8TH OIL SPILL SYMPOSIUM

NYSBA

Emerging Trends in NY Remedial Programs Including the New Clean Water Infrastructure Act of 2017

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Recent Issues / Concerns

DEC determined it did not have enough power soon after the Hoosick Falls story broke in upstate NY to address the source of PFOAs in the Hoosick Falls drinking water supply; after lengthy investigation at a plant that uses PFOAs, contamination in the water supply was actually linked to the landfill where PFOA wastes were buried.

DEC also lost *FMC Corp. vs. NYSDEC*, 143 AD3rd 1128 - Appellate Division essentially ruled that DEC did not have authority to take over a cleanup of an off-site school property since FMC still had an interim status permit and was entitled to a hearing on DEC selected remedy.

This has led to a new law, regs and guidance.

These Recent Issues Has Led DEC to Do Some Interesting things in the last few months

1. **DER-32 – On BCP Applications, volunteers have to sign under penalty of perjury that they will comply with DER-32, but the comment period on this in flux guidance document only expired on May 19th!**

CONCERNS - Is the applicant agreeing to compliance with the 2010 version of this guidance, the draft or a new, final version they have not yet even seen?

LEGISLATION BY GUIDANCE – This document makes changes to the BCP not included in the new regulations, which go beyond BCP guidance. The Department was admonished in Judge Cherlundo's Supreme Court decision in *Destiny v. NYSDEC*, 63 A.D.3d 1568, 879 N.Y.S.2d 865 (4th Dep't 2009), lv. den'd 2009 WL 3161769, 2009 N.Y. Slip Op. 07124 (4th Dep't 2009), for using guidance to change the law, but did not seem to accept the court's advice.

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Judge Cherlundo's Advice

"Clearly, in deciding to adopt the 'guidance factors', the DEC has opted to make itself a fiscal watchdog without legislative authority. Moreover, by adopting the so called 'guidance factors' the DEC has chosen to rewrite the statute that was clearly written by the legislature, the effect of which is to not only dull, but to emasculate the clear intent of the statute, by administrative agency fiat. Such activities cannot - and should not - be condoned."

How is DEC once again violating the good Judge's advice?

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DER-32 Makes Policy Changes only the Legislature Should Make

- **If a BCP site gets larger, DEC views this as a "Major Amendment" (i.e. a bad thing), and requires the expansion parcel to either submit a new application or the existing BCP Site has to move into the most recent version of the BCP, which has less favorable tax credits - Query: Isn't it good if someone wants to do more cleanup of a larger brownfield? Why the punishment? Isn't DEC independently changing the original BCA contract and creating a potential breach of contract action?**
- **A large focus seems to be a plan to discuss limitations re: the tax credits at pre-application meetings – Query: Is that DEC's job? Also Section V.A.8.a, paraphrases statutory exclusion "where a property was previously remediated under one of the DEC remedial programs". Statute says: "department has determined that the property has previously been remediated pursuant to titles 9, 13, and 14 of this article, title 5 of article 56 and article 12 of the navigation law such that it may be developed for its then intended use."**

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New Proposed Part 375 Regulations

- Under the heading "The 2016 DEC Regulatory Agenda" the new regulations are intended to revise 375-1, 375-4, 375-3 and 375-6 to "add or revise multiple provisions to clarify issues that have arisen in the Brownfield Cleanup Program (BCP) in the course of implementing the program since 2006"; Query: If there are issues, why not fix the law? Won't further inconsistencies between the law and the regulations cause problems?
- True motivation is revealed on slide 7: "Cover system - the definition addresses the potential for abuse. DEC is setting parameters to help NYS Division of Taxation and Finance issue appropriate credits in line with the intent of the legislation." In DEC's own opinion, the legislature did not go far enough to diminish the tax credits in June 2015 amendments and now they want to independently cut the credits in regulations.

