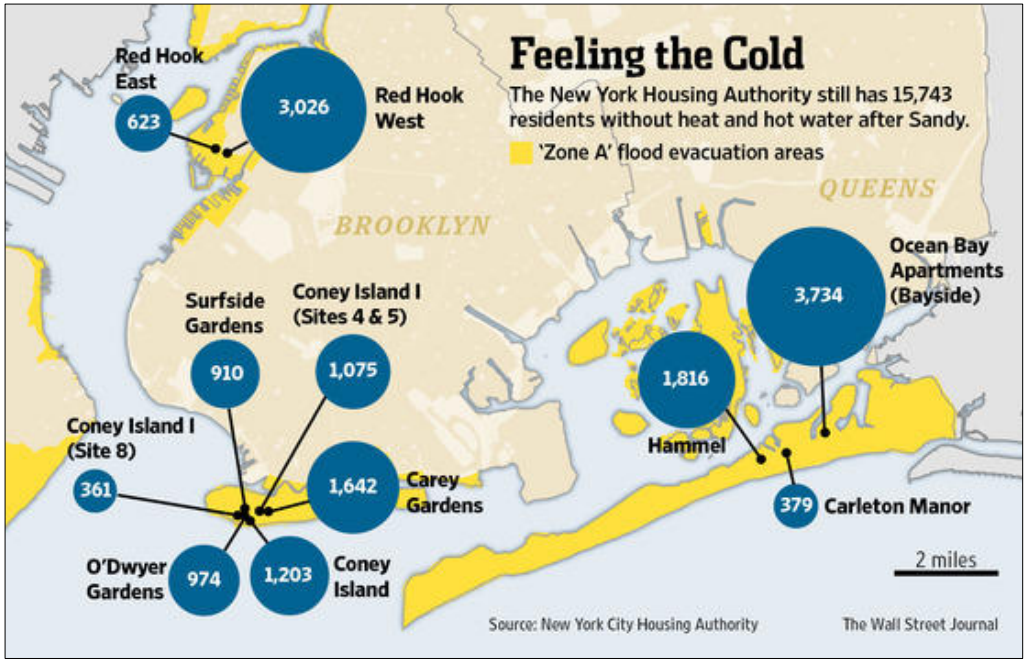
Source:
NY Times: https://www.nytimes.com/2018/10/07/climate/ipcc-climate-report-2040.html

Climate Change Impacts Us Now



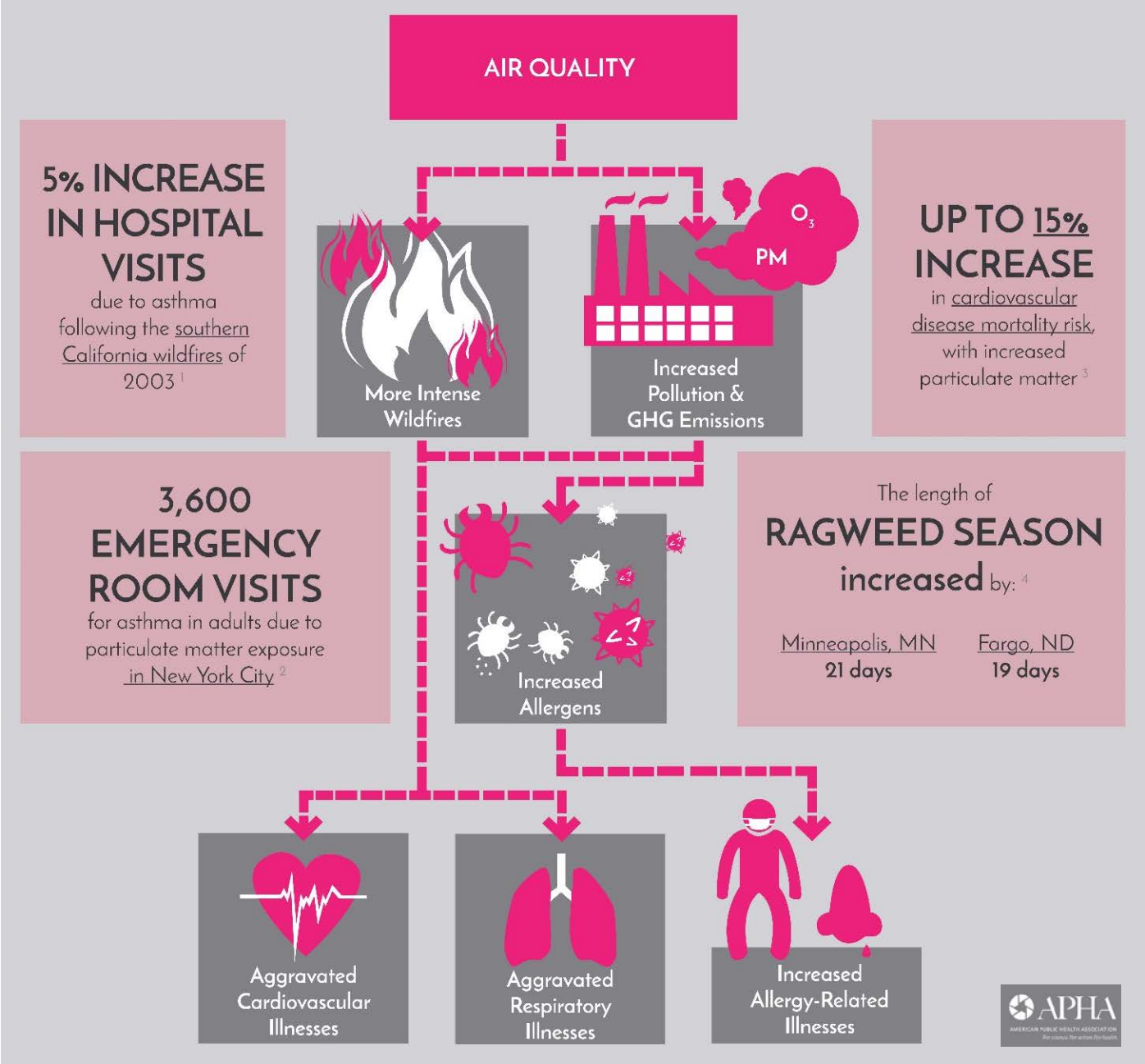
Sources:
NRDC: https://www.nrdc.org/climate-change-and-health-extreme-heat#/map
NY Times: http://www.nytimes.com/newsgraphics/2012/1120-sandy/survey-of-the-flooding-in-new-york-after-the-hurricane.html

Climate Change Impacts to EJ Communities



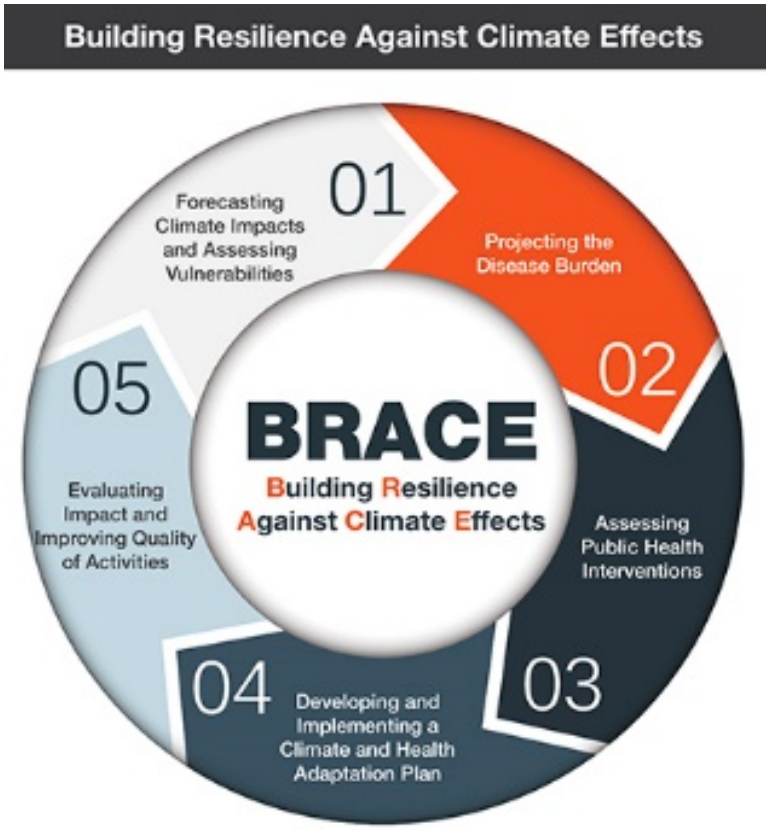
Sources:
Wall Street Journal: https://www.wsj.com/articles/SB10001424127887323551004578119502720476968
NY Daily News: http://www.nydailynews.com/new-york/nycha-gray-monster-residents-live-mold-won-die-article-1.1129343

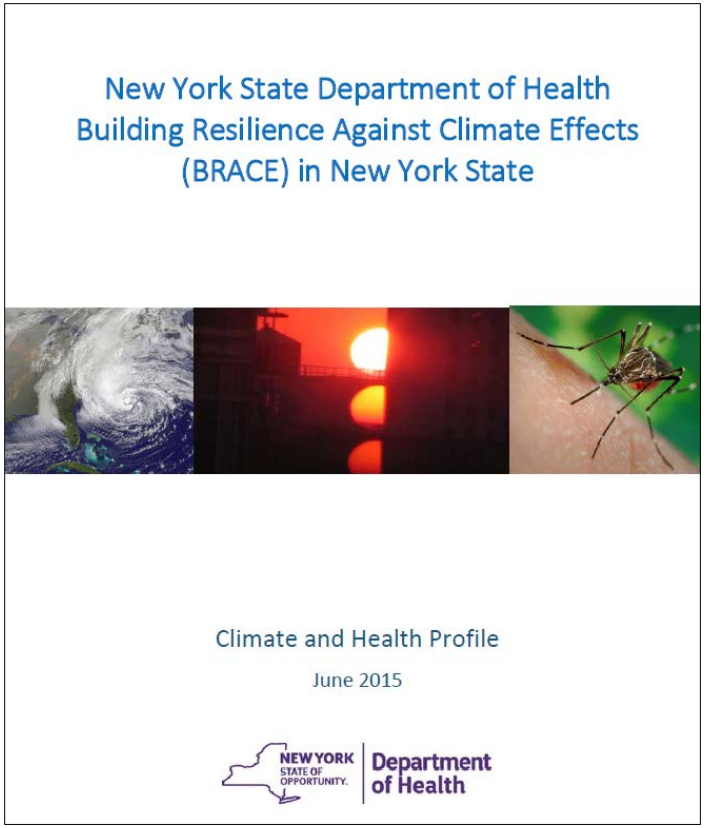
Climate Change Impacts Our Health



Source:
APHA https://www.apha.org/news-and-media/multimedia/infographics/how-climate-change-affects-your-health

