NEW YORK
STATE OF
OPPORTUNITY

Department of
Environmental
Conservation

I Fought the Law and the Law Won- Regulatory Initiatives & Enforcement

Thomas S. Berkman, Esq.
Deputy Commissioner and General Counsel

Play List

Police on My Back – Operation Trash Net

Straight to Hell – Tonawanda Coke

Should I Stay or Should I Go – FMC

Complete Control – Northrup Grumman Plume

Do it Now– Dunn Landfill

Cool Under Heat – Implementation of the 2019 Climate Leadership and Community Protection Act (CLCPA)

Illegal Disposal came to the forefront in 2014 after contaminated C&D was dumped at the Town of Islip's Roberto **Clemente** Park, resulting in the park's closure for several years

Material contained elevated levels of organic compounds, metals, pesticides, PCB's, asbestos, as well as physical contaminants

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Roberto Clemente Park

Illegal dumping of approximately 40,000 tons of C&D from NYC

Investigation revealed 4 sites in Suffolk County that were the dumping ground for the illegal disposal of solid waste

Toxic Dumping Trial

4 sites in Suffolk County illegally dumped with contaminated solid waste

Roberto Clemente Park – Brentwood

Sage Street – Central Islip

Veterans Way – Islandia

Brook Ave – Deer Park

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People v. Thomas Datre, et al

(Toxic Dumping Trial)

- Biggest Criminal Environmental Trial in Suffolk County
- 10 Defendants – individuals and corporations
- Special Grand Jury – Sept 2014 – November 2014
- 32 Count Indictment – ECL felonies, PL felonies dealing with environmental crimes and government corruption

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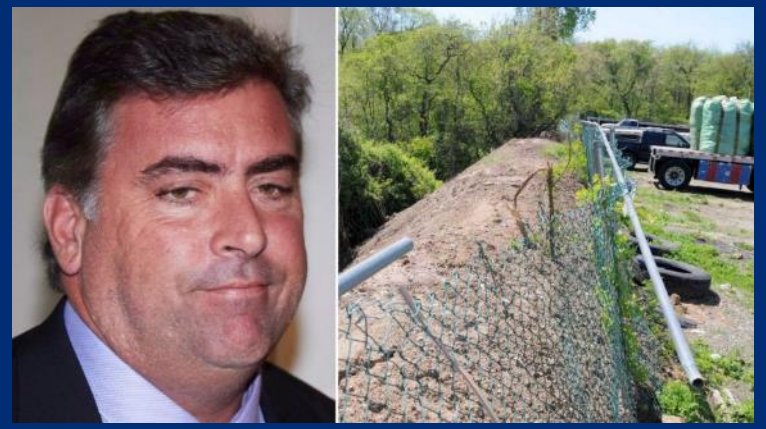
People v. Datre (cont.)

- Trial – February 2016- March 2016
  - 66 witnesses – 9 total DEC personnel testified for GJ & trial
  - 338 exhibits – majority was documentary evidence and photographs
- RESULT =

GUILTY

Datre Part 2



- People v. Ronald Ciancuilli
- Datre co-defendant who was severed from the first trial and had his own trial in May 2016
- RESULT=

GUILTY

OPERATION TRASH NET

In 2017 DEC lead a multi agency crackdown on the illegal disposal of C&D waste and strengthened NY's solid waste regulations to deter illegal dumping, address the growing threat and protect NY's water quality, especially on LI

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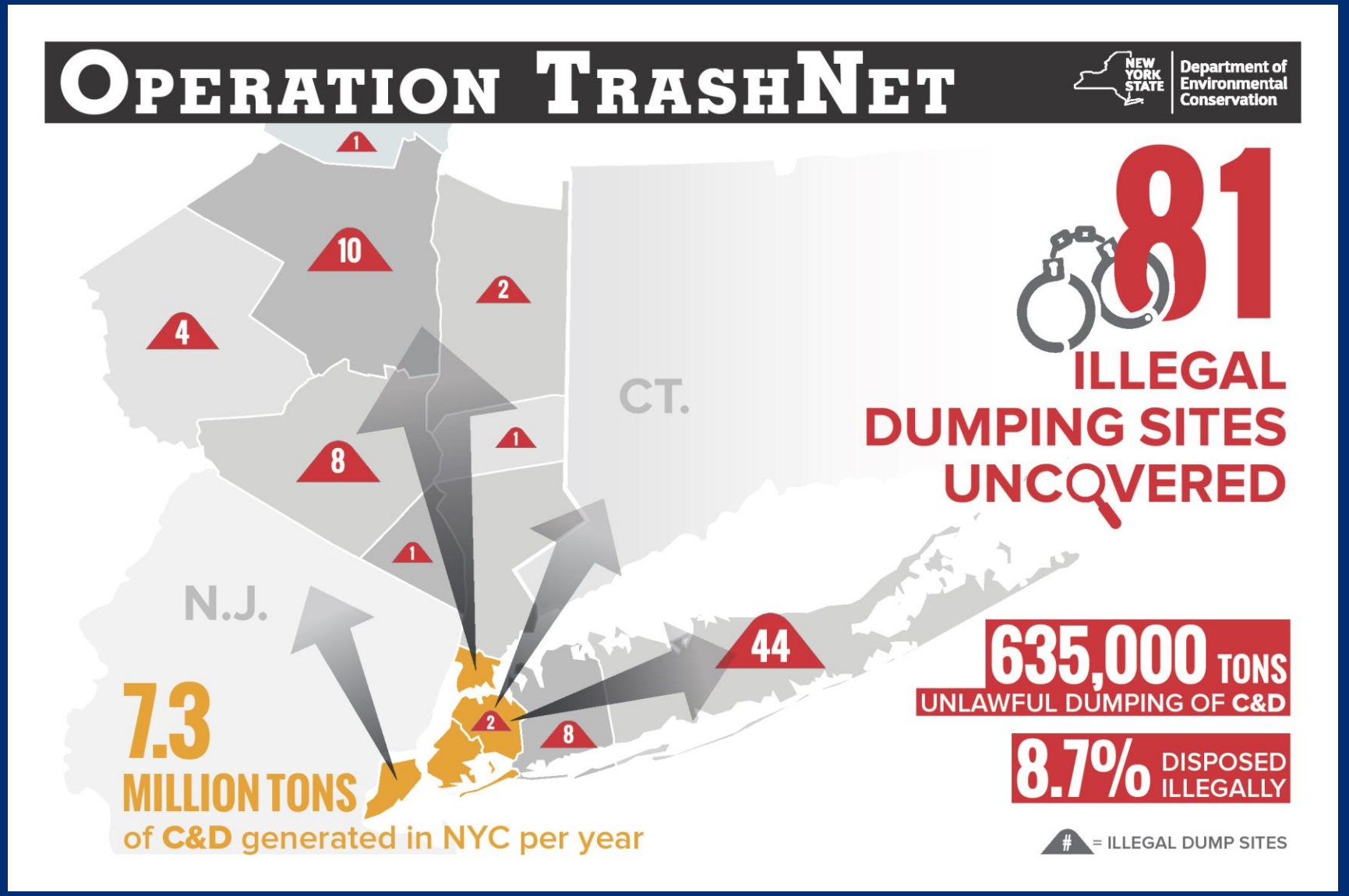
OPERATION TRASH NET

DEC's ECO's and DMM teamed up with district attorney's offices, NYS Police, State DOT and local law enforcement agencies to launch an enforcement blitz on LI and in the Mid-Hudson Valley on the illegal disposal of C&D and other solid waste violations.

This collaboration has spearheaded dozens of undercover details and truck surveillance operations to uncover dozens of crimes.


OPERATION TRASHNET
NEW YORK STATE
Department of Environmental Conservation
1
10
2
4
CT.
8
1
1
N.J.
44
2
8
81
ILLEGAL DUMPING SITES UNCOVERED
635,000 TONS
UNLAWFUL DUMPING OF C&D
8.7% DISPOSED ILLEGALLY
7.3
MILLION TONS
of C&D generated in NYC per year
= ILLEGAL DUMP SITES

Actions taken during Operation TrashNet on Long Island and in the Mid-Hudson Valley:

- Over 550 total tickets issued, and charges filed for various misdemeanors and other serious safety violations during enforcement actions
- More than 170 tickets issued for unlawful disposal of solid waste
- More than 40 trucking companies identified
- 81 new illegal dumping sites uncovered
- 26 trucks seized and impounded
- 53 search warrants executed

Operation Pay Dirt

Executed by the Suffolk County District Attorney's Office in partnership with the DEC in 2018:

- 24 offenders arrested
- 12 corporations charged with crimes
- 12 trucks seized
- Dozens of new illegal dump sites uncovered

Typical contaminants found in the illegally disposed fill:

- Metal
- Treated lumber
- Textile
- Slag
- Coal
- Ash
- Tile
- Wire
- Plastic
- Glass
- Foam insulation
- Asbestos

What's next?

- Monitoring and preventing illegal dumping remains a top priority of the DEC

- New regulations are being written and implemented to deter illegal dumping and protect our environment

DEC Strengthened Part 360 Solid Waste Management Regulations in 2017 Concerning C&D Debris

- Enhanced tracking for transport of C&D debris generated in New York City
- Required registration (Part 364) for transportation of C&D debris
- Expanded beneficial use determinations for select types of C&D debris
- Set limits on allowable storage volumes at C&D debris processing facilities
- Required analysis of all fill material leaving all C&D debris processing facilities

Strengthened regulations specific to Long Island

- Restricted-use and limited-use fill generated outside Long Island is now prohibited from begin transported onto Long Island
- Restricted-use fill must meet general fill requirements for protection of groundwater
- Limited-use fill is prohibited from reuse

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Tonawanda Coke Corporation

Tonawanda Coke Corporation (TCC) was a former merchant byproduct coke manufacturing facility that had been in operation since 1978 in the Town of Tonawanda.

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TCC - No Stranger to Enforcement

2009 - joint state and federal multi-media inspection that detected numerous federal and state laws.

2010 - DEC and EPA issued parallel administrative orders that required repairs and modification to TCC's by-products area due to the significant emissions of hazardous air pollutants, including benzene.

2015 - DEC and EPA reached a settlement with TCC on the remaining violations not covered by the 2010 Orders which was embodied in a federal Consent Decree. The settlement required the payment of a $4 million penalty and numerous injunctive relief items.

Criminal Conviction – Second Criminal Prosecution Nationally Under the CAA

2010 - Criminal indictment issued against TCC and its environmental control manager for violating the CAA, RCRA and for obstruction of justice (concealing a pressure relief valve that released uncontrolled benzene).

2013 – TCC and its environmental control manager were guilty.

2014 - TCC was sentenced and required to pay a $25 million dollar fine and given five years probation ($12.5 million fine and $12.2 million to fund two environmental studies). TCC's environmental control manager was fined $20,000 plus sentenced to one year in prison.

DEC Administrative Enforcement Continued After the Criminal Conviction

DEC issued numerous Notices of Violation to and entered into 7 Orders on Consent with TCC from the sentencing in 2014 to 2018. The violations involved Title V permit violations, petroleum spills, chemical and bulk storage spills, SPDES violations and improper disposal of hazardous waste. These matters were in addition to several actions against TCC for non-compliance with the joint federal and state Consent Decree.

2018 Brought Significant Opacity and Other Violations

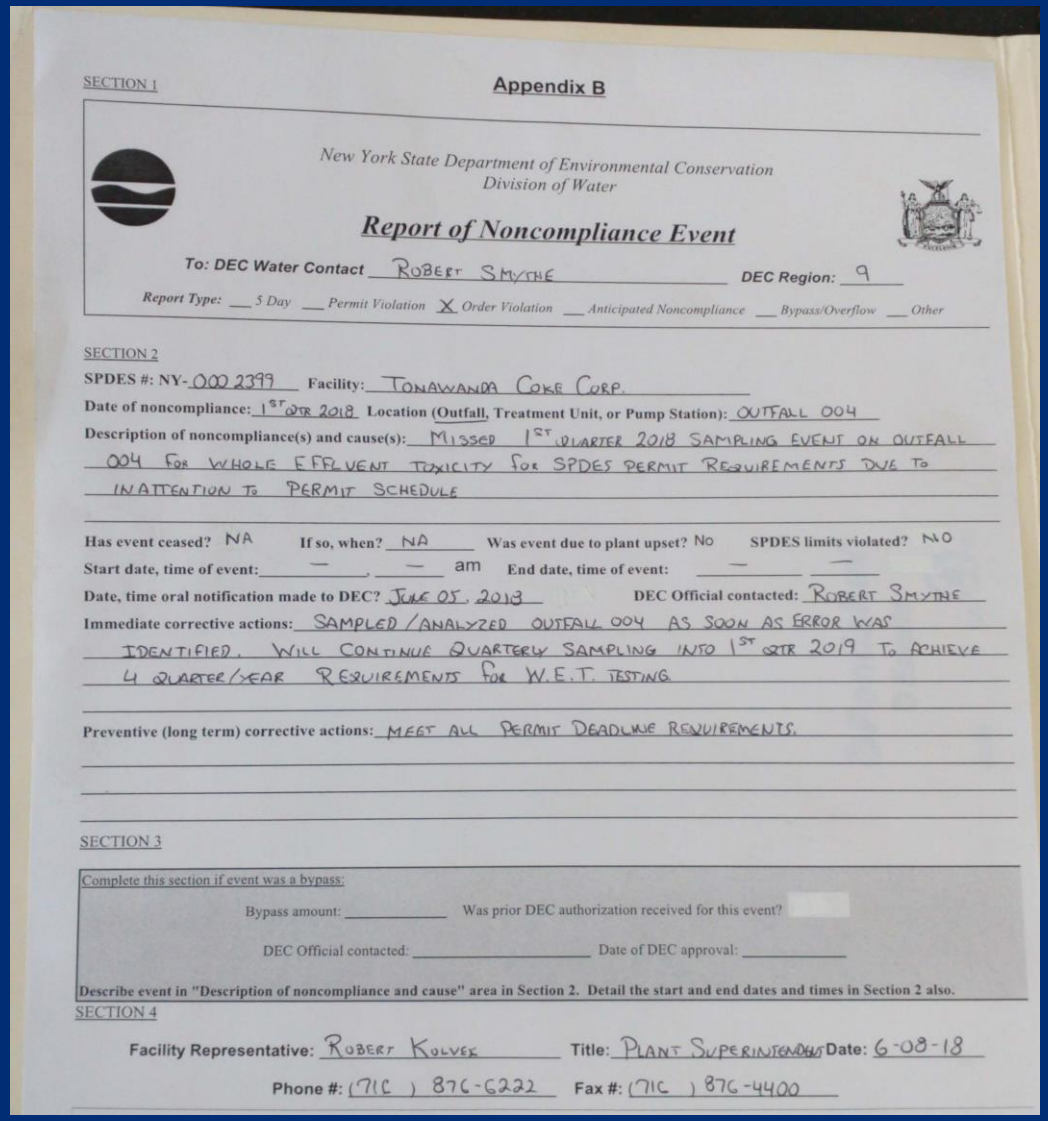
- Opacity violations started occurring at TCC on a regular basis in January 2018. Opacity exceedances then became a daily occurrence through the spring and fall of 2018.
- TCC also violated several CBS, PBS, SPDES and RCRA laws and regulations and its Title V permit for coke oven gas emissions during this time.