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New Proposed Part 375 Regulations Cont'd

- **First Major Legislative Policy Decision in Draft Regulations is not "in line with the intent of the legislation".**

  Cover System for a Track 4 cleanup site:

  - **"restricted residential uses that use buildings to meet the 2 feet of soil cover those buildings will be deemed to be equivalent to 2 feet of soil cover."**
  - **"Similarly, buildings on commercial Track 4 site, will be treated as the equivalent of 1 foot of soil cover for tax credit purposes."**

- **Tax Law §21(b)(2) "Site preparation cost shall not include the costs of foundation systems that exceed the cover system requirements in the regulations applicable to the qualified site."**
- **Tax Law §21(a)(3)(iv) "Eligible costs for the tangible property credit component are limited to costs for tangible property that has a depreciable life for federal income tax purposes of fifteen years or more, costs associated with demolition and excavation on the site and the foundation of any buildings constructed as part of the site cover that are not properly included in the site preparation component and costs associated with non-portable equipment, machinery and associated fixtures and appurtenances used exclusively on the site, whether or not such property has a depreciable life for federal income tax purposes of fifteen years or more.**

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New Proposed Part 375 Regulations Cont'd

What did this language really mean?

- **DEC was supposed to draft regulations that would defined what portion of a foundation would count toward the tax credits in terms of thickness for different qualified sites (e.gs. a PCB site, or a landfill site might need a thicker concrete cover system than a different site);**
- **There was absolutely no discussion that this language was intended to mean, for tax credit purposes, that only the equivalent dollar amount of a 2 foot soil cover for a residential site or a 1 foot soil cover on a commercial/industrial site would count and key parties in the DEC know they are completely manipulating what the legislature intended and what the "deal" was to pass these amendments. The plain language discusses "foundation systems" for the qualified site, not a soil cover for all sites.**

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New Proposed Part 375 Regulations Cont'd

- **Second Major Legislative Policy Decision in Draft Regulations is pure legislating by DEC, since the Law defines Track 1 differently than DEC's new definition and ALLOWS for the use of long term ECs/ICs when there is still some groundwater (and therefore vapor) contamination after a Track 1 cleanup:**

"375-3.8(e)(1)(ii) - Track 1. Track 1 participants will not be allowed to achieve a Track 1 cleanup through the implementation of long term institutional controls and engineering controls (IC/ECs). Volunteers may use long term IC/ECs and achieve a "conditional Track 1". The volunteer will first receive a Track 2 cleanup and if after 5 years GW contamination is reduced to asymptotic levels then a Track 1 COC will be issued. (Previously worked in reverse order.)"

It previously worked in reversed order because that is what the statute says!

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New Proposed Part 375 Regulations Cont'd

- **DEC cannot take away achievement of a Track 1 cleanup because this is based on achievement of SOIL SCOs, not achievement of drinking water standards or DOH guidance values.**
- **ECL §27-1415(4) Track 1: The remedial program shall achieve a cleanup level that will allow the site to be used for any purpose without restriction and without reliance on the long-term employment of institutional or engineering controls, and shall achieve contaminant-specific remedial action objectives for soil which conform with those contained in the generic table of contaminant-specific remedial action objectives for unrestricted use developed pursuant to subdivision six of this section. Provided, however, that volunteers whose proposed remedial program for the remediation of groundwater may require the long-term employment of institutional or engineering controls after the bulk reduction of groundwater contamination to asymptotic levels has been achieved but whose program would otherwise conform with the requirements necessary to qualify for Track 1, shall qualify for Track 1.**

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New Proposed Part 375 Regulations Cont'd

- DEC is redefining Track 1 to mean achievement of BOTH soil & drinking water standards and no vapor exceedances within 5 years. This is diametrically opposed to the Law's intent and plain language. The Law seeks to encourage Track 1 SOIL cleanups even if GW Standards are not achieved because eventually the groundwater will be remediated after a complete source removal, and in many brownfield neighborhoods, pristine GW is simply not achievable.
- Thus, the concept of only needing to achieve asymptotic levels was intended to mean background conditions, NOT the drinking water based GW standards.
- Moreover, the Law allows for the LONG term use of ECs and ICs not just use of ECs and ICs for 5 years.
- Not in the statute allows DEC to take away achievement of a Track 1 cleanup
- Despite promises made at the April 21 COC meeting, there is nothing in these proposed regulations that deals with migrating vapor onto to a Track 1 or 2 BCP Site and exceptions that must be made in these regulations or else no one will try to achieve these cleanup levels since they will merely be punished for doing so.
- Once again, DEC is more worried about tax credits than the environment!