Adapting to Climate Change

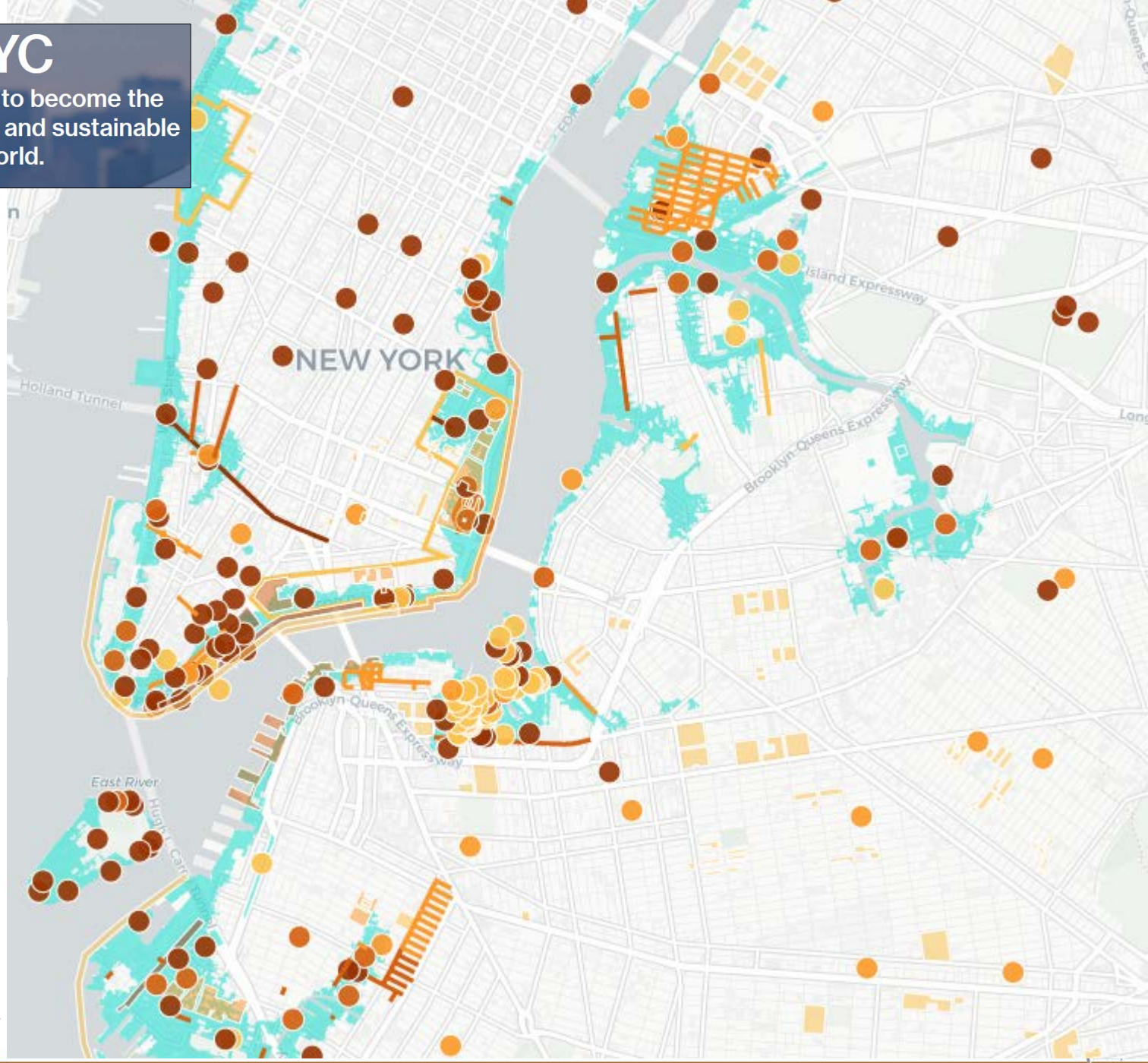




Sources:
CDC https://www.cdc.gov/climateandhealth/BRACE.htm
NYSDOH www.health.ny.gov/environmental/weather/docs/climatehealthprofile6-2015.pdf

OneNYC

is New York City's plan to become the most resilient, equitable, and sustainable city in the world.

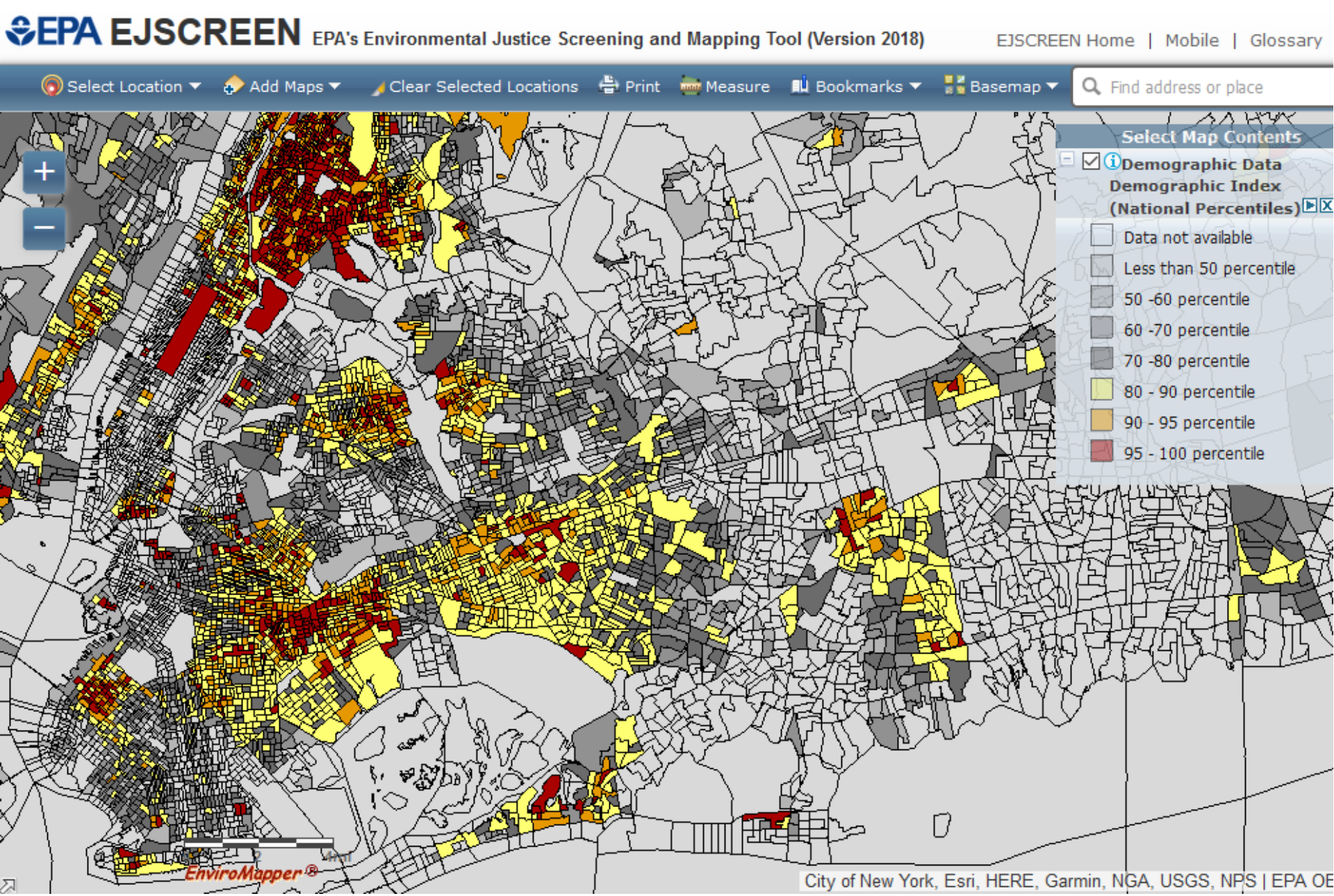


Recovery and Resiliency Projects:

- *Planning*
- *Design*
- *Construction*
- *Completed*

FEMA Modeling Task Force (MOTF) - Hurricane Sandy

Source:
NYC Office of Recovery and Resiliency
https://maps.nyc.gov/resiliency/



Sources:
EJSCREEN https://ejscreen.epa.gov/mapper/
Bloomberg https://www.bna.com/majority-superfund-sites-n73014450645/

Site Remediation and Climate Change

Climate Smart Brownfields Manual

Stage of Brownfield Project	Strategy	Adaptation	Mitigation
Planning	Adopt climate-conscious building codes	✓	
	Offer tax incentives/rebates	✓	✓
	Zoning ordinances	✓	✓
	Update floodplain management plans	✓	✓
	Update coastal and wetland management plans	✓	✓
	Update hazard mitigation plans	✓	✓
	Engage the community in planning	✓	✓

NYC Mayors Office, resiliency planning for Newtown Creek

Sources:
NYC Mayors Office, resiliency planning for Newtown Creek
NY Times: https://green.blogs.nytimes.com/2012/11/13/as-floods-recede-brooklynites-fear-contamination/

WE ACT FOR ENVIRONMENTAL JUSTICE

Community Leadership, Jobs, and Engagement: Community Lawyering for Equitable Solar Access

WHO WE ARE

Since 1988, we have worked to build healthy communities by ensuring that people of color and/or low income participate meaningfully in the creation of sound and fair environmental health and protection policies and practices.

- NORTHERN MANHATTAN BASED
- MOBILIZE PEOPLE OF COLOR AND/OR LOW INCOME
- ENVIRONMENTAL AND CLIMATE JUSTICE
- COMMUNITY-BASED PARTICIPATORY RESEARCH
- PLANNING AND PRACTICES
- FEDERAL, STATE, AND LOCAL POLICY

FOCUS AREAS

CLEAN AIR

CLIMATE JUSTICE

HEALTHY HOMES

SUSTAINABLE & EQUITABLE LAND USE

GOOD JOBS

Conditions in Northern Manhattan

- Over 600k residents, predominantly low to moderate income people of color
- Aging, multifamily tenement buildings, often with deferred maintenance
- Residents live primarily in rentals, public housing, or cooperatively owned buildings

Conditions in Northern Manhattan

- Housing/energy affordability crisis
- Unjust burden of climate impacts on people of color/ low-moderate income residents
- Superstorm Sandy- a major inflection point for conversation on climate resilience

Superstorm Sandy and Climate Chaos

- Knocked out power and destroyed homes all over New York City, parts of the city are still a mess (e.g. Rockaways and the subway)
- Climate-related extreme heat events increasing and expected to increase dramatically

WE ACT Community Response

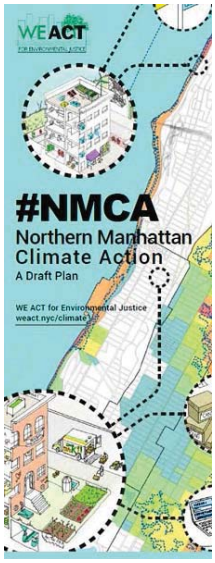
- Community not satisfied with climate solutions proposed by authorities; concern about gentrification and loss of affordable housing

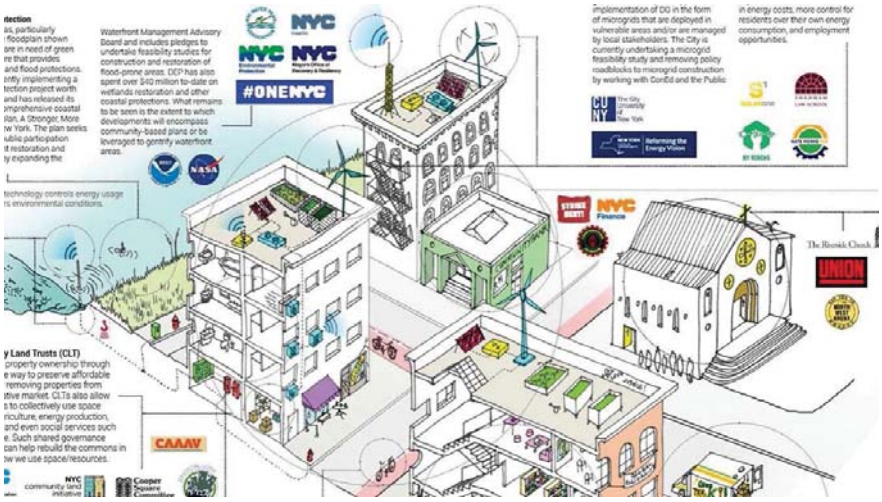
- Desire to prepare Northern Manhattan working class Black and Latinx residents for the next Sandy-type event or other climate-related stress or shock by improving energy security

Northern Manhattan Climate Action (NMCA)

- WE ACT organized a series of workshops with NM residents over six months, including community visioning and "serious games" in which residents responded to simulated climate disasters in real time.