Sodium hydroxide spill

Weak Ammonia Liquor release due to hole in tank

PBS Discharges

TCC reported to DEC that it failed to perform a SPDES required sampling event "due to inattention to permit schedule."



SECTION 1

Appendix B

New York State Department of Environmental Conservation
Division of Water

Report of Noncompliance Event

To: DEC Water Contact ROBERT SMYTHE **DEC Region:** 9

Report Type: ___ 5 Day ___ Permit Violation X Order Violation ___ Anticipated Noncompliance ___ Bypass/Overflow ___ Other

SECTION 2

SPDES #: NY- 000 2399 **Facility:** TONAWANDA COKE CORP.

Date of noncompliance: 1ST QTR 2018 **Location (Outfall, Treatment Unit, or Pump Station):** OUTFALL 004

Description of noncompliance(s) and cause(s): MISSED 1ST QUARTER 2018 SAMPLING EVENT ON OUTFALL 004 FOR WHOLE EFFLUENT TOXICITY FOR SPDES PERMIT REQUIREMENTS DUE TO INATTENTION TO PERMIT SCHEDULE

Has event ceased? NA **If so, when?** NA **Was event due to plant upset?** NO **SPDES limits violated?** NO

Start date, time of event: — — am **End date, time of event:** — —

Date, time oral notification made to DEC? JUNE 05, 2018 **DEC Official contacted:** ROBERT SMYTHE

Immediate corrective actions: SAMPLED/ANALYZED OUTFALL 004 AS SOON AS ERROR WAS IDENTIFIED. WILL CONTINUE QUARTERLY SAMPLING INTO 1ST QTR 2019 TO ACHIEVE 4 QUARTER/YEAR REQUIREMENTS FOR W.E.T. TESTING

Preventive (long term) corrective actions: MEET ALL PERMIT DEADLINE REQUIREMENTS.

SECTION 3

Complete this section if event was a bypass:

Bypass amount: _____ Was prior DEC authorization received for this event?

DEC Official contacted: _____ Date of DEC approval: _____

Describe event in "Description of noncompliance and cause" area in Section 2. Detail the start and end dates and times in Section 2 also.

SECTION 4

Facility Representative: ROBERT KOLVEK **Title:** PLANT SUPERINTENDENT **Date:** 6-08-18

Phone #: (716) 876-6222 **Fax #:** (716) 876-4400

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Cease and Desist and Air Permit Revocation

TCC's continuous operation in conscious disregard for environmental laws led to the issuance of a Cease and Desist and Notice of Intent to Revoke TCC's air permits which was served in July 2018.

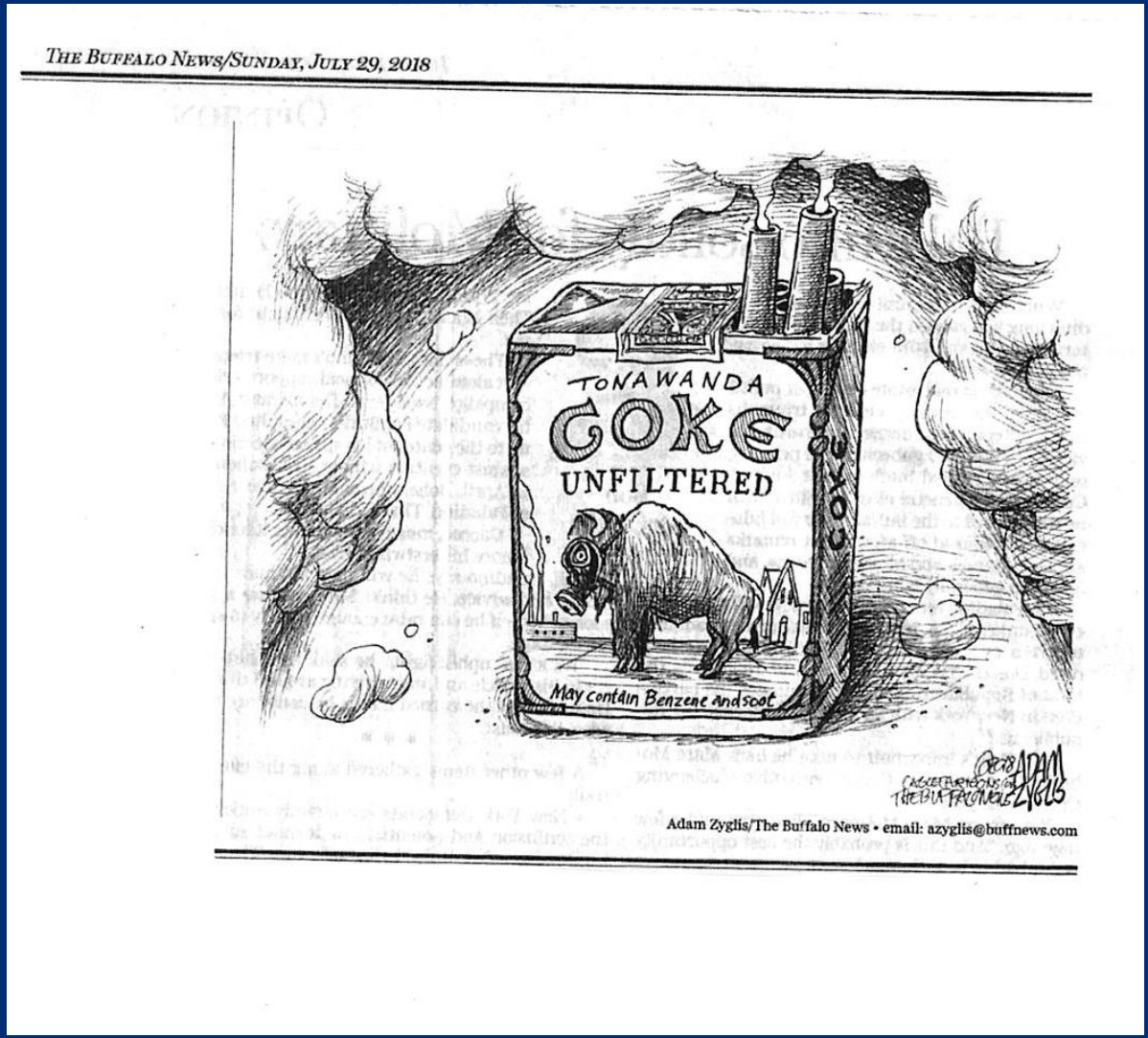
Rather than cease operations, TCC requested a hearing that was scheduled to begin on October 10, 2018.

TCC Criminal Probation Violation

A few months after the service of the cease and desist/permit revocation notice, the federal probation department filed a petition alleging that TCC violated the terms of its probation due to the continued federal and state opacity limit violations and emissions of coke oven gas from the facility.

Following a hearing, Judge Skretny (who presided over the 2013 criminal trial) found that TCC violated the terms of its probation and required that TCC perform a battery stack test, undertake various repairs to the battery in an attempt to stop the opacity violations and required a third party compliance monitor.

Common Theme – Profits Over Environmental Compliance



Harsh Words from Judge Skretny

At the sentencing, Judge Skretny told TCC's President – "You cannot operate like this anymore. You cannot continue to shirk your environmental responsibilities. You cannot continue to elevate cost over compliance."

He further stated that "with this present probation violation, Tonawanda Coke has failed this community again," the "culture of profit over environmental consciousness appears to persist" and "put simply, Tonawanda Coke continues to place a low priority on environmental compliance."

Permit Revocation Proceeding Settled

TCC agreed to shut down operations on October 10, 2018 – day that the proceeding was to begin.

TCC started shutdown procedures on October 14, 2018.

TCC filed for bankruptcy on October 15, 2018.

TCC vacated the site on October 28, 2018.

Chapter 11 Bankruptcy

The bankruptcy proceeding is on-going. Proofs of claims have been filed. The main secured creditor is Honeywell International (former owner and operator of the site) who holds mortgages on TCC's property for funds lent to TCC to pay the criminal fine.

TCC sold various assets last month at an auction.

DOJ recently served a motion for discovery to understand the disbursements made and funds owed to various sister and related corporate entities of TCC.

DEC and EPA Oversight Since Shutdown

The agencies have worked closely to ensure a safe shutdown of the operating components of the facility. Steps have also been taken to address possible incidents, including:

- stabilizing and/or eliminating areas of potential releases of contaminants
- properly storing various chemicals the remained after shutdown
- cleaning and decommissioning sumps and trenches in the process area

Oversight Efforts

- treatment of contaminated wastewater in process tanks
- excavation of impacted soils
- continuous operation and maintenance of the facility's stormwater management system
- negotiation with a former PRP regarding the removal of the abandoned coal tar storage tanks at the site across the road from the plant referred to as Site 108

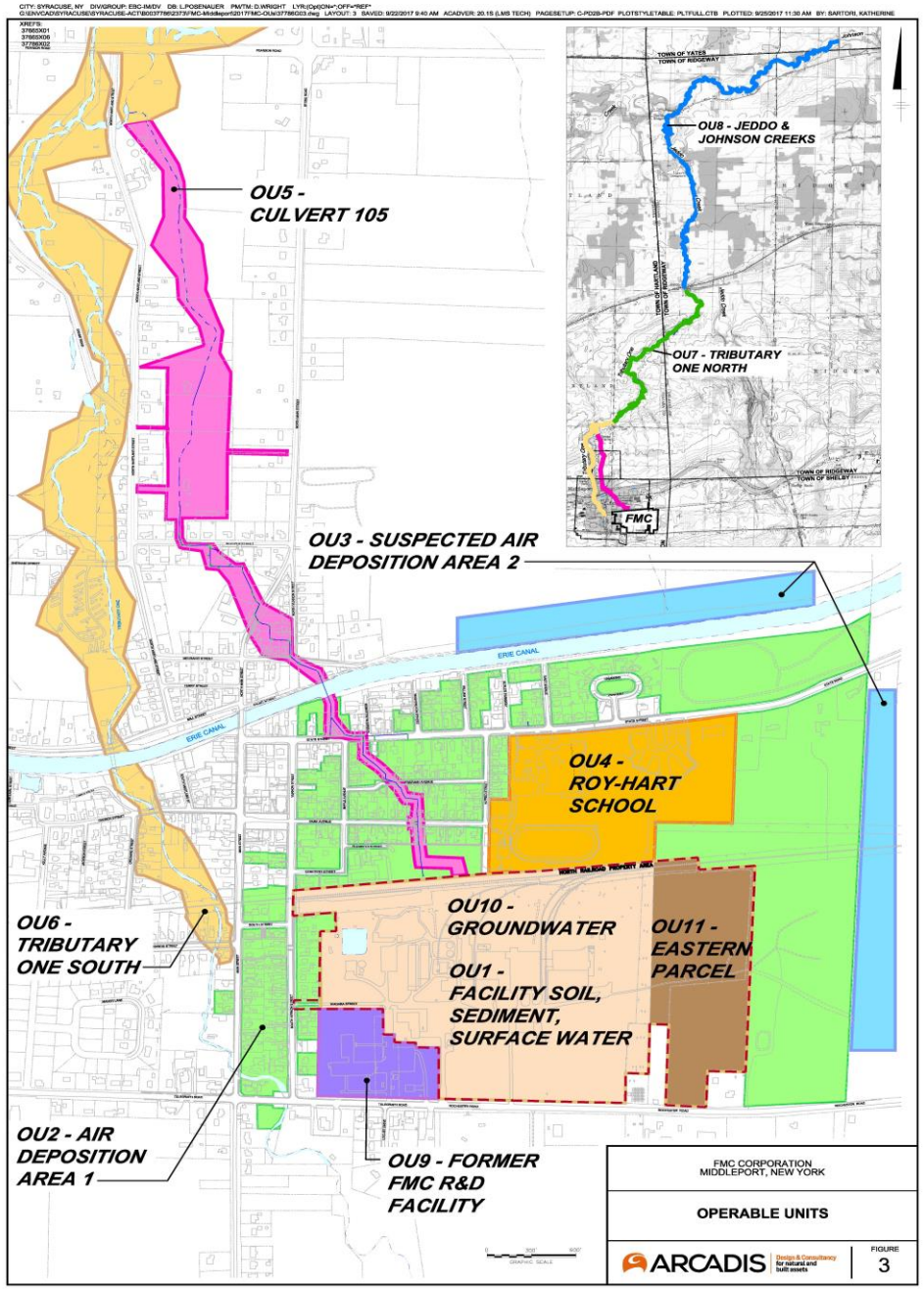
Next Steps – Clean up and Future Redevelopment

DEC shares the common goal of implementing a comprehensive investigation and cleanup that is fully protective of public health and the environment in order to bring the site back into productive reuse.