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New Proposed Part 375 Regulations Cont'd

- **Third Legislation by Regulation Issue:**
- **375-3.8(e)(2)(iv) - Track 2. Site cover cannot be used as a long-term EC to achieve applicable SCOs, but may be used to address contamination below 15 feet. The remedial program may use long term IC/EC to address groundwater or soil vapor contamination. This may include a remedial program implemented by a volunteer to achieve a Track 1, as noted above.**
- **Here DEC's prior 15 foot rule AND their new language prohibiting cover systems as ECs is not what the statute says:**

ECL §27-1415(4) Track 2: The remedial program may include restrictions on the use of the site or reliance on the long-term employment of engineering and/or institutional controls, but shall achieve contaminant-specific remedial action objectives for soil which conform with those contained in one of the generic tables developed pursuant to subdivision six of this section without the use of institutional or engineering controls to reach such objectives.

New Proposed Part 375 Regulations Cont'd

What did the statutory language mean?

- **The Law meant that in order to achieve a Track 2 cleanup, the soil on your site, and in the bottom of the hole, MUST meet the numbers without use of any controls. So why it is clear that a cover system should not be required, the 15 foot rule should not apply and cover systems may still be needed to address groundwater and vapor contamination since such a system may be required for a sub slab mitigation system and to block exposure from contaminated groundwater that may be left even after the Track 2 soil cleanup down to whatever depth is required.**
- **DEC randomly adopted at 15 foot rule, which is inconsistent with the Law, disregards any contamination left under that 15 foot depth above the Track 2 SCOs, and is now saying that a cover system cannot serve to cover the bad dirt above the Track 2 standards that may be left at the bottom of the excavation.**

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NY's New Clean Water Infrastructure Act

Passed in less than 3 Months

In mid April 2017, after little to no debate, New York created the $2.5 billion Clean Water Infrastructure Act of 2017 (CWIA Law), which is allegedly aimed at:

- Helping municipalities upgrade their drinking and waste water treatment facilities,
- Helping homeowners improve their septic systems and
- Enabling land trusts to purchase watersheds, remediate solid waste sites, mitigate drinking water contamination and help farmers comply with Department regulations.

There are three parts to the new CWIA Law:

- Part M Emerging Contaminant Monitoring
- Part R Drinking Water Quality Council
- Part T Clean Water Infrastructure Act

While none of the names include the word "Superfund", this new Law creates a new Superfund Program in New York.

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The CWIA is hardly all about $$ but there is a lot of $$ to Initially Pass Around

- The $2.5 Billion Lit up the Eyes of the Legislators & Municipalities and they failed to review the remaining provisions.

- While the Law that passed was less onerous than the initial draft (which was written to specifically include petroleum sites and to essentially eliminate all due process) the final new law is shockingly broad and municipalities may regret the Law they agreed to support in exchange for funding.

- DEC brilliantly orchestrated this Law making event by creating a problem. With an unknown source of funding, DEC investigated a large number of water supply system throughout the state (largely upstate and on Long Island in Republican Districts) and then promised funding to fix the problem.

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Part M to the Public Health Law Section 1112: Emerging Contaminants Monitoring

- "Emerging contaminants" are defined as "any physical, chemical, microbiological or radiological substance listed as an emerging contaminant pursuant subdivision 3".
- Subdivision 3 says that the Commissioner of Health shall promulgate regulations to identify and list substances as an "emerging contaminant" that meet the following criteria:
  - are not subject to any other substance-specific drinking water regulation of the Department that establishes a maximum contaminant level, maximum residual disinfectant level, or action level;
  - are known or anticipated to occur in public water systems; and
  - because of their quantity, concentration, or physical, chemical or infectious characteristics, **<u>may</u> cause physical injury or illness, or otherwise pose a potential hazard to human health when present in drinking water**.

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Part R Drinking Water Quality Council

The Drinking Water Quality Council, which will include 12 members, shall develop a list of emerging contaminants for the DOH to consider and must development well testing material for private homes, work with other state agencies to oversee the pursuit of parties responsible for contamination:

- DOH Commissioner Health or designee (Chair)
- DEC Commissioner designee;
- DEC designee with expertise in water resources;
- DOH designee with expertise in drinking water;
- 4 Governor designees who represents water purveyors, expertise in toxicology/health risk assessment; microbiology; and environmental engineering;
- 4 Senate and Assembly designees 2 who represents water purveyors, and 2 with expertise in toxicology/health risk assessment

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PART T Clean Water Infrastructure Act has 2 new ECL Titles

I. The new Article 15 Title 33 first authorizes the DEC to provide state assistance to municipalities, not-for-profit corporations and soil and water conservation districts to undertake land acquisition projects for source water protection.