Climate Action Plan





Operationalizing Community Priorities

Energy Democracy- i.e security and control over energy resources emerged as a main theme of the recommendations gathered from the community visioning.

WE ACT and community volunteers formed an Energy Democracy Working Group (EDWG) to work to advance the goals of NMCA

The group targeted Housing Development Fund Corporation (HDFC) low income co-op buildings to maximize climate resilience and affordable housing preservation benefits.

Solarize Launch Party (Oct 2017)

SOLAR UPTOWN NOW

WE ACT FOR ENVIRONMENTAL JUSTICE

SOLARone

CUNY

UHAB URBAN HOMESTEADING ASSISTANCE BOARD

Community Leadership

The EDWG and WE ACT collaborated with Sustainable CUNY, Urban Homesteaders Assistance Board (UHAB), Solar One, and New York Lawyers for the Public Interest to assist with outreach, technical, and legal assistance.

Organizing via Solarize Model

Solarize model: organizing eligible solar buyers into a portfolio to create better bargaining power and competition for benefits:

- Low pricing
- Transparency and responsiveness
- Hiring of WE ACT solar trainees

EDWG and partners worked in parallel to aggregate buildings into a portfolio while securing installer services

Has never been undertaken in a dense urban core setting before

Community Lawyering Model

Advocates contribute legal knowledge and skill to an issue or project that community has identified and prioritized:

- Working from behind, not in front
- Generative, not remedial outcomes

Community Leadership

The EDWG volunteers drove the process from the project's inception:

- Conduct outreach to eligible buildings, planned events and presentations
- Worked together to develop a set of values and priorities for choosing an installer via RFP
- Vetted applications and interviewed installers based on their proposals

Focus on Local Green Jobs

The EDWG prioritized the installers ability to provide jobs to WE ACT's solar workforce trainees. Ability and willingness to employ WE ACT trainees was weighted heavily in the RFP.

Our winning installer agreed to hire two trainees per installation team, and were open to continuing to hire WE ACT trainees as their operation expanded in Manhattan

Engineering, Procurement, and Construction

Buildings and installer entered into standard engineering, procurement, and construction (EPC) contracts

- Between installer and individual HDFC
- WE ACT w/ NYLPI and Loeb & Loeb LLP worked to negotiate stronger terms - i.e. relaxed payment schedules, acknowledgement of roof inspection and electrical study; fixed price within scope
- Issues with solar/aluminum tariffs vs need for fixed pricing

"Global" Project Development Agreement

WE ACT, with help from NYLPI and Loeb & Loeb LLP, crafted a separate agreement with our chosen installer in order to:

- Set parameters for work updates and external comms
- Extend portfolio pricing for a firm period
- Require WE ACT to continue outreach and referrals to installer contingent with installer meeting milestones
- Require interviewing and hiring of WE ACT trainees
- Hold WE ACT harmless for worker-related liability

Barriers and Hiccups

We engaged, sparred with, and broke up with our initial installer. Unable to come to terms on price, terms and conditions of EPC

- Uncertainty around solar PV and aluminum taxes upset installer's desire to commit to fixed pricing
- Inflated pricing beyond PPA feasibility, limiting our portfolio to buildings with cash reserves to pair with existing state and federal incentives
- Unsettled portfolio, and range of profitability between individual projects also deterred installer

Barriers and Hiccups

WE ACT and Solar One were forced to reissue RFP

- After several months, portfolio was more mature and enticing to installer, and may have led to more competitive bids
- Able to secure far better price per watt and stronger commitment to hire workers
- Favorable EPC template, which saved time and grief
- New installer elected level pricing across portfolio

Solar Uptown Now (S.U.N.) by the Numbers

S.U.N.

Buildings	Affordable Housing	Other
9	7	2

Progress

kW	%	kW Goal
408	272	150

Progress

Total Savings	Average kW	Jobs Created
$54,000	32.9	5

Electricity Use For 1 year

kW-Hours	Equivalent to	Equivalent To
3500 Mwh	**570 Cars** Off the road	un-burning **2.8 M** lbs. of coal

Benefits

Households	Residents	WE ACT Members
385	960	3

Examples of rooftop solar profiles






Key Takeaways:

Action and iteration can drive success

- Team moved forward without all the answers
- Negotiated conflicting and suboptimal timelines, adversity with building stakeholders, installers, and federal tariff disruptions to get 9 projects in off the ground in 18 months

Democracy is hard (but worth it)

- Community-led process was tricky but led to greater empowerment of community members

WE ACT's Regulatory and Legislative Advocacy

WE ACT, as part of the New York Energy Democracy Alliance, has prioritized community solar access and equitable energy efficiency implementation

- New Efficiency, New York policy rollout engagement
- NYSERDA intervention participation (REVitalize, Solar Facilitation on NYCHA and HDFC, Solar For All program
- aligned party re: VDER working group
- VDER legislation, public relations and activism

Evolving Ethics Issue

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New York State Bar Association
2019 Annual Meeting
Environmental Law Section

Ethics Panel – Interplay of Due Diligence Ethical Issues Between Environmental Engineers & Lawyers

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Panel Chairperson: Linda Shaw, Esq., Knauf Shaw LLP

Speakers:
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Impact - Kevin Kleaka, PG Executive VP
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Langan – Mimi Raygorodetsky, Senior Associate/ VP

I. Engineers and Environmental Professional's Code of Ethics in Relation to Due Diligence and Environmental Data

Recently, the New York State Department of Environmental Conservation (NYSDEC) and New York State Dpeartment of Health (NYSDOH) have been threatening engineers that unless they change their opinions to remove cover systems and vapor barriers they believe are jusitifed to be part of the remedy for sites in the Brownfield Cleanup Program (BCP), the agencies will not issue work plan approvals or a Certificate of Completion (COC) to their clients. In addition, the agencies have dissuaded consultants from applying new the June 2015 EPA Soil Vapor Intrusion guidance document, which contains formulas to develop standards for over 100 substances. NYSDEC and NYSDOH do not appear to be motivated because their policy position is better for human health and the environment, but rather to save the State of New York from paying more BCP tax credits. As a result of this type of policy decision, the Environmental Section of the Bar thought it would be timely to review both the ethical considerations faced collectively by attorneys and engineers in environmental due diligence and during remedial projects.

A. NSPE Code of Ethics

The National Society of Professional Engineers Code of Ethics indicates that Eningeers must "[h]old paramount the safety, health, and welfare of the public" and once authorized by their client, disclose data subject to applicable law or as required by the Code. They are also required under their Code of Ethics to apply applicable standards. *See* https://www.nspe.org/sites/default/files/resources/pdfs/Ethics/CodeofEthics/Code-2007-July.pdf.

Moreover, "Engineers having knowledge of any alleged violation of this Code shall report thereon to appropriate professional bodies and, when relevant, also to public authorities, and cooperate with the proper authorities in furnishing such information or assistance as may be required."

Therefore, there is a question of whether an engineer has an ethical obligation to report a NYSDEC or NYSDOH engineer who is requiring them to disregard data that could harm safety, health, and welfare of the public.

B. ASCE Code of Ethics

The Code of Ethics of the American Society of Civil Engineers (which generally is generally applicabel to environmental engineers), which is available at http://www.asce.org/code-of-ethics/, has an even more detailed provision:

> Engineers shall hold paramount the safety, health and welfare of the public and shall strive to comply with the principles of sustainable development in the performance of their professional duties.

a. Engineers shall recognize that the lives, safety, health and welfare of the general public are dependent upon engineering judgments, decisions and practices incorporated into structures, machines, products, processes and devices.
b. Engineers shall approve or seal only those design documents, reviewed or prepared by them, which are determined to be safe for public health and welfare in conformity with accepted engineering standards.
c. Engineers whose professional judgment is overruled under circumstances where the safety, health and welfare of the public are endangered, or the principles of sustainable development ignored, shall inform their clients or employers of the possible consequences.
d. Engineers who have knowledge or reason to believe that another person or firm may be in violation of any of the provisions of Canon 1 shall present such information to the proper authority in writing and shall cooperate with the proper authority in furnishing such further information or assistance as may be required.
e. Engineers should seek opportunities to be of constructive service in civic affairs and work for the advancement of the safety, health and well-being of their communities, and the protection of the environment through the practice of sustainable development.
f. Engineers should be committed to improving the environment by adherence to the principles of sustainable development so as to enhance the quality of life of the general public.

C. CHMM Code of Ethics:

A Chemical Hazardous Materials Manager's (CHMM's) primary responsibility is also to protect the public and the environment. All actions taken on behalf of a client or employer must be consistent with this primary responsibility. The interests of individual clients and employers must be **secondary** to protecting public health and safety, national security, and the environment. (emphasis added).
https://www.ihmm.org/sites/default/files/CHMM%20Code%20of%20Ethics%202015.pdf

D. AGI Guidelines for Ethics Conduct

While there is no specific Code of Ethics for geologist or qualified environmental professionals, the American Geoscience Institute (AGI) has guidelines for all geoscientists, which notes that the ethics statements of individual societies may expand beyond these guidelines.

The guidelines state the following:

> Geoscientists play a critical role in ethical decision making about stewardship of the Earth, the use of its resources, and the interactions between humankind and the planet on which we live. Geoscientists must earn the public's trust and maintain confidence

in the work of individual geoscientists and the geosciences as a profession. The American Geosciences Institute (AGI) expects those in the profession to adhere to the highest ethical standards in all professional activities. Geoscientists should engage responsibly in the conduct and reporting of their work, acknowledging the uncertainties and limits of current understanding inherent in studies of natural systems. Geoscientists should respect the work of colleagues and those who use and rely upon the products of their work.