Options include the federal superfund program, the state superfund program, the brownfield cleanup program and/or a combination of these programs for various areas of the site.

FMC Corporation - Arsenic contamination in WNY

- FMC Corporation owns a 103-acre pesticide repackaging facility in Middleport, NY
- Historical pesticide manufacturing at the facility resulted in arsenic, DDT, and other hazardous waste contamination at the facility and in off-site areas (including residential yards and a school in the village)
- The facility is subject to RCRA permitting and compliance, and the off-site areas require investigation and remediation under state hazardous waste laws (Article 27, Title 13 of the ECL)
- From the early 1990s until recently, a minimal amount of remediation, other than interim actions, had been performed



FMC Site
11 Operable Units
Most are Off-Site

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Department of Environmental Conservation

FMC fought the Law

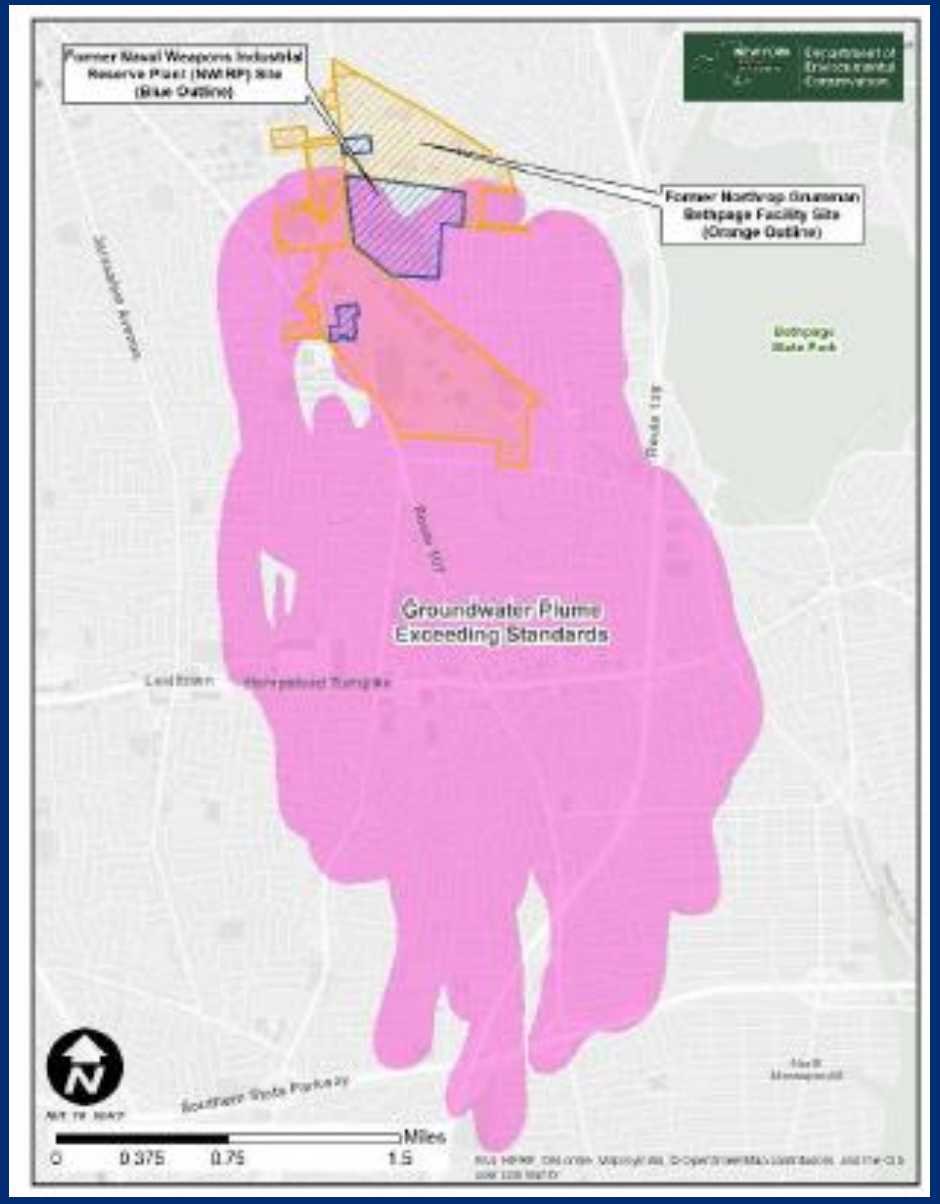
- After DEC issued a remedy decision for over 200 residences and a school (a decision which FMC believed was too stringent), FMC filed an Article 78 to challenge the decision
- FMC also sought to prevent the Department from implementing the remedy using its own state funds
- **And the law won**…After several appeals, the Court of Appeals ruled completely in the Department's favor: *FMC v. NYSDEC,* 31 N.Y.3d 332 (May 2018)

FMC then pursued settlement

- After the loss at the Court of Appeals, FMC was facing a significant cost recovery case and many years of litigation and expert consultant costs to keep fighting
- FMC also received notices of violation for several on-site activities that violated state hazardous waste laws, including an unauthorized demolition of a building containing hazardous wastes
- On June 6, 2019, FMC and NYSDEC entered into a comprehensive consent order, one of the largest environmental enforcement settlements to date:
  - Payment of over $31M for past NYSDEC costs
  - Payment of $2.4M penalty and implementation of a $1M Environmental Benefit Project
  - Posting of $80M in Financial Assurance
  - Reimbursement of NYSDEC future costs and takeover of remediation after 2020 (finishing remediation of all OUs will likely cost over $100M)

Northrup Grumman – Long Island Groundwater Plume

- A portion of Long Island's sole source aquifer, in and around the community of Bethpage, has been impacted by legacy contamination from previous industrial operations by Northrup Grumman and the US Navy
- A massive plume of contaminated groundwater, measuring approximately 2 miles wide and 4 miles long, has already impacted several water districts and could impact future water districts if not contained
- Previous remedial decisions by the DEC, including pumping and treating of contaminated groundwater by Grumman, the Navy, and several water districts, has been the main remedial approach



- Previous modeling and studies determined that levels of VOCs would attenuate – recent studies have shown minimal attenuation
- Also, older models showed the plume would not move considerably to the south – new modeling shows the opposite, the plume is moving
- Public sentiment – the plume should be contained, so that other water districts and the citizens that are served by them are not affected

Grumman – updated modeling and new amended remedy

- Legislation passed in 2014 seeking a reassessment of the feasibility of containment of the plume
- DEC, in conjunction with its contractors and the USGS, performed state-of-the-art modeling over the last several years, and in May of 2019 issued a supplemental feasibility study and a proposed amended remedy, which states that full containment is feasible and would be the action most protective of public health and the environment
- DEC anticipates issuing the final amended remedy shortly, and the Department will seek implementation of the amended remedy by the Navy and Grumman
- Entire approach to the Navy Grumman plume shows how government should work – base decisions on science and be willing to adapt to changes in technology and circumstances – USEPA should consider this approach to the Hudson River

Rensselaer, New York- Dunn Land Fill

Background

Facility: Sand and gravel mine with phased conversion to a construction and demolition (C&D) debris disposal facility

Location: Urban location in close proximity to public school and residential neighborhoods, within the viewshed of downtown Albany, on municipal border of City of Rensselaer and City/Town of North Greenbush

Primary Community Complaints: Dust, truck traffic, odors

DEC Enforcement – Order on Consent 2018

Violations:

- Use of unpermitted access points
- Off-site placement of mined material
- Off-site stormwater discharge
- Off-site dust migration

Assessed Civil Penalty:

- $100,000

Environmental Benefit Project:

- $225,000 for benefit of school and local community

Schedule of Compliance:

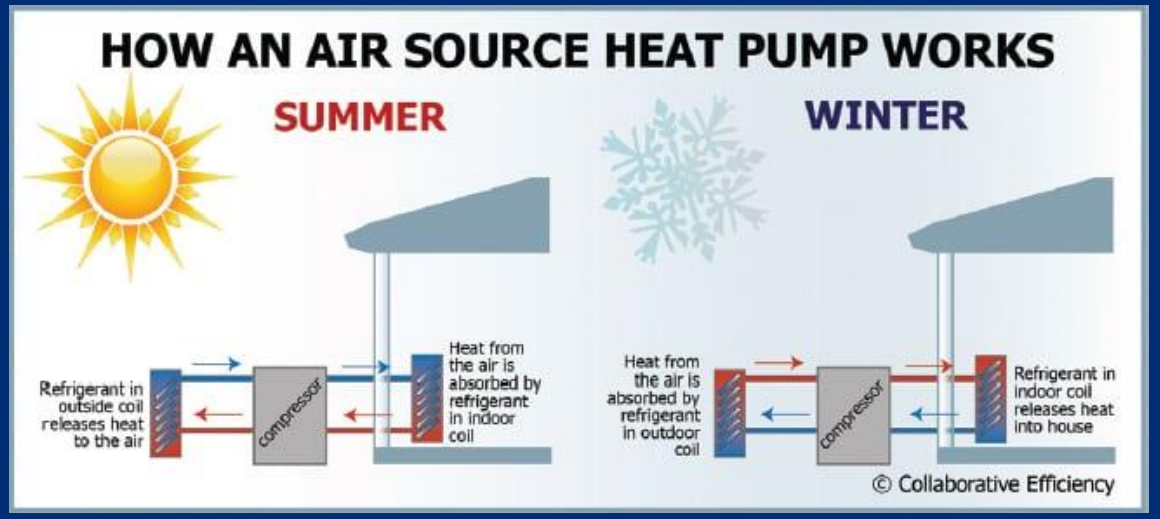
- Site stabilization
- Fugitive dust control plan
- Haulageways improvement
- Dust mitigation measures, including hydromulching, fencing, street sweeping, and truck washing

DEC Enforcement – Order on Consent 2019

- **Violations**:
  - Failure to properly hydromulch wind-sided slopes of mine site
  - Failure to properly apply water and approved dust palliatives to prevent dust from leaving mine site
- **Civil Penalty**:
  - $35,000
- **Schedule of Compliance**:
  - Appointment of third-party monitor
  - Revised Dust Control Plan
  - Construction of soil berm (permit modification)

Climate Leadership and Community Protection Act (CLCPA)

2030		**Statewide GHG Emissions Limit: 60% of 1990 levels**
2030		Clean Energy Goal: 70% renewable energy
2030		Clean Energy Procurement Goal: 3,000 MWs of energy storage
2035		Clean Energy Procurement Goal: 9,000 MWs of offshore wind
2040		Clean Energy Goal: Net zero emissions for the electric sector
2050		Statewide GHG Emissions Limit: 15% of 1990 levels



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January 2021	DEC	DEC shall, pursuant to rules and regulations promulgated after at least one public hearing, establish a statewide GHG emissions limit as a percentage of 1990 emissions • 2030: 40% below 1990 emissions • 2050: 85% below 1990 emissions
July, 2024	PSC	PSC shall establish programs to require the procurement by the state's load serving entities of 6,000 MWs of solar generation by 2025, 3,000 MWs of energy storage by 2030, and 9,000 MWs of offshore wind by 2035
January 2024	DEC	DEC shall promulgate rules and regulations to ensure compliance with the statewide emissions reduction limits Before promulgating rules and regulations DEC shall: • Hold no less than 2 public hearings • Consult with the council, the EJ Advisory Group, the Climate Justice WG, representatives of regulated entities. Community organizations, environmental groups, health professionals, labor unions, municipal corporations, trade associations and other stakeholders

Thank You

- Thomas S. Berkman, Esq.
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- 518-402-8543

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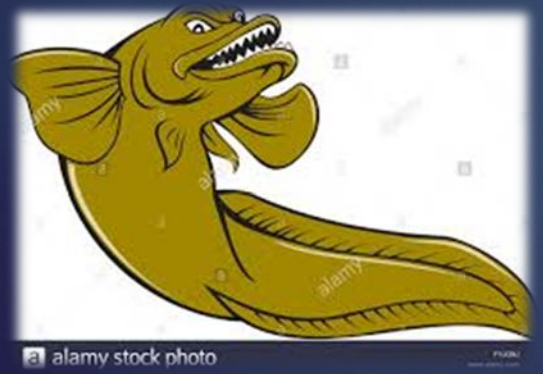
EPA REGION 2 UPDATE

NYSBA EELS Fall Meeting
September, 2019



WALTER MUGDAN

DEPUTY REGIONAL ADMINISTRATOR

US EPA REGION 2

EPA Strategic Plan 2018-2022

- Three major Goals:
  - Core Mission
  - Collaborative Federalism
  - Rule of Law & Process
- Six overarching priorities:
  - attainment of national ambient air quality standards;
  - modernize aging drinking water and wastewater infrastructure;
  - accelerate the pace of site cleanups and promote site reuse;
  - comply with statutory requirements and mandatory deadlines of recently-amended TSCA statute for ensuring the safety of chemicals;
  - increase environmental law compliance rates; and
  - accelerate permit related decision-making.