CAVEAT: No state assistance may be provided to fund any land acquisition project which is undertaken by eminent domain unless such process is undertaken with a willing seller.

The Department, when conducting evaluation of projects, shall give priority to projects which protect or recharge drinking water sources and watersheds, including riparian buffers and wetlands, and shall promote an equitable regional distribution of funds. When evaluating individual land acquisitions projects the Department shall review:

- The project's contribution to the protection of drinking water supplies;
- The presence of a water assessment/protection plan or other similar plan;
- Financial need or hardship

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II. ECL Article 27 Title 12 entitled "Mitigation and Remediation of Certain Solid Waste Sites and Drinking Water Contamination"

So How Did this new "Infrastructure" Law Morph into a new, very Broad Superfund Law being called "Superfund Lite"?

NYSDEC lost the FMC lawsuit, did not think FMC should have been entitled to a hearing on a DEC selected remedy before implementing it, and then embarked on a mission to eliminate as much due process in Title 13. Ultimately, Title 13 remained as is, but a newly established Title 12 provides the DEC with EXTREMELY BROAD authority to address and remediate solid waste and drinking water sites with minimal due process.

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Key Definitions

Title 12 includes new definitions for contaminant, and contaminant, drinking water contamination site, mitigation, solid waste site and solid waste management facility.

- "Contaminant" means **emerging contaminants** pursuant to section eleven hundred twelve of the public health law, and, for solid waste sites, shall include **parameters** identified in regulations required to be tested by landfills to ensure the protection of groundwater quality.
- "Contamination" or "contaminated" means the presence of a contaminant in any environmental media, including soil, surface water, or groundwater, sufficient to cause or substantially contribute to an exceedance of standards, criteria, and guidance values established by the Department or drinking water standards, including maximum contaminant levels, notification levels, maximum residual disinfectant levels or action levels established by the Department of Health.
- "Drinking water contamination site" means any area or site that is causing or substantially contributing to the contamination of one or more public drinking water supplies.

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Definitions Continued

- "Mitigation" means the investigation, sampling, management, or treatment of a solid waste site or drinking water contamination site required to ensure the availability of safe drinking water, including public water systems and individual onsite water supply systems necessary to meet standards, criteria, and guidance values established by the Department or drinking water standards, including maximum contaminant levels, notification levels, maximum residual disinfectant levels, or action levels established by the Department of Health that can be successfully carried out with available, implementable and cost-effective technology. "Mitigation" activities include but are not limited to the installation of drinking water treatment systems, the provision of alternative water supplies, or repair of a landfill cap. "Mitigation" does not mean remediation.
- "Solid waste site" means a site where (a) the Department has a reasonable basis to suspect that the **illegal disposal of solid waste** occurred or, (b) a court of competent jurisdiction has determined that an illegal disposal of solid waste occurred, or (c) the Department knows or has a reasonable basis to suspect that an **inactive solid waste management facility**, which does not have a current monitoring program, is impacting or contaminating one or more drinking water supplies. Solid waste site shall not include a site which is currently subject to investigation or remediation pursuant to title thirteen or fourteen of this article or any site which completed such programs and was either delisted by or received a certificate of completion from the Department.

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§ 27-1203. Mitigation and remediation of solid waste sites.

The DEC is authorized to conduct preliminary investigations to determine if a solid waste site is causing or substantially contributing to imminent or documented drinking water source contamination. Where the DEC has determined through a **preliminary investigation** conducted that a solid waste site is causing or substantially contributing to contamination of a public drinking water supply, **the DEC may mitigate and remediate a solid waste site or area which is necessary to ensure that drinking water meets applicable standards**. To conduct mitigation and remediation of solid waste site, the DEC shall have the following authorization:

- The DEC shall have the **authority to enter all solid waste sites** for the purpose of preliminary investigation, mitigation and remediation
- Where the Department has determined through a preliminary investigation that a solid waste site is causing or substantially contributing to contamination of a public drinking water supply:

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Preliminary Investigation Enables DEC Cleanup With Limited Due Process

- The owner or operator of a solid waste site shall cooperate with any and all remedial measures deemed necessary
- Such owner or operator of a solid waste site shall cooperate with any and all remedial measures deemed necessary
- Remedial measures shall be conducted in conjunction with the Department of Health,
- The remedial goal is to ensure that drinking water meets applicable standards, including maximum contaminant levels, notification levels, maximum residual disinfectant levels, or action levels established by the Department of Health.
- If the DEC or the Department of Health determines that a solid waste site poses a significant threat to the public health or environment due to hazardous waste, the Department shall refer the site to the Superfund Program.