In day-to-day activities geoscientists should:

- Be honest.
- Act responsibly and with integrity, acknowledge limitations to knowledge and understanding, and be accountable for their errors.
- Present professional work and reports without falsification or fabrication of data, misleading statements, or omission of relevant facts.
- Distinguish facts and observations from interpretations.
- Accurately cite authorship, acknowledge the contributions of others, and not plagiarize.
- Disclose and act appropriately on real or perceived conflicts of interest.
- Continue professional development and growth.
- Encourage and assist in the development of a safe, diverse, and inclusive workforce.
- Treat colleagues, students, employees, and the public with respect.
- Keep privileged information confidential, except when doing so constitutes a threat to public health, safety, or welfare.
- As members of a professional and scientific community, geoscientists should:

- Promote greater understanding of the geosciences by other technical groups, students, the general public, news media, and policy makers through effective communication and education.
- Conduct their work recognizing the complexities and uncertainties of the Earth system.
- Sample responsibly so that materials and sites are preserved for future study.
- Document and archive data and data products using best practices in data management, and share data promptly for use by the geoscience community.
- Use their technical knowledge and skills to protect public health, safety, and welfare, and enhance the sustainability of society.
- Responsibly inform the public about natural resources, hazards, and other geoscience phenomena with clarity and accuracy.
- Support responsible stewardship through an improved understanding and interpretation of the Earth, and by communicating known and potential impacts of human activities and natural processes.

The following documents are available on their website:
https://www.americangeosciences.org/community/agi-guidelines-ethical-professional-conduct

- 2015 AGI Guidelines for Ethical Professional Conduct (pdf)
- History, context, and intended use of the 2015 Guidelines (pdf)
- 2013 Consensus Statement on Ethics in the Geosciences (pdf)
- 1999 AGI Guidelines for Ethical Professional Conduct (pdf)
- Member Society Codes of Ethics and Statements on Ethics

II. Attorney's Applicable Code of Ethics Rules of Professional Conduct Provisions

Rule 1.6: Confidentiality of information.

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Part, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is

(a) protected by the attorney-client privilege,

(b) likely to be embarrassing or detrimental to the client if disclosed, or

(c) information that the client has requested be kept confidential.

"Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) **information that is generally known in the local community or in the trade, field or profession to which the information relates**.

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime;

(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;

(5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or

(ii) to establish or collect a fee; or

(6) when permitted or required under these Rules or to comply with other law or court order.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rule 1.6, 1.9(c), or 1.18(b).

Therefore, while Rule 1.6 (formerly DR 4-101) generally prohibits attorneys from revealing "confidential information" of a client, this Rule in environmental law may not relieve an attorney from an independent obligation to comply with reporting obligations under the law. *See* N.Y. Stat 681; *Matter of Balter v. Regan*, 63 N.Y.2d 630, 479 N.Y.S.2d 506 (1984), cert. den'd 469 U.S. 934, 105 S. Ct. 332 (1984).

Rule 1.9: Duties to former clients.

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 or paragraph (c) of this Rule that is material to the matter.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

Rule 1.18: Duties to prospective clients.

(a) Except as provided in Rule 1.18(e), a person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a “prospective client”.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing; or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the firm acts promptly and reasonably to notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(ii) the firm implements effective screening procedures to prevent the flow of information about the matter between the disqualified lawyer and the others in the firm;

(iii) the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) written notice is promptly given to the prospective client; and

(3) a reasonable lawyer would conclude that the law firm will be able to provide competent and diligent representation in the matter.

(e) A person is not a prospective client within the meaning of paragraph (a) if the person:

(1) communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship; or

(2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter.

III. Applicable Statutory and Regulatory Reporting Obligations

A. State Petroleum Reporting Obligations

In a now 20-year old decision of the DEC Commissioner, *In the Matter of Middleton, Kontokosta Associates, Ltd. (Dec. 31, 1998),* a consultant who merely observed an oil spill at a site was found to be in violation of the then reporting requirement in 6 NYCRR §613.8 applicable "to all above-ground and underground petroleum storage facilities with a combined storage capacity of over 1,100 gallons, including all facilities registered under Part 612 of this title":

> Any person with knowledge of a spill, leak or discharge of petroleum must report the incident to the department within two hours of discovery. The results of any inventory record, test or inspection which shows a facility is leaking must be reported to the department within two hours of the discovery. Notification must be made by calling the telephone hotline (518) 457-7362.

DEC Commissioner Cahill ruled that:

The term "any person" in §613.8 should be given a broad, not limited or restrictive, interpretation. The term "any person" is intended to apply, not only to persons who are "owners" and "operators", but also to all other persons with knowledge of a spill, leak or discharge in order to implement the remedial and preventive purposes of the Petroleum Bulk Storage Code, of which §613.8 is a part. The rationale for requiring "any person" to report a spill or discharge to the Department within two hours is obviously to enable stoppage of ongoing contamination as quickly as possible after detection of a spill. For example, in the case of an ongoing gush of oil from an overturned tanker truck on the highway, an immediate report will enable a quick response in order to minimize environmental damage. The reporting duty is on everyone with knowledge of the spill.

However, in 2015, this regulation was repealed and now 6 N.Y.C.R.R. §613-2.4(d)(1) states:

> A ***facility*** must report every spill to the Department's Spill Hotline (518-457-7362) within two hours after discovery, contain the spill, and begin corrective action except if it meets the following conditions:
>
> (i) It is known to be less than five gallons in total volume;
> (ii) It is contained and under the control of the spiller;
> (iii) It has not reached and will not reach the land or waters of the State; and
> (iv) It is cleaned up within two hours after discovery. [emphasis added].

See also 6 N.Y.C.R.R. §613-1.2(d), which limit the requirements under the regulations, including the spill reporting requirement, to the facility operator or tank system owner. However, a "facility" now also includes an underground storage system having a storage capacity that is greater than 110 gallons. 6 N.Y.C.R.R. §613-1.3(v) Therefore, any owner or operator of "one or more tank systems having a combined storage capacity of more than 1,100 gallons (including a major facility), or "an underground tank system having a storage capacity that is greater than 110 gallons pursuant to the recent facility definition in 6 N.Y.C.R.R. §613-1.3(v) must still report a spill to the hotline.

To make matters more confusing the New York Oil Spill Law still includes the "any

person" language, and at Navigation Law §175, provides that "***[a]ny person responsible for causing a discharge*** shall immediately notify the department pursuant to rules and regulations established by the department, but in no case later than two hours after the discharge."

Regulations at 17 N.Y.C.R.R. §§32.3 and 32.4 (methods of notifcation via the Hotline) implement that statute.

> §32.3 Requirement of notification.
> Any person responsible for causing a discharge which is prohibited by section 173 of the Navigation Law shall immediately notify the department, but in no case later than two hours after the discharge. In addition, the owner or operator of any facility from which petroleum has been discharged in violation of section 173 of the Navigation Law, ***and any person who was in actual or constructive control of such petroleum immediately prior to such discharge***, shall immediately give the department the notification required by this Part unless such owner, operator or person has adequate assurance that such notification has already been given.

Under §32.3, the notification requirement under Navigation Law §175 extends to "[a]ny person responsible for causing a discharge," "the owner or operator of any facility from which petroleum has been discharged," and "any person who has actual or constructive control of such petroleum immediately prior to such discharge." Notification is required by a telephone call to the DEC spill hotline, and a list of detailed information that must be provided with the notification is set forth at 17 N.Y.C.R.R. §32.4(b).

For example, in *State v. Williams*, 26 Misc.3d 743 (Sup. Ct. Albany Co. 2009), *aff'd*, 73 A.D.3d 1401 (3rd Dept. 2010), *leave to appeal denied*, 15 N.Y.3d 709 (2010), NYSDEC's action under the Navigation Law against deliverer of fuel to the site was upheld when NYSDEC spill manager concluded that discharge(s) of petroleum occurred during the delivery process to both tanks because contamination was physically located on top of the underground storage tanks and the deliverer had constructive knowledge and control of the spill.

While the reporting requirement under 6 N.Y.C.R.R. §613.8 appears limited to regulated bulk tanks, the reporting requirement under Navigation Law §175 is not limited to bulk tanks, and covers any unpermitted "discharges," as defined by the New York Oil Spill Law. See also Navigation Law §172(8).

Finally, New York Environmental Conservation Law §17-1743 sets forth the following reporting requirement:

> Any person who is the owner of ***or in actual or constructive possession or control of more than 1,100 gallons***, in bulk, of any liquid, including

> petroleum, which if released, discharged or spilled would or would be likely to pollute the lands or waters of the state, including the groundwaters thereof shall, as soon as he has knowledge of the release, discharge or spill of any part of such liquid in his possession or control onto the lands or into the waters of the state including the groundwaters thereof immediately notify the department.

Thus, this provision requires an immediate call to the DEC spill hotline for a spill from a facility that stored more than 1,100 gallons of petroleum or any other liquid that might pollute ground or surface waters.

One of the questions the consultant teams will explore is whether a consultant working on a Phase II investigation is "in actual or constructive possession or control of more than 1,100 gallons" if they have visual evidence that a more than 1,100 gallon tank has leaked and is likely actively migrating to a sensitive receptor.

NOTE: This new regulation and 6 N.Y.C.R.R. §613-2.4(d)(1) are inconsistent with the general advice 'recommendation' DEC still provides on their website, which states that 'anyone with knowledge of a release must report within two hours of discovery'. http://www.dec.ny.gov/chemical/8692.html

B. Other Hazardous Substance and Federal Reporting Obligations

1. CERCLA. Reporting is required by "any person in charge of [a] facility... as soon as he or she has knowledge," to the National Response Center at (800) 424-8802, of any release, of a "reportable quantity" within a 24-hour period of a CERCLA hazardous substance, 40 C.F.R. §302.6(a), except for certain continuous releases. 40 C.F.R. §302.8.

2. SARA Title III Reporting. Pursuant to SARA (Superfund Amendments and Reauthorization Act of 1986) Title III, at 42 U.S.C. §11004, the "owner or operator of a facility" must "immediately" report a release or spill of a reportable quantity of a CERCLA hazardous substance or an "extremely hazardous substance" designated by 40 C.F.R. §355.40(a) to "the community emergency coordinator for the local emergency planning committee of any area likely to be affected by the release" and the NYSDEC Spill Hotline. 40 C.F.R. §355.42. For transportation-related releases, the report may be made by calling 911. 40 C.F.R. §355.42. Exemptions are provided for any release that "results in exposure to persons solely within the boundaries of the facility," federally-permitted releases, and continuous releases meeting the requirements of 40 C.F.R. §302.8(b). 40 C.F.R. §§355.31, 355.32.

3. RCRA Facility Reporting. If a hazardous waste treatment, storage or disposal facility has "a release, fire or explosion" by which a hazardous waste "could

threaten human health or the environment outside the facility," federal and state RCRA regulations require that its "emergency coordinator" must immediately notify local authorities, and call the National Response Center at (800) 424-8802 or the federal "on-scene coordinator" designated under the National Contingency Plan, and in New York the state spill hotline, (800) 457-7362, to report information specified at 6 N.Y.C.R.R. §373-2.4(g)(4)(ii). See also 40 C.F.R. §264.56(d). Similar requirements also apply to "accumulators" of hazardous wastes. 6 N.Y.C.R.R. §372.2(a)(8)(ii), 373-1.1(d)(iii)(c)(5), 373-3.4(g)(4)(iii). 40 C.F.R. §262.34(d)(5)(iv)(C).