EPA Policy on Federal/State Enforcement Partnerships

- Policy issued 7/11/2019; replaces January 2018 interim policy.
- Three major components:
  - Joint work planning
    - Strategic planning & targeting
    - Scheduling inspections
    - Consider enforcement response
  - Roles of states & EPA
  - Rapid elevation of issues

EMERGING CONTAMINANTS

- **PFAS** (per- and poly-fluoroalkyl substances)
  - **PFOA**
    - **Teflon**
    - **Fire-fighting foam**
    - **Wide-spread; relatively easy to treat**
  - **GenX**
    - **Replacement for Teflon**
    - **Somewhat less easy to treat**
  - **PFNA, PFOS, etc.**
- **1,4-dioxane**
  - **Wide-spread; relatively difficult to treat**

EMERGING CONTAMINANTS

- No federal regulatory standards
  - 70 ppt Health Advisory level for PFOA/PFOS
- State regulatory standards include:
  - NY: MCLs of 10 ppt planned for PFOA & PFOS; and 1 ppb for 1,4-dioxane
  - NJ: 13 ppt MCL for PFNA; proposed 14 ppt MCL for PFOA
  - NC: “Health goal” of 140 ppt for GenX
  - CO: 0.35 ppb for 1,4-dioxane in drinking water supplies
- Local regulatory standards
  - Rensselaer County, NY: 0.35 ppb for 1,4-dioxane discharge from Superfund site treatment plant located on County land.

EMERGING CONTAMINANTS

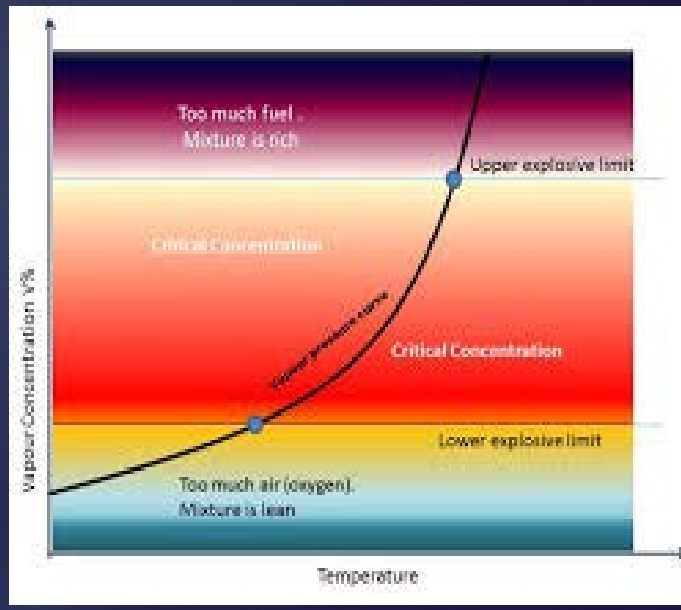
- EPA PFAS Summit, May 2018: EPA will --
  - Initiate steps to evaluate need for an MCL for PFOA & PFOS;
  - Convene federal partners and examine what is known about PFOA & PFOS in drinking water;
  - Begin necessary steps to propose designating PFOA and PFOS as "hazardous substances" through on or the available statutory mechanisms, including potentially CERCLA §102;
  - Develop groundwater cleanup recommendations for PFOA & PFOS at contaminated sites; and
  - Develop toxicity values for GenX and PFBS.

Notable R2 Enforcement Developments

- Methyl Bromide Cases
  - Esmond Family poisoned in May 2015 by illegal application of methyl bromide pesticidal fumigant
  - Application carried out by Terminix franchisee
  - Criminal prosecution of applicator, Terminix, others
    - Guilty pleas in all cases
  - Civil investigations revealed other instances of illegal application
  - Administrative enforcement actions initiated against twelve applicators & two distributors
    - Penalties and injunctive relief sought
    - Most now resolved

Notable R2 Enforcement Development

- *Total Petroleum* CAA §303 Emergency Order issued 5/20/2019
- Order addresses four tanks at Total's Guaynabo facility reported on 5/8/19 to have elevated Lower Explosive Limit (LEL) levels, indicating dangerous fire hazard
  - NFPA standard for such tanks: LEL not to exceed 25%
  - Five tanks had LELs between 39% and 100%
  - After 10 days only 1 tank had LEL <25%
  - Order required 4 tanks to be emptied, de-gassed within 3 days; then repair tanks; and not put tanks back into service without prior EPA approval



Notable R2 Enforcement Developments

- **NYC Hillview Reservoir Cover Judicial Consent Decree**
  - **90-acre reservoir is last stop for finished water before entering NYC distribution system.**
  - **Disinfection takes place upstream of Hillview, but reservoir is not covered so pathogens can enter water there.**
    - ***Giardia*, *Crytopsporidium* and other pathogens from animal waste**
  - **1999 NYS administrative order required cover**
  - **2005 federal SDWA regulation required cover**
  - **2010 EPA administrative order required cover**
  - **3/18/2019 judicial consent decree requires cover**
    - **Lengthy compliance schedule – cover to be installed NLT 2049**
    - **Cost likely to exceed $1.6 billion**
    - **$1 million civil penalty; $50K payment + $200K SEP to settle State claims**

Notable R2 Enforcement Developments

- New York City Housing Authority Administrative Agreement
  - Judicial complaint & proposed consent decree filed EDNY on 6/11/2018
  - Cited multiple HUD & EPA violations, including violations of EPA's Renovation, Repair & Painting (RRP) rule applicable to lead-based paint
  - Court rejected proposed consent decree; parties thereafter negotiated administrative agreement.
    - Agreement is with HUD; EPA is not a party, but EPA lead-based concerns are addressed.
    - Agreement includes requirement for federal monitor.
      - Selected by HUD in consultation w/ US Attorney, NYCHA and City
      - Paid for by City
      - Monitor has broad powers to ensure action plans are implemented and compliance achieved

Interim Remedies at R2 Sediment Sites

- Berry's Creek -- $332 M interim remedy selected Sept. 2018
  - Extensive mercury & PCB contamination
  - Contributes to contamination of Hackensack River
  - Dredge & cap upper section of creek
  - Additional Operable Unit(s) to follow
  - Interim remedy proposed by PRPs
  - All parties understand this is not the final remedy, and more work may be needed, including in the upper section of creek

Interim Remedies at R2 Sediment Sites

- Upper 9 Miles of Lower Passaic River (LPR)
  - LPR contaminated with dioxin, PCBs, other substances
  - EPA selected bank-to-bank dredge-and-cap remedy for lower 8 miles of LPR; $1.4 billion project now in design; construction to begin ~2021.
  - PRPs proposed interim remedy (estimated $300-$500 M) for upper 9 miles, to include selected areas for dredge-and-cap
  - Focused Feasibility Study being performed by PRPs; draft FFS scheduled for 8/2019; proposed cleanup plan by 9/2020.
    - Accelerated process will allow use of cleanup infrastructure for lower 8 miles
    - All parties understand final remedy could require additional work

Early Remedy at a R2 Sediment Site

- Newtown Creek Superfund Site -- CSO Mitigation Project
  - 12/2018 EPA administrative consent order with NYCDEP
  - NYCDEP will perform Focused Feasibility Study evaluating CSO controls necessary for Superfund purposes
  - FFS expected to result in early selection of a CSO remedy, prior to selection of a site-wide remedy
  - FFS will evaluate NYCDEP's 2017 Clean Water Act Long Term Control Plan for Newtown Creek CSOs
    - LTCP proposed a $1.4 billion CSO capture tunnel
    - NYCDEP hopes to demonstrate that LTCP proposal will be sufficient for Superfund

Interim Remedies at R2 Sediment Sites

- Newtown Creek Superfund Site – Lower Two Mile Study
  - 7/25/2019 EPA administrative consent order with five private PRPs ("Newtown Creek Group" or NCG)
  - NCG will perform FFS evaluating interim remedy options for lower two miles the five-mile Creek
  - FFS expected to result in early selection of interim remedy for that section of the creek, prior to selection of a site-wide remedy.
  - Anticipated that final remedy for lower two miles will be included in final site-wide remedy.

NYSBA Environmental & Energy Law Section 2019 Fall Meeting

Regulatory Initiatives & Enforcement

EPA REGION 2 UPDATE

Walter Mugdan
Deputy Regional Administrator
U.S. EPA Region 2
August 2019

I. EPA Strategic Plan

EPA's Strategic Plan[1] for the period from Fiscal Years 2018-2022 identifies three major Goals for EPA, titled (1) Core Mission, (2) Collaborative Federalism, and (3) Rule of Law & Process. The document also identifies six overarching priorities: attainment of national ambient air quality standards; modernize aging drinking water and wastewater infrastructure; accelerate the pace of site cleanups and promote site reuse; comply with the statutory requirements and mandatory deadlines of the recently amended TSCA statute for ensuring the safety of chemicals; increase environmental law compliance rates; and accelerate permit-related decision-making.

Within Goal 1 there are four major "Objectives" focusing on air, water, land and chemicals; and within these there are a total of 13 specific Strategic Measures. For example, under the air quality objective, the Strategic Measure is to reduce the number of NAAQS non-attainment areas nationwide to 101 by the end of federal Fiscal Year 2022. Under the clean and safe water objective there are three Strategic Measures, including reduction of the number of non-compliant community water systems to 2,700 by the end of FY-2022. Under the Land Revitalization Objective, one of the four Strategic Measures is to make 255 additional Superfund sites ready for anticipated use site-wide. And under the Chemical Safety Objective several of the five Strategic Measures set out the commitment to achieve various TSCA-related actions by the statutory deadlines.

Goal 2 includes a focus on enhanced Compliance Assurance, among other issues.

Goal 3 provides additional focus on compliance and enforcement, and includes several Strategic Measures including reduction of the average time from violation identification to correction; and increasing the environmental law compliance rate.

1 <https://www.epa.gov/planandbudget/fy-2018-2022-epa-strategic-plan>

II. EPA Policy on Federal/State Enforcement Partnerships

On July 11, 2019 EPA issued its policy on *Enhancing Effective Partnerships Between EPA and the States in Civil Enforcement and Compliance Assurance Work*.[2] This supersedes the January 2018 Interim Guidance on the same topic, and provides a roadmap for engaging states in discussions about the environmental enforcement and compliance assurance work that we collectively address. The policy has three major components. The first calls for periodic joint work planning between states and EPA. The purpose is to collaboratively engage in strategic planning to identify and prioritize compliance issues and appropriate areas of focus; to plan inspections so as to share the workload while avoiding unnecessary duplication, and schedule joint inspections where appropriate; and plan the enforcement response to non-compliance, including discussion of which agency will handle a given matter and what kind of response is contemplated.

The second major component of the policy addresses the roles of EPA and the states, considering specialized capabilities and expertise; resource demands and availability; and whether a particular matter advances a national compliance initiative (e.g., focusing on a particular pollutant or industry) or involves facilities in multiple states or a federal facility.

The third component establishes a process for rapid elevation of issues that arise between EPA and a state, moving up to senior career officials and finally to senior political appointees in both agencies.

III. Emerging Contaminants

In recent years, a number of un-regulated chemicals have generated considerable concern with respect to drinking water contamination and other possible exposure pathways. One such chemical is 1,4-dioxane, a semi-volatile organic compound that is both ubiquitous and difficult to manage. Also of growing concern is a group of compounds known as per- and polyfluoroalkyl substances (PFAS); perhaps most common among these is perfluoroctanoic acid (PFOA), which was used to make non-stick materials like Teflon, and was also used widely in fire-fighting foam.

These chemicals are not currently regulated under federal environmental laws[3]; in particular, there are no Maximum Contaminant Levels (MCLs) that have been established under the Safe Drinking Water Act, nor are they are "hazardous wastes" under RCRA or "hazardous substances" under CERCLA. If disposed of they are "solid wastes" under RCRA; and, if released into the environment, they are "pollutants or contaminants" under CERCLA. However, though some action can be taken under each statute, these contaminants do not trigger corrective

2 < https://www.epa.gov/newsreleases/epa-announces-policy-enhance-enforcement-and-compliance-assurance-partnerships-states>

3 In December 2017 EPA announced a cross-agency effort to address PFAS. *See*: <https://www.epa.gov/pfas>

action obligations under RCRA, and the government's enforcement authorities under CERCLA are significantly circumscribed.

PFOA and other PFAS are being found in groundwater across the U.S.[4] These compounds have adverse health effects at very low concentrations. On May 25, 2016 EPA published a health advisory setting out the Agency's determination that 70 parts per trillion is the concentration in drinking water of PFOA and a related compound, PFOS, at or below which adverse health effects are not anticipated to occur over a lifetime of exposure.[5] As discussed below, in the absence of federal regulatory action some states have moved ahead with regulatory standards of their own.

Fortunately, PFOA and some other PFAS can be removed from water relatively easily, with common treatment technologies such as air stripping or activated carbon. Unfortunately, some PFAS (including compounds intended as a replacement for PFOA and given the trade name "GenX" by manufacturer DuPont,) are somewhat less easily removed from water.[6]

DuPont, the maker of Teflon, faced some 3,500 toxic tort suits in Ohio, alleging injuries from PFOA-contaminated drinking water. In December 2016 a jury in the first of these to go to trial awarded $2 million to the plaintiff in compensatory damages, and in January 2017 it awarded a further $10.5 million in punitive damages.[7] A few weeks later, in February 2017, DuPont and Chemours (its former subsidiary, which it spun off in 2015) settled these cases for a cash payment of $671 million.[8]

On August 3, 2017 EPA added to the Superfund National Priorities List (NPL) the St. Gobain Performance Plastics McCaffrey St. facility in the Village of Hoosick Falls, NY because of PFOA discharges that contaminated the municipality's public drinking water supplies.[9] This is only the second time EPA has proposed to add a site to the NPL based on discharges of a "pollutant or contaminant" (rather than a "hazardous substance"), and the first time involving PFOA or any PFAS.