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§27-1205 Mitigation of Contaminants in Drinking Water

The DEC & DOH may undertake all reasonable and necessary additional mitigation measures to ensure that drinking water meets applicable standards, including maximum contaminant levels, notification levels, maximum residual disinfectant levels, or action levels established by DOH. Wherever the DOH Commissioner has required a public water system to take action to reduce exposure to an emerging contaminant or emerging contaminants and has determined that the concentration of the emerging contaminant constitutes an actual or potential threat to public health based on the best available scientific information pursuant to Public Health Law §1112, DEC and DOH shall have the following authorization:

To undertake the development and implementation of all necessary and reasonable mitigation and remediation measures of drinking water contamination, as approved by the Department of Health, to address emerging contaminants in public water supplies.

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2 or 10 day Notice and Opportunity for Hearing

DEC may enter **any drinking water contamination site and areas near such site** to undertake all reasonable and necessary mitigation and remediation for such site, provided:

- Written notice was sent to the owners or occupants of such site **or nearby areas** of the intended entry and work at least **10 days** prior to such initial entry unless such owners and occupants consent to an earlier date; but
- If DEC has "substantial evidence" that such drinking water contamination site is causing or substantially contributing to the contamination of drinking water, **2 days'** written notice shall be sufficient.

The DEC Commissioner may order, after notice and opportunity for a hearing, the owner and/or operator and/or any person responsible for such contamination to:

- undertake all reasonable and necessary mitigation and remediation, as approved by DOH, to ensure that drinking water meets applicable standards, including maximum contaminant levels, notification levels, maximum residual disinfectant levels, or action levels established by DOH, and
- employ feasible measures that can be successfully carried out with available, implementable and cost effective technology, subject to DEC and DOH approval of the Department, and
- to implement such program within reasonable time limits specified in the order.

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While Opportunity for Hearing is Provided, Upfront Subpoena Powers, with no Required Miranda Warning, Allows Immediate Access to All Records & Witness Testimony

- DEC can enter all properties served by the public water system, any individual onsite water supply systems impacted by the contamination, and **any land and any surface or underground water sources impacted by the contamination**.
- DEC shall have access to copy all books, papers, documents and records pertinent to an ongoing investigation of drinking water contamination.
- Staff can sign and issue subpoenas in the name of the Department requiring the production of books, papers, documents and other records and may take **testimony by depositions under oath** of any person relating to the ongoing investigation of a drinking water contamination identified in this title.

[THE BAR MAY WANT TO DISCUSS THESE PROVISIONS WITH CRIMINAL ATTORNEYS]

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The Polluter Ultimately Pays the Bill Once DEC Gathers Substantial Evidence

When DEC has **substantial evidence** such drinking water contamination site is causing or substantially contributing to drinking water contamination, **any duly designated officer or employee of the DEC, or of any state agency, and any agent, consultant, contractor, or other person, including an employee, agent, consultant, or contractor of a responsible person acting at the direction of the DEC**, so authorized in writing DEC Commissioner, may:

- enter any drinking water contamination site and areas near such site and inspect and take samples of wastes, soil, air, surface water, and groundwater, including, but not limited to, soil borings and monitoring wells; and
- Charge the **drinking water response account**, but then recover the money from any responsible person in any action or proceeding brought pursuant to the **state finance law, this title, other state or federal statute, or common law** if the person so authorized in writing is an employee, agent, consultant, or contractor of a responsible person acting at the direction of the Department, then the expense of any such sampling and analysis shall be paid by the responsible person.

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In Exchange for Upfront $$, CWIA May Lead to New Litigation Against Municipalities

In exchange for needed water infrastructure project dollars throughout the State, municipalities may find themselves paying more than they receive when the initial grant money runs out in Superfund cases.

Initial focus will be on old landfill solid waste sites causing 1-4 Dioxane and PFOA contamination near drinking water aquifers.

But there are approximately 1,200 of these old landfills in NY – So stay tuned!

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Thank you! Questions?

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