4. Federal UST Regulations. Federal regulations at 40 C.F.R. Part 280 cover underground storage tanks ("USTs") of at least 110 gallons that store petroleum or any substance defined as hazardous under CERCLA other than hazardous waste. See 40 C.F.R. §§280.10, 280.12. If there is a spill or overfill of petroleum of either more than 25 gallons or that causes a sheen on nearby surface waters, or a CERCLA reportable quantity of a hazardous substance, "owners and operators of the UST system" must report the spill within 24 hours to the NYSDEC Spill Hotline. 40 C.F.R. §280.53(a)(1). If spills of less than 25 gallons or less than a reportable quantity cannot be cleaned up within 24 hours, they must also be reported. 40 C.F.R. §280.53(b).

5. Surface Water Spills. Clean Water Act §311(b)(5), 33 U.S.C. §1321(b)(5) requires that "[a]ny person in charge... shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from [a] vessel or facility" of a "harmful quantity" must "immediately notify" the National Response Center at (800) 424-8802. "Hazardous substances" and their reportable quantities are designated by 40 C.F.R. Part 116. 40 C.F.R. §117.21. For oil, a quantity which violates an applicable water quality standard, or which causes a sheen on the water, 40 C.F.R. §110.3, must be reported. 40 C.F.R. §110.6.

6. Releases of Hazardous Substances in New York. Releases of designated quantities, within 24 hours, of hazardous substances listed at 6 N.Y.C.R.R. Part 597 "must be reported to the Department's Spill Hotline (518-457-7362) within two hours after discovery by any person in actual or constructive control or possession of the hazardous substance when it is released, or any employee, agent, or representative of such person who has knowledge of the release." 6 N.Y.C.R.R. §597.4(b)(1). Also, releases of lesser quantities which cause or "may reasonably be expected to cause" "a fire with potential off-site impacts," an explosion, "vapors, dust and/or gases," which may cause illnesses (not including illnesses to persons in the same building), or contravention of air or water quality standards, must also be reported. 6 N.Y.C.R.R. §597.4(b)(2). A spill that is completely contained and accounted for or recovered within two hours, does not reach land or waters, and does not result in impacts listed above, need not be reported. 6 N.Y.C.R.R §597.4(b)(3). Hazardous substances under this regulation do not

include petroleum unless part of a blend. 6 N.Y.C.R.R. §597.1(b)(7)(b). Since the spill reporting requirement applies to "any employee, agent, or representative of such person who has knowledge of the release," 6 N.Y.C.R.R. §597.4(b)(1), it probably applies to consultants, and perhaps even attorneys.

C. Privileged Materials.

The attorney/client privilege under CPLR §4503 protects "communications made in confidence to an attorney for the purpose of seeking professional advice." *Matter of Jacqueline F.*, 47 N.Y.2d 215, 219, 417 N.Y.S.2d 884, 887 (1979). CPLR §3101(c) exempts the work product of an attorney from disclosure, which "includes memoranda, correspondence, mental impressions and personal beliefs conducted, prepared or held by the attorney." *Manufacturers and Traders Trust Co. v. Servotronics, Inc.*, 132 A.D.2d 392, 396, 522 N.Y.S.2d 999, 1002 (4th Dep't 1987).

However, if the material could have been prepared by a lay person, it is not covered. Connors, *McKinney's Practice Commentary* C3101:28. CPLR §3101(d)(2) protects "materials prepared in anticipation of litigation" unless "undue hardship" and "substantial need" are shown. This includes non-party witness statements. *Yasnogordsky v. City of New York*, 281 A.D.2d 541, 722 N.Y.S.2d 248 (2d Dep't 2001). Further, CPLR §3101(g) allows discovery of accident reports. While an investigation or accident report prepared in the ordinary course of business is normally discoverab le, reports prepared exclusively for purposes of anticipated litigation are presumptively shielded. *Landmark Insurance Co. v. Beau Rivage Restaurant, Inc.*, 121 A.D.2d 98, 509 N.Y.S.2d 819 (2d Dep't 1986); Connors, *McKinney's Practice Commentary* C3101:33. *See also* FRCP Rule 26(b)(3). Different rules apply to experts retained solely for litigation purposes under CPLR §3101(d) and FRCP Rule 26.

IV. Relevant Caselaw

Often both consultants and attorneys think that environmental data can be protected under the attorney client privilege if an attorney hires the consultant to perform the Phase II investigation. Merely routing data and studies through a lawyer does not make them privileged. Connors, McKinney's Practice Commentary C3101:35. Therefore, having the attorney subcontract with the consultant may not do any good, although it may make the attorney responsible to pay the bill if the client does not (a good reason not to engage in this practice). The following caselaw concludes data is NOT protected even though communications between the attorney and consultant about the data can be protected.

1. *U.S. Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156 (E.D.N.Y. 1994)

Here, the court concluded that underlying factual **data** generated through studies and collected through observation of physical condition of property can never be protected by attorney-client

privilege and neither can the resulting opinions and recommendations.

There are few, if any, conceivable circumstances where scientist or engineer employed to gather **data** should be considered agent within scope of attorney-client privilege since information collected will generally be factual, obtained from sources other than client.

2. *ECDC Envtl. v. New York Marine & Gen. Ins. Co.*, No. 96CIV.6033(BSJ)(HBP), 1998 WL 614478, at *8 (S.D.N.Y. June 4, 1998)

In this case, the court found that Defendants made a claim of attorney-client privilege that went well beyond the "outer boundary" of the privilege. Unlike a computer study at issue in *Federal Trade Comm'n v. TRW, Inc.*, 628 F.2d 207 (D.C.Cir.1980), which arguably was undertaken to assist the attorneys in litigation, the studies and work performed by Hart and Conestoga Rovers [an environmental consultant firm] clearly served other purposes. Moreover, these consultants based their opinions on factual and scientific evidence they generated through studies and collected through observation of the physical condition of the Property, information that did not come through client confidences. Such underlying factual data can never be protected by the attorney-client privilege and neither can the resulting opinions and recommendations. There are few, if any, conceivable circumstances where a scientist or engineer employed to gather data should be considered an agent within the scope of the privilege since the information collected will generally be factual, obtained from sources other than the client.

3. *NL Indus., Inc. v. ACF Indus. LLC*, No. 10CV89W, 2015 WL 4066884, at *7 (W.D.N.Y. July 2, 2015)

In *ECDC Environmental*, the court found that the expert's factual and scientific evidence and the opinions and recommendations derived therefrom did not come through client confidences and thus was not protected by attorney-client privilege, concluding that "there are few, if any, conceivable circumstances where a scientist or engineer employed to gather data should be considered an agent within the scope of the privilege since the information collected will generally be factual, obtained from sources other than the client."

4. *In the Matter of CONSUMERS POWER COMPANY (Midland Plant, Units 1 and 2) NUCLEAR REGULATORY COMMISSION ATOMIC SAFETY AND LICENSING BOARD*, 14 N.R.C. 1768, 1981 WL 27775 LBP–81–63 (Docket Nos. 50–329–CP, 50–330–CP December 22, 1981)

Attorneys were sanctioned but not fined for failure to disclosure all data in their possession. The Commissioner stated that "Material is not privileged simply because it is an attorney's possession." *See Hickman v. Taylor*, 67 S. Ct. 385; 329 U.S. at 511.

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his

clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case (153 F.2d 212, 223) as the 'Work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty. Were production of written statements and documents to be precluded under such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning. But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order. That burden, we believe, is necessarily implicit in the rules as now constituted *Zucker v. Sable*, 72 F.R.D. 1, 3 (S.D.N.Y. 1975).

5. *Dunning v. Shell Oil Co.*, 57 A.D.2d 16, 393 N.Y.S.2d 129 (3d Dep't 1977).

Data (even if gathered by a litigation expert) and reports that are prepared in the normal course of business or submitted to government agencies are discoverable, including test results, Phase I and II reports, and remedial investigations.

6. *In Occidental Chemical Corp. v. Ohm Remediation Services Corp.*, 45 ERC 1821 (W.D.N.Y. 1997).

The defendant was allowed discovery of documents produced by the plaintiff's consultant, who was originally hired by the plaintiff's former law firm to handle site remediation.

V. Three Ethical Due Diligence Case Studies

1. **Petroleum Spill Reporting – Who is responsible and what are Attorney and Engineer/Consultant's ethical obligations under their respective Code of Ethics.**
2. **Attorney and environmental engineer/consultant ethics in relation to Emerging Contaminants compounds in standard environmental due diligence**
3. **Ethical Disclosure of Prior Malpractice by Attorney and Engineer in relation to a prior Phase I Due Diligence Investigation**

Ethical Case Study #1 -

Consultant, who is performing a Phase II investigation representing the seller/owner of a facility that has been in operation for 20 years, discovered a "reportable" free product petroleum spill that appears to be from a tank the consultant knows is larger than 1,100 gallons. Attorney, who represents the same seller/owner, reminds the Consultant they no longer need to report the spill to NYSDEC under new petroleum bulk storage reporting regulations, and that only their client, the site owner needs to report. Consultant calls seller/owner who advises the consultant not to report and adds that they do not intend to report and asks the consultat to "keep the information quiet". The Consultant is upset and calls Attorney to advise they believe they have to report the spill due to their Engineer/CHMM's ethical obligations under their respective Code of Ethics because it is pure product and the source area is adjacent to a school foundation. They explain their Code of Ethics dictate that the interests of the individual client must be secondary to protecting public health and safety, and the environment and NYSDEC still has on its website the general recommendation for "any person" to report a spill. The Attorney calls the Owner to advise his that the Consultant intends to disclose the spill. The Owner is furious and tells the Attorney to stop the Consultant from making the report. The Attorney starts to question their own ethical obligations in light of the consultant's ethical obligations and whether the Attorney can advise the Consultant to not report the spill, and if they have their own reporting obligations.

Ethical Case Study #2 –

Consultants and attorneys are currently being asked by NYSDEC to require their clients to investigate PFAS and 1,4-dioxane emerging contaminants at pre-existing remedial sites

despite the lack of New York State approved standards. The State has just proposed PFAS drinking water quality standards of 10 parts per trillion (ppt) for PFOS and PFOA, and 1 parts per billion for 1,4-dioxane but not for any of the other 19 PFAS compounds parties are being asked to sample. The State has also declared these two PFAS contaminants hazardous substances. However, the federal EPA has NOT declared any PFAS compounds as hazardous substances even though EPA has created a 70 ppt health advisory level.

An Attorney and environmental consulting firm are engaged in standard environmental due diligence on a site that has a brownfield history and they are representing a buyer. The Attorney asks the Consultant if they should be asking more questions of the seller's property contact, such as whether a fire ever occurred on the site and if fire fighting foam, which contains PFAS compounds, was ever used, or if plastics manufacturing, use of scotch guard or use of Teflon or other PFAS containing compounds were used and if so, if such history should be noted in the Phase I as a Recognized Environmental Condition (REC). The Consultant responds that it is not required to do this because under the ASTM standards, PFAS emerging contaminants are not hazardous substances. The Attorney responds: "but two PFAS compounds are now hazardous substances under State law and we are representing a buyer so we should be more cautious." The Attorney and Consultant each discuss their ethical due diligence obligations if they should make further inquiries or not regarding emerging contaminants even though there are no established "standards" for PFAS at the federal level and no approved standards in New York.