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4 PFAS were recently found in bottled water from Massachusetts. <https://thehill.com/policy/energy-environment/455175-senator-pushes-fda-action-as-forever-chemicals-spread-to-bottled>

5 < https://www.epa.gov/ground-water-and-drinking-water/drinking-water-health-advisories-pfoa-and-pfos>

6 Information about GenX can be found in Wikipedia at: <https://en.wikipedia.org/wiki/GenX>. During 2017 the discovery of GenX in the Cape Fear River and associated drinking water supplies in North Carolina brought … well, considerable fear to local communities. *See, e.g.:* <http://www.capefearriverwatch.org/advocacy/genx-what-happened>. The state established a "health goal" of 140 ppt for drinking water; *see:* <https://files.nc.gov/ncdeq/GenX/FAQ_updated_100417-5.pdf>. EPA has not established any advisory or regulatory limits.

7 *See:* <http://www.law360.com/articles/875696/dupont-owes-2m-in-teflon-testicular-cancer-trial-jury-says?article_related_content=1> *and* <http://www.law360.com/environmental/articles/877780/breaking-dupont-hit-with-10-5m-punitive-verdict-in-cancer-trial?nl_pk=39e483ab-a175-4cb9-9e56-1b4eb4bff18d&utm_source=newsletter&utm_medium=email&utm_campaign=environmental>

8 *See:* <https://www.reuters.com/article/us-du-pont-lawsuit-west-virginia/dupont-settles-lawsuits-over-leak-of-chemical-used-to-make-teflon-idUSKBN15S18U>

9 *See*: <https://www.gpo.gov/fdsys/pkg/FR-2017-08-03/pdf/2017-16172.pdf>

1,4-dioxane is also common; it was used as a stabilizer for other solvents, and was also used in many consumer products including paint strippers, dyes, greases, varnishes, waxes and even baby shampoo. It is classified by EPA as a likely human carcinogen.[10] Unlike PFAS, it is comparatively difficult to extract from water. Its discovery at some Superfund sites has generated considerable public concern.[11] Reference doses have been established for several exposure pathways, but the chemical is not currently regulated under federal environmental laws.[12]

In May 2018 EPA held a "PFAS Summit" with representatives of nearly all the states, and other stakeholders, in attendance.[13] The purpose of the meeting was to share information on ongoing efforts to characterize risks from PFAS and develop monitoring and treatment/cleanup techniques; to identify specific near-term actions, beyond those already underway, that are needed to address challenges currently facing states and local communities; and to develop risk communication strategies that will help communities to address public concerns with PFAS. After the meeting EPA announced these follow-up actions:

- EPA will initiate steps to evaluate the need for an MCL for PFOA and PFOS. EPA will convene its federal partners and examine everything the agencies know about PFOA and PFOS in drinking water.
- EPA is beginning the necessary steps to propose designating PFOA and PFOS as "hazardous substances" through one of the available statutory mechanisms, including potentially CERCLA Section 102.
- EPA is developing groundwater cleanup recommendations for PFOA and PFOS at contaminated sites.
- EPA is developing toxicity values for GenX and PFBS.

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10 <https://www.epa.gov/sites/production/files/2014-03/documents/ffrro_factsheet_contaminant_14-dioxane_january2014_final.pdf>

11 A number of such sites are within the author's area of responsibility, including the Dewey Loeffel site in NY and the Ringwood Mines site in NJ. At the former site, the PRP carrying out the groundwater pump-and-treat remedy (selected based on the presence of other chemicals that are "hazardous substances") agreed to install additions to the treatment train designed to remove 1,4-dioxane.

12 *See* EPA's fact sheet at: <https://www.epa.gov/sites/production/files/2014-03/documents/ffrro_factsheet_contaminant_14-dioxane_january2014_final.pdf> which includes the following: "EPA risk assessments indicate that the drinking water concentration representing a 1 x 10^{-6} cancer risk level for 1,4-dioxane is 0.35 µg/L [ppb]."

13 For information about the PFAS Summit *see* <https://www.epa.gov/pfas/pfas-national-leadership-summit-and-engagement>

A number of bills have been introduced in Congress that would require EPA to establish enforceable standards for some of these pollutants, and/or set those standards directly through legislation.[14] To date, none of these have successfully made it to the point of enactment.

Meanwhile, several states have established their own standards or guidelines for these emerging contaminants, which are often more stringent than the federal health advisory. In March 2017 New York State became the first in the nation to designate PFOA and PFOS as "hazardous substances" under the state's Superfund-analog statute.[15] And in July, 2019 New York Governor Cuomo directed the NYS Department of Health to establish MCLs for PFOA, PFOS and 1,4 dioxane.[16] The Governor's press release on this directive noted that the State Health Commissioner had already accepted the recommendations made in December 2018 by the NYS Drinking Water Quality Council. The Council recommended that the MCLs for PFOA and PFOS should be set at 10 parts per trillion (ppt), and that the MCL for 1,4-dioxane (which would be the nation's first such MCL) should be set at 1 part per billion (ppb).[17]

New Jersey has added PFNA to its List of Hazardous Substances under the New Jersey Spill Act (the NJ analog to CERCLA); proposed an MCL for drinking water of 14 ppt for PFOA; and adopted an MCL of 13 ppt for PFNA.[18] Vermont has established an MCL of 20 ppt for PFOA[19]; North Carolina set a "health goal" of 140 ppt for GenX,[20] Dupont's Teflon replacement compound (actually, a group of compounds); and Colorado set 0.35 ppb as the maximum level for 1,4-dioxane in drinking water supplies.[21]

At least one local government has also legislated in this arena. In December 2017, Rensselaer County, NY passed a law setting a limit on discharges of 1,4-dioxane from any Superfund site that operates a groundwater treatment plant located on County-owned land.[22] There is only one such site -- the Dewey Loeffel Superfund site, at which a pump-and-treat remedial response action is ongoing. In 2014, at EPA's request, the groundwater treatment plant at the site was

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14 See, for example, <https://www.congress.gov/bill/116th-congress/house-bill/535/all-info> and <https://www.congress.gov/bill/116th-congress/house-bill/2377>

15 *See* < https://www.dec.ny.gov/chemical/108831.html>

16 <https://www.governor.ny.gov/news/governor-cuomo-announces-availability-350-million-water-system-upgrades-statewide-and-directs>. New York State has a number of locations where elevated levels of PFAS have been found in drinking water, including Hoosick Falls and Newburgh. In July 2019, NY was named as one of six recipients of federal funding from the Centers for Disease Control and Prevention to expand biomonitoring programs to better assess the extent of PFAS accumulation in people. NY is expected to receive about $5 million in federal funding for the study over a five year period. <https://midhudsonnews.com/2019/07/27/congress-approves-federal-funding-for-cdc-study-of-pfa-chemicals-in-new-york/>

17 *See:* <https://www.health.ny.gov/press/releases/2018/2018-12-18_drinking_water_quality_council_recommendations.htm>

18 *See*: <https://www.nj.gov/dep/srp/emerging-contaminants/>

19 *See:* <http://www.wateronline.com/doc/vermont-sets-new-drinking-water-standard-for-pfoa-0001>

20 NC established a "health goal" of 140 ppt for drinking water; *see:* <https://files.nc.gov/ncdeq/GenX/FAQ_updated_100417-5.pdf>.

21 <https://www.colorado.gov/pacific/sites/default/files/41_2016%2812%29.pdf>

22 *See:* <http://www.ny1noticias.com/nyc/noticias/news/2017/12/13/rensselaer-county-passes-law-to-protect-clean-water>

modified by the PRP, General Electric, to treat 1,4-dioxane. The treated effluent discharges to a surface stream that is not used for drinking water. However, the County legislation sets a stringent discharge limit of 0.35 ppb, a level apparently based on the above-mentioned Colorado limit applicable to drinking water supplies.[23] Although the treatment system has been optimized and is functioning well, it probably cannot meet the 0.35 ppb limit on a steady basis. EPA expressed concerns to the County legislature about the proposed law before it was passed, advising, *inter alia*: "[W]e believe a federal judge would find that the County law is preempted by CERCLA under the Supremacy Clause of the U.S. Constitution [and a]n attempt by the County to enforce its standard might also be considered a premature challenge to a [Superfund] response action, under Section 113(h) of CERCLA."[24]

IV. Notable Region 2 Enforcement Developments

A. Methyl Bromide Misuse Cases: In May 2015 a family of four vacationing in a luxury condo on St. John in the U.S. Virgin Islands was tragically poisoned by an illegal application of methyl bromide in the unit below where they were staying. The chemical is a pesticide, regulated under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). Methyl bromide is a gas used as a fumigant; permissible uses are strictly limited, and it is not permitted to be used in residential settings. The applicator was a Terminix franchisee. The unit where the pesticide was illegally applied had not been properly sealed. The gas leaked out and reached the unit above, where the members of the Esmond family were exposed. All four became gravely ill, and suffered varying degrees of permanent neurological damage; the two teenage sons were the most seriously affected with paralysis and other effects, and the father remains in a wheelchair, unable to walk.[25]

Criminal enforcement actions against, among others, Terminix and Jose Rivera, the local applicator, were concluded with guilty pleas. Civil investigations revealed additional instances of methyl bromide having been applied in residential settings in Puerto Rico and the USVI, and resulted in administrative enforcement actions being taken against twelve applicators and two distributors. The actions cited numerous violations of FIFRA, and also a number of reporting and record-keeping violations of the Clean Air Act. The enforcement actions sought both penalties and injunctive relief. Many of them have since been settled. Several respondents did not timely respond, and EPA has filed motions for default judgments in those cases.

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23 *See:* <https://www.colorado.gov/pacific/sites/default/files/31_2018%2801%29.pdf> at page 41; the Colorado limit is presumably based on the EPA risk assessment cited in Note 66, above.

24 Letter dated Nov. 13, 2017 from Sharon Kivowitz, Assistant Regional Counsel, EPA Region 2, to Stephen Pechenik, Rensselaer County Attorney.

25 The story was widely reported, but there has been little publicly reported information about the current conditions of the various family members. One story that provided some information can be found at: <https://www.delawareonline.com/story/news/crime/2018/04/13/man-indicted-using-pesticide-poisoned-delaware-family-vacation-st-john/514704002/>

B. Total Petroleum Emergency CAA Order: On May 20, 2019 EPA issued an emergency order to Total Petroleum Puerto Rico Corp. under Section 303 of the Clean Air Act. The order addresses elevated lower explosive limit ("LEL") measurements at four gasoline storage tanks at the Total facility in Guaynabo, which indicate a dangerous fire hazard. EPA became aware of the elevated LEL measurements for five tanks when, on the evening of May 8, 2019, Total submitted its response to a CAA §114 information request for LEL testing. Total's measurements showed that all five tanks were over 25% LEL concentration. The National Fire Protection Association, which sets fire safety standards, has a standard for tanks such as these (internal floating roof tanks) to not exceed a 25% LEL in the headspace. Two of the five tanks initially tested as high as 100% LEL; two between 50 and 75%; and another at 39%. On May 9 EPA communicated with Total about the results, and remained in regular and frequent communication with the company in the days thereafter. Ten days later, Total had only emptied one tank; the remaining four tanks remained at elevated LEL levels. EPA therefore issued the emergency order, which required that Total take the following actions:

- Immediately stop adding gasoline to the tanks;
- within 3 days of the order, provide a timeline to empty, de-gas, and clean the four tanks as soon as possible, and to inspect and identify the cause of the elevated LEL levels in each tank;
- identify and complete any necessary repairs to the tanks while they are out of service, and notify EPA of the repairs; and
- take daily measurements of the LEL in the headspace of each tank and provide that information to EPA.

Once Total believes that operating a given tank would not cause imminent and substantial endangerment to public health or welfare or the environment, Total may ask EPA for permission to restart use of that tank. Total may not resume use of a tank without EPA approval.

C. Hillview Reservoir Cover: On March 18, 2019 a complaint and consent decree were concurrently filed in the Eastern District of New York initiating and simultaneously proposing resolution of an enforcement action brought by EPA against the City of New York under the Safe Drinking Water Act. The suit cited the City for failure to cover the Hillview Reservoir, located in Yonkers, in violation of federal regulatory requirements, and federal and state administrative orders. The consent decree requires the City to cover the reservoir and pay a civil penalty.[26]

The reservoir is part of the City's public water system. It is an open storage facility and is the last stop for finished drinking water before it enters the City's water tunnels for distribution to residents. The 90-acre reservoir receives nearly a billion gallons of water each day through the

26 Much of the information in the text above is contained in the press release issued by the U.S. Department of Justice on the occasion of the lodging of the proposed consent decree: < https://www.justice.gov/usao-edny/pr/city-new-york-agrees-settle-federal-complaint-covering-hillview-reservoir-prevent>

Catskill and Delaware Aqueducts, and serves as a holding tank that allows the City to meet daily peak water demand. It is divided into two segments, the East and West Basins. Prior to the water entering the reservoir, it receives a first treatment of chlorine and ultraviolet treatment. Since the reservoir is downstream of these treatments and is an open storage facility, the finished water in the reservoir is subject to recontamination with microbial pathogens, such as viruses, *Giardia* and *Cryptosporidium*, from birds, animals and other sources. Sufficient microbial treatment is not available downstream of the reservoir, so a cover is necessary to prevent recontamination by such pathogens. Until the cover is in operation, the City is required to take active measures to control wildlife in and around the reservoir and monitor to ensure that the water is safe for drinking.

The City has been required to cover the reservoir since it first executed an Administrative Order with the State of New York in January 1999. In March 2006 the City also became obligated to cover the reservoir under federal regulation pursuant to the Safe Drinking Water Act; the regulation required uncovered finished water storage facilities to be covered by April 1, 2009 (or for there to be further downstream treatment). In May 2010, EPA entered into an Administrative Order requiring the City to meet a series of milestones leading to the completion of a cover for the reservoir. The first milestone date was January 31, 2017; the City failed to meet that date, and this judicial enforcement action followed.

The schedule in the decree is an extended one. The East Basin cover is to be constructed and operational by 2042, and the West Basin cover by 2049. The City's estimate in 2009 for the cost of its then-planned concrete cover for the 90-acre reservoir was $1.6 billion. (The actual cost of the cover may be lower, should the City choose a different type of cover.) The schedule is so extended because two other related, major projects need to be completed before the Hillview cover work is started. These are the Kensico Eastview Connection and the Hillview Reservoir Improvements. The completion of the former is expected to take until 2035, with an estimated cost of about $1 billion; the latter project will be conducted concurrently and is anticipated to be completed by 2033 at a cost of about $375 million. (The decree provides for potential schedule acceleration, which could be possible under certain circumstances.)

The decree also requires various interim measures to protect the water until the reservoir cover is in full operation, including: (1) enhanced wildlife management at the reservoir; (2) weekly sampling of source water for *Cryptosporidium* and *Giardia* at the Kensico and Hillview Reservoir effluents; (3) quality control sampling of the Hillview effluent; and (4) implementation of a *Cryptosporidium* and *Giardia* Action Plan for response procedures for elevated *Cryptosporidium* and *Giardia* at Hillview.

In addition, the decree requires that the City pay a civil penalty of $1 million for its past violations of federal requirements. The City will also pay New York State $50,000, and implement a state Water Quality Benefit Project in the amount of $200,000, to settle the State's claim for penalties for violations of the State administrative order.

D. New York City Housing Authority: On January 31, 2019, the U.S. Department of Housing and Urban Development and the New York City Housing Authority signed an administrative agreement requiring NYCHA, under the supervision of a federal monitor, to fundamentally reform its operations and remedy living conditions for its residents, including lead paint hazards, mold growth, pest infestations, lack of heat, and inadequate elevator service.[27] The agreement, which went into effect immediately and does not require court approval, resolves the United States' claims against NYCHA detailed in a judicial complaint filed on behalf of HUD and EPA in federal district court on June 11, 2018.[28] At that time, the parties had also submitted to the court a proposed consent decree that would resolve the cited violations. The court subsequently rejected the proposed decree; the parties thereafter negotiated the administrative agreement. (The judicial complaint was dismissed without prejudice after the monitor was appointed in February 2019.)

EPA's claim in the judicial complaint concerned NYCHA's long-term and ongoing violations of regulations concerning lead-based paint hazards, specifically the Renovation, Repair, and Painting Rule (RRP) Rule promulgated under TSCA and set out at 40 C.F.R. Part 745 subpart E. In addition to requiring NYCHA to comply with the RRP Rule, the remedial relief mandated by the administrative agreement sets out compliance actions under the RRP Abatement (subpart L) and Disclosure Rules (subpart F) as well. Specifically, the administrative agreement requires NYCHA to remediate living conditions at NYCHA properties by specific deadlines and meet strict, objective compliance standards regarding lead paint hazards. For example, NYCHA is required to take action within 30 days to visually inspect all non-exempt units built before 1978 where NYCHA believes a child under 6 resides or routinely visits, and remediate any deteriorated lead-based paint in the apartment; and, over time, to abate all lead paint in all NYCHA developments in accordance with the applicable work-practice standards.

The administrative agreement obligates NYCHA to establish three new critical functions: a Compliance Department, an Environmental Health and Safety Department, and a Quality Assurance Unit. In addition, the agreement requires the City to select a new chief executive officer for NYCHA from a list of qualified professionals jointly compiled by HUD, the U.S. Attorney's Office, and the City. The agreement also renews the City's commitment, reflected in the June 2018 proposed Consent Decree, to provide an additional $1 billion in capital funds to NYCHA over the next four years and an additional $200 million in capital funds each subsequent year for the duration of the Agreement. Also, the agreement locks in an additional $4 billion in City funds budgeted through 2027.

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27 <https://www.hud.gov/sites/dfiles/PA/documents/HUD-NYCHA-Agreement013119.pdf>

28 That judicial complaint was accompanied by a proposed Consent Decree that had been negotiated in advance by the parties. *See:* <https://www.epa.gov/newsreleases/manhattan-us-attorney-announces-settlement-nycha-and-nyc-fundamentally-reform-nycha-0>. However, the district court ultimately rejected the proposed Consent Decree, which led the parties to instead negotiate the administrative agreement.

Pursuant to the agreement, a federal monitor, selected by HUD and the U.S. Attorney's Office in consultation with NYCHA and the City and paid for by the City, will oversee NYCHA's reform efforts.[29] Beyond the specifically enumerated remedial actions required under the Agreement, NYCHA will develop action plans, subject to the monitor's approval, to remediate living conditions at NYCHA and meet the compliance standards set forth in the Agreement. The monitor and NYCHA also will collaboratively develop a plan to overhaul NYCHA's organizational, management, and workforce structure, informed by a new comprehensive study from an independent third-party consultant. Throughout the term of the Agreement, the monitor is required to engage with the community, including NYCHA residents, resident groups, and stakeholders, regarding matters covered by the Agreement, and provide public reports detailing NYCHA's progress. The monitor has wide-ranging powers to ensure that the action plans are implemented, and compliance achieved.

V. Interim and Early Remedies at Region 2 Superfund Sediment Sites

EPA Region 2 has recently announced its intention to proceed with "interim remedies" at two major Superfund sediment sites; and to proceed with an early action at a third. The first of these to be announced was an interim remedy at the Berry's Creek site in New Jersey. Three federal Superfund sites are situated on the banks of the creek, which is a tributary of the Hackensack River. In September 2018 EPA selected a $332 million dredge-and-cap remedy for the upper portion of the creek, which is heavily contaminated with mercury and other hazardous substances.[30] The interim approach explicitly recognizes that more work in the lower portion of the creek, and in the surrounding marshes, and even in the upper portion of the creek itself, might be required in the future; and, in any event, a future Record of Decision (ROD) will be necessary to select a final remedy. Nevertheless, the extensive interim remedy – which was proposed by the PRPs themselves – is expected to dramatically reduce contaminant loadings to the rest of the creek and the Hackensack River, and it can be carried out quite a bit earlier than if a final remedial selection were awaited.

The PRPs for the nearby Passaic River made a similar proposal for the upper nine miles of the Lower Passaic River, and EPA has preliminarily endorsed that approach and proceeded with a focused feasibility study, recently completed.[31] The PRP's proposal contemplates an interim

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29 The monitor's first report was issued in July 2019, in which he expressed concerns about the pace of actions to assess and address lead paint problems. The report notes that as of 5/31/19 NYCH was awaiting lab results for nearly 1000 units, and had yet to inspect over 600 units. 18 cases of children with elevated blood lead levels had been reported since January, and 10 of those between April and June. *See* <http://www.nydailynews.com/new-york/ny-federal-monitor-report-nycha-20190722-xz6gguijabenlfjr65irogvxua-story.html>

30 *See*: < https://www.epa.gov/newsreleases/epa-moves-forward-332-million-cleanup-berrys-creek-bergen-county-nj>

31 *See* < https://semspub.epa.gov/work/02/534002.pdf>

dredge-and-cap remedy, with the understanding that a later, final remedy selection might require additional work.

And at the Newtown Creek site in New York, EPA in December 2018 executed an administrative consent order with the City of New York for performing a focused feasibility study (FFS) to evaluate a possible early remedy for control of combined sewer overflows (CSO) into the creek.[32] Here, too, the selection of such a CSO remedy would precede a final site-wide remedy selection. A full remedial investigation and feasibility study (RI/FS) for the site is being conducted by six parties – the five members of the "Newtown Creek Group" (NCG) plus New York City -- under a separate administrative settlement agreement issued in 2011 to address site conditions throughout the five-mile long creek. However, the selection of a final, site-wide remedy based on that RI/FS is still a number of years off. In the meantime, the FFS being conducted by the City will evaluate the sufficiency for CERCLA purposes of the CSO controls proposed by the City in the Long Term Control Plan for Newtown Creek issued in 2017 pursuant to the Clean Water Act.[33] If the FFS demonstrates that those CSO controls are sufficient for CERCLA purposes and would be consistent with any eventual site-wide remedy for the Creek, then EPA expects to proceed with that early remedy selection. The City's interest in this process is to secure confirmation that the very extensive and expensive CSO control work proposed in the LTCP is indeed consistent with what would be required under CERCLA, so that it can proceed with development of those projects with confidence that more or different work would not later be required under a final site-wide CERCLA remedy.

And on July 25, 2019 EPA issued an Administrative Order on Consent to the five members of the NCG[34] requiring them to undertake a separate FFS to investigate hazardous substances in the lower two miles of Newtown Creek. Following completion of that FFS, EPA Region 2 anticipates that, if appropriate, it will select a remedy for an interim early action to be carried out in the lower two miles of the site. It is anticipated that the final remedy decision for those lower two miles will be memorialized as part of the future site-wide remedy to be selected once the RI/FS is completed.

VI. ***Burlington Northern*** **CERCLA Decision Progeny**

On May 4, 2009 the Supreme Court handed down its decision in *Burlington Northern & Santa Fe Railway Co., et al v. United States, et al.* [35] The decision is of major significance with respect to two areas of Superfund jurisprudence: "arranger" liability, and divisibility or apportionment of harm.

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32 < https://semspub.epa.gov/src/document/02/528368>

33 < http://www.nyc.gov/html/dep/pdf/cso_long_term_control_plan/ltcp-newtown-creek-cso.pdf>

34 Phelps Dodge Refining Corporation, Texaco, Inc., BP Products North America Inc., Brooklyn Union Gas Company d/b/a National Grid NY, and ExxonMobil Oil Corporation

35 129 S. Ct. 1870.

The Court held that defendant Shell was not liable as an "arranger," observing that the term is not defined in CERCLA, so it should have its ordinary meaning. The Court held that the word "arrange" implies "action directed to a specific purpose" and therefore liability as an arranger would attach only if one takes "intentional steps to dispose of hazardous substances." Acknowledging that Shell knew of spillage at the Brown & Bryant facility -- which became the Superfund site in question -- the Court held that "knowledge alone is insufficient to prove that an entity 'planned for' disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product." The Court noted that Shell took a number of steps to encourage B&B to reduce the likelihood of spills. The court did observe that circumstantial evidence can be sufficient to prove intent: "In some instances, an entity's knowledge that its products will be leaked, spilled dumped or otherwise discarded may provide evidence of the entity's intent to dispose of its hazardous wastes."[36]

The Court also held that the district court had a reasonable basis for apportioning liability. The Court noted with apparent approval the long line of cases holding that the standard of liability under CERCLA is joint and several, unless the harm at the site is divisible and can reasonably be apportioned, and that the burden is with the defendants to prove that "a reasonable basis for apportionment exists." The Court quoted with approval the Restatement of Torts, holding that when "two or more causes produce a single, indivisible harm, 'courts have refused to make an arbitrary apportionment for its own sake, and each of the causes is charged with responsibility for the entire harm'." The Court nevertheless concluded that in this instance the District Court had a reasonable basis for apportioning the defendant railroads' liability at 9%.[37] The Court further confirmed that equitable considerations play no role in divisibility analysis, which is a purely legal issue. (Equitable considerations may be employed to *allocate* costs in contribution actions among joint and severally liable parties, but not to *apportion* legal liability.[38])

Is joint and several liability still the default standard? The Supreme Court indicated it was so. At the time, some commentators expected that the high court's approval of the apportionment carried out by the district court (based on a very simplistic and arguably nonsensical methodology[39]) would open the door for apportionment in many more cases; but that has not happened.

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36 This acknowledgement by the Supreme Court is relevant when considering whether the *Aceto* decision, discussed further in the text below, is still good law.

37 This author contends that the district court's basis for assigning the two defendant railroads a 9% apportioned share was fundamentally flawed. *See:* Walter Mugdan, *The Burlington Court's Flawed Arithmetic*, 40 Envtl. L. Rep. News & Analysis 10637 (2010). Similar criticisms are made by William C. Tucker in: *All is Number: Mathematics, Divisibility, and Apportionment under Burlington Northern*, Fordham Env. L. R., Fall 2010. Note that while the Supreme Court in Burlington accepted the district court's apportionment calculation, it did not mandate the sort of arithmetic used by the district court.

38 A number of courts have confused apportionment with allocation, and have purported to apportion when in fact they were carrying out an equitable allocation. *See*, e.g., *The City of Gary v. Paul Shafer d/b/a Paul's Auto Yard and Paul's Auto Yard, Inc.*, 2011 WL 3439239 (N.D. Ind. August 5, 2011), in which the two terms are used interchangeably, suggesting the court did not understand the difference. And in *Reichhold v. United States Metals Refining Co.*, 2009 WL 1806668 (D.N.J. June 22, 2009), the court purported to carry out an apportionment but relied explicitly on equitable considerations.

39 *See* note 37, above.

Is the *Aceto* line of cases still good law with respect to "arranger" liability? In *U.S. v. Aceto*,[40] manufacturers were held liable for spills on the property of a repackager. There are important distinctions from *Burlington*, however, suggesting that *Aceto* is still good law. In *Aceto*, the manufacturers retained ownership of the chemicals throughout the repackaging and subsequent reshipment processes. By contrast, Shell simply sold a useful product to B&B, a type of transaction that has long been held to *not* give rise to "arranger" liability. As noted above, in *Burlington* the Supreme Court wrote: "In some instances, an entity's knowledge that its products will be leaked, spilled dumped or otherwise discarded may provide evidence of the entity's intent to dispose of its hazardous wastes." The *Aceto* manufacturers did not take any precautions against spillage and had knowledge of the likelihood of spillage; indeed, they had "tolling agreements" with the repackager which recognized that a certain amount of spillage (and thus product loss) would occur. The Restatement of Torts, cited with approval by the Supreme Court in *Burlington*, was also cited by the *Aceto* court for its proposition that those who employ independent contractors to perform abnormally dangerous activities will be subject to strict liability for the harms therefrom. In other words, an entity cannot escape liability by contracting out dangerous parts of a process.