Ethical Case Study #3 -

A prospective purchaser relies on a "clean" Phase I Environmental Site assessment report, which the purchaser paid for, but was performed by a Consultant hired by a bank, to purchase a site that states the site was historically a lumber yard since the 1950s but this did not consistute a recognized environmental condition (REC). The Consultant relied upon the standard databases to perform the Phase I, which did not reveal any spills, etc. but a standard Google search would have revealed that the site was a former radioactive plant associated with the Manhattan Project. The purchaser buys the site in reliance upon the Phase I and later finds out about the radioactive history of the site. The purchaser hires an attorney and new environmental consultant to determine if the first consultant committed malpractice in relation to a prior Phase I Environmental Investigation and whether the bank should be sued.

VI. Due Diligence Procedures

A. Phase I ESA.

1. **Phase I Requirements.** The Phase I must be conducted by an "environmental professional," 40 C.F.R. §312.21, and completed within one year of closing, with certain aspects updated within 180 days of closing. 40 C.F.R. §312.20. It must either meet ASTM Standard

E1527-13, or the requirements set forth at 40 C.F.R. §§312.20-312.31, including interviews with past and present owners, operators, and occupants, reviews of historical sources of information, searches for recorded environmental cleanup liens, reviews of government records, visual inspections of the facility and adjoining properties, and consideration of specialized knowledge or experience of the purchaser, the relationship of the purchase price to the value of the property if not contaminated, commonly known or reasonably ascertainable information about the property, the degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation.

2. **RECs.** Normally the Phase I ESA will identify whether a recognized environmental condition ("REC") exists. ASTM Standard E1527-13 defines RECs as "the presence or likely presence of any hazardous substances or petroleum products in, on or at a property: (1) due to any release to the environment; (2) under conditions indicative of a release to the environment; or (3) under conditions that pose a material threat of future release to the environment." A Phase I may also identify an historic recognized environmental condition ("HREC"), or a controlled recognized environmental condition ("CREC").

3. **Data Gaps.** These are "a lack of or inability to obtain information required by the standards and practices listed in [40 C.F.R. Part 312] despite good faith efforts by the environmental professional or persons" seeking to claim CERCLA defenses. Gaps should be avoided, and often are due to failures to complete FOIL requests, abstract of title reviews or interviews, and can easily be plugged, if only with supplements.

4. **Certification.** Like an instrument survey, Phase I and II ESAs should be certified to the buyer and buyer's attorney, as well as any lender and environmental insurer. In *Ridge Seneca Plaza LLC v. BP Products North America Inc.*, 2013 U.S. App. LEXIS 21999 (2d Cir. 2013), a Phase I ESA was certified to contract vendee, but later a sole-purpose LLC was formed that was assigned the contract and took title. As a result, negligence claims against the consultant were dismissed due to lack of privity.

B. Phase II Study. Phase II is an intrusive investigation where soil, groundwater, vapor or building materials are sampled and tested. A Phase II is normally undertaken when a Phase I ESA identifies RECs that determines a likelihood of contamination. The goal of a Phase II is to confirm environmental contamination. A purchaser is not required to perform a Phase II in order to qualify for defenses, but since the purchaser

must perform due care in relation to the property and stop any ongoing releases in order to maintain the bona fide prospective purchaser defense, sometimes it make sense to perform the Phase II to investigate the potential RECs. While Phase II ESAs are quite different depending on the site conditions and RECs, ASTM Standard E1903-11 addresses Phase IIs. Normally, a Phase II, at a minimum, will compare contaminant levels with "applicable or relevant requirements," including Soil Cleanup Objectives set forth at 6 N.Y.C.R.R. Part 375-6, NYSDEC Soil Cleanup Guidance CP-51 (Oct. 2010), surface and groundwater standards at at 6 N.Y.C.R.R. Part 703, and vapor standards in agency guidance on vapor intrusion, including NYSDOH, *Guidance for Evaluating Soil Vapor Intrusion in the State of New York* (Dec. 2006) and *Updates to Soil Vapor/Indoor Air Decision Matrices* (May 2017). However, a consultant is not limited to state applicable or relevant requirements under ASTM or Ethics and therefore should also look at new requirements such as the June 2015 EPA guidance document on Soil Vapor intrusion, which includes formulas to calculate vapor exceedances for over 100 substances.

[NOTE: For a while both NYSDEC and NYSDOH were telling consultants not to review this applicable and relevant guidance document. After informing USEPA that NYSDEC and NYSDOH were improperly advising consultants in New York not to analyze vapor samples under this EPA guidance document, during a BCP dispute over high exceedances of benzene at a petroleum site where the agencies were concluding no vapor mitigation was needed simply because there were no exceendances of their own State matrices, the agencies were admonished by EPA and DEC lost the BCP dispute. Consultants should use this guidance because it is applicable and relevant. Arguably, this is another instance where the State agencies were advising consultants to violate their own Code of Ethics. This BCP Dispute went through the entire current dispute resolution process, which no longer requires a hearing by an administrative law judge. The NYSDEC administrator selected to decide the dipsute ruled against his own DEC colleagues and agreed the site required a soil vapor barrier presumably because the USEPA guidance exceedances for benzene were relevant and applicable. There was no specific opinion on the Code of Ethics violation but this was raised in the dispute].

In sum, Attorneys and Consultants have ethical obligations that must be considered during the environmental due diligence and site remedial process. If State agencies ask a consultant or attorney to violate their code of ethics, not only should the attorney and consultant advise the agencies that they cannot violate their own Code of Ethics by disregarding data that may impact public health and the environment, but the Attorney and Consultant may have an ethical obligation to report the State engineer trying to force them to do so. This is a relatively new field of law that is continuing to emerge as we learn about new chemicals and their impact on the environment and public health. Therefore, being cautious, but also protecting our client's interest is a delicate balancing act. The ethics associated with this balancing act were analyzed in this article and intended to illustrate basic principles while parties evaluate site specific facts, which may dictate being overly cautious or being more protective of the client's interests.

Speaker Biographies

Jose Almanzar, Esq.

Jose Almanzar is an Associate Attorney at Periconi, LLC, where his practice focuses on environmental due diligence counseling for commercial real estate transactions, environmental regulatory matters, and environmental litigation. Prior to joining Periconi, LLC, Jose provided counsel to Fortune 100 clients with environmental due diligence and project development, and has represented parties in mass environmental tort matters across the country.

Jose received his Juris Doctor degree, *cum laude*, from New York Law School, where he focused his studies on environmental and land use law, and graduated in the top twenty percent of his class. Prior to attending law school, Jose worked as an environmental scientist for a national environmental consulting company, where he conducted site surveys and prepared Phase I Environmental Site Assessments, Asbestos Assessment Reports and Lead-Based Paint Reports.

MICHAEL BOGIN

SHAREHOLDER

SIVE PAGET & RIESEL, P.C.

Michael Bogin's practice focuses on environmental regulation and permitting, with emphasis on solid waste management, brownfield cleanup and waterfront development matters. A principal at SPR, Michael has led the environmental teams on dozens of residential and commercial brownfield cleanup and waterfront projects in Williamsburg, Greenpoint, Coney Island, Far Rockaway, Long Island City, Maspeth, Port Morris, Staten Island and the lower Hudson Valley. Following hurricanes Irene and Sandy, Michael developed significant expertise in coastal resiliency and FEMA flood zone issues and co-chaired a full-day forum on these topics at Hofstra University School of Law. Michael co-chairs the Solid Waste Committee of the EELS, and Chairs the Westchester Chapter of the New York League of Conservation Voters.

Ben Brazell is a Principal and Director of Environmental Services for Environmental Design & Research, Landscape Architecture, Engineering & Environmental Services, D.P.C. With over 15 years of environmental consulting experience, Ben has been directly involved in the environmental review and permitting of dozens of commercial wind and solar power projects (primarily located in New York and Ohio). Ben's specialized expertise includes environmental impact analysis, Article 10 and SEQRA compliance in New York, Ohio Power Siting Board compliance, state and federal wetland permitting, and overseeing large-scale, complex regulatory permitting processes. He is currently serving as the Senior Project Manager and/or Principal-In-Charge for approximately 12 projects that fall under the jurisdiction of Article 10, including the Cassadaga Wind Project, which the first project to submit an Article 10 Application, and the only project to receive a Certificate of Environmental Compatibility and Public Need from the New York State Board on Electric Generation Siting and the Environment. Ben also has specialized training and expertise in stream restoration and mitigation, wetland delineations, ecological surveys, and shadow flicker analysis.

Keith Brodock

Mr. Keith Brodock is a licensed professional engineer and project manager with over 15 years of experience in environmental engineering, remediation design, and construction. As a professional engineer, Mr. Brodock has responsibilities ranging from oversight of investigation and remediation to cost estimation and project execution. His experience includes sites impacted with chlorinated solvents, petroleum compounds, polychlorinated biphenyls (PCBs), and constituents of emerging concern, such as perfluoroalkyl substances (PFAS). One of his primary responsibilities is serving as president of Integral Engineering, P.C., which provides engineering services in New York, New Jersey, and North Carolina.

Mr. Brodock has overseen projects in New York and across the country. He routinely advises clients on risk management, site investigation and remediation, regulatory climate, and mitigation measures for contaminated properties. Mr. Brodock has considerable experience in developing strategic plans for remediation that meet wide-ranging stakeholder needs. He is a remediation design engineer integrating sustainability into designs and he serves as resident engineer on multiple construction projects in the New York City and New Jersey areas. Mr. Brodock also has substantial litigation support experience on cases involving a range of remediation issues, engineering cost analysis, and liability allocation.

Richard Clarkson
Director, Bureau of Solid Waste Management
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As the director of the Bureau of Solid Waste Management, Mr. Clarkson and his staff regulate solid waste management facilities and waste transporters, review and approve local solid waste management plans, administer state recycling assistance grants to municipalities, and oversee the abatement of illegal tire sites among other activities. Mr. Clarkson has worked for the Department since 1997. He is a professional engineer and received his bachelor's degree in Environmental Engineering from Rensselaer Polytechnic Institute.

Bronx Borough President Ruben Diaz, Jr.

Ruben Diaz Jr. first entered public office as a member of the New York State Assembly in 1997, and is currently serving his third full term as Bronx Borough President, having been reelected in November 2017 with more than 88 percent of the vote.

As borough president, Ruben Diaz Jr. has led the implementation of a robust agenda—on economic development, housing, health and wellness, NYCHA, education, and public safety—in every corner of the borough. The Bronx has seen unprecedented development and job growth since he first took office in 2009.

A lifelong resident of the Bronx, Borough President Diaz lives in the Southeast Bronx with his wife Hilda Gerena Diaz. They have two sons, Ruben Diaz III and Ryan Isaiah Diaz. He graduated from Lehman College, City University of New York, with a Bachelor's degree in political theory.

Stephan Roundtree, Esq. - WE ACT for Environmental Justice (PRESENTER):

As Environmental Policy and Advocacy Coordinator, Stephan's work focuses on policy development, advocacy, on issues of energy efficiency and equity, climate resilience, and toxic hazard abatement and mitigation. He also develops political education curricula, engages community members in WE ACT's policy initiatives, and work to grow the organization's political power through strategic relationship building. Stephan is a graduate of Boston College and Northeastern School of Law, and is an avid outdoors person."