Several lower courts have indicated that *Aceto* is still good law. In *American International Specialty Lines Insurance Co. v. U.S.*, 2010 WL 2635768 (C.D. Cal. Jun 30, 2010) the district court cited *Aceto* and distinguished *Burlington* in its decision holding the U.S. government liable as an arranger. In *Duke Energy Progress, Inc. v. Alcan Aluminum Corp.*, 2013 U.S. Dist. LEXIS 65165 (E.D.N.C. May 6, 2013) the court also cited *Aceto*. Both decisions are summarized below.

Recent Lower Court Decisions: There have been dozens of district court opinions, and a growing number of Circuit Court opinions, that have interpreted or applied *Burlington*.[41]

Arranger Liability Decisions:

Defendants have had some success escaping "arranger" liability. The courts have agreed that these cases are fact-driven; most have focused on trying to ascertain the intent or purpose of the alleged "arranger," but the analyses have led to sometimes inconsistent outcomes. Following are a few recent examples of how courts have ruled.

- ***U.S. v. Dico***, 8th Circuit, Jan. 15, 2019, Case No. 17-3462. The case involves Dico's sale of a contaminated building to a purchaser who dismantled it for saleable steel scrap. In 2015 the Circuit reversed and remanded for trial the district court's summary judgment finding that Dico was liable as an arranger. To determine Dico's intent it instructed the lower court to consider the sale price of the materials in comparison with the cleanup cost liability avoided by the sale; and the usefulness of the materials sold in general, without reference to how the

40 872 F.2d 1373 (8th Cir. 1989).

41 The author is deeply indebted to his colleagues in EPA's Office of Site Remediation Enforcement for compiling the information on which these very brief summaries are based. Any errors that may be contained in these summaries are, however, solely the authors' responsibility.

buyer actually used the materials. The district court conducted a bench trial in 2017, and found that Dico and its co-defendant Titan arranged to dispose of a hazardous substance, and held them jointly and severally liable for EPA's response costs. It further held Dico liable for the same amount in punitive damages, and found Dico and Titan jointly and severally liable for all costs not yet reported, all future costs, all enforcement costs, and attorney's fees. Dico and Titan appealed. In this 2019 decision the Circuit affirmed the district court's judgment.

- ***New Mexico v. EPA et al., 2018 U.S. Dist. LEXIS 22548 (D.N.M. Feb. 12, 2018).*** Plaintiffs sued EPA and its contractor, Environmental Restoration (ER), for releasing acid mine drainage and heavy metals from the Gold King Mine in Colorado, into the Animas River watershed. Plaintiffs asserted that Defendants were liable as operators, arrangers, and transporters of hazardous substances. ER contended it was not liable as an arranger because the discharge of acid mine drainage was accidental. The district court rejected ER's argument, concluding that ER's sole purpose was the disposal of hazardous substances that were no longer useful. The court found that the "intent to dispose" analysis set forth in *Burlington* is not applicable to "plain" arranger liability, which the court described as a transaction with the sole purpose of discarding substances that are used and no longer useful (*i.e.*, wastes). Because the acid mine drainage was used and no longer useful, the court denied ER's motion to dismiss the arranger claim.

- ***Pakootas v. Teck Cominco Metals, Ltd.,*** No. 15-35228 (9th Cir. July 27, 2016). The 9th Circuit Court of Appeals reversed the trial court decision from the Eastern District of Washington denying Teck's motion to dismiss certain CERCLA claims against it. The appellate court held that the term "disposal," as defined in RCRA and cross-referenced in CERCLA (and as used in the arranger liability provision of Section 107 of that law, *i.e.*, "arranged for disposal…"), does not include aerial emissions of hazardous substances that were carried by the wind from Teck's smelter smokestacks in Canada to the Upper Columbia River (UCR) Superfund site in the U.S. The 9th Circuit had previously held that Teck, a Canadian corporation, could be held liable for releases of hazardous substances into the UCR site. The case had been remanded to the district court for a determination on Teck's CERCLA liability. Plaintiffs then filed an amended complaint to add the CERCLA claim based on air emissions from the stacks, and Teck moved to strike that claim. The trial court denied Teck's motion, but certified the case to the 9th Circuit after that court's 2014 decision on a similar question in a RCRA case, *Ctr. for Cmty. Action & Envtl. Justice (CCAEJ) v. BNSF Ry. Co.*, 764 F.3d 1019 (9th Cir. 2014).

  This 9th Circuit's decision is directly contrary to an earlier decision out of the Southern District of Ohio, ***The Little Hocking Water Association, Inc., v. E.I. du Pont de Nemours & Co.,*** Case No. 2:09-CV-1081, March 10, 2015,[42] holding that air emissions that are deposited

42 <https://insideepa.com/sites/insideepa.com/files/documents/mar2015/epa2015_0626.pdf>

onto the ground *do* constitute "disposal" under RCRA. The Ohio court expressly declined to follow the 9th Circuit's 2014 *CCAEJ* decision.

Divisibility or Apportionment Decisions:

Defendants have generally been less successful overcoming traditional joint and several liability, though there are some notable exceptions. In some cases, it appears the courts have confused legal "apportionment" and equitable "allocation." Examples include:

- ***Pakootas v. Teck Cominco Metals, Ltd,*** **2018 U.S. App. LEXIS 26098 (9th Cir. Sept. 14, 2018).** The circuit court affirmed the district court's ruling on summary judgment rejecting Teck's divisibility defense. Plaintiffs alleged that Teck discharged hazardous substances from its smelter, which is located 10 miles north of the US/Canadian border, into the Upper Columbia River (UCR). These discharges flowed downstream into the United States. The 9th Circuit began its analysis by classifying divisibility as the "rare" exception to CERCLA joint and several liability. The Court rejected Teck's divisibility defense under both prongs of the two-part divisibility analysis – finding that Teck failed to show the harm is theoretically capable of apportionment and that Teck failed to establish a reasonable factual basis to apportion the harm. None of the apportionment methods posed by Teck's expert considered threatened releases of hazardous substances, the mixture and synergistic effects of contaminants, or the full range and extent of contaminants. Thus, Teck failed to meet its burden of showing that the entire harm caused by Teck's wastes combined with all other pollution in the UCR was theoretically capable of apportionment. Teck erred in considering "the effects of its waste in isolation from the other contaminants at the site." Further, all three of the apportionment methods offered by Teck's expert were some variation of a volumetric approach, but Teck failed to take into consideration other critical factors, such as the geography of the site (*e.g.*, how far the slag travels down the River, variations in conditions in the river), the time when the wastes entered the river, and the relative toxicity and migratory potential of the hazardous substances. Without evidence of how these factors affected the contamination at the Site, an apportionment would be arbitrary. The court noted that Teck could bring a contribution action against other sources to mitigate any inequity as a result of the unavailability of apportionment.

- ***United States v. NCR Corp. ("Fox River"),*** 688 F.3d 833 (7th Cir. August 3, 2012). The Fox River site has proved to be one of the most fertile for post-*Burlington* judicial decisions, though the jurisprudence has not necessarily been the clearest or most consistent. The river was contaminated with PCBs from multiple sources, mostly involving (directly or indirectly) the manufacture or recycling of PCB-impregnated "carbonless carbon paper." In this 2012 decision the 7th Circuit held that NCR failed to prove the harm was capable of apportionment because PCB levels contributed by NCR caused sufficient contamination to warrant the clean-up of river sediments. The court described this case as an example of "multiple sufficient causes" of environmental harm. NCR's expert asserted NCR had only contributed about 6% to 9% of the PCBs in the river. The court held, however, it did not follow that NCR was only responsible for 6% - 9% of the clean-up costs. Had NCR been the only party to dump PCBs into the river, the

river would still have to be dredged and capped, because PCB levels contributed by NCR exceeded EPA's threshold. There was no linear correlation between the cost of cleanup and the level of PCBs in the river. Once the PCBs reached a threshold level, cleanup became necessary. The court concluded that in this case, "contamination traceable to each defendant" is the proper measure of harm, though other measures of harm may be appropriate in different circumstances. This legal conclusion was confirmed after an 11-day bench trial (2013 U.S. Dist. LEXIS 62265 (E.D. Wis. May 1, 2013)).

However, in ***United States v. P.H. Glatfelter Co***., 2014 U.S. App. LEXIS 18436 (7th Cir. Sept. 25, 2014)**,** the Seventh Circuit reversed the district court's ruling from that trial, finding that the harm by NCR is theoretically capable of apportionment and remanding for further proceedings. On May 15, 2015, the District Court in ***U.S. v. NCR Corp***., Case No 10-C-910, ruled that in view of the Circuit Court's opinion, NCR indeed established its divisibility defense. This is a case where only one contaminant – PCBs -- is present; there are records sufficient to provide reliable estimates of the amounts of PCBs discharged by the various PRPs; and those various PRPs are all viable and involved in the case. The court held that NCR showed the harm was theoretically capable of division, and that NCR was able to suggest a reasonable basis on which to apportion its share of the remediation. (The apportionment basis suggested by NCR was, essentially, the relative amounts of PCBs contributed by the PRPs.)

BUT WAIT, THERE'S MORE! In a further twist, on October 19, 2015 the District Court reversed its May 15 decision, holding instead that NCR had ***not*** demonstrated a reasonable basis for ***not*** being held jointly and severally liable. Ruling on Motions for Reconsideration, the court analyzed expert opinion testimony and ultimately concluded that "NCR has failed to meet its burden to demonstrate both that the harm is theoretically capable of divisibility and that there is a reasonable basis for apportionment." Slip Opinion at 9.

VII. Other Notable CERCLA Case Developments

A. Statute of Limitations

In August, 2017 in *Asarco LLC v. Atlantic Richfield Co.*,[43] the 9th Circuit overturned a decision by the District Court for Montana[44] which had held that the three-year statute of limitations in CERCLA applied to Asarco's contribution claim against Atlantic Richfield, and ran from the date Asarco entered into a judicially approved settlement of its liability for environmental cleanup of an old lead smelter site, even though the settlement was under the RCRA and Clean Water Act statutes and *not* under CERCLA. Asarco had

43 No. 14-365723 (9th Cir., August 10, 2107) <https://law.justia.com/cases/federal/appellate-courts/ca9/14-35723/14-35723-2017-08-10.html>

44 Civil Action No. 12-53-H-DLC (District of Montana, Helena Division, August 26, 2014)

entered into a later judicial settlement that purported to be under CERCLA, but which imposed no different requirements than did the earlier non-CERCLA settlement. On appeal, the Circuit agreed that a non-CERCLA settlement can be the basis for a CERCLA contribution action because a "corrective measure" under a different law can quality as a CERCLA "response" action. But the court disagreed that the 1998 RCRA decree in this case resolved ASARCO's liability, and so the SOL did not begin to run at that time.

In *Hobart Corp. v. Waste Management*[45] the Supreme Court declined to hear an appeal from the Sixth Circuit's opinion ruling that CERCLA §113 contribution claims are subject to a three year statute of limitations, and that the "most logical" triggering event in this case was the effective date of an administrative order that the plaintiff entered into with EPA to conduct a remedial investigation and feasibility study (RI/FS). This is potentially troubling, because a cooperative PRP may enter into an agreement to perform an RI/FS early in the process, before much is known about the likely cost of cleanup. In the absence of that information, settlement among PRPs is likely to be more difficult.

In *New York v. Next Millennium Realty, LLC,*[46] the Second Circuit addressed the distinction between Superfund "remedial" and "removal" actions. CERCLA establishes different statutes of limitation for the two types of response action. The Circuit Court overturned a district court decision dismissing plaintiff's cost recovery claim as time-barred because the money was spent on remedial response work; the appellate court held that the work was removal response, which has a more lenient statute of limitations.

B. Owner Liability Rulings

In July 2017 the 10th Circuit Court of Appeals ruled that the U.S. government is an "owner" and therefore potentially liable under CERCLA for cleanup costs at a former mining site located on U.S.-owned National Forest lands.[47] The court found that the U.S. clearly held title to the land in question, and was therefore an owner in the widely accepted common sense of the word, notwithstanding that it did not control or direct the mining operations that caused the contamination. (The court also found that the U.S. was not liable as an "arranger"; see the discussion, above, of arranger liability under the Supreme Court's *Burlington Northern* decision.)

The Supreme Court has been asked to resolve a difference between the 2nd and 9th Circuits regarding the determination of when a tenant can be considered an "owner" for

45 758 F.3d 757 (6th Cir. 2014), *cert denied* 2015 WL 231991 (U.S. Jan. 20, 2015)
46 No. 12-2894 (2d Cir. Oct. 15, 2013)
47 *Chevron Mining, Inc., v. U.S.*, No. 15-2209, 10th Circuit, July 19, 2017;
<https://www.ca10.uscourts.gov/opinions/15/15-2209.pdf>

purposes of Superfund liability.[48] The owners of a site in NY have asked the Court to reverse a 2nd Circuit decision holding a tenant is not an owner under CERCLA even if it meets the common law definition of an owner, the test adopted by the 9th Circuit. The 2nd Circuit declined to adopt the common law standard, instead following its own earlier decision that established a more complicated test to determine if a tenant/sublessor is an owner under CERCLA. The petitioners assert that the actions of the tenant "when the pollution occurred, without any involvement, consent or oversight by the [petitioners], confers owner liability under CERCLA on Tenant/Subleasor, for the contamination discharged by its Subtenant." They urge the Court to adopt the 9th Circuit's 2011 ruling in *City of Los Angeles v. San Pedro Boat Works*,[49] which expressly rejected the 2nd Circuit's standard.

C. Tort Claims Against the U.S. for Hazardous Waste Disposal Practices

In *Angela Pieper, et al., v. United States*,[50] the Court declined to review a case concerning the U.S. government's past waste disposal practices at a military installation in Frederick, MD. The Army disposed of hazardous waste there decades ago; the property has since been named a federal Superfund site. Plaintiffs alleged the waste caused health problems and sued under the Federal Tort Claims Act, which waives sovereign immunity for some but not all acts. Excluded from the waiver are actions that involve judgment and discretion on policy and similar issues. The 4th Circuit affirmed the district court's holding that the decisions of Army personnel on how and where to dispose of hazardous substances represented an exercise of such discretion, and the Supreme Court declined to hear the appeal.

D. Successful Challenge to Inclusion of a Site on the NPL

In *Genuine Parts Company v. EPA*[51] the D.C. Circuit Court removed a site from the Superfund National Priorities List – a rare outcome in NPL challenges. At the West Vermont Drinking Water Contamination site in Indiana, a dry cleaner had discharged perchloroethylene into a sewer system that leaked; a separate manufacturing facility also had discharges into the system. Plaintiffs argued there was a "confining layer" that prevented contamination from reaching water supplies. The court held that EPA didn't adequately address several diagrams that "appear to contradict the agency's position" that two aquifers beneath the site are interconnected. "Because EPA 'entirely failed to consider an important aspect of the problem' by failing to address evidence that runs

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48 *Next Millennium Realty, LLC, et al., Petitioners, v. Adchem Corp. et al., Respondents, Petition for Writ of Certiorari*, filed Sept. 25, 2017. *See:*
<https://insideepa.com/sites/insideepa.com/files/documents/oct2017/epa2017_2091.pdf>

49 <http://cdn.ca9.uscourts.gov/datastore/opinions/2011/03/14/08-56163.pdf>

50 No. 17-1324, Supreme Court of the United States, May 21, 2018.

51 D.C. Circuit Court, No. 16-1416, May 18, 2018.

counter to the agency's decision we must hold that the listing of the site is arbitrary and capricious."

E. Scope of Judicial Review of EPA Remedy Selection

In *Emhart Industries v. U.S. Department of the Air Force, et al.*,[52] plaintiff challenged EPA's selection of the remedy for an NPL site, and asserted a "sufficient cause" defense for its non-compliance with an EPA unilateral administrative order under CERCLA §106 requiring it to carry out that remedy. In its remedy challenge, Plaintiff sought to introduce evidence, including expert testimony, that it had not presented to EPA prior to issuance of the Record of Decision, and that was therefore outside the scope of the agency's administrative record. The District Court took note of CERCLA's directive that review of remedy selection "shall be limited to the administrative record."[53] Citing general principles of administrative law, the court identified several very narrow exceptions that would allow it to consider evidence outside that record. Among these was one on which the court relied in admitting plaintiff's additional expert witness testimony. The court citied a First Circuit decision that allowed an exception to the "rule against supplementation [of the record]" where "additional testimony by experts" will "aid to understanding highly technical, environmental matters."[54] The court found that the subject matter in this case was indeed "high technical" and that additional expert testimony (from both the plaintiff and the government) would aid its understanding. The court acknowledged that the additional testimony is only for the purpose of assisting it in understanding information contained in the administrative record, and that the court must still look "first and foremost" at the administrative record, "not some new record" made in the current trial.[55]

The court went on to note that pursuant to CERCLA and the National Contingency Plan regulations, plaintiff should ordinarily be limited to arguments that it advanced prior to EPA's final remedy decision, particularly during the public comment period on the proposed remedial plan, and which were therefore available to the agency for consideration at the time of the administrative decision-making process. But here, again, the court identified a narrow exception, to wit that EPA must explain any "key assumptions" that underpin its decisions, and that plaintiff's evidence may be received on the specific question of whether EPA adequately did so in this matter.[56]

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52 U.S. District Court for Rhode Island, C.A. No. 06-218 S, August 17, 2017 <http://www.lawandenvironment.com/wp-content/uploads/sites/5/2017/08/Opinion-Emhart-Indus.-v.-New-England-Container-Co..pdf>

53 42 U.S.C. §113(j)(1), which goes on to specify that the agency's decision must be upheld unless a challenger can demonstrate, on that record, that the decision was arbitrary and capricious.

54 *Emhart, id.* at 23.

55 *Id.* at 25.

56 *Id.* at 30.

The court in fact did find that EPA's remedy selection decision was "arbitrary, capricious or otherwise not in accordance with law" with respect to three specific EPA findings; and that therefore plaintiff had sufficient cause not to comply with EPA's unilateral administrative order.[57]

57 *Id.* at 106 *et seq.*

Outline of Cases and other Materials

Environmental Law Section Fall Meeting 2019
NYS Bar Association

Lemuel M. Srolovic
Bureau Chief, Environmental Protection Bureau
Office of New York Attorney General Letitia James
(September 2019)

I.

Select Challenges by the New York Attorney General to Actions by Federal Agencies to Roll Back Protections of Human Health and the Environment

Challenging Rollback Action by the Department of Agriculture (USDA)

- Lawsuit challenging USDA's rollback of nutritional standards for sodium and whole grains in breakfast and lunch foods served to schoolchildren at low- or no-cost (April 3, 2019). https://ag.ny.gov/press-release/2019/attorney-general-james-and-multistate-coalition-sue-trump-administration-gutting

Challenging Rollback Actions by the Department of Commerce

- Intervened in action challenging National Oceanic and Atmospheric Administration's authorization of incidentally harassing marine mammals during seismic testing for oil and gas in the Atlantic Ocean (Mar. 6, 2019). https://ag.ny.gov/press-release/2019/attorney-general-james-joins-states-efforts-halt-seismic-testing-atlantic-coast

- Rulemaking comments opposing three proposed rules by the National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (Fish & Wildlife) amending regulations implementing the Endangered Species Act to pull back on the Act's protections of endangered species (Sept. 25, 2018). https://ag.ny.gov/press-release/attorney-general-underwood-opposes-trump-administrations-proposed-rollbacks-endangered

- Lawsuit challenging the decision by the Secretary of Commerce to require citizenship information in taking the 2020 census (Aril 3, 2018). https://ag.ny.gov/press-release/2018/ag-schneiderman-files-suit-block-trump-administration-demanding-citizenship-info U.S. Supreme Court rules against Commerce and remands the matter to the district court. *Department of Commerce v. New York*, ___US___, 139 S. Ct. 2551 (2019).

Challenging Rollback Actions by the Council on Environmental Quality (CEQ)

- Rulemaking comments opposing CEQ's proposed guidance to federal agencies regarding assessing greenhouse gas emissions and climate change impacts of federal actions subject to the National Environmental Policy Act (Aug. 27, 2019). https://ag.ny.gov/press-release/2019/attorney-general-james-condemns-trump-admin-policy-ignoring-climate-change

Challenging Rollback Actions by the Department of Energy (DOE)

- Lawsuit challenging DOE's failure to publish final efficiency standards for five product categories: portable air conditioners, power supply devices, air compressors, walk-in coolers and freezers, and commercial packaged boilers (June 13, 2017). https://ag.ny.gov/press-release/2017/attorney-general-schneiderman-announces-lawsuit-and-other-legal-action-against

- Petition challenging DOE's delay of final rule establishing efficiency standards for electric ceiling fans (April 3, 2017). https://ag.ny.gov/press-release/2017/attorney-general-schneiderman-announces-lawsuit-and-other-legal-action-against In May 2017, DOE published the final standards. https://ag.ny.gov/press-release/2017/trump-administration-reverses-course-energy-efficiency-standard-following-ag

Challenging Rollback Actions by the Environmental Protection Agency

- Petition challenging EPA rules rescinding the Clean Power Plan and adopting the Affordable Clean Energy (ACE) rule (Aug. 13, 2019). https://ag.ny.gov/press-release/attorney-general-james-leads-fight-against-trumps-dirty-power-rule

- Rulemaking comments opposing EPA's proposed "Science Transparency Rule" to exclude from EPA decision making any scientific studies, models, and other information that have been validated by peer review but where not all of the underlying data are available to the public because of medical privacy protections or other reasons (Aug. 16, 2018). https://ag.ny.gov/press-release/ag-underwood-leads-coalition-23-states-counties-and-cities-opposing-trump-epa-plan

- Rulemaking comments opposing EPA's proposed rule regarding changes to cost/benefit analyses in rulemaking under various federal statutes (Aug. 13, 2018). https://ag.ny.gov/press-release/ag-underwood-leading-coalition-13-ags-state-agencies-tells-trump-epa-drop-proposed

- Petition challenging EPA's suspension of the 2016 Glider Truck Rule, which limited and then sunset the number of "glider trucks" – new heavy-duty truck bodies outfitted with refurbished or rebuilt pre-2010 highly polluting engines -- that could be exempt from new truck emissions standards (July 19, 2018). https://ag.ny.gov/press-release/2018/ag-underwood-part-coalition-16-ags-sues-epa-over-former-administrator-pruitts

- Petition challenging EPA "guidance" that effectively rescinded a prior rule prohibiting the use of hydrofluorocarbons (HFCs) – potent greenhouse gases – in commercial refrigeration units (June 27, 2018). https://ag.ny.gov/press-release/ag-underwood-sues-epa-over-illegal-rollback-key-climate-protection-regulation

- Lawsuit challenging EPA's suspension of new training requirements to protect workers in agriculture and their families from exposure to agricultural pesticides (May 30, 2018). https://ag.ny.gov/press-release/2018/ag-underwood-leads-suit-against-trump-administration-protect-farmworkers

- Lawsuit challenging EPA's suspension of the Clean Water Rule defining the "waters of the United States" covered by the Clean Water Act (Feb. 6, 2018). https://ag.ny.gov/press-release/2018/ag-schneiderman-leads-coalition-11-ags-suing-trump-epa-illegal-rollback-clean

- Petition challenging EPA's delay of final "Chemical Accident Safety Rule (July 24, 2017). https://ag.ny.gov/press-release/2017/ag-schneiderman-leads-lawsuit-against-trump-epa-blocking-vital-rule-protect-ny DC Circuit vacates EPA's delay rule, *Air Alliance Houston v. EPA*, No. 17-1155 (D.C. Cir. Aug. 17, 2018).

- Intervened in petition challenging EPA's action allowing the continued use of the pesticide chlorpyrifos on food crops even though the agency failed to determine a safe level for residue of the chemical on food (July 5, 2017). https://ag.ny.gov/press-release/2017/ag-schneiderman-leads-legal-challenge-against-epa-over-toxic-pesticide

- Intervened in petition challenging EPA's stay of New Source Performance Standards for greenhouse gas emissions from new sources in the oil and gas sector (June 20, 2017). https://ag.ny.gov/press-release/2017/ag-schneiderman-joins-14-ags-filing-intervention-lawsuit-against-epa-secure

Challenging Rollback Action by the Federal Energy Regulatory Commission (FERC)

- Rulemaking comments opposing adoption of a federal rule subsidizing coal and nuclear electric generating plants on the grounds that those plants are "fuel secure" (Oct. 23, 2017). https://ag.ny.gov/press-release/ag-schneiderman-opposes-unlawful-trump-bailout-plan-coal-burning-power-plants

Challenging Rollback Actions by the Department of the Interior

- Rulemaking comments opposing three proposed rules by Fish & Wildlife and NMFS amending regulations implementing the Endangered Species Act to pull back on the Act's protections of endangered species (Sept. 25, 2018). https://ag.ny.gov/press-release/attorney-general-underwood-opposes-trump-administrations-proposed-rollbacks-endangered

- Lawsuit challenging Interior's reinterpretation of the Migratory Bird Treaty Act as not applying to "incidental take" of migratory birds covered by the Act (Sept. 5, 2018). https://ag.ny.gov/press-release/ag-underwood-leads-suit-against-trump-administration-abandoning-longstanding

Challenging Rollback Actions by the National Highway Traffic Safety Admin (NHTSA)

- Petition challenging NHTSA's rollback of enhanced civil penalty rate for automakers that violate the Corporate Average Fuel Economy (CAFE) Standards (Aug. 2, 2019). *New York v. NHTSA*, No. 19-2395 (2d Cir. Aug. 2, 2019).

- Rulemaking comments opposing NHTSA's proposed rollback of enhanced civil penalty rate for automakers that violate CAFE Standards (May 2, 2018).

- Second Circuit vacates NHTSA's rule delaying the civil penalty enhancement rule. *NRDC v. NHTSA*, 894 F.3d 95 (2d Cir. June 29, 2018).

- Petition challenging NHTSA's delay of final rule enhancing the civil penalty rate for automakers that violate the CAFE Standards (Sept. 11, 2017). https://ag.ny.gov/press-release/2017/ag-schneiderman-leads-new-lawsuit-protect-fuel-efficiency-standards

II.

Exxon Litigation

People of the State of New York v. Exxon Mobil Corporation, Index No. 452044/2018 (Sup. Ct. N.Y. Cnty.) (Justice Ostrager).

Exxon Mobil Corp. v. Healey, No. 18-1170 (2d Cir.).

III.

The Responsible Corporate Officer Doctrine

New York v. C and J Enterprises, LLC, No. 2688-10 (Sup. Ct. Albany Cnty., decision & order of Apr. 12, 2018), appeal pending, No. 528430 (3d Dept. 2019).