Geosyntec consultants

Mark Johnson

Education:	M.S., Environmental Engineering, University of Maryland at College Park, 2004; B.A., Earth and Planetary Sciences, The Johns Hopkins University, 1995
Practice Areas:	Transaction Support; Litigation Support; Environmental Management; Contaminated Site Assessment and Cleanup
Disciplines:	Earth Sciences, Environmental Engineering, Hydrogeology
Specialties:	Site Investigation and Remediation; Groundwater Assessment and Remediation; Subsurface Vapor Intrusion to Indoor Air; Environmental Management Assessment and Systems; Brownfields Redevelopment Planning and Design

Mark Johnson is a Principal based in Columbia, MD and Washington, D.C. with more than 23 years of experience focused on site investigation and remediation, groundwater assessment and remediation, subsurface vapor intrusion to indoor air, environmental management assessment and systems, and brownfields redevelopment planning and design.

He has conducted or managed 100's of Phase I and Phase II site assessments and compliance audits at industrial, manufacturing, and commercial facilities throughout the United States, and internationally in Canada, Latin America, South America, Europe, Asia and Australia. Mr. Johnson routinely collaborates with Geosyntec's partners within CAT Alliance (www.cat-alliance.com), a global joint venture, to provide cross border diligence and auditing services to multi-national clients. Mr. Johnson serves as Geosyntec's representative on the Management Group of CAT Alliance with a focus on ensuring contracting, pricing, and quality control measures are in-place and routinely maintained. In addition, he has completed detailed analyses of complex CERCLA, RCRA, and state-lead chemical manufacturing, industrial, and refinery facilities in support of litigation as well as insurance claims analysis, bankruptcy proceedings and cost evaluation for multi-million dollar projects and claims. He specializes in earth sciences, hydrology, and environmental engineering.

As a consultant, Mark has developed numerous remedial investigation work plans and reports, baseline human health risk assessments, feasibility reports, and remedial action closure reports under a variety of state-lead enforcement programs including underground storage tank and voluntary cleanup programs. He has designed and implemented various remedial technologies, including enhanced aerobic bioremediation, soil excavation, soil vapor extraction, dual-phase extraction, and in situ chemical oxidation.

In his current focus, he assists commercial and attorney clients in evaluating potential future environmental remediation requirements and costs associated with industrial facilities as part of due diligence, aids insurance clients in evaluation of cost recovery claims, and litigation support. Mark was a key asset in assisting a Fortune 500 client with technical support during the settlement of a Consent Decree related to groundwater and surface water conditions and managed several of its large site investigation and remedial planning projects. He also managed numerous environmental claims and ongoing litigations including toxic tort, asbestos, pollution, chemical exposure, and hazardous waste claims for a leading insurance carrier. Mark has experience supporting numerous government-sector site investigation and remediation projects for the U.S. Army Corps of Engineers (USACE) and U.S. Environmental Protection Agency (EPA) and has provided his clients with environmental cost estimating and performs environmental liability valuation (ELV) services by utilizing multiple costing software platforms including RACER™.

Mark develops cost estimates for a multitude of purposes including resource planning, establishing financial reserves, insurance, and litigation matters, and third-party negotiations.

Contact Mark Johnson at MJohnson@Geosyntec.com or +1-410-381-4333.

KEVIN KLEAKA P.G. is Executive Vice President and Partner at Impact Environmental. He started with Impact in 1994, early in its history, and is principally responsible for the environmental consulting engineering practice in the New York and New Jersey office. He is responsible for the company's environmental assessment, consulting, remediation, construction support and engineering projects. His long-term history and dedication with the company serves as the foundation for many client relationships and drives the overall management of the company. Mr. Kleaka's expertise is derived from years of experience with Phase I and Phase II environmental site assessments, field sampling, drilling, geophysical surveys, petroleum spill investigation and remediation, underground injection control programs, Brownfield Program redevelopment sites, construction sites, Superfund cleanup sites, RCRA closures, underground storage tank compliance, vapor intrusion investigations and engineering control design and implementation. Mr. Kleaka works with numerous clients, including financial lenders/investors, private real estate owners, developers, insurance companies, government agencies, construction companies, and attorneys, to navigate the complex environmental regulations in New York State, New Jersey, Massachusetts, Connecticut, and Pennsylvania. He is responsible for a skillful team of geologists, hydrogeologists, engineers, environmental scientists, and field technicians. His team is very dedicated and consistently meets client expectations through the successful completion of hundreds of projects each year. Mr. Kleaka is a licensed Professional Geologist in New York.

Robert A. LoPinto, P.E.

Project Manager III

Mr. LoPinto is an accomplished engineer with a B.S. in Chemical Engineering and an M.E. in Environmental Engineering in addition to being a graduate of the US Army Command and General Staff College. Bob has served on numerous waste and recycling advisory boards and was a professor of Military Science at Hofstra University. He also served his country as a Division Engineer Supply Officer in Vietnam. Before joining Walden, Bob was President of Shapiro Engineering in Valley Stream, NY for 19 years after serving in the Army Corps of Engineers for the prior 21 years. His expertise includes system design and compliance for wastewater; hazardous waste; air pollution and solid waste; field Inspection and on-site audits of industrial facilities; laboratory management; field noise measurements and noise mitigation system design; and engineering/ technical report preparation.

EDUCATION

M.E. Environmental Engineering
Manhattan College

B.S. Chemical Engineering
Polytechnic Institute of Brooklyn

Graduate
US Army Command & General Staff College

LICENSES/ CERTIFICATIONS

Professional Engineer in New York

SELECTED RELEVANT EXPERIENCE

- **Solid Waste Management**
  Evaluate and design facilities in accordance with State and Local zoning, offsets, regulations and requirements. Prepare all required permitting applications and documentation. Prepare required annual and quarterly waste reports and performance standards for permit renewal, including opacity testing. Ensure continued compliance with government regulations.
- **Title V Permits and Annual Emission Reports (USEPA & NYSDEC)** Assist facilities in determining if they require Title V or State Air Permits and file for required permits. Provide compliance support for numerous conditions, including testing, report preparation and periodic Certifications of Compliance. Preparation of Annual Emission Statements which identify all pollutants emitted by facilities. Offer assistance in designating alternative chemicals to reduce the pollutants emitted.
- **Remediation and Environmental Monitoring**
  Soil sampling and air monitoring during site remediation and construction at several sites in New York City, including a public park and playground at the former Elmhurst Gas Tank site. Oversaw all work practices and contaminated soil disposal. Prepared all required reports including Health and Safety Plan (HASP), Community Air Monitoring Plan (CAMP), Procedural Plan, Sampling Plan, and Final Report.
- **Storm Water/Wastewater Management**
  Projects include site inspections, system design, application and drawing preparation and filing for Federal, State and Local permits including Joint Application under Coast Management Program for work in wetlands, General Discharge Permits and SPDES Permits, Site Connection Applications, design of Wastewater and Storm Water Detention and Treatment systems and Storm Water Pollution Prevention Plan (SWPPP).
- **Construction and Design**
  Site inspections, system design, preparation of drawings and reports for Federal, State and Local government agencies and municipalities. Secure Federal and State permits for wetlands construction.

AFFILIATIONS

National Society of Professional Engineers

- Past President, Queens County Chapter
- Chairperson, NY State Society's Engineer/Manager Task Force
- MATHCOUNTS Competition Coordinator

NY Citywide Recycling Advisory Board, 1990 - 2011

- Steering Committee Member
- Technical Working Group Member

Queens Solid Waste Advisory Board, 1990 - 2011

- Chairperson

Community Board #7, Queens, 1990 - 2011

- Environmental Committee Chairperson
- Sanitation Committee Chairperson
- Vice-Chair of Board, Executive Committee

Ft. Totten Environmental Restoration Advisory Board

- Document Review Sub-Committee Member
- Former Cochair of Board

Queens County, Flushing Bay Task Force

- Former Member

USCG (Ft. Totten) Environmental Restoration Advisory Board

- Former Chairperson

NYC DOS North Shore Marine Transfer Station Community Advisory Group
Former Chairperson

NY City Environmental Control Board, 1997 - 1998

- Appointed to ECB as a civilian member

NY State Northeast Queens Nature and Historical Preserve Commission

- Commissioner, 2005-2009

National Waste and Recycling Association

- Member

Solid Waste Association of North America

- Member

Sarah Osgood

As Director of Policy Implementation at the New York State Department of Public Service, Sarah Osgood serves as senior policy advisor to the Chair of the Public Service Commission, providing guidance, support, and leadership for policy development and implementation efforts to ensure consistency with priority objectives. She also plays a coordinating role and oversees the Article 10 process from a program and policy perspective. Prior to this, Sarah held several positions within State government, including Chief of Staff and Program Manager for Policy and Program Development at NYSERDA and Assistant Secretary for Renewable Energy in the Office of the Governor. Ms. Osgood holds a BS and MS in Mechanical Engineering from RPI, and an MBA from the University at Albany.

Beveridge & Diamond

John H. Paul

Principal

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John's practice focuses on environmental and energy law, project development, and environmental quality review of project proposals.

He assists clients in permitting, regulatory compliance, and enforcement matters involving waste management and disposal, hazardous wastes, bulk storage, wastewater, and air emissions. He advises clients with regard to remediation of contaminated properties and brownfield development, particularly on properties involving multiple ownership interests and complicated histories. He also advises and represents property owners and developers with regard to laws governing the development and use of waterfront and wetland properties.

John works with project development teams in planning, permitting, contracting, and transactions in support of large-scale development. This work has included energy and transmission projects on brownfields and municipally-owned properties, as well as submarine and wetland installations. Environmental impact review is a fundamental part of this work, and John helps clients manage the process to streamline review in support of reliable and defensible agency approvals.

John’s litigation practice includes federal and state class action defense, cost recovery, enforcement defense, and defense of citizen suits on behalf of site owners and operators, municipalities, and past owners of contaminated properties.

While at Pace University School of Law, John was awarded the White Plains Bar Association's Environmental Law Scholar Award. He served as Managing Editor of the Pace Environmental Law Review for 2002-2003. Before entering law school, John served in the U.S. Peace Corps in the Republic of Moldova, where he was an Associate Professor of English at the Moldovan state university.

John was selected by his peers for inclusion in *Super Lawyers* from 2016-2017.

Education

- Boston University (B.A., 1990)
  - English
- Pace University (J.D., *magna cum laude*, 2003)

Bar Admissions

- New York
- District of Columbia

Court Admissions

- U.S. Court of Appeals - Second Circuit
- U.S. District Court – Southern District of New York
- U.S. District Court – Eastern District of New York

Professional Affiliations

- American Bar Association, Section of Environment, Energy and Resources
- New York State Bar Association, Environmental Law Section

Representative Experience

Project Development

John represented five cities, a village, and two sewer districts that cooperated on a unique regional solution to reduce combined sewer overflows from all of their systems into the Hudson River. He helped create and organize a local development corporation and set up two inter-municipal agreements, which allowed the municipalities to start work on projects that are making a significant difference in the river's water quality.

Site Remediation

John helped several property owners and responsible parties clean up historically contaminated properties under brownfield programs and administrative consent orders, ensuring that his clients' responsibilities were appropriately defined while putting the properties back to productive use. The project required strong communication to manage the interests and legal positions of the government, property owners, and past users of the site.

Permitting

John was part of a team that secured permits and property authorizations for an underwater power cable from New Jersey to Brooklyn. The route crossed a patchwork of physical and legal territories, and his team crafted a sequence of permits and contracts that were issued successfully under strict time pressure to start construction.

Publications

March 15, 2018
Second Circuit Confirms NYSDEC Waived Water Quality Certification Authority by Delaying Decision on Application
Beveridge & Diamond

November 21, 2017
Connecticut Launches New and Incentivized Brownfields Program
Beveridge & Diamond

January 19, 2017
NEC FUTURE Names Preferred Alternative and Releases the Final Tier 1 Environmental Impact Statement
Beveridge & Diamond

June 30, 2016
New Ratemaking Order Revamps Conventional Cost-of-Service Ratemaking for New York Utilities:
Beveridge & Diamond, P.C.

May 4, 2016
New York State's Microgrid Development Incentives
Beveridge & Diamond, P.C.

April 26, 2016
Valuation of Distributed Energy Resources under New York State's REV Initiative
Beveridge & Diamond, P.C.

April 4, 2016
New York State Modifies Standardized Interconnection Requirements
Beveridge & Diamond, P.C.

December 16, 2015
NYSDEC to Propose Emission Limits for Distributed Generation Sources
Beveridge & Diamond, P.C.

December 4, 2015
New York State's Microgrid Development Incentives
Beveridge & Diamond, P.C.

November 24, 2015
New York State to Order that 50% of Power Consumed by New Yorkers be from Renewable Sources by 2030
Beveridge & Diamond, P.C.

October 29, 2015

New York State Department of Environmental Conservation Revises Regulations Governing Bulk Storage Tanks
Beveridge & Diamond, P.C.

July 2, 2015
New Application Process Takes Effect for New York Brownfield Cleanup Program, Additional Regulations Pending
Beveridge & Diamond, P.C.

July 28, 2008
Recent Clean Water Act Regulations Eliminate the Viability of Once-Through Cooling Systems for Potential Re-Powering Projects
Bloomberg Environmental Law Report

June 26, 2004
Federal Brownfields Law Provides Two Types of Liability Protection
New York Law Journal

June 26, 2003
The Second Circuit Clears the Murk of Gorsuch and Consumer's Power from the Esopus Creek
20 Pace Envtl. L. Rev. 841

Mimi Raygorodetsky
Senior Associate
LANGAN

Ms. Raygorodetsky has spent the last twenty years cleaning up brownfields in New York City. She is currently a practice leader for Langan's Environmental Group in New York. In this capacity, she leads multi-disciplinary engineering teams to source and direct large, complex and contaminated redevelopment projects from the earliest stages of pre-development diligence, through the remediation/construction phase, to long-term operation and monitoring of remedial systems and engineering controls. She has a comprehensive understanding of federal, state, and local regulatory programs and uses this expertise to guide her clients through a preliminary cost benefit analysis to select the right program(s) given the clients' legal obligations, development plans, and risk tolerance. She is particularly strong at integrating the requirements of selected programs and client needs to develop and design targeted and streamlined diligence programs and remediation strategies. She collaborates on most projects with her partners in other engineering disciplines at Langan to fully dovetail remediation with construction, resulting in significant efficiencies, cost savings and other benefits for her clients.

Ms. Raygorodetsky's most enjoys large, complex waterfront development projects – and the dirtier, the better! Her projects have helped define the skyline of New York City – some of her favorite projects include the IAC Building, Greenpoint Landing, 420 Kent Avenue, Bronx Point, the Plaxall sites on Anable Basin, and Willets Point. She loves to drive around the City with out-of-town guests and point out all the buildings she has helped to build.

Stephan Roundtree, Esq

As Environmental Policy and Advocacy Coordinator, Stephan's work focuses on policy development, advocacy, on issues of energy efficiency and equity, climate resilience, and toxic hazard abatement and mitigation. He also develops political education curricula, engages community members in WE ACT’s policy initiatives, and work to grow the organization’s political power through strategic relationship building. Stephan is a graduate of Boston College and Northeastern School of Law, and is an avid outdoors person.

Scott Salmon, LEED AP

Project Manager I
Environmental Services

Mr. Salmon is a Project Manager I within the Environmental department at PS&S. Mr. Salmon has more than 13 years of progressively responsible experience in consulting engineering and utilities. He specializes in environmental due diligence and the assessment of environmental risk and liability in commercial and industrial real estate transactions. Mr. Salmon has designed, budgeted, and implemented hundreds of Phase I and Phase II Environmental Site Assessments (ESAs) in accordance with ASTM E1527 and E1903. He is also an experienced manager of the Preliminary Assessment/Site Investigation process in New Jersey in support of innocent property purchaser defense and Industrial Site Recovery Act (ISRA) compliance. Mr. Salmon has a proven track record as a project manager supporting utility clients in meeting challenging deadlines and submitting high-quality deliverables on schedule and under budget. He has extensive experience in successfully evaluating and permitting both linear and site-specific energy projects with state and local regulators.

Education

Rutgers University, New Brunswick, NJ: M.S. Geography/2011

Prescott College, Prescott, Arizona: B.A., Environmental Studies/2000

Credentials

LEED Accredited Professional

Affiliations

U.S. Green Building Council

Association of American Geographers

American Planning Association

Relevant Experience

Capital One Bank On-Call Environmental Due Diligence Contract Management – Various Sites in New York & New Jersey*: Served as Contract Manager for approximately $150,000 of gross annual revenue related to the performance of Phase I and Phase II ESAs across the New York metropolitan area. Worked closely with the bank's Environmental Risk Manager to identify and interpret environmental risk and to advise the lender in the structuring of real estate deals complicated by environmental issues.

Valley National Bank On-Call Environmental Due Diligence Contract Management – Various Sites in New York & New Jersey*: Served as Contract Manager for approximately $175,000 of gross annual revenue related to the performance of Phase I and Phase II ESAs across the New York metropolitan area. Prepared Phase I ESAs on behalf of Valley National's New York Corp. Commercial Real Estate Department and the New Jersey Commercial Loan Department (Northern and Southern Regions).

Hair Systems Inc. ISRA Compliance, Preliminary Assessment, Site Investigation - Englishtown, NJ*: Provided Industrial Site Recovery Act (ISRA) and Brownfield and Contaminated Site Remediation Act compliance at this reactive hair care product manufacturing facility. The Preliminary Assessment/Site Investigation (PA/SI) report included a thorough analysis and documentation of the waste streams of the industrial operation, which manufactured reactive hair care products such as hair dyes. The PA synthesized years of soil and groundwater sampling data collected from the site and identified several AOCs including surface soils contaminated with metals and groundwater plumes impacted with petroleum contaminants.

Toch Industrial Park ISRA Compliance, Preliminary Assessment, Site Investigation – Kearny, NJ*: This industrial park contained multiple industrial establishments under separate leaseholds. Prepared General Information Notices (GINs) and Preliminary Assessment Reports for the industrial establishments to comply with ISRA obligations. Numerous AOCs were identified in the Preliminary Assessment process including numerous underground

Scott Salmon, LEED AP

continued

TQP Categories

2C Site Assessment/ Remediation
2D Spill Prevention, Contingency & Countermeasure
3B Endangered and Threatened Species
3C Forestry/Vegetation Maintenance (Regulatory)
3D Freshwater Wetland Permits
4C US Army Corps of Engineers Permits
6C Regulatory Compliance/Policy
7A Stormwater Management
8B Soil Erosion and Sediment Control Certifications
10A Project Management/ Scheduling
12A Environmental Impact Statements

and above-ground storage tanks and wastewater holding ponds. Implemented concrete sampling protocol towards the on-site re-use and recycling of building materials and implemented site investigation sampling protocol to evaluate potential releases from the identified AOCs.

Former National Gypsum Facility, Preliminary Assessment – Delair, NJ*: A Preliminary Assessment (PA) was conducted on behalf of a prospective purchaser of the former National Gypsum Facility, whose historic operations included cardboard box and gypsum backing manufacturing. Remediation of the site was in progress at the time of the PA. The Preliminary Assessment Report (PAR), completed in November 2011, identified a total of 11 areas of concern (AOCs) requiring additional investigation. Eight of these AOCs were identified as the remedial responsibility of National Gypsum under an ISRA trigger and Remediation Agreement with NJDEP. Three new AOCs were identified that were not being addressed by National Gypsum.

PSEG Long Island – Western Nassau Transmission Project – Town of Hempstead, NY: Prepared environmental screening report of the properties adjacent to and within 500 feet of the proposed construction corridors for a new 138 kV underground electric transmission facility between the East Garden City and Valley Stream Substations. The environmental screening was performed to identify potential environmental impacts associated with the current and historical usage of the adjoining properties along the Project routes, the substation locations and nearby properties. The screening information was used to draft a guidance document for the handling and minimalization of excess soil, groundwater and waste materials generated during construction activities associated with the seven mile transmission line.

Equilon Sewaren Pipeline Corridor Phase I ESA – Woodbridge Township, NJ*: Prepared a ASTM 1527-05 compliant Phase I Environmental Site Assessment (ESA) for this 8.51 acre linear corridor in Woodbridge Township which runs in a north/south direction and is bound by Arbor Street in the south and the New Jersey Turnpike in the north. The corridor is improved with multiple underground petroleum pipe lines and associated equipment. A number of Recognized Environmental Conditions (RECs) were identified and additional investigation proposed.

*Work performed prior to joining PS&S

Linda R. Shaw, Esq.
Knauf Shaw LLP

Since March 1998, Linda Shaw has been a partner at Knauf Shaw LLP, an environmental/land use law firm. Her legal practice began in 1990 after receiving a Masters in International Law and Public Administration and Law degree from St. John's University, during which time she worked for the City of New York in Sanitation, where she got her start in environmental law and then the Mayor's office. Ms. Shaw is also the owner of a certified State and City of New York woman owned business - Future Energy Development, LLC – which helps building owners secure grants for energy efficiency projects such as solar farms on brownfields and landfills and combined heat and power units for the last eight years.

Ms. Shaw's practice is focused on the facilitation of brownfield projects and associated land use and cost recovery litigation.

As General Counsel and Secretary to the Board of Directors of the New York State Energy Research and Development Authority (NYSERDA), Noah manages all aspects of legal analysis and counsel to NYSERDA leadership and the Governor’s staff concerning the Authority’s initiatives and related clean energy issues and legislation. Among other matters, Noah has been deeply engaged in the design and implementation of the state’s Clean Energy Standard, the State's offshore wind energy policies and programs, the state’s involvement with the United State Climate Alliance, co-chaired by New York State, and many other of the State’s renewable energy and energy efficiency programs and policies. Prior to joining NYSERDA in 2014, Noah was Senior Advisor to the General Counsel at the U.S. Department of Energy, where his portfolio included a wide range of issues regarding, among other matters, the Loan Programs Office, the Office of Energy Efficiency and Renewable Energy, the Office of Nuclear Energy and matters concerning congressional affairs. Before working at the Department of Energy, Noah was a senior associate in the Boston office of the law firm Mintz, Levin, Cohn, Ferris Glovsky & Popeo.